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Equity and the Social Reproduction of Capital

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Introduction: Marxist Thinking about Equity

In this short essay we will draw on Marxist thinking to argue that equity is essential to the social reproduction of finance capital.[1] To focus our analysis we will limit our discussion to a study of the relationship between finance capital, the family and related themes in property law. [2] We will argue that equitable doctrines can be seen as assemblages[3] that define and reproduce the way in which money, people and property relate to each other. Assemblages of equity/capital are ideological complexes– ways of being, thinking and acting that effectively legitimize a particular mode of production. The role that equity plays in the functioning of a regime of profit making is effectively concealed from the student of the subject.[4] Unscrambling the reality of equity is not easy. Feminist scholars have perhaps been the most successful in drawing attention to the 'hidden' patriarchal logic of the subject. However, unless feminist insights are linked to an understanding of the social reproduction of capital, we cannot appreciate how modes of capital accumulation operate under cover of the legitimizing effects of equitable doctrines.

Whether or not a Marxist approach to equity is the best way of configuring a critical approach to the subject depends on the extent to which a particular kind of 'abstract'

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[1] In the post war period in Britain, and certainly within recent years, domestic property investment can be seen as money generating money- and thus as (crudely) falling within Marx's understanding of finance capital. In more technical language, financial capital can be understood by reference to the "purely technical movements" of money. Whilst finance capital is required by the other forms of capital, it also has the tendency to 'detach' itself. Indeed, Marx notes that it can be seen as part of the "total social capital" that has become separated or distinct from other forms of capital and begins to perform "financial operations for the entire class of industrial and commercial capitalists" Ernest Mandel, *Marxist Economic Theory* (London: Merlin, 1968), 371. Finance capital appears as "an independent kind of capital" David Harvey, *The Limits to Capital* (London: Verso, 2006), 377. Indeed, it would appear that the more fundamental relationship between capital and labour- is almost "completely obliterated and abstracted" (Harvey 2006, 382). For example, one of the forms that finance capital takes- 'interest'- can be spoken of "as a relationship between two capitalists, not between capitalist and labourer" Karl Marx, Capital Volume III (London: Lawrence and Wishart, 1954), 382.

[2] Matrimonial property is something of a misnomer. It does not just describe property held by parties to a marriage. It also describes property held between parties who are cohabiting and unmarried. It should also be pointed out that this term is not to be understood in the civilian sense of community of assets.

[3] Although the term has a Deleuzian provenance, this paper does not claim to be working with a Deleuzian sense of the term, for reasons explained below. For a sophisticated analysis of the theory of the assemblage, see Manuel DeLanda *A New Philosophy of Society: Assemblage Theory and Social Complexity*, (London: Continuum, 2006). Assemblage theory has not so far been used to engage with property law or equity.

[4] The term Marxist is not meant to suggest that the positions expressed in this essay are aligned with any particular Marxist or Communist party. The adjective is meant to express the use of ideas deriving from Marx's work and thinking. However, if you read this essay and are inspired to become a communist, so much the better.

thinking can descend to the granular level of the case law. We thus face an exacting task: not only do we need to outline the relationship between the social reproduction of capital and equity, we need to show how this relationship can be read at the level of legal doctrine. In order to work at this level, one needs to be aware of the creativity and subtlety of a normative order that is able to define everyday realities. This means we need to engage with a doctrinal complexity exploited by judges in the ongoing re-creation of the norms of equity. Indeed, tensions in the case law are central to the judicial desire to create a viable and legitimate regime of property law. It is evident from the cases that judges do not repeat the patriarchal assumptions of the 1950s. Judicial creativity may intensify the inherent tensions in the subject, but judicial engagement with changing social realities is central to equity's articulation of the movement of finance capital.

This essay is organized around three sections. The first section provides a theoretical introduction. Whilst this may seem rather heavy going, it is important as it allows us to elaborate the necessarily inter-connected levels of our thinking. We will argue that Marx's concepts of articulation and combination are essential to understand assemblages of equity/ capital.[5] We will then show how assemblages of equity/capital are hegemonic ideological forms that legitimize relationships between people, capital and property. The second section reads these general theoretical concerns into the case law. We will examine the doctrines of law and equity from the concept of family assets, through to the wife's special equity, constructive and resulting trusts and the contemporary doctrine of undue influence. We will read tensions in the case law as rival doctrinal interpretations of how equity can adapt itself to changing social relationships. Capital has indeed been subjected to some checks and minor restrictions. However, equity has been quite successful in obscuring the part it plays in shifting the risks of profit making from financial institutions to those least equipped to bear them. A concluding section will draw out the implications of our approach for a critical understanding of equity. Our focus will be on elaborating an alternative equitable assemblage where capital is compelled to bear the costs of its own reproduction.

