

# Equity as a Vehicle for Law Reform: The Case of Unilateral Mistake

Irit Samet\*

*In this paper I ask whether English Law should permit rescission for unilateral mistakes in the formation of contract, in circumstances where the defendant (D) knew or should have known about the claimant's (C) mistake, and if so, should Equity be (re)employed to deploy the remedy. The paper introduces the Caveat Emptor Common Law rule on this issue, which rules out rescission, and the various considerations that count in its favour. I argue that neither considerations from efficiency, nor those based in ethics can justify the current rule, and that new, flexible and morally-sensitive resolution is called for. If we examine the way in which Equity intervenes to reform areas of law where the Common Law fails to provide a satisfactory solution to legal disputes, we will see that the Caveat Emptor rule displays exactly the kind of defects that Equity does a very good job at remedying. The law on the duty to disclose information at the pre-contractual stage emerges as an excellent example for Equity's great potential as a vehicle for improving the law in a measured, nuanced and imaginative way.*

---

\* Reader in Private Law, Dickson Poon School of Law, King's College, London.

- 
- I. INTRODUCTION
  - II. JUSTIFYING THE COMMON LAW RULE
    - A. Moral Value 1: No Legal Duty to Prevent Harm
    - B. Moral Value 2: Self-Reliance
    - C. Social Benefit 1: Certainty
    - D. Social Benefit 2: Law for Export
    - E. Social Benefit 3: Generating Socially-Beneficial Information
  - III. WHEN AND WHY EQUITY INTERVENES IN THE PARTIES' COMMON LAW RIGHTS
  - IV. THE MORAL DEMERITS OF THE *CAVEAT EMPTOR* RULE, AND WHY EQUITY IS THE RIGHT WAY TO CORRECT THEM
    - A. Legal Duty to Prevent Harm
    - B. Who's Self-Reliance?
    - C. Certainty and Other Legal Virtues
    - D. Generating (very little) Socially-Beneficial Information
  - V. CONCLUSION
- 

## I. Introduction

“This by nature is equitable, that no one be made richer by another’s loss”.<sup>1</sup>

The situation is painfully familiar: a party to contractual negotiations has information which is highly relevant for the subject matter of the purported deal. Keeping it to himself would improve his stakes, but the other party would be labouring under a mistake so that her share of the pie would be lower than if she were fully informed. The question whether the state would come to her assistance once the contract is signed and she becomes conscious of the information is part of the law on “contractual mistake”; this, it is widely agreed, is a “confusing and problematic area [of law] in England and in many of the common law countries which adopted the English doctrine”.<sup>2</sup> In this paper, I discuss a very specific

- 
1. Dig 12.6.14 (Pomponius Sabinus 21), cited in John P Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little, Brown and Company, 1951) at 3.
  2. Catharine MacMillan, *Mistakes in Contract Law* (Portland: Hart Publishing, 2010) at 1.

aspect of the law on contractual mistake, and ask whether it should be reformed, and by what means: should we permit rescission for unilateral mistakes in the formation of contract, in circumstances where the defendant knew or should have known about the claimant's mistake?<sup>3</sup> And if so, should equity be (re)employed to deploy the remedy? To answer these questions, I will first introduce the Common Law rule on this issue and the various considerations that count in its favour. I then ask in which cases, and in what way, equity intervenes to reform areas of law where the common law fails to provide a satisfactory solution. The next section argues that many of the justifications offered for the Common law rule on unilateral mistake fail, and that as a result the rule displays the kind of difficulties that equity is designed to address. The law on the duty to disclose information at the pre-contractual stage emerges as an excellent example for the great potential of equity to improve the law in a measured, nuanced and imaginative way.

The basic rule of English contract law which applies to situations of un-induced unilateral mistake, of which the other party knew, says that the

claimant has no basis for avoiding the contract. Even if the defendant knows that the claimant would never have entered the contract or anything like it had he known the truth, the defendant is fully entitled to take advantage of the mistake.<sup>4</sup>

In spite of some well-known exceptions found in common law and regulation (mainly in special contexts like insurance, family, financial

- 
3. There are many adjacent issues which I will not discuss here, like the timing of the relief, the quality of the remedy or the position of third parties. Unilateral mistakes can also occur when a party wrongly believes that the written contract reflects the terms agreed upon by the parties. The law here is very clear: if the other party knows about (or suspects) a mistake he needs to shout (*Commission for the New Towns v Cooper (Great Britain) Ltd*, [1995] Ch 259 (CA (Eng))). This is a case of equitable estoppel and is thus a branch of a different equitable doctrine. See Terence Etherton, "Contract Formation and the Fog of Rectification" (2015) 68:1 *Current Legal Problems* 367 at 17-18.
  4. Hugh Beale, *Mistake and Non-disclosure of Facts: Models for English Contract Law*, (Oxford: Oxford University Press, 2012) at 18.

markets, etc.), the residual rule is clear cut: “*caveat emptor*” or, “[i]f you don’t know, ask. If you didn’t ask, don’t complain”.<sup>5</sup> The *Caveat Emptor* rule is a concrete expression of the belief that in a perfectly competitive market, aggregate utility is maximized when every person rationally pursues her own ends. Misrepresentation, undue influence and unconscionable behaviour interfere with the ideal market conditions and English law is more than happy to allow rescission when such reprehensible practices are proved;<sup>6</sup> failure to look after your own interests is a different story. A peculiar gap thus emerges between the overall thrust of English contract law towards rules which promote fairness and social market, and the residual law that applies to un-induced unilateral mistakes which remains staunchly individualistic.<sup>7</sup>

Until the 19th century and the administrative fusion between common law and equity courts the common law courts did not attribute any importance to mistake in the formation of contract.<sup>8</sup> One important reason for the neglect was that chancery procedures (cumbersome as they were) were much better suited to ascertaining mistakes. As a result, suits that involved mistake were channelled by the barristers to the Court of Chancery, so that the common law had no opportunity to develop a

- 
5. Beale, *supra* note 4 at 106. A detailed list of the traditional exceptions can be found in SM Waddams, “Precontractual Duties of Disclosure” in Peter Cane & Jane Stapleton, eds, *Essays for Patrick Atiyah* (Oxford: Clarendon Press, 1991) at 237.
  6. The discussion here excludes contracts that are afflicted with undue influence or unconscionable bargain which raise a different set of questions, and the remedy for which is usually considered to be based on unjust enrichment principles. For a discussion of restitution in these cases as based on unconscionability, see Prince Saprai, “Unconscionable Enrichment?” in Robert Chambers, Charles Mitchell & JE Penner, eds, *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Oxford University Press, 2009) at 417.
  7. On the transformation of English contract law to a social-market embracing law see Hugh Collins, *The Law of Contract*, 4d (London: Cambridge University Press, 2008) ch 2.
  8. MacMillan, *supra* note 2 at 38.

doctrine concerning the effect of mistake on contractual obligations.<sup>9</sup> Parties who laboured under a mistake and sought to rescind (or rectify) the resulted contract could find sympathy with the courts of equity who would intervene for victims of both *suggestio falsi* and *suppressio veri*. The latter was of course the greater innovation, as it went far beyond the doctrine of fraud — the closest counterpart which would be familiar to the common law jurists. But the equitable doctrine of unilateral mistake, like most of equity’s jurisdiction, was never systematised to the level of its common law contemporaries. Only some general principles can be extracted from the (not too many) cases, while the treatises of the 19th century provide contradictory accounts, which too often do not follow the case law.<sup>10</sup> If a party seeks to enforce a contract in spite of the occurrence of mistake, one author tells us, he “must necessarily make that court [of common law] an instrument of injustice; ... courts of equity have interposed, be restraining the party whose conscience is thus bound from using the advantage he has improperly gained”.<sup>11</sup> When equity intervened it did so in the more flexible and particularistic manner that typifies it.<sup>12</sup> It offered restitution (a remedy which was conceived by its 19th century resuscitators as equitable in nature) to claimants who proved their mistake, and the unconscionability of

- 
9. *Ibid* at 39-44. A parallel line of cases in which remedy was offered to the mistaken party developed in Scotland, but today it is “considered controversial, and at most a narrow exception to the rule that an uninduced unilateral error is not sufficient to annul a contract”: see Reid & MacQueen, *supra* note 4 at 355-56.
  10. As shown in MacMillan, *supra* note 2; see also Reid & MacQueen, *supra* note 4 (a parallel line of cases in which remedy was offered to the mistaken party developed in Scotland, but today it is “considered controversial, and at most a narrow exception to the rule that an uninduced unilateral error is not sufficient to annul a contract” at 355-58).
  11. John Mitford, *A Treatise on the Pleadings in Suits in the Court of Chancery* (London: W Owen, 1787) as in MacMillan, *supra* note 2 at 45.
  12. On the flexible nature of the equitable doctrines and how this is essential to their function see Henry Smith, *An Economic Analysis Of Law Versus Equity* (2010) [unpublished, archived at Harvard Law School, Harvard University] (in the context of property law).

the other party who was silent.<sup>13</sup> But this equitable jurisdiction to assist parties who suffered harm as a result of un-induced unilateral mistake withered away as fusion kicked in, and claims concerning mistake were heard by a unified High Court. And so, the question of this paper can be posed as: should equity reclaim its pre-fusion power and intervene in the parties' common law rights where the defendant knew or should have known about the claimant's substantive mistake?

