

EDITORIAL: A DANCE TO THE MUSIC OF TORT

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‘The Canengusian Connection: The Kaleidoscope of Tort Theory’ captures a body of law in flux and a moment in time. The body of law on which Allan Hutchinson and Derek Morgan focus their attention is broad. It encompasses negligence, tort more generally, and other branches of law concerned with accident compensation (*e.g.*, New Zealand’s comprehensive no-fault compensation scheme). We find Hutchinson and Morgan exploring these areas of legal activity at a time when Margaret Thatcher’s Conservative government was attacking an assumption with which they had each grown up. This is the assumption that government should (through, *inter alia*, the instrumentality of law) fashion a set of socially just practical arrangements (*e.g.*, an egalitarian society offering all its members a high level of security from cradle to grave). Margaret Thatcher and her colleagues were prepared to consign this assumption (at least in a form strongly inflected by the ideal of distributive justice) to the dustbin of history.¹ Hutchinson and Morgan, by contrast, indicate (in the second half of their essay) that social justice is a matter that government, the judiciary, and academic commentators should take seriously.

Two-and-a-half decades on from its appearance in the *Osgoode Hall Law Journal*, this is only one of many ways in which ‘The Canengusian Connection’ retains legal and political significance. For it offers five responses to the problem of accidents that still constitute moves in various of the language games that have grown up around this issue. For this reason, the essay is a help to those who seek to get to grips with tort and alternative means of accident compensation.² This is not simply because Hutchinson

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¹ D. Marquand, *The Unprincipled Society: New Demands and Old Politics* (London: Fontana Press, 1988), ch 3; A.W. Turner, *Rejoice! Rejoice! Britain in the 1980s* (Aurum: London, 2010), ch 1. Cf R. Vinen, *Thatcher’s Britain: The Politics and Social Upheaval of the 1980s* (London: Simon & Schuster, 2009), 292-295 (arguing that ‘we should hesitate before labelling Thatcher as the destroyer of the post-war consensus’).

² See C. Douzinas, S. McVeigh, and R. Warrington, ‘Thrashing in the Dwelling House’ (1989) 52 *Modern LR* 261, 263 (describing the reworked version of ‘The Canengusian (2010) J. JURIS 273

and Morgan offer an accessible taxonomy of responses to the problem of accident compensation. The essay also models a style of open-minded engagement with a matter of practical concern that will be of benefit to those who acquire it. While Hutchinson and Morgan alert their readers to five ways in which they might respond to accidents, they do not identify any one of them as (in some sense) ‘the best’. This is an approach that bespeaks a commitment to what John Keats called ‘negative capability’. This is the capacity to be in ‘doubts’ and ‘uncertainties’ without hastily deciding to identify any particular view as capturing the truth of the situation we are contemplating.³

To the extent that a commitment to ‘negative capability’ informs ‘The Canengusian Connection’, it speaks well of its authors. But we might also see this virtue as having something to do with the character of British higher education at the time Hutchinson and Morgan put pen to paper. They began composing the essay in Newcastle University’s Faculty of Law in 1983. To think of this place at that time is to contemplate a social milieu that no longer exists. While British universities had been subject to ‘cutbacks’ in the early 1980s, they still offered those working within them a high-trust environment – free from the pressures of teaching- and research-related processes of audit.⁴ This was a context in which academics were largely free to pursue their research-related inclinations.⁵ In ‘The Canengusian Connection’, Hutchinson and Morgan made use of this freedom to work up an account of accident compensation law informed by the agenda of Critical Legal Studies (a self-consciously radical body of thought that had its origins in the USA).

Connection’ that appeared in A.C. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought* (London: Sweet & Maxwell, 1988) as yielding ‘excellent tutorial material’).

³ J.A. Cuddon, *A Dictionary of Literary Terms* (Penguin Books, Harmondsworth, 1979, rev edn), 418. See also M. Heidegger, *What Is Called Thinking* (New York: Harper & Row, 1968, J. Glenn Gray, trans), 48 (arguing that ‘[w]e must stay with the question’ and ‘guard against the blind urge to snatch at a quick answer’).

⁴ See R. Stevens, *From University To Uni: The Politics of Higher Education in England Since 1944* (London: Politico’s, 2004), 45-47 (on university-related ‘cuts’), and R. Mullender, ‘The Virtues of Silliness’, *Times Higher Education Supplement*, 15th September 1995, 13 (describing the impact of audit culture on British universities).