[5] The totality is – more properly (but still in a somewhat crude and common sense way) the idea of a whole composed of complex inter-relationships between parts. The totality as an assemblage of assemblages is the complex sense in which a legal system composed of legal doctrines and institutions is located or embedded within a total 'world' or reality where the 'parts' are elements of a 'whole' (without any part being simply reducible to the 'truth' of the whole). Describing the totality is clearly not the task of this essay, but it is worth remembering that any discussion of equity, the law of property or indeed the legal system needs to be placed in the context of a mode of production, distribution and exchange. To abstract one part of the whole is necessitated by the very analysis that we are undertaking (indeed, by legal theory or jurisprudence as a discipline) but, at the same time abstraction distorts any possible understanding of how the system as a whole operates. Thus to think in terms of a totality is an inherently flawed attempt to create a multi-scaler way of analysing the connection of everything to everything else. The assemblage is always already part of an assemblage of assemblages--microcosm and macrocosm: the world in a grain of sand; capitalism in a case.

The Social Reproduction of Capital: Assemblage and Ideology

Why has there has been so little critical work done on equity that draws on Marx? Why has Marxist thinking been neglected as a means for setting an "appropriate agenda" for critical scholarship on trusts? [6]

This is a difficult question to answer. Showing how Marxist analytical concepts can be brought to bear on the technical concerns of the case law has not been easy. We hope that this essay goes some way to creating an adequate theoretical apparatus. We need to appreciate that law or equity are not super structural instances that reflect tensions in the economic base. This reductive model can be rejected from the very beginning as Marx does not need to be read in this way. We require a more sophisticated understanding of what Marx called the "articulation of production" (*Gliederung*), or, an "economic form" that is composed of combinations (*Verbindung*) of elements that bring together the means of production and relations of production.[7] In Capital III, Marx referred to this structure of articulation as "the entire formation of the economic community (*Gestaltung*) based on "production relations."[8] We will use the term assemblage as a short hand to refer to this articulated structure of production. [9] An assemblage can be thought of as a combination of instances or practices: ways of doing things. The relationship of one instance to another is complicated- but- it can be characterized as one of mediation. This allows us to sketch out an understanding of how, within a capitalist mode of production, legal practices mediate economic practices to produce a regime of property law. This approach does not reduce law to economy as it stresses the importance of law in structuring economic and social relationships. The articulation of production is thus an assemblage of legal, social and economic forces and relations. Thus, informing Marx's idea of articulation or assemblage is the way in which capital creates and sustains those legal and social relationships that assure its own reproduction.

This may mean that "law [is]…second in order of analysis to relations of production"- but- this statement does not refer to the combinatory effects of law.[10] To argue that law is secondary means that one must begin by thinking of the reproduction of a mode of production, and then analytically determine the role that law plays in this ongoing process. Explaining this precise relationship between law and a capitalist mode of production is outside the scope of this essay. We want to focus on one particular concern. If we (crudely) understand finance capital as 'money making money' the mediation of finance capital by law creates combinations of legal, social and economic institutions and

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[66] See Roger Cotterrell's groundbreaking essay 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' *Journal of Law and Society* 1987 14 (1), 83-88 at 83.
[7] Karl Marx, *Grundrisse* (London: Penguin, 1973), 17.
[8] Karl Marx, Capital Vol III (London: Lawrence and Wishart, 1954), 770.
[9] See Adam Gearey, 'Re-Reading Capital: Notes Towards an Investigation of Law, Politics and Pensions' in De Sutter, L.(ed.) *Althusser and Law.* (Abingdon, UK: Routledge, 2013)
[10] See Etienne Balibar, 'The Elements of the Structure and their History' in Louis Althusser, *Reading Capita*l (London: Verso, 1997), 228.

practices. A good example would be the mortgage.[11] The mortgage provides a normative social structure for 'money to make money.' Our focus is on those familial relationships that are organized around domestic property, and the extent to which the alienability of domestic property can be restricted. Judges and lawyers have been busy inventing and adapting equitable doctrines to provide at least some recognition of the problems that arise in situations where property is held by men and women in 'matrimonial' relationships. This is to anticipate the argument we make below. For the moment we need to stress that thinking about an assemblage of law/capital allows us to grasp "a juridical corpus relatively independent of exterior constraint."[12] For instance, we can begin to appreciate the intimate and perhaps concealed links between specific technical legal concerns, the acquisitive drive of finance capital and changing forms of social relationship

So far, our thinking has been at a somewhat abstract level. The assemblage that serves to ensure that social reproduction of capital is embedded in a hegemonic social and economic order. [13] This brings us to our next key point. Hegemony requires legitimization, and legitimization is the task of ideology.[14] If 'the everyday' is the site in

[11] For a Marxist analysis of the mortgage, see Richard Corell and Ernst Herzog, The Subprime Crisis and Marx's Theory on Ground Rent, The World Review of Political Economy 5(2) 2014.