## II. Justifying the Common Law Rule

Before we can judge whether equity should reclaim its authority to assist a party who worked under a mistake known to the other party (but not induced by him), we need to assess the merits of the law as it stands now. Under the current *Caveat Emptor* rule, parties to a contract are not under a duty to disclose information concerning the subject matter of the contract. People are expected to make all relevant investigations before committing to a contract, and have only themselves to blame if they fail to do so. As the courts of common law readily admit, the rule would strike the person on the street as unethical: "a man of tender conscience or high honour would be unwilling to take advantage of the ignorance of the other party"; it is a piece of law that clearly departs from our moral principles: "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor".<sup>14</sup> In what follows I will present, briefly, some arguments to the effect that the inconsistency between the court of law and "the courts of morals" can be justified by second-order considerations of morality and public welfare. If valid, they show that the "tender conscience or high honour" which rejects the

---

13. Even where *restitutio ad integrum* was impossible see *Alati v Kruger* (1955) 94 CLR 216 (HCA) at 224 (when the parties were not in a position to give back exactly what each received under the contract). Also see more examples of equity's flexibility in this matter in Jamie Glister & James Lee, *Hanbury & Martin Modern Equity*, 19d (London: Sweet & Maxwell, 2012) at 29-001.

14. *Smith v Hughes* (1871), LR 6 QB 597 (Eng) at 604, per Chief Justice Cockburn, and at 607, per Justice Blackburn.

*Caveat Emptor* rule merely reflects moral intuitions that cannot survive a more reflective survey of the full range of considerations which apply to the legal treatment of un-induced mistakes.

In his book on restitution, Hanoch Dagan offers a powerful argument for the position that the law on restitution should be read as an expression of our commitment to the values of autonomy and utility, as well as to the value of community welfare.<sup>15</sup> This is not the place to assess the merits of his argument, but in what follows I discuss considerations in favour of the *Caveat Emptor* rule that concern both the parties to the dispute and the wider community. If, like Ernest Weinrib, you believe that only consideration of corrective justice (*i.e.* strictly between the parties to the dispute) should be taken into account when deciding disputes about the right to restitution (and in private law in general), you will discard reasons B-E below as irrelevant.<sup>16</sup> But if, like Dagan, you believe that a solution to these issues should be offered from a wide perspective which includes the effect of the decision on society as whole, you will (hopefully) find all the arguments (and counter arguments) in Part IV interesting and relevant. One more methodological note about mixing arguments from morality and efficiency: when thinking about rules of contract law, we need not worry too much about efficiency-oriented considerations crowding out concerns of morality. For in this area of the law, they actually tend to work in tandem, and lead in the same direction. As Charles Fried explains, the “convergence of [law-and-economics and normative analyses] is particularly salient [in] the design of institutions that facilitate the coordination, through agreements, of the energies of

---

15. Hanoch Dagan, *The Law and Ethics of Restitution* (London: Cambridge University Press, 2004) ch 2.

16. For example, see Ernest Weinrib, “Restoring Restitution” (2005) 91:3 *Virginia Law Review* 861.

otherwise independent persons”.<sup>17</sup> Contradictory results may, of course, be found, but in our case these often incommensurable values converge quite nicely, and I will therefore leave this thorny issue for another time.

### A. Moral Value 1: No Legal Duty to Prevent Harm

One argument against imposing a duty of disclosure on parties to contractual negotiations links it to the law’s general reluctance to impose positive duties to assist other people in need. English law does not normally order us to save other people, even from severe harm, unless we actively contributed to its occurrence. This, it is widely agreed, is a good policy. The regulation of society ought to be achieved by means of prohibiting harmful acts, rather than by obliging citizens to engage in harm-preventing activities.<sup>18</sup> Two compelling thoughts are mentioned in support of this “no action no liability” principle. First, “a legal system that proscribed non-doing alongside doing would be profoundly intrusive ... present individuals with fewer opportunities to avoid liability ... (and is) likely to impinge to a greater extent upon one’s interests”.<sup>19</sup> Obligations to act limit the liberty of citizens to a greater degree than prohibitions since forbidding us from doing still leaves us with the freedom to engage in endless other non-doing actions. But when we are ordered to do X, in contrast, this is likely to tie us up for the duration, as we can hardly

- 
17. Charles Fried, “The Ambitions of Contract as Promise” in Gregory Klass, George Letsas & Prince Saprai, eds, *Philosophical Foundations of Contract Law* (Oxford: Oxford University Press, 2014) at 23; see also Avery Katz, “Economic Foundations of Contract Law” in Klass, at 175; Eyal Zamir & Barak Medina, *Law, Economics, and Morality* (New York: Oxford University Press, 2010)(who say with regards to the parties’ duties in the pre-contractual stage that “incorporating deontological constraints with economic analysis of contract law may be fruitful” at 350).
  18. On the viability of the “act requirement” as a descriptive, as well as evaluative claim, see Douglas Husak, “Does Criminal Liability Require an Act?” in Douglas Husak, *The Philosophy of Criminal Law: Selected Essays* (New York: Oxford University Press, 2010) at 287-393.
  19. AP Simester, “Why Omissions are Special” (1995) 1:3 *Legal Theory* 311 at 325; and Tony Honoré, *Responsibility and Fault* (Portland: Hart Publishing, 1999) at 54.



engage (attentively) in more than two activities at a time.<sup>20</sup> A good legal system, one that is concerned to protect the liberty of the citizens, would therefore operate by way of banning harm-causing activities, and introduce only a few positive prescriptions to top up these prohibitions, where this is necessary.

The other reason for the law's reluctance to order us to prevent harm is rooted in a widely held view about moral responsibility. By focusing on the people whose actions brought about a certain harm, and largely ignoring those who failed to help the victim to escape it, the law mirrors an essential difference in the degree of their respective responsibility for that harm. The standard example contrasts the man who did not help a drowning child, with the man who pushed her into the deep waters. While the behaviour of the person who noticed the unfortunate event but went on reading his paper on the beach is morally reprehensible (or monstrous), his blameworthiness is markedly different from that of the person who drove her over the cliff. Wrapping them together in one blanket of moral and legal responsibility would dilute the sense of personal responsibility, as perpetrators and bystanders will come to share a vague impersonal group responsibility. The norms of a legal system, which aims to gain the moral approval of the citizenry, must reflect this deep-seated moral intuition about the strong link between accountability and agency by sharply differentiating people who bring about harm from people who fail to prevent it. Together, these arguments present a powerful case against imposing legal responsibility for failing to help other people when their problem was not of your doing. The common law goes as far as declining to mandate actions to save other people's lives,

---

20. Michael S Moore, *Placing Blame: A Theory of the Criminal Law* (New York: Oxford University Press, 2010) at 241; Jonathan Bennett, "Morality and Consequences" (The Tanner Lectures on Human Values delivered at Bransnose College, Oxford University, 6, 19, 23 May 1980) at 66 [unpublished]. This is not necessarily the case in respect of every prohibition and obligation to act, as demonstrated by Patricia Smith, "Omission and Responsibility in Legal Theory" (2003) 9:3 *Legal Theory* 221 at 232-33; Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2007) ch 7.3.1, and others. But as a general observation about the operation of the law in democratic societies it is good enough.

even when the effort required is minimal.<sup>21</sup> The thought is that the huge gap that is thereby created between what we owe each other in morality and in law can be understood in light of the setback to freedom which legal positive duties inevitably lead to. And if a duty to save lives cannot overcome this mighty barrier, a duty to save people from self-induced mistakes stands no chance. The *Caveat Emptor* rule is thus understood as an expression of fundamental principles which concern the relationship between law, liberty and moral responsibility.

## **B. Moral Value 2: Self-Reliance**

“I can buy my neighbour’s land for a song, although I know and he doesn’t that it is oil-bearing. That isn’t dishonest, it is ‘smart business’ and the just reward for my superior individualism”.<sup>22</sup> In this and other similar quotes from around the common law world, the *Caveat Emptor* rule is perceived as sending a message to patrons of the law that unless their agency (in the philosophical sense) is defective, or they are in some serious way dependent on the other party, they are expected to look after their own affairs. This expectation is a mark of respect for people’s autonomy, and of their ability (and right) to decide how to allocate their resources — in this case, whether, and how much, to invest in finding out what is (for them) the true value of a certain contract. Moreover, industrious women and men that look after their business, rather than look to others to get them out of the mud should be rewarded, as such diligence is the basis for economic prosperity. The *Caveat Emptor* rule is thus an expression of dearly held values of autonomy and self-reliance.

## **C. Social Benefit 1: Certainty**

The next argument in favour of the *Caveat Emptor* rule highlights the way in which it exemplifies a cluster of legal virtues that are often grouped together under the heading “rule of law”. The rule of law is an exemplary

21. Civil law systems take a different stance, see Martin Vranken, “Duty to Rescue in Civil Law and Common Law: Les Extrêmes se Touchent?” (1998) 47:4 International and Comparative Law Quarterly 934.

22. *Blair v National Security Insurance Co*, 126 F (2d) 955 (3rd Cir 1942 (US)) at 958, per Chief Justice Clark.

state of affairs wherein

legal norms fixed and announced beforehand – norms which make it possible to foresee with fair government in all its actions is bound by certainty how the authority will use its coercive power, and to plan one’s individual affairs on the basis of this knowledge.<sup>23</sup>

The rule of law is designed to protect human dignity from the arbitrary power of the state by limiting the extent to which its agents can meddle with people’s long term planning.<sup>24</sup> If I cannot know with reasonable clarity what the law is going to be like in the long term (because it changes constantly, or is retroactive), or if I cannot know what it demands of me (because it is unclear or unpublicized), or if it is impossible to predict how it will apply to my circumstances (because it is *ad hoc* or not enforced by the judiciary), then I cannot design my projects in a way that stirs clear of the law. As a result, my investment in meaningful long-term projects can be frustrated by the state at any moment. Such appalling state of affairs is not only an affront to the citizens’ sense of dignity, but it will also decrease the overall efficiency of transactions, the planning of which requires information about the relevant law.<sup>25</sup>

Lon Fuller’s famous list of rule of law *desiderata* is designed to replace the arbitrary reign of humans who are given excessive discretion (be they judges or government officials) with rule of rules that set in a clear way what would be the legal ramifications of your actions. A good law, he says, “is the enterprise of subjecting human conduct to the governance of rules”;<sup>26</sup> or, in the words of Justice Scalia: “A government of laws means a government of rules”.<sup>27</sup> These observations are thought to be true for any

---

23. This is an adaptation of Hayek’s definition (adopted by Raz), with “legal norms” replacing his “rules” see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (New York: Oxford University Press, 1979) at 210.

