RULES AND VALUES IN LAW: GREEK PHILOSOPHY; THE LIMITS OF TEXT; RESTITUTION; AND NEUROSCIENCE - ANYTHING IN COMMON? †

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1 Law is expressed through language. The articulation of legal rules and principles is done through words. Parliament produces written statutes. The Executive promulgates written regulations. Courts publish written reasons for judgment. Textual analysis is a critical aspect of legal method, with legislation to be interpreted according to its text, scope and purpose and the text of non-legislative written instruments to be construed employing similar considerations. Careful textual analysis is crucial. It is also the case that questions of construction involve a search for meaning, anchored in a particular context. For this reason, we must also have regard to the broader context of facts and values in the resolution of legal questions.

2 I have spoken before about the balance that must be struck in the law between strict textually-rooted rules and the fundamental values – social, cultural, *human* – from which, at a foundational level, our law is derived.[1] An acknowledgement of a need for balance between rules and values in the law is a recognition of the need for legal rules and principles to conform to values, in particular universal and transcendental standards. It is also an

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I am grateful to my Associate Samuel Walpole for his assistance in preparing this paper. His insights have been immensely valuable. This paper is a development of thoughts expressed in a number of my earlier papers: James Allsop, "Values in Law: How they Influence and Shape Rules and the Application of Law" (Paper delivered at the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong Hochelaga Lecture Series, Hong Kong, 20 October 2016); James Allsop, "Values in Public Law" (Paper delivered as the 2015 James Spigelman Oration, Sydney, 27 October 2015); James Allsop, "Characterisation: Its place in Contractual Analysis and Related Enquiries" (Paper delivered at the Contracts in Commercial Law Conference, Sydney, 18-19 December 2015); James Allsop, "Conscience, Fair Dealing and the Commerce – Parliament and the Courts" (Paper delivered at the Finn's Law: an Australian Justice Conference, Canberra, 25 September 2015). In it, I have sought to go further than these earlier papers to explain why, perhaps, this relationship between rule and value exists in the law and what its implications may be. I am indebted to the work of Iain McGilchrist in his illuminating and commanding work, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2009) along with Stephen Margett's insightful work, *Soul Driving* (Publishing House Seven, 2015), in developing my thoughts in this regard.

[1] James Allsop, "Values in Law: How they Influence and Shape Rules and the Application of Law" (Paper delivered at the Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong Hochelaga Lecture Series, Hong Kong, 20 October 2016) [5].

acceptance of the fact that a lack of adequate legal rules would see the law drift into a formless void of sentiment and intuition.[2] Accepting the need for balance between rules and values involves appreciating the wholeness of a concept (its gestalt) along with its constituent parts – rather than taking an approach that only looks to the individual integers or the particular taxonomical arrangement of a concept.

3 Despite its essentiality in facilitating expression, language can be limiting and constraining. Many concepts (legal and non-legal) are not capable of full expression in words. Words can never completely encapsulate some concepts to which they refer, or the experiential phenomenon that they represent. Language is a tool of expression, not the concept itself.[3] In using language, we render a concept explicit; in most cases, this is necessary and useful. It may, however, come at the expense of the implicit,[4] for in a number of cases it is not possible to refer to the whole by defining it, or by listing its constituent parts, or even by describing it.[5]

4 I intend nothing to be taken as a rejection, or a criticism, of textual analysis, legal taxonomy or careful, logical analysis of legal rules. Such techniques are fundamental to the common law method. They are also, in their more general forms, fundamental to human understanding and progress. What I do wish to consider, however, are the limitations of any approach that seeks to abstract, decontextualise and deconstruct value-informed principles into superficially precise rules, definitions and categories to then stand as a logical and abstracted construction. Such an approach is one where the product of that analysis is not reintegrated into a wider contextual understanding of a concept informed by the relevant values. By over-definition or over-categorisation, without a process of re-evaluation against the broader context, we run the risk of rendering the beautiful prosaic, the meaningful

[2] Ibid.
[3] Iain McGilchrist, *The Master and his Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2009) 115.
[4] Ibid 280.
[5] Ibid 95. For instance in addressing one of the most human and personal legal contexts, the variation of a will of a testator in the distribution of the assets of the estate, in *Andrew v Andrew* (2012) 81 NSWLR 656 at 657-658 [1] I said:

> "This is a difficult case. The difficulty arises from the need to apply a statutory test couched in evaluative language embodying human values and norms of conduct deeply personal to those involved and often incapable of clear expression. The human expression of will concerning the disposition of property flowing from considerations of emotion (including love and disappointment), reason and societal and family obligation cannot often be fully understood."

shallow, the subtle blunt, the flexible rigid and the infinite finite. Perhaps this is what Nietzsche had in mind when he said in Maxim 26 in *Twilight of the Idols* that he distrusted all systematisers and that 'the will to a system is a lack of integrity'.[6]

5 It is important to appreciate that the relationship between rule and value is inherently present in law, and why this may be the case. It illustrates a wider relationship between the general and particular, the implicit and the explicit, the expressed and the unexpressed, and the abstracted and the experienced, which extends beyond the law and more broadly into human thought. This involves a tension and relationship between wholeness and reductionism that is present in a diverse array of human endeavour and thinking.

The Greek Philosophers

6 Ancient Greece has been of tremendous influence to both the Western and Near Eastern worlds. The development of thought in Greek philosophy represents one of the first manifestations of the tension between the explicit and the implicit that is represented in the relationship between rules and values in our modern law.