[12] Pierre Bourdieu, 'Force of Law: Towards a Sociology of the Juridical Field' Hastings Law Review 38(5) 1987, 805-813, at 815.

[13] To take one social aspect of this assemblages: there is the obvious sense in which bankers and financiers as a class- and indeed the entire banking and financial services sector- 'represent' or 'speak for' finance capital. See Antonio Gramsci, *Selections from the Prison Notebooks*, (New York: International Publishers, 1971). Gramsci asserts that "the supremacy of a social group manifests itself in two ways, as 'domination' and as 'intellectual and moral leadership'" (Gramsci 1971, 57). We are perhaps more concerned with the latter term. Hegemony as an understanding of "total social authority" is won by a class or an alliance of classes by a mixture of coercion and consent at both the political and economic level, but also in "civil, intellectual and moral life" (Gramsci 1971, 331-332). The mechanisms of the state such as the courts and the police may be elements of this coercive authority but Gramsci is perhaps directing our attention more to matters like the promulgation of a shared world view. If we allow, following Gramsci that hegemony under capitalism is to do with the promulgation of a certain world view where markets are central to all aspects of human life then we have to appreciate that "the bourgeois class poses itself as…capable of absorbing the entire society, assimilating it to its own cultural and economic level." (Gramsci 1971, 260).

[14] The starting point of this account of ideology can be found in the work of Louis Althusser. For Althusser, ideology is the construction of reality. One cannot oppose ideological falsity to a truth that is somehow independent of ideology. Laclau's recent work on ideology helpfully elucidates this point. It is not as if there is 'ideology' and a reality outside of ideology. Reality is always ideological: a particular construction of 'what is.' See Ernesto Laclau 'The Death and Resurrection of the Theory of Ideology', *MLN*, 112\(3), 1997 pp. 297-321, at 303. However, what both Althusser and Laclau tend to downplay is the way in which ideology is always a way of acting- a set of practices. People act on the basis of their understandings of the world, which they take to be more or less correct. Our understanding of the social reproduction of capital thus needs to engage with how people think and act; and how modes of thinking and acting reproduce ideas and practices. We hint at these ideas in the reading of the cases in the second part of this essay. However, we are not seeking to produce at this stage an account of ideological practices. To follow this idea through, we would have to look at the different ways in which lawyers, judges and the plaintiffs and defendants in property disputes. Pierre Bourdieu's work may be useful in elaborating an understanding of the tensions that result from rival attempts to determine meanings in the juridical field. However, as Bourdieu is critical of both Althusser and Gramsci, linking together his account of the juridical field, with notions of ideology and practice presents certain difficulties.

which the reproduction of capital takes place, the legitimization of the ideological order must be seen as a subtle, creative and ongoing 'structure' of the everyday. In order to understand the social reproduction of capital, we must therefore investigate how norms of equity are bound up with ideologies of work and marriage that are flexible enough to re-invent themselves. We will show that the judges have been able to exploit the inherent tensions of the case law in order to adapt and refine equitable doctrines. The case law will thus be read as a series of confrontations over the interpretation of "a corpus of [cases] sanctifying a correct or legitimized vision of the social world."[15] Our main concern is to plot out these rival visions, but, at the end of the essay we will address the very idea of the indeterminacy of doctrine in a more creative way: to what extent might an alternative assemblage of equity be possible?

Equitable Assemblages

Over the past fifty years or so, judges have created different and often competing assemblages of equitable rules and principles that have allowed norms to be re-worked in the light of changing understandings of social roles. Precisely because the social relationships in question are intimate or familial, rather than 'commercial' or at 'arm's length', judges have attempted to develop principles that create – if not a special or exceptional legal order- then one where these relationships are acknowledged as sui generis. We can trace a shift from somewhat patriarchal understandings of marriage to an understanding of more egalitarian forms of intimate relationship. The dilemma is as follows: the more that equity shows sympathy to parties whose position has been abused, the more the movement of finance capital is limited by restrictions that relate to the alienability of property held by those in intimate relationships. The judges cannot simply throw out any special regard for the emotional relationships that develop around property as they know (as well as any Marxist) that these are essential to the way in which the hegemony of a capitalist order of property operates: it must change as society changes.