24. *Ibid* at 220.

25. Louis Kaplow, “General Characteristics of Rules” in Gerrit de Geest & Francesco Parisi, eds, *Production of Legal Rules* (Northampton: Edward Elgar, 2011) at 502; and review of the literature in Barbara Luppi & Francesco Parisi, “Rules versus Standards” in Geest, *ibid*.

26. Lon L Fuller, *The Morality of Law* (New Haven and London: Yale University Press, 1964) at 106.

27. *Morrison v Olson*, 487 US 654 (1988).

area of law. But when it comes to what Lord Mansfield called "mercantile transactions", the legal virtue of certainty is of such importance, that he thought that "it is of more consequence that a rule be certain, than whether the rule is established one way or the other".<sup>28</sup> This may be a little extreme, but the message is clear: in the context of legal norms that effect commercial relationships, adherence to the rule of law ideal is of a particular value, as the ability to calculate one's risk is a crucial factor in determining the worthiness of a transaction. Respect for autonomy (in choosing what transactions to engage in) and concern for efficiency both push hard for a commercial law that comprises of clear, general and predictable rules. From this point of view, the *Caveat Emptor* rule is an exemplary norm; it makes it crystal clear what is required around the negotiation table and what is not, and cuts the costs of litigations, as there is minimum space for court discretion as to its application. Sticking to the rule, even when the defendant turns out to be a selfish opportunist, may seem offensive at first sight, but sticking to the rule is the only way to secure the benefits promised by the rule of law. Under the surface, the *caveat emptor* law is a boon to the citizens' autonomy, well-being and material welfare.

#### **D. Social Benefit 2: Law for Export**

The benefits of a system of legal rules that abides by the requirements of the rule of law *desiderata* accrue to any legal system that adopts this model. But in England, zealous devotion to the virtues of clarity and predictability generates an extra social good: it supports a lucrative line of export, namely, commercial litigation. As Hugh Beale explains,

[o]ur courts handle many cases that have no real connection with England save that the parties have chosen that the contract should be governed by English law. This is often coupled with a choice of England and Wales as the jurisdiction. This 'law for export' has deliberately been kept even closer to the classical model than the law for domestic consumption.<sup>29</sup>

The English strict position on rescission for unilateral mistakes is a primary example of such adherence to rule-based law in which the need

28. *Vallejo v Wheeler* (1774), 1 Cowp 143 (KB (Eng)) at 153.

29. Beale, *supra* note 4 at 116.

for discretionary *ex-post* judicial decision-making is, to a great extent, eliminated. This approach is indeed very different from the position of other European systems, which may explain why drafters of many business to business (“B2B”) contracts indeed choose England as their jurisdiction. The relevant section of the *Principles of European Contract Law* captures the spirit of the typical European law on this crucial issue: Article 4:103 (Fundamental Mistake as to Facts or Law) establishes that a party who has entered a contract under a mistake of fact may avoid it provided that:

- a) the other party knew or ought to have known of the mistake, and it was contrary to good faith and fair dealing to leave the mistaken party in error; and
- b) the other party knew or ought to have known that the mistaken party, had it known the truth, would not have entered the contract or would have done so only on fundamentally different terms.<sup>30</sup>

The flexibility and discretion which are embedded in norms of this kind make the European law less clear and predictable than its English counterpart. And as predictability carries with it a parcel of benefits that are of utmost importance in the commercial world, the *Caveat Emptor* rule may well be making a direct contribution to a thriving export sector.<sup>31</sup>

### **E. Social Benefit 3: Generating Socially-Beneficial Information**

In what has by now become a classic in legal economics, this argument demonstrates how a rule that allows a negotiating party to keep valuable information to himself incentivises entrepreneurial folks to unearth the true value of a piece of property which a placid owner may miss

---

30. Ole Lando & Hugh Beale, eds, *Principles of European Contract Law* (Netherlands: Kluwer Law International, 2000) at 191.

31. More on English law as an export sector can be found at: <http://www.theguardian.com/law/2013/feb/07/uk-law-booming-export-crime> and <https://www.justice.gov.uk/downloads/publications/corporate-reports/MoJ/legal-services-action-plan-0313.pdf>.

altogether.<sup>32</sup> A standard example is the owner of land who uses it for agricultural purposes without ever bothering to find out whether it holds riches like minerals or natural gas; another is the owner of an art collection who neglects to investigate the pedigree of the works on her walls, and thus deprives the world of a long-lost masterpiece. Those who are willing to take the initiative and invest in finding out the true value of a piece of property they do not own, will only do so if they can somehow benefit from it.<sup>33</sup> And so, by allowing parties to keep to themselves information about the subject matter of the contract, the law dangles the chance of fat profit in front of their eyes and encourages them to make the necessary investment. If information which affects the price need not be shared with lacklustre owners, the go-getters will presumably keep trying to uncover the real potential of what's around them. And so, again, we need to lift our eyes from the predicament of the owner who finds out that her ignorance led her to enter a loss-making deal; if instead, we focus on the interests of society at large, the Caveat Emptor rule, which at first looked morally bankrupt, will appear in a wholly different light. In a state of scarce resource, we should strive to end underuse of property which is the result of sheer passivity. The Caveat Emptor rule is promoting a state of affairs in which property ends up in the hand of those who realise its full potential. And this is the most efficient manner of allocating our limited resources.

### **III. When and Why Equity Intervenes in the Parties' Common Law Rights**

In the rest of this paper I will argue that while the concerns raised by the above arguments are genuine and must be taken on board when thinking about the law's response to situations of unilateral mistake, they

---

32. Jack Hirshleifer, "The Private and Social Value of Information and the Reward to Inventive Activity" (1971) 61 *The American Economic Review* 561.

33. Anthony T Kronman, "Mistake, Disclosure, Information, and the Law of Contracts" (1978) 7:1 *Journal of Legal Studies* 1 ("[a] rule permitting non-disclosure is the only effective way of providing an incentive to invest in the production of such knowledge" at 9).

cannot support the current *Caveat Emptor* rule. We should, instead, reclaim the equitable authority to rescind the contract where the claimant can prove that the defendant knew, or should have known, that she is unaware of a critical piece of information, and nevertheless went ahead with the contract without alerting her to the mistake. The *Caveat Emptor* rule should become a well-defined exception to a rule that mandates disclosure of important details to the other party.

If equity were to intervene so as to disallow the informed party to insist on enforcing his contractual rights (to performance or compensation in its lieu), it would not do so on the basis of defective consent on the part of the ignorant party. Rather, equity would step in because the *conscience* of the defendant is affected by the way he sticks to his common law rights. Unconscionability, as Catharine MacMillan shows, has always been the historical basis of intervention in cases of un-induced unilateral mistake. “The principle is that it is against conscience for a man to take advantage of the plain mistake of another, or, at least, that a court of equity will not assist him in so doing”.<sup>34</sup> Equity, in other words, works in a very specific way, by introducing a new factor to the equation: the defendant’s conscience. It is therefore one thing to say that the rules on pre-contractual disclosure ought to change, and quite another to argue that a good way to do so is by means of equitable jurisdiction. And so, in this section, I look briefly at the very particular way in which equity acts to correct defects in common law rules. When we then move to examine why and where the *Caveat Emptor* rule fails, it will become clear that the unique way in which equity steps in to undo the damage of failing common law rules is particularly suitable for this situation; or, so I hope.

For many critics, even if the current law on unilateral mistake requires reform, equity would be the wrong means of bringing it about. Equity’s distinctive *modus operandi*, they claim, disqualifies it from adjudicating commercial law disputes, or, indeed, from deciding the majority of cases in private law. This is because equity grants excessive discretion to judges,

---

34. *Manser v Back* (1848), 6 HARE 443 (Ch (Eng)) at 448; MacMillan, *supra* note 2 at 45.

gives them a *de facto* licence to decide cases according to their private beliefs and encourages them to bend the common law rules when these do not reflect the current moral sensitivities of the society (or class) in which the court is embedded. In that way, it introduces into private law a highly unwelcome dimension of subjectivity and uncertainty and shows disrespect for the democratic processes of law making. Famous proponents of equity, like Justice Benjamin Cardozo from US Supreme Court, readily admit that equity's way of doing things has an adverse effect on the generality and certainty of the law: "[t]he plastic remedies of the chancery are moulded to the needs of justice"; one of equity's central characteristic, he maintained, is its ability to answer "the call of the occasion".<sup>35</sup> And thus, whereas Cardozo J celebrates the way in which equity empowers the judge to deviate from steadfast rules, wave aside the need for precedential stability and focus on a just solution to the case at hand, the critics believe that this behaviour disqualifies it from adjudicating disputes in private law.

All the features of equity which are of concern to this critique of equity as a mode of decision making in law are encapsulated in the concept of "unconscionability", which "was and remains the fulcrum upon which entitlement to equitable relief turns".<sup>36</sup> Equity, right from its birth, embarked on a quest after legal results that please the conscience.<sup>37</sup> And even as legal historians debate the question of what this reference to "conscience" meant for the very first courts of equity, there is no doubt that since the celebrated case of the *Earl of Oxford's Case*,<sup>38</sup> chancery

---

35. *Foreman v Foreman*, 167 NE 428 at 429 (Cali App Ct 1929 (US)); Judge Cardozo in *Adams v Champion*, 294 US 231 (1935) at 237.

36. *Lift Capital Partners Pty Ltd v Merrill Lynch International*, [2009] NSWSC 7 (Austl) at para 126, per Justice Barrett.

37. Helmut Coing, "English Equity and the Denunciatio Evangelica of the Canon Law" (1955) 71:2 Law Quarterly Review 223 at 224 (in that, it was different from civilian systems which never pursued this course even when they implemented parallel mechanisms of *naturalis aequitas* borrowed from Roman law); and Timothy S Haskett, "The Medieval English Court of Chancery" (1996) 14:2 Law and History Review 245 at 267.