7 The early Greek thinkers are considered to be the progenitors of Western philosophy.[7] Indeed, Bertrand Russell referred to the philosopher Thales, who belonged to the Milesian School of Philosophy that arose in Ionia in the sixth century BC, as "the first philosopher".[8] The Pantheon – if we may use that word – of Greek philosophers can perhaps be classified into the pre-Socratics and the post-Socratics. Within the evolution of Greek thought between pre-Socratic and post-Socratic intellects, we see (with some exceptions) a shift between a phenomenological modality of understanding of the world in the ideas of the pre-Socratics and a more detached, analytic approach in the later post-Socratics. The post-Socratics came to dominate much of contemporary Western philosophy.[9]

8 Pre-Socratic thinkers were concerned, primarily, with attempting to understand the natural world. Their investigations were fundamentally metaphysical. Unlike later Greek philosophers they showed a willingness to trust experience and perception, to seek to

[6] Friedrich Nietzsche, *Twilight of the Idols* (Duncan Large trans, Oxford University Press, 2008) 8.
[7] Bertrand Russell, *A History of Western Philosophy* (Unwin, 1984) 25.
[8] Ibid; see also McGilchrist, above n 3, 266.
[9] At least until the rise of philosophers such as Schopenhauer, Hegel, Nietzsche and Heidegger: see McGilchrist, above n 3, 137.

accommodate difference and to build a more holistic conception of the world.[10] These thinkers sought to "reconcile a sense of the apparent unity of the phenomenal world with its obvious diversity".[11] These philosophers – including Thales, his student Anaximander, Heraclitus, Parmenides, Empedocles and Anaxagoras – posited that there was a unifying principle or substance from which all matter derived.[12] They sought an explanation of how the world is made, how it came into being and why it is like it is.[13] McGilchrist suggests that this was a means of "accounting for division within unity, while at the same time respecting the reality of both".[14]

9 This pre-Socratic conception of the world is illustrated by Heraclitus, an Ionian "mystic" who lived around 500 BC.[15] Heraclitus considered the natural world to be in a state of permanent flux, although unity arose in the universe through "combination of opposites". Thus, according to Heraclitus a unified view of the world arose through appreciation of its diversity.[16] Heraclitus considered many parts of the world to be fundamentally paradoxical. He also acknowledged that attempts to describe the world using language can, in reality, lead to paradoxical results and that "the attempt to avoid paradox … distorts".[17] The way to avoid this distortion and achieve an understanding of the world was to consider the phenomenology of experience, rather than turning inward and adopting a detached, analytic perspective.[18] McGilchrist summarises Heraclitus' philosophy in the following way:[19]

> If we are enabled to attend to experience, rather than our pre-conceived ideas about experience, we encounter, according to Heraclitus, the reality of the union of opposites. Appreciating this coming together, wherein all opposing principles are reconciled, was the essence of … wisdom for Heraclitus. Opposites define one another and bring one another into existence. … [O]pposites do not cancel one another, but … are the only way to create something new.

10 Heraclitus' thinking demonstrates an appreciation of the importance of context and awareness of the implicit. He contends that one must understand the whole of the contradictory aspects

[10] Ibid 267.
[11] Ibid.
[12] See ibid 271; Russell, above n 7, 44-100.
[13] H Lloyd-Jones (ed) *The Greek World* (Penguin, 1965) 132.
[14] McGilchrist, above n 3, 267.
[15] Russell, above n 7, 59.
[16] Ibid 59-62.
[17] McGilchrist, above n 3, 269.
[18] Ibid.
[19] Ibid.

that make up existence in order to reach a conclusion about the nature of the world.[20] Furthermore, Heraclitus appears to have appreciated the inherent limitations of language and the need to construe and understand the world according to its implicit contextual environment evidenced and experienced in reasoned thought and responses to the world.[21] Through appreciating this wholeness we come to understand the inherent complexity present in the world. The post-Socratics tended to depart from this more contextualised understanding of the world in favour of one of abstraction and analysis.

11 Plato is the father of this move towards the explicit.[22] He opined that "knowledge" could not be derived from experience or perception.[23] His philosophy has been characterised as "rest[ing] on the distinction between reality and experience".[24] Exact deductive reasoning, mathematics and theorems, as opposed to sense and perception, that was developed by Plato can be seen to be derived from Pythagoras.[25] According to Plato, the experiential world was not to be trusted. Plato was a major critic of Heraclitus, and particularly doubted Heraclitus' view of the universe as existing in a state of permanent flux. Some constancy had to exist, Plato suggested.[26] Out of this developed Plato's Theory of the Forms, which he described in Book V of *The Republic.*[27] The idea behind this theory is that whilst there may be many individual objects in the world with the same name, there exists an overarching, abstract "ideal" or "form" that represents the only real version of that thing. In this way, the abstract attains primacy and becomes the real. That is, an experientially observed example of a thing is not really the thing itself, it is only an imitation. The abstract concept is what is the true thing.[28] General, abstract words are required to understand the world and express ideas as otherwise "there will be nothing on which the mind can rest."[29] The idea that the implicit and contextual is inferior to the explicit and abstract can be traced to Plato.[30] With the growth of

[20] Ibid.
[21] Ibid.
[22] Russell, above n 7, 163.
[23] Ibid 163.
[24] Ibid 135.
[25] Ibid 55-56.
[26] Ibid 164-165.
[27] An idea which is said to "not [be] traceable to his predecessors" and so amounting to a development in philosophical thought: ibid 137.
[28] Ibid 137-139; McGilchrist, above n 3, 286.
[29] Russell, above n 7, 143, quoting Socrates in Book V of Plato's *Republic*.
[30] McGilchrist, above n 3, 286.

Plato's influence, the appreciation of the phenomenological world was departed from in Greek philosophy in favour of an abstract approach.[31] The theory of the forms was a shift towards an approach to the world centred on categorisation,[32] as was Plato's separation of the mind from the body.[33] Plato's thinking subsequently influenced later Western philosophers, such as St Augustine.[34] As McGilchrist notes, one cannot disparage the contribution of this shift in Greek philosophical thinking to the development of the Western world: it led to the systematic development of knowledge and of sophisticated theories of science and technology.[35] What the shift from Heraclitus to Plato does demonstrate, however, is that the relationship between implicit and explicit, reflected in the law in the relationship between value and rule, is evident not just in the law but also in the philosophy of the Ancient Greeks. This shift also shows that at different times and in different domains the balance between these competing understandings of the world can alter so that one way of understanding, or *knowing,* becomes dominant. The balance can slip away.