In order to understand the range and complexity of these issues, we need to examine a number of areas of law. To further our argument, we will look first of all at the family assets doctrine. The doctrine was founded on provisions in the Married Women's Property Act of 1882. This Act was exploited by certain judges to achieve 'just and fair' settlements between spouses. For us, this is the beginning of equity's special regard for principles that relate to intimate association. The judicial starting point was an assumption that matrimonial property should be held in common. Dispositions of property on the break-up of a marriage could thus be structured on the basis of common ownership. Questions between husband and wife as to ownership of property could be resolved not by "dictation of one to the other" but "by agreement, by give and take."[16] This raises the presumption that if money is invested or property bought in joint names, it should belong to the parties jointly. Family assets could thus be defined as "the things intended to be a continuing provision for them during their joint lives."

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[15] *Supra,* n. 12 at 817.
[16] Hoddinott v Hoddinott [1949] 2 K.B. 406, at 416.

Carved out of the general regime of property law is an enclave where distinct principles apply. Suffice to say that- had the family assets doctrine been allowed to stand- it would have had an impact on the terms in which financial capital could be 'imprinted' with norms that determine its movement. This is precisely why the family assets doctrine was heretical. There was judicial resistance to the idea that property could be subjected to such a special regime. In a series of cases, the courts sought to show that the law properly rests on the principles of implied trusts.[17] How does the implied trust operate in this context and how does it bring an end to the doctrine of family assets? It is a central principle of property law that proprietary interests can only be obtained through conveyance into, or registration in the name of the owner. If a party to a relationship makes a contribution to the purchase price of a property that is to be shared, but her name does not appear on the deeds or in the register, then an implied trust may arise to ensure that her interest is protected. However, a wife who contributes to the payment of household bills, or looks after children and does domestic duties, would find it very difficult to argue that these activities in themselves gave rise to a property interest.[18]

This doctrinal development accords with broader ideas of marriage where affective labour is provided within the terms of a relationship and does not amount to an actual claim for payment or recompense. However, it is instructive to note that judicial desires for a special regime for matrimonial property did not end with the orthodox understanding of the role of implied trusts. Although the principle of family assets was not resuscitated, there was an attempt to shape the operation of implied trusts to take into account similar principles. This is a complex area of law, but we can consider one key case: Cooke v Head.[19] Speaking broadly in favour of protecting property held in intimate relationships but compelled by the doctrine of precedent to follow the rulings in Gissing and Pettitt, Lord Denning applied the principles of the implied trust but rejected the idea that shares in property should be determined by "money contributions." The correct approach was to look "more broadly" at the facts of the case and work on the principles of "husband and wife cases" and "divid[e]" the property accordingly.[20] The notion of joint efforts that underpins the form of the implied trust in Cooke v Head appears to be even more radical than the family assets approach. The principle of joint efforts "applies to husband and wife, and to man and mistress, and maybe to other relationships too." It is

[17] Pettitt v Pettitt [1969] 2 W.L.R. 966, at 808. In Pettitt, the need to return to correct principles is justified by the evocation of Sir Edward Coke. Coke is presented as a champion of the straight path, the "golden metwand" or the phallic embodiment of the law of the tribe that must replace the "uncertain and crooked cord of discretion."

[18] Gissing v Gissing [1970] 2 All E.R. 780 follows Pettitt. The case holds that where two spouses have contributed to the purchase of a property that is placed in the name of one of them and there is no discussion as to how the interests in the house were to be determined and no intention in the property owning spouse that there should be a sharing of the beneficial interests, than the law of trusts is to be invoked. To obtain a share for the non-property owning spouse, it would be necessary to show that there were either direct or indirect contributions to the purchase price of the property. In the case of indirect contributions it is likely that it would be difficult for the court to determine the correct distribution of the assets. Difficulty in assessing shares does not allow an application of the equitable maxim that would justify the award of a half share.

[19] Cooke v Head [1972] 1 W.LR. 518.

[20] *Ibid.,* at 522.

not so much that the law cannot make room for women. It is absolutely necessary that it must. The crucial issue is the extent to which any acknowledgement of differences between men and woman can depart from the main principles of property law.