38. (1615) Rep Ch 1 (Eng).



judges who talked about conscience referred to the inner compass which tells us right from wrong: “The Office of the Chancellor says Lord Ellesmere ‘Chancellor is to correct Men’s consciences for Frauds, Breach of Trusts, Wrongs ...’<sup>39</sup> and therefore “[w]hen a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party”.<sup>40</sup>

The idea that legal relationships can be assessed by the court according to their fit with conscience was never to everyone's liking. As early as 1526 we can find Thomas Audley grumbling about “a law called ‘conscience’, which is always uncertain, and depends on the greater part on the ‘arbytrement’ of the judge; by reason thereof no man is certain of knowing his title to any land”.<sup>41</sup> And ever since then judging in accordance with the standard of conscionability has been described, by proponents and opponents alike, as tending “not so much to the formation of fixed and immutable rules, [but] rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles”;<sup>42</sup> and equity’s grand aims and critical principles were understood as determining its adaptable and flexible nature. As soon as equity in England emerged in the 1980s from a long period of hibernation and took the decisive step of “mov[ing] out of the

---

39. *Ibid* at 7.

40. *Ibid* at 11. See also AJ Duggan, “Is Equity Efficient?” (1997) 113:4 Law Quarterly Review 601 at 617, 619. For the view that the term “conscience” in medieval times signified a different (more flexible) evidence gathering procedures, see MR Macnair, “Equity and Conscience” (2007) 27:4 Oxford Journal of Legal Studies 659.

41. Cited by Margaret McGlynn, *The Royal Prerogative and the Learning of the Inns of Court* (Cambridge: Cambridge University Press, 2004) at 188; and John Selden’s quip from a hundred and fifty years later as in John Selden, Richard Milward & Edward Arber, *Table-talk* (London: A Murray & Son, 1689) (“[f]or Law we have a measure ... [but equity judges want to] make the standard for the measure, we call a foot, a Chancellor’s Foot” at 46 solidified into an idiom that haunts equity to this day).

42. ICF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 7d (Sydney: Lawbook Co, 2007) at 6.

family home and ... into the market place”,<sup>43</sup> the old concerns about its subjectivity resurfaced with vengeance. The target was, again, equity’s resort to categories of conscience: “unconscionability” declared one fierce opponent of equity’s renewed force, “[is] as vague and unstable a concept as could well be found”.<sup>44</sup> The heaviest fire is directed against the suggestion that unconscionability can be used as a general liability head, over and above what we find in individual doctrines which contain an unconscionability element, like breach of trust or proprietary estoppel.<sup>45</sup>

But unconscionability can take a less adventurous form as an integral part of well-defined doctrines so that its meaning is developed in tandem with other parts of the doctrine as the courts go about deciding cases that fall under its heading. When applied in that way, the conscionability standard is considered by many to be a most useful tool for achieving the goals set by the doctrine of which it is a part. Thus, in the recent case of *Cavendish Square Holding BV v Talal El Makdessi*<sup>46</sup> (“*Cavendish*”) the UK Supreme Court decided that the question whether a contractual obligation amounts to a “fine” — and would hence be struck down — is to be determined by an unconscionability test.<sup>47</sup> Looking back at the historical roots of the doctrine, the court observes that whereas the Common Law rule on when a clause would be considered an unenforceable fine was “mechanical in effect and involve[d] no exercise

43. Lord Justice Millett, “Equity – The Road Ahead” (1995–96) 6 King’s College Law Journal 1 at 4.

44. Peter Birks, “Meagher, Gummow and Lehane’s Equity Doctrines and Remedies” (2004) 120:2 Law Quarterly Review 344 at 345; on the 30 years stagnation of equity in English law until the 80s see PJ Millett, “Equity’s Place in the Law of Commerce” (1998) 114:2 Law Quarterly Review 214.

45. In England, see *Hussey v Palmer*, [1972] EWCA Civ 1 (Lord Denning’s (in)famous “constructive trust of a new model”) that has been described in *Carly v Farrelly*, [1975] 1 NZLR 356 (SC) by Justice Mohan (“justice [being] consigned to the formless void of individual moral opinion” at 367).

46. *Cavendish Square Holding BV v Talal El Makdessi*, [2015] UKSC 67 [*Cavendish*].

47. *Ibid* at para 213.

of discretion at all”, in the “equitable jurisdiction ... the classification of terms for the purpose of the penalty rule depends on the substance of the term and not on its form or on the label which the parties have chosen to attach to it”.<sup>48</sup> This latter approach was endorsed by the post *Judicature Acts* High Court. In *Cavendish*, the Supreme Court set out to dispel some misleading frills that had been added to the test over the years, and firmly established that “[t]he question whether [the clause is] enforceable should depend on whether the means by which the contracting party’s conduct is to be influenced are ‘unconscionable’”.<sup>49</sup> Indeed, as the Court immediately admits, it can be argued that the old-new rule “undermines the certainty which parties are entitled to expect of the law”.<sup>50</sup> However, the Court’s discretion in this context is well-defined and confined to examination of the remedies for breach, rather than a “jurisdiction to review the content of the substantive obligations which the parties have agreed [on]”.<sup>51</sup> As such the conscionability test preserves the right balance between the need for a flexible substance-based mode of decision-making, and the values of predictability and stability, so crucial to contract law.<sup>52</sup> An equitable duty not to withhold critical information in the pre-contractual stage would similarly employ the unconscionability standard in a regimented form.

Yet, embeddedness in the doctrine is unlikely to appease all the critics. For the conscionability element, even in its tamed version, still expresses equity’s willingness to employ flexible, morally-sensitive principles, and a mode of legal reasoning that is *ex-post* and discretionary in nature. Equity, to put it this way, undercuts the rule of law in that it replaces certain, predictable and general rules with investigations into something as tentative as the defendant’s conscience. I have argued elsewhere that the view of conscience as an idiosyncratic inner voice — a “set of deep-seated but idiosyncratic convictions” — is what gives rise to many of

---

48. *Else (1982) Ltd v Parkland Holdings Ltd*, [1994] 1 BCLC 130 (CA (Civ) (Eng)) at 144, per Justice Hoffmann; *Cavendish*, *supra* note 46 at para 15.

49. *Ibid* at para 31.

50. *Ibid* at para 33.

51. *Ibid* at para 42.

52. *Ibid*.

the worries lest legal categories of conscionability will lead to over-subjective results.<sup>53</sup> Equity, however, is employing a completely different model of conscience. The equitable standard of conscionability is built on an objectivist model which takes seriously both the phenomenon of conscience as a deep personal conviction and the objectivity of the moral principles it invokes.<sup>54</sup> The “voice of conscience” is an expression of a powerful inclination to abide by what we perceive as a universal moral duty, even in the face of adverse consequences to our interests.<sup>55</sup> The conscionability standard thus invites the court to delve into a pool of shared morality, *viz*, the collection of norms that are accepted by conscientious people, and scoop out the answer to the question “what was the moral duty of the defendant in the circumstances”?<sup>56</sup>

The appeal to shared morality assumes that the answers to many of the moral dilemmas faced by defendants are out there, and that a sincere

---

53. As the subjective interpretation of the term would suggest, see Irit Samet, “What Conscience Can Do for Equity” (2012) 3:1 *Jurisprudence* 13. Some like Peter Birks, profess moral relativism that undermines any claim by the conscience to offer a path for moral truth (Peter Birks, “Annual Miegunyah Lecture: Equity, Conscience, and Unjust Enrichment” (1999) 23:1 *Melbourne University Law Review* 1). See David Enoch, “Disagreement”, *Taking Morality Seriously* (Oxford: Oxford University Press, 2011) at 159 (for one of many powerful attacks on moral relativism of this kind).

54. Or so I have argued: see Samet, *supra* note 53.

55. Immanuel Kant, *Critique of Practical Reason* (Cambridge: Cambridge University Press, 1997) at 5.

56. Such appeal to common morality is not at all unique to equity. Tort law and property law make extensive use of shared understanding of the normative basis of legal rights and duties, both in order to confer legitimacy on the legal result and in order to use the moral “know how” to reduce the information costs of abiding by the law. See *e.g.* John CP Goldberg & Benjamin C Zipursky, “The Moral of MacPherson” (1998) 146:6 *University of Pennsylvania Law Review* 1733 at sec III; Andrew S Gold & Henry E Smith, “How Private Law is Simply Moral” online: <lawf.biu.ac.il/library/mb/9GoldSmith.pdf>; Jeremy Waldron, “Inhuman and Degrading Treatment: The Words Themselves” (2010) 23:2 *Canadian Journal of Law & Jurisprudence* 269 at 284. In the context of property law see Smith, *supra* note 12.

quest and attention to one's inner moral compass makes them readily available. The concern lest equity gives the judge a *carte blanche* to impose on the parties his or her own idiosyncratic values, with all the damage that such licence would cause to the rule of law, is therefore unwarranted.

Once we have cleared the suspicions that equity is a “sort of moral U.S. fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated as a result of the defendant behaving badly”<sup>57</sup> we can look for the working principle on the basis of which equity departs from the common law. Equity, I wish to argue, has a specialised role to play in our system, a role that is closely associated with the conscionability standard and its appeal to moral norms. Unfortunately, I do not have enough space here to expand on the argument or demonstrate how it works across a wide range of equitable doctrines.<sup>58</sup> Below is a brief summary of a theory about the way in which equity works to amend defects in the common law. My hope is that even in this nascent form, it will help us understand why resorting to equity would be a good way of reforming the law on un-induced unilateral mistake.