⁵ For a fictive (but informed) account of the high-trust academic environment referred to in the text, see M. Bradbury, *The History Man* (London: Arrow Books, 1975), 49 (where the novel’s central character, Professor Howard Kirk, declares that ‘[c]ritical consciousness reigns’).

This approach to law itself became the subject of debate in Newcastle Law Faculty at the time Hutchinson and Morgan were writing the essay. So too did the ‘black-letter’ view with which Hutchinson and Morgan contrasted it. They dwelt on these debates when they returned to Newcastle in July of 2009 to lead a symposium on ‘The Canengusian Connection’. For those of us who were not in Newcastle in the early 1980s, some of the exchanges between Hutchinson and Morgan and former colleagues had the ring of reminiscences shared by combatants in a war long since over. Former ‘Crits’ and ‘black-letter lawyers’ recognized that they were guilty of caricaturing one another. All concerned spoke with mixed feelings about the benefits of growing older and wiser (and, as a consequence, more tolerant).

These preliminaries over, discussion of the essay began. Patrick O’Callaghan and Gemma Turton pointed up its virtues as an aid to those delivering undergraduate tort courses. Jenny Steele identified herself as highly sympathetic to the agenda of social justice that finds expression in the second half of the essay, while Richard Mullender argued that Hutchinson and Morgan had presented negligence law in an uncharitable light. Hutchinson and Morgan professed themselves disappointed that accident compensation law remains far from perfect and surprised that their assessment of it continues to have great relevance. They also dwelt on the increased prominence that the ideal of corrective justice and the associated principle of personal responsibility now enjoy among commentators on tort law.⁶

This was a development about which Hutchinson and Morgan had misgivings. The theme that accident compensation law had lost its way was evident in their respective contributions to discussion. This theme gave expression to assumptions that may have their roots in the writings of E.H. Carr – a historian who exerted a considerable influence over the young Hutchinson. According to Carr, progress depends on our ability to ‘master, transform, and utilize [our] environment’ (or, more particularly, the institutional and other assets within it).⁷ In the context of accident compensation law, these assets include (as Hutchinson and Morgan made plain in the symposium) institutions that place emphasis on social rather

⁶ See G. Edward White, *Tort Law in America: An Intellectual History* (New York: Oxford University Press, 2003, expanded edition), ch 8 (on the increased emphasis placed on corrective justice (and personal responsibility) in tort since 1980).

⁷ E.H. Carr, *What is History?* (London: Penguin Books, 1990, 2nd edn), 127. See also 119 (where Carr states that ‘[b]elief in progress means belief not in any automatic or inevitable process, but in the progressive development of human potentialities’).

than personal responsibility. But it would be wrong to see Hutchinson and Morgan as proponents of a suffocating collectivism rather than individualism. Derek Morgan drove this point home when he identified Arthur Leff's views as having exerted an influence over the composition of 'The Canengusian Connection'. For Leff tells us that 'What we want is simultaneously to be perfectly ruled and perfectly free'.⁸

In the fifteen months since the symposium took place, the essays that now appear in *The Journal Jurisprudence* have taken shape. While each of these essays offers a distinct response to 'The Canengusian Connection', common concerns and/or features unite subsets of the collection. While recognizing that Hutchinson and Morgan offer a wide-ranging account of accident compensation law, Turton and Siu stake out positions that Hutchinson and Morgan do not consider in 'The Canengusian Connection'. Arvind, Bennett, Campbell, O'Callaghan, and Siu each dwell on the relationship between private and public impulses in tort law (see Appendix 1). Pedersen, Mickiewicz, O'Callaghan, and Mullender advance arguments that share concerns that we might categorise as anthropological.⁹ For they dwell (while pursuing complementary themes) on the nature of those who fashion and reflect upon the operations of negligence law, tort more generally, and other institutions concerned with accident compensation (see Appendix 2).

Pedersen identifies the positions on accident compensation law explored by Hutchinson and Morgan as throwing light on environmental law. He also argues that 'The Canengusian Connection' provides a basis on which to explain a common reaction to controversy on practical questions. A wide variety of responses to such questions, may, on Pedersen's account, induce in those who contemplate them a sense of cognitive dissonance. This unpleasant feeling arises in circumstances where people find themselves considering contradictory ideas simultaneously. Pedersen argues that those who experience this feeling may respond to it by engaging in denial. To this end, they may fasten on one response to the question they are contemplating and identify it as 'the answer'. This leads Pedersen to pursue the theme that those who make responses of this sort would do better to engage in a form

⁸ A.A. Leff, 'Unspeakable Ethics, Unnatural Law' (1979) 6 *Duke LJ* 1229, 1229.