12 The shift from pre-Socratic to post-Socratic thought was not a uniform transition from the phenomenal to the abstract. Aristotle, who was in fact a student of Plato,[36] and a post-Socratic philosopher, struck in his *Nichomachean Ethics* a balance between rules and values. Aristotle's metaphysical outlook had a greater appreciation of the value of perception and experience than Plato,[37] and his theories of justice also show an appreciation of the importance of context. In Book V of the *Nichomachean Ethics,* Aristotle adopts what first appears to be a categorised conception of what comprises "justice". He posits that justice is about proportions. He first divides justice into two sub-divisions: distributive, which is about "geometrical proportion", and corrective, which concerns "arithmetical proportion".[38] Later, he describes justice in another way. He writes of justice existing in a community as "political justice", which is then to be divided into "natural justice" and "legal justice".[39] Legal justice is comprised of the general laws promulgated by the community. It is similar to statutory

[31] Ibid 272.
[32] Ibid 285.
[33] Ibid 264.
[34] William A Welton (ed), *Plato's Forms: Varieties of Interpretation* (Lexington Books, 2003) 1; see also McGilchrist, above n 3, 264.
[35] McGilchrist, above n 3, 284-285.
[36] Ibid.
[37] Ibid.
[38] Aristotle, *Nichomachean Ethics* (David Ross trans, Oxford University Press, 2009) 84-91.
[39] Ibid 92.

commands. Up until this point, Aristotle's theories of justice are rather categorical, abstract and explicit. They seem to be a product of the Platonic shift. However, into those fixed categories Aristotle inserted his concept of "equity", which served as "a correction of law where it is defective owing to its universality".[40] Aristotle wrote that:

> … [T]his is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite…the decree is adapted to the facts.

13 Aristotle's concept of equity is perhaps one of the earliest examples of the role of a value based standard in law allowing for an appreciation of the totality of circumstances by providing for a broader, contextualised legal solution where rigid rules cannot appropriately satisfy the values at play. In developing equity to ameliorate the rigours of legal justice, Aristotle appreciated the balance that needs to be struck between rules and values, and demonstrated an awareness of the relationship between the two. There was a recognition by Aristotle that rules could, by reason of their generality and rigidity, fail to provide an appropriate result in some cases.[41] Aristotelian equity can readily be seen as the genesis of the Equitable jurisdiction administered, originally, by the Court of Chancery and particularly in the discretionary practice of the early Chancellors.[42] Links can also be drawn between Aristotelian equity and unjust enrichment.[43] Aristotle's concept of equity as "individualised justice"[44] may, however, be somewhat more open-textured than Equitable principles today.

14 More fundamentally, however, the development of Greek philosophy, both in the movement from Heraclitus to Plato and within the framework of Aristotle's ethical philosophy, demonstrates the tension between reductionist and holistic approaches to understanding the world. Within the law, this manifests in the relationship between rules and values. A dialectic between rules and values was certainly present in Aristotle's thinking. And that continuing influence of his thinking, along with the broader pattern in Greek philosophical thought, represents the ever present influence of Greek philosophy on rules and values in law.

[40] Ibid 99.
[41] Emily Sherwin, 'Restitution and Equity: An Analysis of the Principle of Unjust Enrichment' (2001) 79 *Texas Law Review* 2083, 2091-2092.
[42] Ibid 2092-2094.
[43] See ibid; *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516; see also Ben Kremer, 'Restitution and unconscientiousness: another view' [2003] 119 *Law Quarterly Review* 188.
[44] See Sherwin, above n 41, 2091.

Rules and Values in the Law

15 Let us return to the familiar fields of our law. Lawyers like the idea of relying upon fixed legal rules, expressed in, what appear to be, clear words. There is nothing inherently wrong with this. It provides the usual framework for certainty of analysis and for stability. An exhaustive, definitional reliance, however, on legal rules can lead to complexity and incoherence, through the innate limitations of language. Think of modern revenue statutes. This often stems from a laudable desire to be clear and comprehensive. In some situations, it is just not possible to express specific linguistic definitions of legal concepts in a manner that will appropriately capture the many circumstances that may, in the future, call for their application. [45]

16 In the realm of public law, consider jurisdictional error, or the ground of review for legal unreasonableness. Judicial review on such grounds is fundamentally about the control of power. The concepts involved, and the limits of power are not susceptible to exhaustive definition. The boundaries of these concepts cannot be precisely defined. What is required is an evaluation of the text, scope and purpose of the relevant statute, the factual context and the underlying values relevant to the exercise of Executive power.[46] An understanding of this can be seen in the emphasis in *Kirk v Industrial Court (NSW)*[47] that the examples of jurisdictional errors provided in *Craig v South Australia* do not form a "rigid taxonomy of jurisdictional error".[48] Similarly, a conclusion that an administrative decision is unreasonable is not based on linguistic analysis of different judicial expressions of the principle[49] (for such a comprehensive textual definition of this evaluation is not possible).[50] Rather, whether a decision is unreasonable is to be identified by an evaluative process of characterisation.[51]

17 In private law, the paradigm example of the relationship between rules and values can be seen in the nature of Equity, and the pervasive governing norm of unconscionability. Determining whether a course of conduct is unconscionable involves a characterisation of whether that

[45] *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 267 [268].
[46] See *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at 3-6 [2]-[13].
[47] (2010) 239 CLR 531.
[48] Ibid at 573 [73] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[49] *Stretton* (2016) 237 FCR 1 at 3 [2].
[50] Ibid 5 [10].
[51] Ibid 5-6 [11].

conduct is contrary to the conscience of equity. This is to be ascertained through an assessment of all the circumstances [52] against the values and norms acknowledged to be operating in the area and the expressions of Equity's conscience represented in the case law. In the case of statutory prohibitions against unconscionable conduct such as those found in the *Australian Consumer Law* and related legislation, [53] this process is also to be informed by the values that the legislature can be taken to consider relevant in the setting of the statutory standard. [54] The final judgment as to whether conduct is unconscionable cannot be determined by fixed rules, or deductive abstracted reasoning, or the substitution of another definition such as "moral obloquy"; it is necessarily evaluative and may often be contestable.[55] That is not to say the process is not deeply guided by expressions of principle, but a failure to acknowledge the evaluative nature of this assessment will result in complexity, incoherence and confusion.[56]

18 There are a multitude of these evaluative principles operating in our law (alongside many other more explicit rule-based doctrines). They represent an approach to reasoning that is not abstracted, nor reductionist, but holistic, and they necessarily require an appreciation of the implicit aspects of the concept sought to be described. They include the role of unjust enrichment in the law of restitution, to which I will now turn. These are all areas of legal decision-making that are influenced by values, and which cannot be reduced entirely to precise, rigid rules.