Equity has a clear vocation, and a distinct way of fulfilling it: it operates on the side of the common law to promote a legal virtue which I call the “[a]ccountability [c]orrespondence”: when legal rules impose liability it should ideally correspond to the pattern of moral duty in the circumstances to which the rules apply. Barring unusual cases, the best way in which law can serve morality is by complying with the accountability correspondence requirement, namely, by ensuring that where legal liability is attached to an action it closely follows the matrix

---

57. David Neuberger, “The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity” (2009) 68 *Canadian Journal of Linguistics* 537 at 540; see also Ben McFarlane, *The Law of Proprietary Estoppel* (Oxford: Oxford University Press, 2014) ch 5 for a careful and comprehensive review of the meaning of unconscionability in estoppel cases law.

58. As I attempt to do in my forthcoming book Irit Samet, *Equity Goes to Market* (Oxford: Oxford University Press, 2017).

of moral accountability for this action.<sup>59</sup> Major reforms which were designed to introduce greater convergence between legal liability and our perception of moral accountability have been introduced in many areas of law.<sup>60</sup> This is because a law in which the legal result is out of kilter with our deep convictions about moral accountability is not only dubious from the perspective of justice, it is also bound to alienate its addressees — the judiciary as well as the citizens.

The law, like any social institution, requires legitimacy if it is to develop and operate effectively.<sup>61</sup> And citizens are much more likely to become self-regulatory, that is, adopt a proactive approach for law abidance (rather than merely respond to external incentives) where the

- 
59. The principle of accountability correspondence does not take a stance in the question which actions should have legal liability attached to them. It only says that once we decide that agents of action X should bear legal consequences, legal liability and moral responsibility for this action should be aligned.
60. Prominent examples would be the struggle to lessen the effects of “legal luck” on criminal responsibility, and the move from the traditional view that company directors’ duty is to maximise of shareholders’ profits, to the idea that they need to advance the “company’s success” which is measured also by reference to “the firm’s impact on the community and the environment” and its “reputation for high standards of business conduct” (see Yoram Shachar, “Wresting Control from Luck: The Secular Case for Aborted Attempts” (2008) 9:1 *Theoretical Inquiries in Law* 139; *Companies Act 2006* (UK), c 46, s 172; Florian Wettstein, “The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy” (2010) 96 *Journal of Business Ethics* 33; Michael Blowfield & Alan Murray, *Corporate Responsibility* (Oxford: Oxford University Press, 2011)).
61. Numerous legal policies seem to be premised on the thought that compliance is secured by the presence of sanctions for wrongdoers, but recent studies suggest that deterrence, although it sometimes significantly influences law-related behaviour, will, at other times, have no such effect (see Daniel Kahan, “The Secret Ambition of Deterrence” (1999) 113:2 *Harvard Law Review* 413); see also Daniel Nagin, “Criminal Deterrence at the Onset of the 21st Century” (1998) 23 *Crime and Justice: A Review of Research* 1 (much of the discussion was focused, naturally, on criminal policies).

government and its institutions — like the police and the courts — are perceived as legitimate.<sup>62</sup> In the context of legal systems, legitimacy would mean “the belief that the law and agents of the law are rightful holders of authority; that they have the right to dictate appropriate behaviour and are entitled to be obeyed”.<sup>63</sup> Such sense of legitimacy can be rooted in different aspects of the authority’s actions and decisions.<sup>64</sup> For our purposes, it is important to note that legitimacy perceptions, and the respect (or disrespect) for the law that follows, are strongly influenced by people’s evaluation of legal results as just (or unjust). The connection between perceived legitimacy and the citizen’s tendency to identify with the law and follow it willingly is so strong, that at the end of their classic study of the correlation between community views and criminal codes, Paul Robinson and John Darley state that “the moral credibility of the criminal code is its single most important asset”.<sup>65</sup> The

---

62. Tom R Tyler, *Why People Obey the Law* (Princeton, New Jersey: Princeton University Press, 2006) ch 5.

63. Jonathan Jackson et al, “Why Do People Comply with The Law? Legitimacy and the Influence of Legal Institutions” (2012) 52:6 *British Journal of Criminology* 1053.

64. For example see Tyler, *supra* note 62, ch 9-11; Stephen Schulhofer, Tom Tyler & Aziz Huq, “American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative” (2011) 101:2 *Journal of Criminal Law and Criminology* 305 (it has been shown that when legal enforcement institutions, like the police, follow principles of procedural fairness (understood mainly as allowing defendants a fair opportunity to state their case), it will significantly reduce the cost and alienation that are associated with policies which rely on threats to secure obedience); see also Jackson, *supra* note 63 (for similar results in the UK).

65. Paul H Robinson & John M Darley, *Justice, Liability, and Blame: Community Views and the Criminal Law* (Boulder: Westview Press, 1995) at 202. On the strong effect of result-based evaluation of the law on obedience, see also June L Tapp & Felice J Levine, “Persuasion to Virtue: A Preliminary Statement” (1970) 4:4 *Law & Society Review* 565; June L Tapp & Lawrence Kohlberg, “Developing Senses of Law and Legal Justice” (1971) 27:2 *Journal of Social Issues* 65; Kevin Carlsmith, John Darley & Paul Robinson, “Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment” (2001) 83 *Journal of Personality and Social Psychology* 284.

“community views” about how a certain set of circumstances should be resolved is thus “an essential consideration that ought to be influential factor in the policy-making and code drafting process, [because] [t]he compliance power of criminal law is directly proportional to its moral credibility”.<sup>66</sup>

This conclusion can be carried over to other areas of the law. Thus, rules of private law, company law, administrative law, etc., which divert from the community’s strong moral intuitions should have a parallel adverse effect on the citizens’ attitude to the law. Note that the damage to the sense of respect for the law is not limited to the specific area of law in which the perceived injustice is to be found. Research shows that in the face of a perceived injustice of a legal rule or result (in various areas from duties of landlord and tenants to civil forfeiture) people tend to flout the law *as a whole* in many subtle, lower level and harder-to-detect ways such as littering, tax avoidance and services theft.<sup>67</sup>

These findings have deep ramifications for areas in which the common law is so keen on realising the rule of law ideals of predictability, clarity and generality that it is willing to severely compromise the moral merits of the legal result. Think of the numerous situations in which the common law would enforce bright-line rules of property and contract law and refuse to make exceptions for circumstances where an opportunistic party used these rules to relinquish her moral responsibility for the defendant in a way that strongly offends the public’s sense of

---

66. Robinson & Darley, *supra* note 65 at 6.

67. As argued by many and demonstrated in empirical research by Janice Nadler, “Flouting the Law” (2005) 83:5 Texas Law Review 1399 at 1401.



justice and fairness.<sup>68</sup> The strict *Caveat Emptor* rule is an excellent example of this willingness on the part of the common law to sacrifice the moral credibility of the legal result at the altar of the rule of law *desiderata* of certainty, predictability and generality. As we saw, even its proponents admit that the results of the *Caveat Emptor* rule stand in stark contradiction to people's moral intuitions. Moreover, as will become clear in the next section, a deeper scrutiny reveals that the moral standing of the *Caveat Emptor* rule is much more dubious than its proponents claim, and the gut feeling that it departs from basic moral norms is correct. At the same time, the rule allows shrewd actors to take unconscionable advantage of its clear-cut edges, *i.e.* they would be able to enjoy the clarity of its application, and obtain an advantage that

---

68. Examples abound: in the context of negotiation to transfer rights in land, the common law would allow A to evade responsibility for B's detrimental reliance on A's words as long as they were not put down in writing; C can insist on enforcing a contract with D, regardless of the fact that it is clear that the document fails to accurately record the agreement of the parties as intended; E would be allowed to keep property which he inherited in a will, even where he orally promised the deceased to hand it over to someone else (as such gifts did not abide by the writing formalities of the *Wills Act*). In these and many other cases, the claimants could prove the morally relevant facts of their case: the pledge, the reliance, the frustrated expectation, the promise to a dying friend. But the crystal clear rules which regulate the transfer of property rights, bequests of property upon death and the interpretation of contracts trample the moral obligation under foot. The courts of equity, in contrast, paid close attention to the particularity of the situation, and employed open-ended conscience-based principles that enabled them to trace the pattern of moral responsibility in each case. Accordingly, in the above situations, writing formalities were waived so that the defendants were made to account for a setback in the claimant's life which they encouraged him to take risks (in "proprietary estoppel" (*e.g.* in *Crabb v Arun District Council*, [1975] EWCA Civ 7 a gap between the wording of the contract and parties' intention could give rise to a right to rescind *e.g.* *Mackenzie v Coulson* (1869), LR 8 Eq 368 (Ch (Eng)); and promisors were made to fulfil their promises to the dead man, even where testamentary rules were not complied with (via the equitable doctrine of secret trusts *e.g.* *McCormick v Grogan* (1869), LR 4 HL 82.

offends our shared conscience.

The common law's treatment of un-induced unilateral mistake is therefore afflicted with a dangerous fissure between the defendant's (lack of) *legal* liability and his *moral* duties towards the claimant. The *Caveat Emptor* rule is not the only context in which the courts are ready to bite the bullet and concede a deep inconsistency between legal and moral duty in relation to the defendant's actions. Their attitude to such unfortunate conflicts can be one of complacency:

the application of... [legal] propositions may produce a result which appears unfair. So be it...I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals... [is] justice which flows from the application of sure and settled principles.<sup>69</sup>

Equity adopted a very different approach. The courts of equity were willing to change the legal result and compromise the clarity, generality and predictability of the common law rules in order to avoid a dangerous fissure between the pattern of moral responsibility and that of legal liability for the same set of facts. In order to align moral and legal responsibility, the courts of equity would pay close attention to the particularity of the situation, and employ open-ended conscience-based principles that enable them to track the pattern of moral responsibility in each case. In that way, they stave off the serious danger created by the common law tendency to lose sight of the importance of maintaining equilibrium between intuitive perception of the morally right result and abstract considerations of common good (in the form of unity and reliability of the legal rules). Instead of sticking blindly to formalistic rule of law requirements, equity listens to the warning of Justice Marshall of the US Supreme Court: "however admirable its resolute adherence to the law as it was, a decision contrary to the public sense of justice [would] ... diminish respect for the courts and for law itself".<sup>70</sup>

This, I believe, is the essence of the conscionability standard: it

---

69. *Cowcher v Cowcher*, [1972] 1 All ER 943 (Fam) at 948, per Justice Bagnall.