⁹ The adjective 'anthropological' is apt since the relevant papers exhibit an interest in the behaviour and thought processes of a particular group of people (those concerned with accident compensation) and their relations with the social context in which they have acquired this interest.

of rational reflection that he explains and defends by reference to the writings of, *inter alios*, Karl Popper and John Dewey.

Mickiewicz's essay complements that of Pedersen. For she argues that we should seek to pursue coherence in negligence law (and in tort more generally) by drawing on the account of 'aspect perception' elaborated in the later philosophy of Ludwig Wittgenstein and in the writings of Martin Heidegger. Aspect perception is a theory according to which interpreters are apt to pick out some items (while excluding others) in the fields that they are scrutinising. Mickiewicz argues that, by sensitizing ourselves to this problem, we will be better placed to pursue coherence in areas of activity such as negligence law (where we are called upon to contemplate a wide range of practical impulses). On her account, we can, by applying this approach to negligence law, bring, among other things, the ideals of corrective and distributive justice into a mutually supporting relationship. While unfolding this analysis, Mickiewicz also offers a critique of Ernest Weinrib's corrective justice-based account of tort. She recognises that Weinrib's thinking has a clear-cut, hard-edged quality. However, she criticises the theoretical framework that he has worked up on the ground that it is one into which actually-existing tort law never quite manages to fit.

While Mickiewicz's essay (like that of Pedersen) identifies open-mindedness as a capacity we can cultivate, O'Callaghan and Mullender pursue themes that tend in a contrary direction. Drawing on the account of judicial behaviour in 'The Canengusian Connection', O'Callaghan scrutinizes an area of private and public law that has grown dramatically in the years since Hutchinson and Morgan wrote their essay. This is the body of English law concerned with protecting the human right to privacy (while, at the same time, adequately accommodating the equally fundamental right to free expression). O'Callaghan identifies some of those who have sought to fashion new private law protections (grounded on Article 8 of the European Convention on Human Rights) as having fallen victim to 'monologue creep'. By this he means a process that issues in those who embrace a particular practical agenda becoming less and less sensitive to arguments that challenge the assumptions on which they act. In support of his argument, O'Callaghan draws on the literary theory of Mikhail Bakhtin and the philosophical writings of Martin Buber. Moreover, he applies his account of monologue creep to a group of commentators and judges – the 'Strasbourg enthusiasts' – who have been in the van of the process of doctrinal development he describes. There is much in this essay that merits further exploration – not least the relationship between the process of monologue creep and the

notion of ‘enthusiasm’. For ‘enthusiasts’ do not (on an account written in circumstances far different from our own) ‘become narrow-mindedly obsessed with something’.¹⁰ Rather, they ‘take[] to the air, ignor[ing] the actual state of things on the ground and allow[] [their] enthusiasm to soar upwards to take residence in castles in the sky’.¹¹ However, movement – even creeping movement – in the direction of monologue does suggest something of a descent into obsession.

While ‘monologue creep’ suggests a slow retreat from open-mindedness, Mullender finds in the work of the eighteenth century novelist, Laurence Sterne, grounds for thinking that few people may ever be open-minded. For Sterne argued in *Tristram Shandy* that people regularly respond to practical questions by riding hobby-horses. Mullender argues that ‘The Canengusian Connection’ lends support to Sterne’s view. For a number of the positions on accident compensation law described by Hutchinson and Morgan exhibit what Sterne would call a ‘hobby-horsical’ character. Having forged this connection between *Tristram Shandy* and Hutchinson and Morgan, Mullender argues that we are confronted both in ‘The Canengusian Connection’ and in tort law by (to draw on Sterne once more) a ‘scampering’ discourse. This arises in circumstances where contributors to debate, rather than being attentive to the views of others, simply jump on their respective hobby-horses and ride off in the direction that they find most appealing.

But often, in the sphere of accident compensation law, the reasons for embracing a particular view or agenda are very attractive. This is a point to which Gemma Turton’s essay lends force. She identifies Hutchinson and Morgan as having written an essay that is enormously useful to undergraduates studying tort law. For it presents them with a range of perspectives on this body of law that will encourage them to think critically about its operations – and about alternative compensation schemes. As well as pointing up the usefulness of ‘The Canengusian Connection’ to those who study and teach tort, she argues that Hutchinson and Morgan fail to offer a suitably strong defence of negligence law. To make good this defect in their exposition, she identifies negligence law as a means by which to do corrective justice and to promote, *inter alia*, the principle of personal responsibility. Moreover, she notes that, in the years since the essay’s appearance, this view has gained increasing currency – finding expression in,

¹⁰ V. Klemperer, *LTI – Lingua Tertii Imperii: A Philologist’s Notebook* (London: Continuum, 2006, M. Brady, trans), 54.