To examine this theme in more detail we can look at a particularly fraught issue: to what extent can the interest claimed by a non-property owning party bind third parties? This question is traditionally seen as resolved definitively in National Provincial Bank v Ainsworth.[21] Prior to Ainsworth, there had been attempts to develop a 'deserted wife's equity.'[22] This 'special equity' theory stood against principles that made for commercial efficiency in the alienation of property. However, in Ainsworth the 'special right' was trimmed down to a mere personal claim for support. The court rejected the argument that it was a property right. History, practicality and common sense are evoked in support of this claim. History showed that the ecclesiastical courts understood that the wife's rights against her husband never amounted to more than an obligation for consortium. It would therefore be wrong, against the history and development of the law, to pretend that modern marriage should have a different legal profile.[23] The claim to "consortium"- corresponding with a moral right to support- is thus de-coupled from a proprietary right that would restrict the alienability of real property. The spaces for heretical doctrine are accordingly limited.

In case our arguments seems to rely too heavily on case law from the 1950s and 60s, we can move forward to consider one of the more recent and significant authorities. If we contrast Lloyds Bank v Rosset[24] with Midland Bank v Cooke, we can see different attempts to achieve a balance in equity between protection of property interests and the alienability of property. Rosset shows that constructive/ resulting trusts and proprietary estoppel were to regulate claims over matrimonial property. Lord Bridge argued that a person claiming an interest in a property had to show that there was a clear intention that it would be shared. Evidence might be obtained from liability to undertake mortgage payments or contributions to the purchase price of the property. In other words, the court would only recognise a fairly narrow set of circumstances in which intention to share can be shown. Rosset thus limits the doctrinal spaces for the recognition of a distinct regime of property ownership. However, if Rosset speaks for the res-assertion of property law principles, Midland Bank v Cooke[25] suggests a modification in the law that returns to something like the family assets doctrine. In Cooke, the court had to deal with the calculation of the shares in which the property was to be held after the break down of a relationship. The problem was an absence of evidence as to the parties' intentions. Waite

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[21] National Provincial Bank v Ainsworth [1965] 2 All E.R. 472.

[22] *Ibid.,* at 1241.

[23] Moreover, to recognize a wife's right to her husband's property would create problems for conveyancing. Lord Upjohn defines the key issue as "essentially…[a] conveyancing matter(s)."After all, the entire regime of property law after the 1925 legislation was to simplify and make practical dealings in real property: " it has been the policy of the law for over a hundred years to simplify and facilitate transactions" [in land]. It is of great importance that persons should be able freely and easily to raise money on the security of their property" (485). It would be impractical if third parties had to have regard to any interests of the spouse: "It would mean that the concurrence of the wife would be necessary for all dealings" (Lord Wilberforce).

[24] Lloyd's Bank v Rosset [1990] 1 All E.R. 1111.

[25] Midland Bank v Cooke (1995) 27 H.L.R. 733.

L.J. argued that it was necessary to consider the whole course of the relationship, and not to limit calculation of share to "acts of direct contribution of the sort that are needed to found a beneficial interest in the first place."[26] If this examination fails to produce a result, the court can apply the maxim "equity equals equality."[27] The court could thus use an equitable doctrine to effectively re-instate the operation of family assets.[28]

Rosset and Cooke attest to the ongoing tensions in equity. Given the social reality of intimate relationships, it would be difficult under the ruling in Rosset for a spouse to make a claim to a share in a property- precisely because the popular morals of marriage assume that affective labour is provided for free; or, is embedded in forms of recompense that are not understandable in terms of formal rights. Whilst Cooke might suggest that equity could provide some way of crediting such forms of labour, direct contributions are still required. The extent to which contemporary law can understand the dynamics of more egalitarian relationships takes us to Stack v Dowden.[29]

Stack v Dowden is significant because it shows the court modifying the principles of property law to take into account the significant social changes in the ownership of property. As Baroness Hale points out "the huge expansion in home ownership….since the Second World War", "the 'right to buy' legislation of the 1980s" and the "continuing house price inflation"[30] have redefined the context in which married couples or cohabitees hold property. These changes have made the need for a resolution of the problems in the case law all the more necessary. Given the refusal or inability of Parliament to legislate "….the evolution of the law of property to take account of changing social and economic circumstances" fell upon the courts."[31] Baroness Hale completely understands that the law must provide a workable ideological regime in which legal forms articulate social life: in other words, the different and various ways in which men and women negotiate their live together must correlate in a fair and reasonable way in the interests in property are determined. The formal language of the law must, as far as possible, accommodate the way in which people actually understand how their property is to be held. Consider the following passage. It concerns that "inferences" on the terms of home ownership that can be drawn from the behaviour of the parties over a course of dealings with a property. An "arithmetical calculation" is "less important" than a study of "how the parties arranged their finances" - and the courts must take into account "the parties' individual characters and personalities" in determining "where their true