70. *Flood v Kuhn*, 407 US 258 (1972)(Justice Marshall, dissenting, quoting from Peter L Szanton, "Stare Decisis: A Dissenting View" (1959) 10:4 Hastings Law Journal 394 at 397).

directs the court to find out whether assisting the defendant to enforce his common law right would tip the balance between the need to preserve the rule of law virtues of the norm and the need to ensure accountability correspondence. If it so does, then equity will prevent the defendant from standing on his rights so as to restore the correlation between the legal consequences of the defendant's actions and the pattern of moral rights and duties that it gives rise to. The law would thus be made to support the inter-personal morality of the parties, and as a result, strengthen the legitimacy of the system in the eyes of the community.

But the conscionability standard is not only for the courts. It can, thanks to its strong connotation, be used by the citizens to guide their behaviour.<sup>71</sup> By using a term like "conscience" that is universally associated with morally-oriented deliberation as a foundation for legal liability, equity sends a strong message to the citizens that the law expects them to rise above considerations of self-interest even when they deal with other market participants. It tells them that the call of conscience should be heeded not only when dealing with family and friends, but also when doing business with strangers. Their conscience (if they keep it in good working condition) will tell them how to plan their actions so that they end up on the right side of the law. The call of conscience should be used by the law's addressees as an additional source of information, which they must consult (on top of legal instruments and balance sheets) when deciding whether, and how, to use their legal rights. Once this message is internalised, people will work hard to nurture and protect this inner compass from conscience-muting

---

71. For a presentation of the expressivist theory of law see Elizabeth S Anderson & Richard H Pildes, "Expressive Theories of Law: A General Restatement" (2000) 148:5 *University of Pennsylvania Law Review* 1503. On the potential of the expressive character of law to lift the moral standards of its addressees see sources in Kenworthy Bilz & Janice Nadler, "Law, Psychology, and Morality" in Brian H Ross, ed, *Psychology of Learning and Motivation*, vol 50 (New York: Academic Press, 2009) at 102.

mechanisms of rationalisation and self-deception;<sup>72</sup> for otherwise they may lose a valuable guide to the do and don'ts of behaviour in market. They will understand, in other words, that feelings of guilt and shame are warning signs not only of moral culpability, but also of potential trouble with the law, which may cost them dear.

If my account of the reference to conscience is viable, the court of equity sees itself as appealing to the defendant's ability to decipher the moral intricacies of her situation, arrive at correct appreciation of her moral duty and act on it. Once she does not so act, because she chose to ignore the call of her conscience, or to give in to conscience silencing psychological mechanisms, she will not be allowed to take shelter behind a formal ideal of the rule of law and the values of certainty, clarity and generality it enshrines. In the next section, I move to inspect more closely the claims in favour of the *Caveat Emptor* rule. We will see that in fact, our instinctive response to the *Caveat Emptor* rule, which was dismissed in *Smith v Hughes*<sup>73</sup> as the sensibility of a "tender conscience", closely traces the result of a deeper analysis of the values the rule instantiates and the social benefits it may generate. Equity, I will claim, should therefore step (back) in, and change the *Caveat Emptor* rule so as to realign the moral responsibility with the legal liability of a person who let the other party sign a contract in the knowledge that she misses a critical piece of information about the deal.

---

72. On our strong tendency to succumb to self-deception and rationalisation about the moral standing of our actions see for example Alfred R Mele, *Self-Deception Unmasked, Princeton Monographs in Philosophy* (New York: Princeton University Press, 2003); Michael K Green, "Kant and Moral Self-Deception" (1992) 83 *Kant-Studien* 149 at 164; and Daniel Goleman, *Vital Lies, Simple Truths: The Psychology Of Self-Deception* (New York: Simon & Schuster, 1996) part II at 55-91.

73. *Supra* note 14.

#### IV. The Moral Demerits of the *Caveat Emptor* Rule, and Why Equity is the Right Way to Correct Them

In this section, I want to show that the justifications provided for the *Caveat Emptor* rule are either defective on their own terms, wrongly presented as ideology free, or too slight to justify the stark departure from moral standards which it embodies. As the discussion unfolds it will become clear why a norm based on a conscionability standard is highly suitable to fix the deep problems of the current bright line rule. We will see that, indeed, efficiency considerations which ought to inform a good solution to the disclosure conundrum can many times be addressed by a set of fine-tuned well defined rules. But a truly successful ordering of disclosure duties in the pre-contractual stage would require an open-ended standard which combines clear guidelines with room for discretion in applying moral criteria.

Melvin Eisenberg summarises the view of many when he writes that “social morality indicates that if one actor knows a material fact that is relevant to the transaction, and knows that the other actor does not know the fact, non-disclosure is sharp dealing, or a kind of moral fraud”.<sup>74</sup> In Part II above, I tried to show that the *Caveat Emptor* rule is not merely a reflection of a different attitude to the ethical standards in business (or the lack thereof); it is not just that “conduct which on the continent is regarded as fraud is regarded in England as good business”.<sup>75</sup> The claim was that an array of arguments show that, on deeper inspection, the *Caveat Emptor* rule serves the common good on more than one level, and that therefore its unpalatable surface belies its real moral merit. In what follows, I address these arguments and argue that, in most cases, the *Caveat Emptor* rule does not serve the common good, but rather the interests of a small section of the public. To make the law on un-induced unilateral mistakes do justice in the wide range of cases to which it applies, the *Caveat Emptor* rule should become a carefully curved exception to

---

74. Melvin Eisenberg, “Disclosure in Contract Law” (2003) 91:6 California Law Review 1645 at 1653-65.

75. Beale, *supra* note 4 at 73.

a general rule that would require disclosure of critical information in the pre-contractual stage.<sup>76</sup>

### A. Legal Duty to Prevent Harm

The *Caveat Emptor* rule, we saw, can be read as motivated by the belief that legal duties “to do X”, and in particular to save strangers from predicaments you did not cause, unduly infringes on personal freedom. However, the reasons behind the “no duty to save” policy are not incontestable, and their applicability to the case of unilateral mistake is particularly dubious. First, the idea that moral responsibility changes in such a dramatic way between actions and omissions is far from consensual. For some serious thinkers, our tendency to feel less guilty for failing to help, than for inflicting harm, is nothing but a rationalisation that enables us to keep to our comfortable lives.<sup>77</sup> Moreover, it is widely agreed that special relationships, like friendship, mentorship or parenthood, break down the distinction (as much as there is one) between responsibility for damaging action, and responsibility for omitting to help. Teachers, for example, are not only under a moral obligation not to molest their pupils, but they are also obligated to act when they suspect that a pupil

---

76. See also Eisenberg, *supra* note 74 (“The law should require disclosure of material facts except in those classes of cases in which a requirement of disclosure would entail significant efficiency costs” at 1655); Zamir & Medina, *supra* note 17 who say that the set of rules on pre-contractual deception, which is informed by considerations of morality, as well as of efficiency, “should prohibit all forms of deception, including false assertions, half-truths, and silence” at 278; and Nicholas J McBride “Rescission of Settlement for Mistake and Non-disclosure” (1999) 58:3 Cambridge Law Journal 461, n 46.

77. As helping those in need is so much more demanding than merely avoiding causing unnecessary pain. See for instance Jonathan Glover, *Causing Death and Saving Lives* (London: Penguin Group, 1977) ch 7; Jonathan Bennett, “Whatever the Consequences” (1966) 26 Analysis 83.

is being abused by others.<sup>78</sup> Association can differentiate the person in need of help from the nameless mass of strangers so that a duty to go out of your way to help (and not merely refrain from harming) arises.

The situation of parties to contractual negotiation arguably gives rise to a proximity that can beget a positive duty to correct other people's mistakes. The strong policy consideration against enacting positive legal duties can be suspended in that case because the number of strangers whom you are requested to assist is well defined and limited. Indeed, if the defendant is a business owner who engages in contractual negotiations much of the day, the number of strangers whose mistake it would be his responsibility to correct would be high. But even then, he will only need to correct those mistakes of which he knows, or should have known. In such cases, a flexible unconscionability standard would become handy: an equitable standard will allow the court to look closely at the particular case and mark out those errors that, given the volume of the defendant's business and the interaction he in fact had with the complainant, she could not expect him to correct. This is likely to change from one case to another, but the conscionability standard should give enough guidance to parties as to when they are expected to save a person, with whom they are negotiating, from acting under a mistake. In this way, a cleverly deployed equitable rule can point out those cases where a duty to assist another person in trouble would be too onerous to be imposed by the law (even if in morality one may be obliged to do so).

## **B. Who's Self-Reliance?**

A major building block in the justification of the *Caveat Emptor* rule is a value laden distinction between a proactive party who makes all the

---

78. See Irit Samet, "Proprietary Estoppel and Responsibility for Omissions" (2015) 78:1 Modern Law Review 85. A similar change in responsibility levels happens with people who hold special positions such as community leaders. In equity, land owners are expected to correct strangers' mistakes about their proprietary rights, or otherwise, forever hold their piece, as the doctrine of proprietary estoppel will force them to accept the situation assumed by the stranger's action.

necessary inquiries and a lacklustre one who waits for others to supply her with the material she needs in order to make an informed choice about the contract. Whether you put it in terms of the state's role in fostering the virtue of self-reliance, or of the law's aim to promote efficiency (here, by incentivising entrepreneurial spirit), the message is similar: the law will not assist those who cannot be bothered to take care of their own business. But such presentation of the way in which the *Caveat Emptor* rule operates is misleading. In its current universal application, what it does many times is simply allow the strong to prevail over the weak. As Hugh Beale observed:

the *caveat emptor* approach depends on the buyer being sophisticated enough to ask the right questions—or to take advice. And the latter is not just a question of sophistication; it is also one of the cost of taking legal advice.<sup>79</sup>

The idea that the *Caveat Emptor* rule rewards the entrepreneurial is built on an assumption that the parties are equal in their ability to assemble all the information they require, and that whether they in fact did so is down to their approach, *i.e.* a “go-getter” or a “sitting on the fence” type. But since the rule covers the whole spectrum of potential parties to contracts, from big business to small and medium ones, as well as private people, its operation often merely reflects the power relations between the parties, not their virtues or vices.