¹¹ *Ibid.*

for example, the writings of Allan Beever and Ernest Weinrib. Turton makes these points while offering an account of the ways in which she has used ‘The Canengusian Connection’ in her own classes. Among other things, she identifies Hutchinson and Morgan as having written an essay that is a means to the end of ‘enculturation’. For it helps students to become better attuned to the disciplinary community that they are joining.¹²

While Turton’s essay is much concerned with corrective justice, Siu’s response to ‘The Canengusian Connection’ makes plain the relevance of distributive justice to accident compensation law. Following the lead of, *inter alios*, Calabresi, he recognises that many accidents are the inevitable by-product of socially valuable activity. This being so, accident compensation on the model of New Zealand’s no-fault scheme has much to recommend it. Moreover, Siu defends this position in terms that differ from those that appear in ‘The Canengusian Connection’. For he is a proponent of qualified consequentialist moral philosophy. This is the view that a society committed to distributive justice should pursue socially valuable outcomes while protecting interests that its members regard as intrinsically valuable.

Siu’s emphasis on social (or distributive) justice reveals a focus on matters of public concern that he shares with Arvind and Campbell. Arvind identifies ‘The Canengusian Connection’ as shedding considerable light on the question as to whether we should regard tort law’s essential nature as purely private or straightforwardly public. Before staking out a position of his own, Arvind examines the analysis of those who argue for each of these views (including, *inter alios*, Weinrib and Beever (the private account) and Posner (the public view)). He also examines the arguments for a ‘middle way’ between the public and private accounts (as set out by, for example, Gordley). Having mapped the terrain on which this debate has long been unfolding, Arvind makes a highly distinctive contribution of his own that draws on Christian theology.

Like Arvind, Campbell dwells on the presence in tort law of private and public concerns. Unlike the other contributors to this collection, he does not, however, offer a direct response to ‘The Canengusian Connection’. Rather, he focuses his critical attention on an assumption that finds expression in a number of the positions on accident compensation law presented by Hutchinson and Morgan. This is the assumption (associated

¹² On ‘enculturation’, see J. Seeley Brown and P. Duguid, ‘Space for the Chattering Classes’, *Times Higher Education Supplement*, 10th May 1996 (Multimedia Feature, iv, iv-vi).

with functionalist or green light conceptions of public law) that we can rely on government to treat justly all those affected by its activities. Campbell notes that this assumption has long informed commentary on a prominent nineteenth century English tort case, *Bradford v Pickles*. He finds it in, for example, Brian Simpson's account of this case. Drawing on, and developing, a later analysis of *Bradford* (offered by Michael Taggart), Campbell calls into question the plausibility of the assumption that we can rely on government to advance the cause of justice.¹³

Bennett focuses, in his essay, on an area of the law where he sees government (in the form of Tony Blair's New Labour administration) as having advanced the cause of justice. On Bennett's analysis, the judiciary has responded to the Human Rights Act 1998 by establishing a new and highly distinctive cause of action for 'misuse of private information'. Moreover, he finds in this development support for the conclusion that the human right to privacy is (after much procrastination) receiving the attention it deserves. He also argues that a commitment to corrective justice informs the new cause of action on which he dwells. This leads him to argue that Wright J's judgment in 'The Canengusian Connection' is a useful source of guidance to the judges (e.g., Eady J) concerned with fashioning privacy-related protections. Bennett notes that, while Wright J attaches importance to the ideal of corrective justice, he does not lose sight of the fact that law is an artefact. Hence, those concerned with its development must pay close attention to detailed questions of institutional design (e.g., whether liability should be fault-based or strict).