A Case Study: The Law of Restitution

19 The law of restitution is an example of the relationship between rules and values in the law, and the operation of a broad evaluative standard as against precise and fixed rules. Is the principle of unjust enrichment – that a person must make restitution to another when they have been unjustly enriched at the other's expense – a dispositive principle for the resolution

[52] *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113 at 119 (Dixon CJ, McTiernan and Kitto JJ): "[a] court of equity takes a more comprehensive view, and looks to every connected circumstance that ought to influence its determination upon the real justice of the case."
[53] *Competition and Consumer Act 2010* (Cth) sch 2: ss 21, 22; *Australian Securities and Investment Commission Act 2001* (Cth) ss 12B, 12CC.
[54] *Paciocco* (2015) 236 FCR 199 at 266 [262] (Allsop CJ).
[55] James Allsop, above n 1, [32].
[56] *Paciocco* (2015) 236 FCR 199 at 267 [267] and 276 [304] (Allsop CJ).

of concrete cases, or is it a unifying concept that assists, at a higher level, in the development of the law?

20 The struggle for ascendancy between rule-focused and principle-based analyses has dominated this area of the law for centuries. A desire to abstract, categorise, taxonomise and establish with rules the bounds of this branch of the law of obligations can be seen in its original designation as "quasi-contract". Holdsworth described these as obligations that "hover on the border line of contracts",[57] which originally developed out of actions for debt and account.[58] This continued with the rise of the action for assumpsit, and particularly the application of the action for indebitatus assumpsit to quasi-contract.[59] Like other legal actions of the time, quasi-contract began to be divided up into strict categories of pleading and forms of action that required specific wording: money paid, money had and received, quantum meruit and quantum valebat.[60]

21 Into a rule-based and cause of action-based framework (of little coherence other than through historical explanation) came the principle-based approach adopted by Lord Mansfield in the seminal case of *Moses v Macferlan.*[61] Lord Mansfield described "the gist" of an action for money had and received being "that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money".[62] He said that: "[i]t lies only for money which, *ex aequo et bono,* the defendant ought to refund."[63] In stating this overarching principle, Lord Mansfield provided *examples* of where recovery would be available – mistake, failure of consideration, imposition, extortion, oppression or undue influence[64] – rather than seeking to *define* the vitiating factors that would comprise the action. On this formulation, the action was better characterised as involving an assessment of concepts of equity and good conscience in the circumstances; a holistic assessment was to be undertaken, but by reference to known and familiar categories of behavior that would raise the issue of relief. Gummow J, in *Roxborough v Rothmans of Pall Mall* considered the

[57] See Sir William Holdsworth, *A History of English Law* (Methuen, vol 3, 1922).
[58] Ibid 425-428.
[59] Sir William Holdsworth, *A History of English Law* (Methuen, vol 8, 1922) 91-94.
[60] Robert Goff and Gareth Jones, *The Law of Restitution* (Sweet & Maxwell, 1st ed, 1966) 3-5.
[61] (1760) 2 Burr 1005.
[62] Ibid 1012.
[63] Ibid.
[64] Ibid.

equitable influences upon Lord Mansfield's reasoning in *Moses v Macferlan.*[65] Notably, his Honour referred to American cases which located Lord Mansfield's reasoning within the province of Equity.[66] In subsequent cases, Mansfield himself referred to considerations of conscience.[67] Indeed, in the contemporary discourse Gummow J' s "re-embracing of unconscientiousness" in restitution has been described as "merely a return to [the orthodoxy]" of Lord Mansfield.[68] The decision in *Moses v Macferlan* represents an approach of Lord Mansfield to the fusion of law and Equity.[69] It indicates Mansfield's focus on underlying principle – and values – rather than dogmatic adherence to rules.[70]

22 The debates around the fusion of law and Equity resulted in many intellectual casualties. One of these was Mansfield's analysis of restitution. Although early text writers such as Evans (himself influenced by Pothier) characterised the action for money had and received as one based upon unjust enrichment,[71] Blackstone adopted a different analysis, and interpreted the action as being based upon an implied contract.[72] An approach that brought restitution back within the domain of contract returned, as did a more precise rule-based framework. The English courts adopted the implied contract analysis: see in particular the Court of Appeal in *Baylis v Bishop of London*[73] and the House of Lords in *Sinclair v Brougham.*[74] Viscount Haldane LC stated that there had to be an implied contract that would be valid under normal principles of contract law.[75] Some twentieth century judges were highly critical of Mansfield's value-based approach. In *Baylis,* Hamilton LJ described it as "vague jurisprudence[76] while in *Holt v Markham* Scrutton LJ criticised it with some condescension

[65] See *Roxborough* (2001) 208 CLR 516 at 545-551 [76]-[89] (Gummow J).
[66] See *Claflin v Godfrey* 38 Mass 1 (1838), cited in *Roxborough* (2001) 208 CLR 516 at 549-550 [86] (Gummow J).
[67] *Clarke v Shee* (1774) 98 ER 1041 at 1042; *Sadler v Evans* (1766) 98 ER 34 at 35.
[68] Kremer, above n 43, 190.
[69] James Allsop, "Restitution: Some historical remarks" (2016) 90 *Australian Law Journal* 561, 570.
[70] Ibid 570.
[71] See Warren Swain, "Unjust Enrichment and the Role of Legal History in England and Australia" (2013) 36 *University of New South Wales Law Journal* 1030, 1033.
[72] Ibid.
[73] [1913] 1 Ch 127.
[74] [1914] AC 398.
[75] Ibid 416.
[76] [1913] 1 Ch 127 at 140.

as representing "well-meaning sloppiness of thought".[77] After some contrary dicta,[78] such an analysis was subsequently adopted in Australia.[79]

23 This implied contract analysis persisted until the last quarter of the twentieth century although the expression of a norm-derived principle did not disappear.[80] Lord Wright in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*[81] rejected the formalistic theory of implied contract and argued that restitutionary relief should be available to prevent the unjust enrichment of a defendant; such a remedy was to be justified on the ground that retention of a benefit by a defendant would be "against conscience":[82]

> It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.