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[26] *Ibid.,* at 735.
[27] *Ibid.,* at 743.
[28] Waite L.J.'s argument posits "mutual trust" (*Ibid* at 746) as the foundation of a principle of emotional solidarity. Mutual trust is linked to the notion of the endurance of the relationship. Can trust only be evidenced by endurance? Are there not other emotional concerns that could be said to be equally important? Waite L.J. does indicate another principle that might allow the legal constitution of familial intimacy: "It would be anomalous…to create a range of home buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it." Perhaps honesty more than endurance, could be seen as the definitive component of a relationship of mutual trust.
[29] Stack v Dowden 2007 UKHL 17
[30] Ibid, para 41.
[31] Ibid, para 46.

intentions lay." Note that "in the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection."[32] Baroness Hale is attempting to get to the grain of everyday life. She is drawing our attention to the myriad daily decisions- rooted in the management of emotions, money and property – that the court can legitimately use to draw 'inferences' about the terms of property ownership. Note that "arithmetical calculation" is put to one side. The last sentence, with its peculiar evocation of "natural love and affection" shows the court hanging on to a particular ideology of human relationships: it is as if the 'natural' (pre-social? pre-legal?) affective bond between two people provides something of an interpretative long-stop- but-interestingly 'natural love' is broadened out to apply to both conventional as well as unconventional forms of intimate association.

For all the coherence of Baroness Hale's reasoning, Stack v Dowden suggests that it will be hard to find coherent terms for the legal regulation of property. Consider, if nothing else, the obiter comments on the inherent difficulties in inferring intentions about property ownership- and the preferences expressed for the resulting trust rather than the constructive trust as the vehicle for equity in these circumstances. It is as if we find in this area of law a kind of flip flopping between opposed positions. We might say that this is brought about by a peculiar conjunction of factors. There is a distinct echo of the ideological sentimentality towards the family and intimate relationships. It brings to the law of property a kind of morality of intimacy that the judges either cannot or do not want to expel from the general principles of property law.

These themes are brought together in Barclay's Bank v O'Brien.[33] Mr O'Brien was a petty entrepreneur, who mortgaged the matrimonial home to the bank to provide funds for his business. Mrs O'Brien, whose agreement was needed to finalise the mortgage, was pressured into agreeing to the mortgage by her husband. The task facing the court in O'Brien was to resolve this problem in a contemporary context where matrimonial property must be freely mortgageable and the formal equality of men and women is recognised in law. The problem is approached from the perspective of the law of surety. Thus, the principles that are to apply to a marital relationship are to draw on those that relate to a lender seeking security for a loan.

The law would prefer not to place a particularly onerous duty on the creditor to check that the surety understood and had not been unduly influenced. Such a duty would make it harder for banks to make loans and thus be detrimental to a certain circuit of capital. Petty entrepreneurship demands that the matrimonial home should be freely available as a source of collateral. In O'Brien, the court attempts to resolve the problem by making use of the equitable doctrine of notice. A property transaction between husband and wife could be scrutinised in the following way. If it is tainted by misrepresentation or undue influence, the wife would have an equity against her husband to set it aside. This equity would be binding on third parties to the extent that they have notice (actual or constructive) of the facts that gave rise to the misrepresentation or the undue influence.

[32] Ibid, para 69.
[33] Barclay's Bank v O'Brien [1992] 3 W.L.R 593.

Surety law is thus 'combined' with the doctrine of notice drawn from property law.

How is this position justified? It is offered as a particular 'support' or opportunity to resolve the problematic issue of an objective support for the female legal subject. The court is determining a 'balance' between commercial mortgages and the trust that the wife places in her husband. The female legal subject is created as responsive and caring, located in a domestic sphere; and, by this very token, at risk from exploitations and undue influence. However, this potential for exploitation cannot in itself structure the law. The requirement of the special regime, that a relationship of mutual trust be supported and nurtured, is over-determined by a requirement that finance capital circulates as freely as possible.

Such is the disturbance in this field of law that the issue of undue influence returned to the House of Lords. We need to trace the articulations of law and economics that run through the judgment in Etridge:[34]

"In O'Brien's case this House decided where the balance should be held between these competing interests. On the one side, there is the need to protect a wife against a husband's undue influence. On the other side, there is the need for the bank to be able to have reasonable confidence in the strength of its security. Otherwise it would not provide the required money…..The House produced a practical solution. The House decided what are the steps a bank should take to ensure it is not affected by any claim the wife may have that her signature of the documents was procured by the undue influence or other wrong of her husband. Like every compromise, the outcome falls short of achieving in full the objectives of either of the two competing interests. In particular, the steps required of banks will not guarantee that, in future, wives will not be subjected to undue influence or misled when standing as sureties. Short of prohibiting this type of suretyship transaction altogether, there is no way of achieving that result, desirable although it is. What passes between a husband and wife in this regard in the privacy of their own home is not capable of regulation or investigation as a prelude to the wife entering into a suretyship transaction."[35]