The contribution to this collection made by Hutchinson and Morgan suggests that they are more positively disposed towards the common law than they were in 1984. Through the medium of their fictive judge, Derall Lefft, they describe the common law 'as always moving but never arriving' and as 'always [being] on the road to somewhere, but never getting anywhere in particular'. These observations sound a note reminiscent of Michael Oakeshott, a thinker of a decidedly conservative disposition – and someone

¹³ This theme in Campbell's essay is neatly summed up by a character in A. Powell, *A Dance To The Music Of Time*, Vol III, *Autumn* (London: Arrow Books, 2002), 573 (on 'the great illusion that government is carried on by an infallible ... machine'). This observation has particular relevance to a solicitor who played a prominent role in *Bradford v Pickles*: Bradford Council's long-serving, highly respected and (to use Campbell's word) 'intransigent' Town Clerk, Mr W.T. McGowen.

we might expect to have little in common with Leff J.¹⁴ But Oakeshott argued that the common law is a form of ‘civil association’. By this he meant a modest politico-legal framework that, while providing stability for those who live within it, does not retain precisely the same shape over time. This is because those who bear responsibility for elaborating it constantly pursue intimations within the form of life that it sustains.¹⁵

While an echo of Oakeshott is something new in the Hutchinson and Morgan *oeuvre*, their contribution points up a feature of their approach to the law that has held constant over time. In their examination of recent Australian case law on wrongful life, a commitment to close reading is, as it was in 1984, on display. This attention to the detail of the law serves to explain, just as much as their commitment to Critical Legal scholarship, the power of ‘The Canengusian Connection’ as a contribution to debate. The lemon-squeezing approach to legal texts adopted by Hutchinson and Morgan is not at all surprising. For they bear the ‘blind impress’ of a culture that finds expression in the common law and that has adopted this approach to interpretative questions and the practical matters they concern for many centuries.¹⁶ This influence has surely shaped their thinking more profoundly than the American politico-legal materials that figure prominently in ‘The Canengusian Connection’.

The fact that two students studying in Newcastle Law School, Emilia Mickiewicz and Man Chun Siu, have responded to ‘The Canengusian Connection’ by contributing essays to this collection is particularly pleasing. The importance of energizing law students is a theme in the body of Critical Legal thought that informs ‘The Canengusian Connection’. In the case of Mickiewicz and Siu, Hutchinson and Morgan have certainly prompted energetic and ambitious responses. However, neither of these contributors to this collection has acted on the Critical Legal impulse to trash the existing legal (and social) script.¹⁷ In embracing the Wittgensteinian practice of

¹⁴ M. Loughlin, *Public Law and Political Theory* (Oxford: Clarendon Press, 1992), 70 (noting that Oakeshott described those who engage in ‘political activity’ as ‘sail[ing] a boundless and bottomless sea’ where there is ‘neither starting-point nor appointed destination’).

¹⁵ *Ibid.*, 64-83.

¹⁶ See R. Rorty, *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989), 23 (quoting Philip Larkin on ‘the blind impress’ that ‘[a]ll our behaving bear’). On close reading as a ‘lemon-squeezing style of analysis’, see T. Eagleton, *Literary Theory* (Oxford: Blackwell, 1983), 44 and 51.

¹⁷ See R. M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press, 1987), 319-320 (on ‘trashing the script’, ‘resistance to determination by our contexts, and ‘our capacity to overcome the

paying close attention to an existing form of life, Mickiewicz's essay is somewhat conservative in orientation. Siu, by contrast, seeks to synthesise consequentialist and deontological positions on negligence law and emerges from the process not as a radical but as a reformer. In each case, they present us with the fruit of independent thinking. That is surely as much as Critics can hope to inspire in their readers.

As well as preparing their respective papers, the contributors to this collection have participated in a dialogue that has unfolded for over a year – embracing the symposium in 2009, a number of later presentations, and numerous e-mail exchanges. This has enabled them to identify, among other things, the common themes mentioned earlier. Among the highlights in this dialogue was a presentation by David Campbell in Newcastle Law School in June 2010. As well as raking over *Bradford v Pickles* and the extensive commentary it has inspired, he offered an analysis of the relationship between tort and the welfare state that challenges many of the optimistic assumptions that have informed its development. David followed this up by travelling to Newcastle a month later to discuss with other contributors to the collection the relationship between the public and private impulses at work in tort.

Along with these meetings, a more open-ended exchange took place between Bennett and O'Callaghan. It concerned the relationship between the European Convention on Human Rights (ECHR), the Human Rights Act (HRA), and the bodies of private law developed by the judiciary with the aim of protecting privacy-related interests. While this exchange has been centrally concerned with a cause of action that did not exist when Hutchinson and Morgan wrote their essay (the misuse of private information), it nonetheless provided evidence of its continuing usefulness as an aid to understanding. Like the judges in 'The Canengusian Connection', Bennett and O'Callaghan would, in short order, move from matters of legal detail to relevant political philosophy. At the level of detail, Bennett took the view that we can grasp the character of the changes wrought in this rapidly developing area by reference to a notion of 'direct horizontality'. The gist of Bennett's argument is that the shaping force of higher-order public law best explains, *inter alia*, the House of Lords' decision to recognize a cause of action for 'misuse of personal information'.

contexts', and 'redirect the forces that seem[] to hold us in thrall'). See also A.C. Hutchinson and P.J. Monahan, 'The "Rights" Stuff: Roberto Unger and Beyond' (1984) 62 *Texas LR* 1477.