And just as the *Caveat Emptor* rule does not necessarily recompense the industrious, disclosure duties do not, usually, reward laziness. Treatise writers in the nineteenth century were already careful to note that in proscribing non-disclosure, equity took care not to protect the negligent. There was “no case in which the Court of Equity had been successfully asked to interpose in favour of a man who wilfully was ignorant of that

---

79. Beale, *supra* note 4 at 28. Later, at 30 he maintains that the presence of “a blanket rule of non-disclosure ... [expresses] a very strong ideological message about self-reliance, or [shows that] that we are unable to devise a workable rule to deal with the problem”.



which he ought to have known”.<sup>80</sup> The standard of conscionability is flexible enough to allow the court to factor in the expectation that people do what they can to look after their affairs to the best of their ability. The particularistic nature of the equitable inquiry allows the judge to ask to what extent the specific claimant is responsible for her ignorance with regards to a crucial matter that concerns her position. From the point of view of a party who considers whether to spend the time and resources on finding the information she needs — and it may take a lot of time and money to find out what exactly one should ask once we venture beyond the standard set of questions — it would be very unwise to sit back and rely on the disclosure requirement. For “there is no certainty that the existence of your mistake will become known to the other party and so trigger the duty to point it out”.<sup>81</sup> It is even less certain that the other party would be deemed as someone who “should have known” about your mistake *and* as unconscionable in failing to correct it. A disclosure duty would not incentivise a “sit around” attitude to information gathering. It is the party who is unconscious even of the *possibility* of making further inquiries who is most likely to fall back on the disclosure duty of the other side.

### C. Certainty and Other Legal Virtues

From the point of view of the rule of law ideal, we saw, the *Caveat Emptor* rule is an exemplary legal norm. It has a minimal penumbra of uncertainty, its operation is hence easy to predict, and it applies across a wide range of cases so that a nuanced understanding of the phenomenon is not necessary in order to assess its effect on one’s actions. However, this fit with the rule of law virtues of certainty, predictability and generality comes at a high price. The gap that the *Caveat Emptor* rule opens between the pattern of legal liability and that of moral duty is deep and, for reasons

---

80. *Duke of Beaufort v Joseph Neeld*, [1845] 8 ER 1399 (HL) as in MacMillan, *supra* note 2 at 50 (and more cases cited there). Similar limitation can be found in the French law and the principles of European contract law, see Beale *supra* note 4. See also Eisenberg, *supra* note 74 at 1684-85.

81. Beale, *supra* note 4 at 82.

I reviewed in Part III, dangerous.<sup>82</sup> If equity (re)assumes its authority to intervene in order to close (or, at least, narrow) this gap, will the result be fatal to the certainty of the law on un-induced unilateral mistake? Not necessarily. The first thing to note is that mistakes about a critical aspect of the contract are only likely to occur in out-of-the-ordinary contracts, or with regards to odd pieces of information. This is because run of the mill situations will very often be covered by standard practices of investigations and off-the-shelf questionnaires.<sup>83</sup> Moreover, especially when it comes to sellers, a disclosure duty should not introduce a big transformation in the current practice. Ample research in economics shows that sellers will frequently share information with the other party even if they have no legal obligation to do so, as the advantage gained by non-disclosure will often unravel under competition.<sup>84</sup> In addition, numerous statutes and regulations require disclosure by sellers.<sup>85</sup> This means that only in a limited number of cases would the equitable norm operate to undo a deal to which one party only entered because she was unaware of a critical piece of information known to the other party.

Moreover, one of the biggest benefits of a clear certain rule, namely, that people can calculate its effects on their action and plan accordingly (by purchasing insurance, etc.) does not pertain to the typical case of a unilateral mistake. Unilateral mistakes often come as a nasty surprise, not as a realisation of risk whose chances of occurring one could have

---

82. As celebrated novels like Michael Frayn's *Headlong* testify, the existence of the "no need to disclose" rule is known to the wide public (New York: Faber & Faber, 1999). The book describes the disastrous results of an attempt to take advantage of the rule in the context of art dealings, and was shortlisted for the Man Booker Prize.

83. Many such forms can be found on the internet; for the sale of land see for instance <<http://www.houseweb.co.uk/house/sell/hips/PIQ.pdf>>; for sale of business see <[http://www.certifiedacquisitions.com/uploads/Seller\\_Questionnaire.pdf](http://www.certifiedacquisitions.com/uploads/Seller_Questionnaire.pdf)>.

84. Eisenberg, *supra* note 74 at 1678 (and sources cited there).

85. *E.g.* *The Consumer Protection from Unfair Trading Regulations 2008* (UK), SI 2008/1277 s 6; *The Provision of Services Regulations 2009* (UK), SI 2009/2999 s 8; consultation on *The Occupational and Personal Pension Schemes (Disclosure of Information)(Amendment) Regulations 2015* (UK), SI 2015/482.

calculated in advance. A description of the *Caveat Emptor* rule in terms of certainty would not cut much ice with the surprised party, especially if she is a non-specialist and therefore expects the law to mirror the widely shared moral intuition that the other party should have alerted her that she labours under an error. Another point to note is that the effect of uncertainty on third parties would be dramatically reduced due to the way in which equity protects *bona fides* purchasers.<sup>86</sup> The worry lest third parties will have to bear the risk of relying on a contract that is in fact voidable strongly militates against releasing the mistaken party from the contract. Equity, with its built-in mechanism of sheltering innocent outsiders from such risks is thus well suited for the task of reforming the *Caveat Emptor* rule.

Furthermore, as I explained in Part III, the standard of conscionability can be used by the law's addressees as a useful guide, even if it cannot achieve the level of certainty secured by fixed *ex-ante* rules. In the context of un-induced unilateral mistakes, a norm that instructs you to reveal critical information, if you suspect that the other party is unaware of it, is pretty clear and certain.<sup>87</sup> True, as we will see below, a successful disclosure duty would include some exceptions whose application requires court discretion. In the large majority of cases, however, a duty to alert the other party to a mistake that is known to you may be burdensome, but is in no way unclear. Certainty is therefore mainly jeopardised by the availability of a remedy where one party should have known about the other party's mistake. The extent to which a conscionable person ought to infer that the other party is ignorant and take steps to ascertain it may, indeed, be less than clear-cut. Nevertheless, the reference to conscience — a concept whose moralistic connotations are obvious to everyone — directs the law's addressees towards an ethical approach to the issue of ignorance in pre-contractual negotiation. A conscience in a good working condition,

---

86. That was already the case when equity granted rescission for unilateral mistakes in the 18th and 19th century: see MacMillan, *supra* note 2.

87. See Beale, *supra* note 4 at 119-22. For another way of reducing the effect of uncertainty is to allow opt out in business to business ("B2B") contracts.

*i.e.* an alert sensitive inner compass, would tell its owner that the less than favourable conditions which the other party agrees to may be a result of some ignorance on his part (rather than, say, generosity, lack of experience or absentmindedness). Conscience would drive the party in the know to ask “by the way, did you know that X?” even when that may rob him of an advantage, and the conscionability standard would make it clear that, to stir clear of the law, one should follow this advice. This is not the certainty of a fixed *ex-ante* general rule, but it is a legal principle that definitely offers the parties to contractual negotiations a useful guide on how to conduct themselves so as to avoid interference by the state. A conscionability-based duty of disclosure will therefore strike a better balance between the value of certainty and the ideal of accountability coherence, *i.e.* a state of affairs in which the law follows the pattern of moral responsibility in the circumstances.<sup>88</sup>

#### **D. Generating (very little) Socially-Beneficial Information**

One of the most compelling arguments in favour of the *Caveat Emptor* rule is the way in which it incentivises the entrepreneurial to obtain useful information about other people’s property. While the lacklustre owner fails to fully realise the potential of the resource over which she was given control, the eager beaver probes the quality of her property, tempted by the chance of making a nice turnover if he manages to buy it from her for what *she* thinks it is worth. This is all very nice, but in fact the *Caveat Emptor* rule can potentially encourage socially valuable investigations in a very limited number of factual scenarios, while its application is general and far-reaching. If we look at the problem of un-induced unilateral mistake from a perspective of economic efficiency, our point of departure should be that mistakes always increase the resources which must be devoted to the process of allocating goods to

---

88. See Beale, *ibid* (who says about his suggestion for disclosure duty: “I think that this proposal, though less certain than the current law, would nonetheless be workable. Rules that are a great deal less certain are used in countries whose economies seem as successful as our own” at 99).

their highest-valuing users.<sup>89</sup> And so, a rule that allows the enforcement of contracts which are based on an error must be justified by showing that the benefits it entails exceed the costs inherent to mistakes. A closer look at the *Caveat Emptor* rule reveals that it incentivises valuable investigations only in very specific cases, with the result that the current wholesale right to withhold information is inefficient.