24 The implied contract theory of restitution was finally rejected by the High Court of Australia in 1987 in *Pavey & Matthews Pty Ltd v Paul.*[83] Deane J's judgment founded recovery in restitution upon a "unifying concept" of unjust enrichment, rather than the existence of an implied contract.[84] His Honour explained that unjust enrichment was a:[85]

> unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation to make fair and just restitution … and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.

25 The House of Lords followed suit in 1989 with its decision in *Lipkin Gorman v Karpnale*,[86] and again in the *Westdeutsche* case in 1996.[87] The English law, in that case and subsequently, has been substantially informed by the work of the great English scholar of

[77] *Holt v Markham* [1923] 1 KB 504 at 513.
[78] See, eg. *Campbell v Kitchen & Sons Ltd* (1910) 12 CLR 515 at 531 (Barton J); *R v Brown* (1912) 14 CLR 17 at 25 (Griffith CJ).
[79] *Smith v William Charlick Ld* (1924) 34 CLR 38; *Turner v Bladin* (1951) 82 CLR 463.
[80] See Allsop, above n 69, 573-575.
[81] [1943] AC 32.
[82] Ibid 61.
[83] (1987) 162 CLR 221.
[84] Ibid 256.
[85] Ibid 256-257.
[86] *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 at 573 (Lord Goff).
[87] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 710 (Lord Browne-Wilkinson): "[t]he common law restitutionary claim is based not on implied contract but on unjust enrichment".

restitution, Professor Peter Birks. He embarked upon the great task of seeking to divine an overall structure or taxonomy for the law of restitution. Birks' contribution was of immense significance; it demonstrates the benefits that come from structured and analytical thinking about the law. The Birksian approach did involve another approach of division, however, it was one focused on principle. He contended that a case should be analysed[88] according to a framework of whether a defendant has been enriched, whether the enrichment was at the plaintiff's expense, whether there was a vitiating factor present that made the enrichment unjust and whether any relevant defences were open on the facts. These elements, drawn, to a significant degree, from abstracted deductive reasoning, then led to a conclusion as to whether a defendant has been unjustly enriched.[89] A similar approach has been taken by other English writers, including by the authors of *Goff & Jones: The Law of Unjust Enrichment*[90] who structure their work around "the ingredients of a claim in unjust enrichment."[91] Such an approach is also taken in Professor Andrew Burrows' *The Law of Restitution*[92] and in his comprehensive *Restatement of the English Law of Unjust Enrichment.*[93]

26 Arising out of the influence of Birks comes a subtle difference in emphasis between the English and Australian law of restitution. It is important not to overstate this difference and, indeed, recent developments in England reveal differences that may be less pronounced than perhaps previously thought to be. Birks' framework, as taken up in English law, presents an analysis with somewhat more abstracted structure and which could be considered as dividing unjust enrichment into distinct elements that come to approach something like constituents of an unjust enrichment cause of action. Lord Steyn adopted this analysis in *Banque Financière de la Cité v Parc (Battersea) Ltd*.[94] Later, in *Menelaou v Bank of Cyprus UK Ltd* Lord Clarke stated that:[95]

[88] Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, 1989) 20.
[89] Ibid.
[90] A text which, until its eighth edition, was entitled *Goff & Jones: The Law of Restitution.*
[91] Charles Mitchell, Paul Mitchell and Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th ed, 2011) [1-09].
[92] (Oxford University Press, 2011) 26-27.
[93] (Oxford University Press, 2012).
[94] [1999] 1 AC 221 at 227 (Lord Steyn) and 234 (Lord Hoffman). Burrows, in fact, describes this academic framework as having been "expressly approved" by the courts: Burrows, above n 92, 27.
[95] [2016] AC 176 at 187 [18] (emphasis added).

> In *Benedetti v Sawiris* [2014] AC 938 the Supreme Court recognised that it is now well established that the court must ask itself four questions when faced with a **claim for unjust enrichment**. They are these: (1) Has the defendant been enriched? (2) Was the enrichment at the claimant's expense? (3) Was the enrichment unjust? (4) Are there any defences available to the defendant?

27 However, recently, Lord Reed on behalf of the Supreme Court in *Commissioners for HM Revenue and Customs v Investment Trust Companies (in liq)*[96] has made it clear that this framework is not one of rigid rules, but guiding principles.[97] His Lordship described the questions posed in *Battersea, Benedetti* and *Menelaou* as "broad headings" used to "ensure a structured approach to the analysis of unjust enrichment". They "are not themselves legal tests, but are signposts towards areas of inquiry involving a number of distinct legal requirements".[98]

28 It remains to be seen how these statements will be developed. Indeed, in the decision in *Lowick Rose LLP (in liq) v Swynson Ltd & Anor*[99] delivered on the same day Lord Sumption cited Lord Reed and noted that the law of restitution "recognises a number of discrete factual situations in which enrichment is treated as vitiated by some unjust factor".[100]

29 Australian law has consistently rejected any adoption of unjust enrichment as a dispositive principle, or as forming its own cause of action. In *Southage Pty Ltd v Vescovi,* the Victorian Court of Appeal analysed the High Court's jurisprudence in this regard and concluded that Australian law had rejected a framework like that outlined in *Menelaou* to the extent that it has the effect of establishing unjust enrichment as a dispositive principle.[101] The recent decisions in *Investment Trust Companies* and *Lowick Rose* may, with time, suggest that English law has shifted to an approach where this framework provides a structure for analysis, at a higher level of abstraction, with unjust enrichment acting as an overarching principle. This would be closer to the position in Australia. Lord Reed in *Investment Trust Companies* even identified unjust enrichment "as a unifying principle underlying a number of different types of claim".[102]

[96] [2017] UKSC 29.
[97] Ibid [41].
[98] Ibid.
[99] [2017] UKSC 32.
[100] Ibid [22].
[101] (2015) 321 ALR 383 at [49].
[102] [2017] UKSC 29 at [40].