This argument reveals the law in a particularly interesting light. The whole passage is structured around the notion of a balance; note the structure of the sentence: "on the one side…[o]n the other side."[36] This suggests even handedness, the desire to give each side its due. However, the terms that are to be set in balance are then re-defined. We know, because of the volume of litigation that the issue here does not reflect a "minority of cases" but represents a much broader pattern. Lord Nicholls proposes an understanding of the test for undue influence that does not depend on the bank's knowledge of the nature of the marriage or the degree of "trust and confidence" that is placed by the wife in the husband. The intimate relationship, the role of trust and confidence, is thus pushed back entirely into the darkness of the private realm. This is because any onerous responsibility

[34] Royal Bank of Scotland v Etridge No2 [2001] U.K.H.L, para 44.
[35] *Ibid* ., at para 56.
[36] *Ibid*., at para 37.

would "leave the banks in a considerable state of uncertainty."[37] Etridge thus champions the movement of finance capital. It is of no great surprise that the case opens with a repetition of the need to understand the economic situation. We can trace these themes through Lord Nicholls' judgment.

The phase of the argument in which we are interested operates with the rhetorical device of fore-fronting. This serves to stress the act of updating the law, recognising the risks involved and presenting a return to principles as the correct way forward. One is thus compelled to accept this account of events, this version of authority, or risk returning to chaos. Lord Nicholls goes on to assert an economic imperative:

" [b]ank finance is in fact by far the most important source of external capital for small businesses…[t]hese businesses comprise about 95 percent of all businesses in the country…Finance raised by second mortgages on the principal's home is a significant source of capital for the start up of small businesses."[38]

The home is inscribed in a circuit of capital that has its own demands. One might cynically ask whose freedom is at stake? Is it that of the person to be secured in their property, or that of a certain economic formation to perpetuate itself? The argument that the matrimonial home should be as freely alienable as possible is presented as if it was one of common sense. But whose interests are served by this right to be in debt? We have come across the law's protection of an economic operation that is predicated on loan finance and a set of powerful economic actors whose shareholders derive considerable financial benefits from the interests charged on loans. Lord Nicholls' argument privileges finance capital, rather than the social duties of banks, or the protection of family assets.

[37] *Ibid.,* at para 56.
[38] *Ibid.,* at para 34.

Recent cases show that the tensions in these cases are still active. In Scott v Southern Pacific Mortgages Limited[39] a 'sale and rent back' scheme was litigated. Mrs. Scott failed to show that she had an equitable interest that would have been binding on the mortgagee. The significant fact in the case was that Mrs. Scott was effectively swindled into mortgaging her home. One would have thought that equity would have assisted such a party. However, as in Etridge, the interests 'protected' by the law were those of the banks and a system of electronic conveyancing designed to allow the rapid and uncomplicated sale of commodified land. One might also speculate on the fate of Mrs. Scott. Housing her at public expense would show how the social costs of the banking system must be carried by the state; a subsidy on the profits of private business. Furthermore, in Curran v Collins[40] the long shadow cast by Rosset falls over Ms Curran's endeavours to establish an indirect interest in property acquired over a course of a long relationships with Mr Collins. Despite Stack v Dowden, it appears that the cast of property law is such that formal interests will always trump those that are informal or unwritten. Toulson LJ tersely pointed out that "the law of property can be harsh on people, usually women, in that situation."

Where are we now?

The Unfortunates

Our analysis of the cases above owes a great debt to feminist scholarship. However, we would part company with at least some aspects of the feminist approach as it distracts us from an analysis of the ideological subtleties of law in the social reproduction of capital. We hope we have made it clear above in our analysis above that the judges are struggling to create forms of special regard for women in property law. At stake is the way in which various forms of labour are recognised and valued. Anne Bottomley, for instance, has drawn attention to the "the free market model of equal individuals freely entering into legal relations".[41] From this perspective we can also see how a supposedly universal and gender blind principle tends to create problems for those who are located in certain social positions: in particular those who provide services through unwaged labour, or lack cultural capital. However, we need to take this insight much further, as it is the devaluing of affective labour that is the key to the social reproduction of capital. Baroness Summerskill captured precisely what was at issue in the following statement in the House of Lords, where she comments on the so called deserted wife's equity:

"In the course of this case great importance has been attached to the property right of the bank which advanced £2,000 on the security of the house. I find it difficult to understand why more importance was not attached to the social needs of the mother of four children

[39] Scott v Southern Pacific Mortgages Limited [2014] UKSC 52
[40] [2015] EWCA Civ 404
[41] Anne Bottomley, 'Self and Subjectivities: Languages of Claim in Property Law' 1993 *Journal of Law and Society* 20(1), 56-70.

who for years had been giving unremitting service to the home and her country—that is, if we acknowledge that children represent, in one sense, the wealth of the nation. She had been required to be maidservant, laundress, cook and concubine (if I may use the term in its legal sense) to her husband, and nurse and part-time teacher to her children. If we were to assess these services given over the years to the family, and indirectly to the community, in monetary terms we should find their value far in excess of £2,000. I say that the husband and the nation are in debt to the mother, and the repayment of this debt should be given priority. Her contribution to the country has been greater, financially and socially, than the banker's advance."[42]

Baroness Summerskill identifies the way in which principles of law recognise a very narrow form of value. Not only that. Investment risks are born by unfortunate individuals rather than financial institutions. Baroness Summerskill was hardly a Marxist, but we can generalise her point. The principles of equity appear unable to protect women and men from financial institutions -or- perhaps more precisely – certain people are sacrificed for the maintenance of a system for the free movement of money and the commodification of property. Profit making? Sacrifice? Surely, this is an inflated, rhetorical language- quite different from the measured prose of Baroness Summerskill's argument. However, such a rhetorical turn of phrase might be necessary to draw attention to the moment when a speech in the House of Lords recognises exactly what is at stake.

At the beginning of this essay we argued that the density of equity can make it very difficult to think about the subject in anything other than the terms mandated by the subject for its own self-understanding. To return to another point we made at the beginning of the essay, it is difficult to obtain the correct critical register of language and analysis. This paper is an experiment in 'getting under the skin' of the subject. The complexity of our analytical apparatus is necessary if we are to understand what is at stake in doctrines that often appear simply to be no more than the careful working out of the intricacies of rules and principles that structure the management of property investment. It is difficult to see the sophisticated ways in which we are exploited by finance capital. There is, in other words, a kind of paralysis that settles upon the critical thinker when s/he confronts the realities of modern equity. It is as if, rather like our outburst above, one needs to be suddenly alienated (in a Brechtian sense) from the hegemonic terms that the subject creates for itself. We can elaborate this point by engaging in a thought experiment.

Let us allow ourselves, at least for a moment, the idea that counter hegemonic practices can be performed in equity and property law. How is it possible to create an assemblage of equity that might compel capital to carry the costs that at present it shifts to those least able to bear them? Imagine something that might happen in the near future. After austerity policies have finally crashed the world economy and discredited capitalism, a significant realignment of law and politics takes place. As part of this democratic revolution, a cadre of socialist/feminist lawyers and judges begin to redefine the norms of property law. What principles will guide them? If they are working in the area that we have studied in this essay, they would probably seek to protect the rights of those in

[42] *HL Deb 25 May 1965 vol 266 cc820-8, at 821.*

intimate associations. Let us say for sake of argument that this new assemblage of equity can be created through elaboration of norms around communal property. Consider the following statement as a starting point:

"In most Western democracies there is some measure of community of goods, on the basis that where there is a home and children somebody has to look after them. If the wife did not do it, the husband would have to do it or pay somebody to do it. It is because in most countries it is ordinarily the wife who looks after the home and children, that the husband is free to go and earn a living for them both which he could not do if he had to do half the looking after of the house and children. If that is so, or if they both be working, it is only right that they should share their property and income during marriage."[43]

One can imagine all kinds of interesting ways in which equity might give recognition to the value of affective labour, and capital compelled to carry the real costs of its social reproduction. To misquote Deleuze- who knows what equity might be capable of becoming.

Conclusion

In this essay we have argued that equity serves to legitimize a regime of property law based on the alienability of property and the unrestricted movement of finance capital. This kind of thinking cuts against modes of analysis that would seek to study law (or indeed economy or society) in isolation. Equity clearly has its 'bespoke' concepts and doctrines but these must be related to the tensions that define the location of equity within a complex social and economic totality defined by a capitalist mode of production. Sustaining a formal regime of profit making requires certain people to be sacrificed and certain costs to be shifted from capital to people. That this seems merely unfortunate rather than the systemic operation of an assemblage of equity/capital, attests to the power of hegemonic ideology. Our concluding fantasy imagined a different world; an alternative assemblage of equity.

[43] Ibid., at 826.