Since Kronman's 1978 ground-breaking paper on the efficiency of disclosure duties, it has been the consensus that, broadly speaking, we should distinguish between information that was acquired by a party in a "casual" manner and information which she deliberately obtained, as only the latter ought to be protected by a right not to disclose.<sup>90</sup> Why, from efficiency point of view, should we oblige the party who casually came by a relevant piece of information to reveal it to the other party? Mistakes, like accidents, are costly, and in principle should be avoided "since the actual occurrence of the mistake, always (potentially) increases the resources which must be devoted to the process of allocating goods to their highest valuing users".<sup>91</sup> Only if non-disclosure generates a substantial social benefit should the informed party be allowed to keep it to herself. Casually getting hold of information which is relevant to other people's property does not generate sufficient social benefit to justify the cost of allowing a mistake to determine the course of a contract.<sup>92</sup> But neither is it the case that all *deliberate* acquisitions of information are beneficial to such a degree that encouraging them warrants a right to keep it to yourself; it all depends on the kind of information thus attained. For instance, in contrast with the famous US Supreme Court decision

---

89. Kronman, *supra* note 33; see also Zamir & Medina, *supra* note 17 (who conclude: "Ordinarily, the cost of transferring the correct information to the uninformed party is small and its benefit clear. Accordingly, prohibitions against deceit and pre-contractual disclosure duties are *prima facie* efficient" at 269).

90. Kronman, *supra* note 33 at 13.

91. *Ibid* at 2-3.

92. Stumbling on information by chance is indifferent to incentives to act one way or another. See more detailed argument in Eisenberg, *supra* note 74 at 1656-61.

in *Laidlaw v Organ*,<sup>93</sup> the deliberate obtainment of mere foreknowledge (*i.e.* information that will, in due time, be evident to all) is not worthy of encouragement as it does not increase the pie, only the share of the person who happened to have the information.<sup>94</sup>

Another substantial limitation on the ability of the *Caveat Emptor* rule to incentivise the search for socially beneficial information relates to the position of sellers. As Melvin Eisenberg shows,<sup>95</sup> the distinguishing characteristics of sellers make it the case that they should *always* be required to disclose material facts concerning their property. Sellers typically have asymmetric access to adventitiously acquired information about the property they are selling, while they are sufficiently incentivised to look for other information about a property they own; they do not need the extra incentive in the form of a right to withhold information about the subject matter of the contract.<sup>96</sup> From the perspective of clarity and predictability it would have been good if the disclosure duty could swiftly apply to all sellers. But justice and efficiency dictate some fine-tuned exceptions. Thus, when a universally known practice in a specific market (*e.g.* commercial real estate) is one of “each party to herself”, expectation that information would be disclosed cannot be justified. Similarly, if a party was ignorant about a material fact in circumstances where a diligent buyer would have been put on notice, or because she failed to conduct a reasonable research, the law should not absolve her

93. 15 US (2 Wheat) 178 (1817) [*Laidlaw*].

94. Hirshleifer, *supra* note 32 at 562; *Laidlaw*, *supra* note 93; Robert Cooter & Thomas Ulen, *Law and Economics*, 3d (New York: Addison-Wesley, 2000) at 273-74. Many cases of foreknowledge would fall under what Cooter and Ulen called “redistributive information”, *i.e.* such that only “creates a bargaining advantage that can be used to redistribute wealth in favor of the informed party”. Working to obtain this kind of knowledge is socially wasteful and should be discouraged by imposing disclosure duties. Only with regards to information that “can be used to produce more wealth”, we can show that “[e]fficiency demands giving people strong incentives to [produce it] ...” by exempting them from the duty to disclose it at 273-74.

95. *Supra* note 74.

96. *Ibid* (see detailed discussion at 1674-77); Zamir & Medina, *supra* note 17 at 272.

of her contractual obligations.<sup>97</sup> The disclosure duty of sellers should therefore be drafted as a standard which, while it establishes a pretty general duty of disclosure for sellers, does allow the court to peg the sellers' duty of disclosure to the level of their moral responsibility for *this particular* erroneous buyer.

In contrast with the above rule that mandates a disclosure duty on sellers which can be, all and all, reasonably clear on the edges, a just and efficient regulation of *buyers'* disclosure duties will have to take the form of a flexible open-ended standard that accommodates the more prevalent exceptions to the duty to alert the seller to her mistake. Apart from the above case of the studious buyer who worked hard to reveal hidden qualities of a piece of property, in some social context the pre-contractual interaction is best understood as a game in which buyers troll for mistakes by sellers. Used book trades and art auctions are the most obvious examples of such social games — where sellers cannot legitimately expect buyers to reveal their assessment that the item they wish to buy is actually worth much more than the owner's asking price.<sup>98</sup> Other, less obvious, situations may fall into this category, and a space should be left for the court to exercise discretion as to whether this is the case. Another set of circumstances where a buyer should be allowed to keep critical information to himself is where

a certain [building] project requires assembling a considerable number of parcels. Revealing the entrepreneur's plan to prospective sellers would result in ... a 'holdout' [*i.e.* some agents may exploit the need for their consent to extract a portion of the producer surplus in excess of their opportunity costs].<sup>99</sup>

A duty to disclose information in this case would thus open the door not only to inefficiency but to opportunism and an unfair distribution of the

---

97. See examples in Eisenberg, *supra* note 74 at 1683-85.

98. *Ibid* at 1686; see also Peter Walker, "Multimillion-dollar Photo of Billy the Kid Playing Croquet was \$2 Junk Shop Find", *The Guardian* (13 October 2015), online: <[www.theguardian.com/us-news/2015/oct/13/billy-the-kid-croquet-junk-shop-two-dollars](http://www.theguardian.com/us-news/2015/oct/13/billy-the-kid-croquet-junk-shop-two-dollars)> (example of a photo bought for \$2 in a junk shop and sold for \$2.3 million can be found in this article).

99. Zamir & Medina, *supra* note 17 at 273.

pie.<sup>100</sup>

The bottom line of all these complex considerations is that the *Caveat Emptor* rule increases the efficient use of property only in a narrow range of cases which involve resourceful buyers. And even in these cases, the claim that the only (or by far the best) way to incentivise socially valuable explorations of other people's property is to allow the entrepreneurial buyer to keep critical information to himself has not gone unchallenged.<sup>101</sup> Anyway, as Eisenberg clearly shows, the chances that in our times one will be able to find out valuable information about another's property (such as the existence of minerals or natural gas) are slim, while exploration companies that engage in the business do not exploit the right to withhold information in their negotiations with owners.<sup>102</sup> In most cases of industrious parties who worked hard to discover hidden qualities of property they do not own, the claim that one has a right not to share his findings with the owner will not be raised. In some other situations, court discretion would be necessary in order to avoid holdouts and for adjusting liability to responsibility in special

---

100. It is worthwhile mentioning that up until now courts in the US have failed to tailor their decisions in contract disputes in accordance with legal economics finding about the utility of each course of action: see Kimberly D Krawiec & Kathryn Zeiler, "Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories" (2005) 91:8 Virginia Law Review 1795 at 1818-21 who argue, on the basis of a large scale statistical survey of American cases, that courts are not more likely to require disclosure when the information is casually acquired as opposed to deliberately acquired; see also Eric A Posner, "Economic Analysis of Contract Law After Three Decades: Success or Failure?" (2003) 112:3 Yale Law Journal 829 (the answer is "failure", at least when it comes to influence on actual courts' decisions).

101. Other mechanisms to profit from the obtainment of such information are at hand. For example, where inheritance goes to next of kin, no matter how remote, you find people who specialise in tracing such remote relatives of lone deceased. They then approach the potential heir with the promise to reveal the identity of the long lost relative in return for a hefty percentage of the inheritance. A similar approach can be taken with respect to unknown qualities of one's property.

102. Eisenberg, *supra* note 74 at 1687-91.



market conditions. The bottom line is that the secrecy allowed by *Caveat Emptor* rule ought to become an exception to a general standard which obligates disclosure in the pre-contractual stage as required by justice and efficiency. Again, a conscionability based standard which allows the court to exclude such scenarios from a general disclosure duty would work very well.

## V. Conclusion

The law on un-induced unilateral mistakes probably comes into effect only in a rather small number of contract cases. Economic reality and practices which developed over the years often lead both sellers and buyers to be frank about their assessment of the subject matter of the contract. Nevertheless, the decision taken by each legal system as to the duty of people who negotiate a contract to save the other party from making a costly error says a lot about its most fundamental values. The message that it sends to the parties about the ethical level they should aspire to attain ripples well beyond the specific issue of disclosure. In the case of the English *Caveat Emptor* rule, the common law professes a set of individualistic values, or tolerance of sheer selfishness, that do not reflect the moral convictions of the wider community. Arguments to show that the *Caveat Emptor* rule actually embodies a commitment to a lofty rule of law ideal and promotes economic utility fail to show that the alternative (*viz* a fairly wide duty of disclosure that follows ethical standards) will seriously undermine the law's aspiration to legality, or efficiency. On the contrary, the disutility of mistakes and erosion of the legal system's legitimacy — both clear risks of the *Caveat Emptor* rule — strongly militate against adhering to the current law. A change is needed; but by what means?

English law, I have argued, has a ready-made device for introducing the necessary reform: the nineteenth century equitable jurisdiction to rescind a contract where insisting on its performance (or expectation damages) would be unconscionable since the defendant knew, or should have known, that the claimant only entered the deal because she was ignorant of a crucial fact. An *ex-post* flexible standard of that kind will allow the court to take into account subtle differences between

cases which may change the moral standing of the defendant and/or the benefit to society from forcing a disclosure duty in a particular case.

Moving from the bright-line *Caveat Emptor* rule to a conscionability-based standard would indeed detract from the certainty of the law in that area. But equity does not simply neglect the rule of law value; it is bent on reintroducing a *balance* between the demands of clarity, generality and predictability, and the ideal of coherence between law and moral principles. We saw how the invocation of conscience provides a pretty good guide on how the law would apply in different situations — a guide that relies on our inbuilt ability to recognise, and be motivated by, our moral duty. Coupled with the demand that the mistake is substantial and an in-built protection for innocent third parties, an equitable conscionability-based disclosure duty will lend relatively few surprises on people who know the law and think about it seriously. The unfortunate situation of un-induced unilateral mistake is thus an excellent example of the prowess of equity: through its carefully-developed mechanisms it is able to realign legal liability and moral responsibility in a way which is respectful of the rule of law ideal and sensitive to the shared values of the community.