30 In Australia, unjust enrichment has consistently been described as a unifying concept[103] that operates at a higher level of abstraction.[104] Understood in this way, it is a conceptual apparatus for understanding restitutionary claims and to assist in the determination of novel cases.[105] Recognition of this role for the concept and the fact that the factors giving rise to restitutionary relief are not closed is evident in the judgment of French CJ, Crennan and Kiefel JJ in *Equuscorp Pty Ltd v Haxton*.[106]

31 This is not to say that the Australian law of restitution has ever been a land of formless judicial discretion. Far from it. The Australian approach involves a two stage analysis that was outlined in *David Securities v Commonwealth Bank of Australia*.[107] The first requires the plaintiff to establish the presence of a qualifying or vitiating factor (established by precedent or by principled doctrinal development) which results in prima facie liability to make restitution. As part of this stage of analysis, it must also be shown that the defendant has no juristic reason for retaining the enrichment.[108] This prima facie liability can then be "displaced" by the presence of circumstances that would make an order for restitution unjust.[109] This second stage is where the contextual nature of the Australian approach manifests itself.

32 The approach taken by Birks reflected a degree of reluctance to embrace judicial discretion, referring to Lord Mansfield's recourse to equitable considerations as involving "a dangerously high level of abstraction".[110] For him, the "unjust" in "unjust enrichment" did not describe a "notion of justice" but only the vitiating factors which the law had recognised as giving rise to restitution.[111] Such a concern (though not the conclusion to be drawn from it)

[103] See *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Roxborough* (2001) 208 CLR 516 at 543-545 [70]-[74]; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [151]; *Lumbers v W Cook Builders* (2008) 232 CLR 635 at 665 [85]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 515-517 [29]-[30]; cf *Australian Financial Services & Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at 596 [78].
[104] *Equuscorp* (2012) 246 CLR 498 at 517 [30].
[105] K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworths, 3rd ed, 2016) 40-44 [135]-[136].
[106] *Equuscorp* (2012) 246 CLR 498 at 517 [30].
[107] (1992) 175 CLR 353 at 379.
[108] *Roxborough* (2001) 208 CLR 516 at 527 [20] (Gleeson CJ, Gaudron and Hayne JJ).
[109] *Equuscorp* (2012) 246 CLR 498 at 517 [30].
[110] Birks, above n 88, 80.
[111] Ibid 99.

was shared by Deane J. In *Pavey,* his Honour emphasised that a rejection of implied contract in favour of the concept of unjust enrichment was not intended to "assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate".[112] The High Court stated in *Farah Constructions* that whether someone has been unjustly enriched "is not determined by reference to a subjective evaluation of what is unfair or unconscionable."[113] Such concerns were also acknowledged by Lord Reed in *Investment Trust Companies,* in his Lordship's potential re-casting of the English analysis.[114]

33 The distinction presented by Australian law can be most readily observed now in its explicit recognition of Equitable principles – that is, considerations stemming from the body of law known as Equity – in the second stage of analysis that requires a court to consider whether it would be unjust to order restitution.[115] In emphasising this, the High Court has drawn upon Lord Mansfield's principle-based approach in *Moses v Macferlan*.[116] In this sense, the Australian approach recognises a greater balance between rules and values rather than the more rule-based taxonomy or framework of a cause of action. The invocation of Equitable principle is not unstructured. Equity's conscience does not lead to subjective evaluation, but reflects, rather, "a conscience 'properly formed and instructed'"[117] – by established principles and the values of Equity. To paraphrase Gageler J, "unjust" in the context of "unjust enrichment" must be explained, rather than defined.[118] It is in this interplay between vitiating factors and the wider circumstances that the balance between rules and values in the Australian law of restitution can be observed.

34 Ultimately, how different these approaches are is a legitimate matter for debate. Both owe their form to the recognition and acceptance of unjust enrichment as a foundation of recovery. The arrangement of rules and principles differs in giving expression to the concept. Neither approach, however, resorts to any narrow conceptualising that marked the trappings of the law of quasi-contract.

[112] *Pavey* (1987) 162 CLR 221 at 256.
[113] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 156 [150] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); see also *David Securities* (1992) 175 CLR 353 at 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ).
[114] [2017] UKSC 29 at [39].
[115] See *Hills* (2014) 253 CLR 560 at 596-597 [78]; Allsop, above n 69, 577.
[116] See *Equuscorp* (2012) 246 CLR 498 at 517-518 [32] (French CJ, Crennan and Kiefel JJ).
[117] *Hills* (2014) 253 CLR 560 at 596 [76] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
[118] Ibid 618-619 [140]-[141] (Gageler J).

Change of position

35 One of the grounds upon which the making of an order for restitution might be considered unjust is change of position. The manner in which the defence has been developed in Australia is one of the best examples of the relationship between rules and values in the law of restitution, and the law generally. It is an example of a distinctly Australian approach to restitution. It reflects the contextual approach in Australian law of denying restitution where it would be unjust to do so, based on the circumstances of the case.[119]

36 Change of position is a defence available to a defendant who has acted to his or her detriment in reliance upon a payment received such that he or she would now be in a worse position if required to make restitution than if the defendant had never received the payment.[120] In recognising the defence in *Lipkin Gorman,* Lord Goff said:[121]

> It is not…appropriate in the present case to attempt to identify all those actions in restitution to which change of position may be a defence … At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.

37 Lord Goff's formulation of the defence operated through a holistic and evaluative assessment, in the context of the individual case, of whether it would be unjust to order a defendant to make restitution. Similarly to their analysis of restitutionary causes of action, many writers have subsequently sought to break down the defence into elements: stipulating requirements of acting in good faith, detrimental reliance on the receipt of the payment and requiring that the payment be a 'but for' cause of the detriment.[122] This does provide necessary guidance and prevents the analysis slipping into idiosyncratic judgments; however, these aids to understanding must not subsume the holistic assessment informed by context and value that is at the heart of the defence.

[119] *Equuscorp* (2012) 246 CLR 498 at 517 [30].
[120] *Hills* (2014) 253 CLR 560 at 568 [1] (French CJ), 592-596 [65]-[77], 597 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 624-625 [155] (Gageler J); *Lipkin Gorman* [1991] 2 AC 548 at 580 (Lord Goff).
[121] *Lipkin Gorman* [1991] 2 AC 548 at 581.
[122] See, eg. the approach in Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 125-165 which breaks the defence down into its "primary elements".

38 Birks tended to enmesh the defence within a scaffold of fixed rules created by abstracted and deductive reasoning,[123] by a rejection of a defence of change of position in favour of one of "disenrichment".[124] He considered that the defence of change of position as formulated in *Lipkin Gorman* was unnecessarily broad.[125] On Birks' disenrichment approach, the defence is quantitative and looks to whether there is a net gain in the defendant's favour that remains after the dispersals by the defendant. In so doing, it applies an almost mathematical frame of reference to a defence which was originally formulated to be based on a consideration of the circumstances of the case in their entirety, judged against a value-informed standard of conscience. Professor Burrows also adopts the disenrichment approach, describing it as the "essential justification" of change of position.[126] The disenrichment model has also found some judicial acceptance in England.[127]

39 This quantitative approach was rejected as the basis of the defence of change of position in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd*.[128] Although it was noted that disenrichment may describe a type of case where the change of position defence may appy,[129] the evaluation required by the defence is whether it is "inequitable in all the circumstances" to require a defendant to make restitution.[130] French CJ characterised the defence as an example of many areas of the law that "require the case-by-case application of broadly stated legal rules and standards …. [which] [r]arely…yield all-encompassing rules for the application of a foundation standard or norm."[131] Similarly, the plurality stated that a "mathematical assessment" of enrichment was contrary to the relevant equitable principles that were focused upon "who should properly bear the loss and why".[132]

40 The application of these principles in the circumstances of the case in *Hills* led to the defendants being entitled to a defence for the entirety of the amount mistakenly paid to them.

[123] See Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 208 ff.
[124] Ibid 208.
[125] Ibid; see also the discussion by French CJ in *Hills* (2014) 253 CLR 560 at 579-580 [21].
[126] Burrows, above n 88, 526.
[127] See, eg. *Test Claimants in the FII Group Litigation v Her Majesty's Revenue Commissioners (No 2)* [2014] EWHC 4302 (Ch) at [354] (Henderson J) cf *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [66]-[67] (Munby LJ); *Scottish Equitable Plc v Derby* [2001] 3 All ER 818 at [32] (Robert Walker LJ).
[128] (2014) 253 CLR 500.
[129] Ibid 576-577 [17] (French CJ).
[130] Ibid 568 [1] (French CJ); 594 [69] (Hayne, Crennan, Kiefel and Bell JJ); 624-625 [155] (Gageler J).
[131] Ibid 581-582 [23] (French CJ).
[132] Ibid 596-597 [78] (Hayne, Crennan, Kiefel and Bell JJ).

The appellant, AFSL, had been induced by fraudulent invoices from a company called TCP to purchase equipment from Hills Industries and Bosch and hire it back to TCP. AFSL paid the invoices directly to Hills and Bosch. This resulted in Hills and Bosch discharging debts owed to them by TCP and abandoning legal proceedings against TCP. By the time it was discovered that the invoices were fraudulent, TCP was insolvent. AFSL sued Hills and Bosch to recover the mistaken payments. It was contended that Hills had lost its opportunity to recover the debts owed to it by TCP. The result was that it was inequitable to require Hills to make restitution and, as the lost opportunity could not be precisely quantified, conscience meant that the defence extended to the whole of the value of the amount paid by AFSL.

41 The factual context of *Hills* emphasises that in areas of the law where evaluative standards are in play, such as the defence of change of position, rigid rules cannot be used on their own to dictate outcomes. If the disenrichment approach had been adopted in *Hills,* and Hills had and Bosch had not been able to quantify the value of the lost opportunity to pursue the debts, they would have been liable in restitution. The reasoning in the judgment allows for a holistic synthesis of the circumstances of the case, evaluated against a standard of inequitability and guided by an analytical framework that considers separate aspects of the defence and then draws them together in an evaluative and contextual assessment.[133] This is appropriate, given the equitable principles that inform the defence.[134] Such an understanding was captured by Gageler J who wrote that the defence is:[135]

> …the second stage of an analysis founded ultimately on notions of conscience and **explained (as distinct from defined)** by the concept of unjust enrichment.

42 As I stated in my judgment in the Court of Appeal in *Hills*:[136]

> Given the broad range of acts or omissions that may legitimately be done or not done on the faith of a receipt, to require the measurement of the payee's position in terms only of the currency of the payer's mistake may unfairly or mechanically restrict the just reconciliation of the competing rights.

[133] An observation earlier made in IM Jackman, *The Varieties of Restitution* (The Federation Press, 1998) 164, 167.
[134] A point made by Professor Bant: Elise Bant, 'Change of position: outstanding issues' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 133, 146.
[135] *Hills* (2014) 243 CLR 560 at 619-620 [143] (Gageler J) (emphasis added).
[136] *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* [2012] NSWCA 380 at [153] (Allsop P).

43 In order to make an evaluative judgment as to whether the defence should apply, one must make a holistic assessment of the facts and circumstances in which the defence may operate. Such an operation cannot be reduced to rigid rules or a piecemeal assessment of the facts. They must be considered and assessed in their entirety. When the flexibility of the equitable change of position defence is combined with the more categorical approach to the establishment of prima facie liability based on the presence of vitiating factors, one can see the relationship between rules and values and the balance struck in the law of restitution between the two. This does not mean that unjust enrichment is a dispositive principle. Rather, it unifies the categories of case in which liability may arise, which may be displaced by an appreciation of the whole context.

Philosophy, Law and the Divided Brain

44 So far we have explored the relationship that exists in our law between rules and values and how the process of striking a balance between the two has played out in the debates surrounding the law of restitution. We have also considered the parallels in the development of Greek philosophy, which of course then directly come to influence the law through Aristotle. We would now like to consider why these parallels exist and why this divide between discrete and contextual understanding is present across so many facets of human experience. The answer has implications for our own thinking as humans.

45 To explore the reasons for why this may be so it is helpful and illuminating to consider some recent research in the area of neuroscience and in this regard we are indebted to the work of psychiatrist and neuroscientist Iain McGilchrist.

46 McGilchrist would attribute this relationship between rules and values and, more fundamentally, human expression of ideas as either rules or statements of broader values, as a product of the architecture of our brains. He explores the body of empirical research that indicates that the worlds of our different cerebral hemispheres are fundamentally different. Broadly, and perhaps at an oversimplified level, the left hemisphere is the region of the abstract; it is a hemisphere of division and categorisation. It provides "clarity and power" for analysis, but at the expense of context.[137] Our right hemisphere, on the other hand, focuses

[137] McGilchrist, above n 3, 174-175.

on "the experiential world".[138] It is about narrative and understanding of the implicit.[139] It does not have the capacity to categorise and develop taxonomies like the left hemisphere, but can form a holistic picture of concepts. Broadly, both hemispheres deal with the same subjects, but they deal with them in different ways: they function differently.

47 What is argued by McGilchrist is that the right hemisphere should naturally be the dominant hemisphere;[140] the left hemisphere is to be used to analyse, in a detached way, what the right hemisphere considers as a whole.[141] He considers that what should then occur is that the product of analysis by the left hemisphere should be reintegrated into the holistic assessment of the right hemisphere to provide for a holistic assessment of the world.[142] The hemispheres are "complementary".[143]

48 McGilchrist contends that, over the centuries, the left hemisphere mode of thought has begun to dominate the right hemisphere and, instead of the biological position of the right hemisphere being dominant, intellectual history has moved in a way that gives precedence to the left hemisphere way of thinking; that is, the explicit, the abstract and the divided.[144] This can be seen in Western philosophy, which has evolved into a "verbal and analytic" field.[145] It is seen in the shift from pre-Socratic thought to the ideas of Plato. And, it can be seen in the law where there is a desire to over-rely on rigid rules without acknowledging the values that, in reality, are fundamental to the law and its application and which ultimately make and inform the rules.

49 How often has a brilliant idea been analysed to the point of abstraction taking it far from the grounded reality of the whole. Abstraction has its seductive beauty, just as an appreciation of the whole can have. As was said by William James in 1884:[146]

> Beautiful is the flight of conceptual reason through the upper air of truth. No wonder philosophers are dazzled by it still, and no wonder they look with some disdain at the low earth of feeling from which the goddess launched herself aloft. But woe to her if

[138] Ibid 178.
[139] Ibid 191.
[140] Ibid 176.
[141] Ibid 208.
[142] Ibid 206.
[143] Ibid 210.
[144] Ibid 237.
[145] Ibid 137.
[146] William James, "The Function of Cognition" (Address to the Aristotelian Society, 1 December 1884).

> she return not home to its acquaintance … Every crazy wind will take her, and like a fire-balloon at night, she will go out among the stars.

50 What is the lesson of this for the law, and for lawyers? The research and advances in neuroscience discussed in McGilchrist's work provide a perspective for thinking, and analysis about the law. Not a framework or a taxonomy, but a perspective from which one can consider and, more importantly, reconsider – by reference to the whole. One should not exhaustively rely on analytical, abstracted and de-contextualised methods of thought as the totality of any analysis, as critical and important as such approaches always will be. There will often need to be a synthesis, and a balance: to contextualize the abstracted into experience. Law is about people and human existence, their relationships with each other and the perception and recognition of societal bonds. Law is about power (public and private) and its control. In its application, law is often non-linear by virtue of the fact that it is necessarily both relational and experiential. Neuroscience illustrates that there is a need for us to balance, and integrate, the implicit and the explicit. This is how the human brain has evolved. The imperative to appreciate wholeness and context was understood by the pre-Socratic Greek philosophers, and by Aristotle. The tension and relationship between the two approaches can be seen in all fields of the law; today I have sought to illustrate it in the law of restitution.

51 The relationship between rules and values has an indefinable, but immovably central, place in the law; just as a similar balance has in other fields. Degas and Manet were friends, rivals and great artistic spirits. Degas began his artistic life with a fierce devotion to technical drafting skill, and a desire to pierce the veil of beauty, and to uncover the truth, a truth capable of being expressed by drafting skill that lay at the heart of this work. Manet, his older friend and rival, exposed him to a gift of insight – of the secret, of the furtive, of the hint of the deeply beautiful coming from the life of the city, from people, from places, from clothes, from style and from human interaction and engagement. From this, Degas came to paint the ineffable ballet dancers and bathers – revealing individual beauty in everyday circumstances, in colour, in shape, in movement and in ambiguously expressed presence. This is beauty in the

experienced, in the half expressed, in the implicit, in the imprecise, and in the particular in its whole.[147]

52 This is not a world away from law. This is life. Law is life as well. Law is not all about taxonomy, systems, rules and definition. It is not all about short answers to simple questions. If it were, we would not have *Moses v Macferlan*,[148] or *Kable*,[149] or an insistence on individualised justice in sentencing, or the qualification to such in the principles of sentencing in *Veen (No 2)*,[150] or an insistence on fairness in the exercise of public power, or mercy, or the residual discretion in sentencing, or the law of penalties, or jurisdictional error, or unconscionability as the thematic force of Equity, or the insistence on human decency in relational behavior, or the countless other manifestations of values in the law.

53 As the great Sir Maurice Byers put it in 1987 in a short article on an advocate's view of the judiciary, with his customary combination of perception, lucidity and conciseness:[151]

> The law is an expression of the whole personality and should reflect the values that sustain human societies. The extent to which those values influence the formulation of the law varies according to the nature of the particular legal rule in question. This means that the judges must appreciate what they are doing and what the consequences of their decisions may be for their society.

[147] S Smee, *The Art of Rivalry* (Text Publishing, 2016), Ch 2.
[148] (1760) 2 Burr 1005.
[149] *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51.
[150] *Veen v The Queen [No 2]* (1988) 164 CLR 465.
[151] Sir Maurice Byers, "From the Other Side of the Bar Table: An Advocate's View of the Judiciary" (1987) 10 *University of New South Wales Law Journal* 179, 182.