O'Callaghan rejects this claim on the ground that private law has been the medium through which the sources of legal protection fashioned by their Lordships and other judges have arisen. This leads him to conclude that we should not talk of 'direct' but, rather of 'indirect horizontality'. As these exchanges unfolded, Bennett and O'Callaghan placed increasing emphasis on relevant political philosophy. Bennett defended his public law-based analysis on rationalist grounds. On his view the ECHR and HRA state (at a high level of generality) morally attractive and adequate grounds for legal development. By contrast, O'Callaghan finds in relevant private law intimations of the 'slow-growing wisdom' that, on some analyses, is a feature of common law culture.¹⁸ While he baulks at efforts to pigeonhole him, we might see him as a proponent of historical reason.¹⁹

The exchange between Bennett and O'Callaghan, like that between the judges in 'The Canengusian Connection' calls attention, among other things, to the 'space' within which legal disputes unfold.²⁰ In each of these instances, the space in question is not a legal field shaped by clearly specified purposes that all participants share. Rather, it is a field within which a range of legal institutions are situated: public and private law in the case of Bennett and O'Callaghan; fault-based and strict liability, along with alternative compensation schemes, in that of the Canengusian judges. Fields of this sort endure over time. But they do not retain a settled shape. Judges reconfigure doctrine. Legislators usher new compensation schemes into existence. Commentators respond to linguistic uncertainties by stipulating new definitions. Ideals of justice gain adherents or lose currency. To seek to

¹⁸ K.N. Llewellyn, *The Bramble Bush* (New York: Oceana, 1930), 43.

¹⁹ See, G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986), 37 (on the common law as 'a historically embodied tradition', prominent within which is the assumption that 'reason' is 'immanent' within the developing body of judge-made norms and the social practices that they seek to track). For more general discussion of 'historical reason', see D. Boucher, *Political Theories and International Relations* (Oxford: Oxford University Press, 1998), 37-40 and 317-319.

²⁰ 'Space' predicates extension. But when we remember that we are using this word to describe a collection of abstractions (legal norms) we grasp that it is metaphoric. This encourages the thought that 'space' is imprecise. However, this may not be the case. Karl Popper's account of 'world 3' provides support for this view. Popper identifies abstract artefacts that have objective contents as falling within world 3. Legal norms are obvious candidates for inclusion in this category. So too are the relations in which they stand relative to one another. For these relations yield a system: e.g., a body of higher-order and lower-order norms of the sort described by Kelsen in his account of a *Stufenbau*. On 'world 3', see K. Popper, 'Knowledge: Subjective Versus Objective', ch 4 in D. Miller, ed, *A Pocket Popper* (Glasgow: Fontana Press, 1983). See also H. Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press, 1992), 64, 75, and 77-78.

grasp, much less to control, these developments is to come face-to-face with the fact that few in the fields contemplated by Hutchinson and Morgan and Bennett and O'Callaghan are agents in any very strong sense. They are, in truth, rather like the characters that Anthony Powell describes in *A Dance To The Music Of Time* – 'unable to control the melody, perhaps, to control the steps of the dance'.²¹

But we can, at least, seek to make sense, in an exploratory spirit, of the field that features in 'The Canengusian Connection' and others like it. And this is what each of the contributors to this collection has aimed to do. In each case, they have sought to stake out a position that, while tentative, makes a plausible claim to advance understanding.²² The exploratory character of these contributions to debate is a feature that they have in common with 'The Canengusian Connection'. For Hutchinson and Morgan identify accident compensation law as, among other things, a battlefield – but they do not seek to offer the final word on the nature of this site of conflict.²³ Exploratory research is an activity that calls on those who engage in it to run risks.²⁴ This is not something that a low-trust higher education sector reshaped by processes of audit is as well equipped to do as it was twenty-five

²¹ A. Powell, *A Dance To The Music Of Time*, Vol 1, *Spring* (London: Arrow Books, 2000), 2.

²² The idea of an 'exploratory' contribution to debate owes much to a paper given by Andrew Halpin in Newcastle in May 2010. While contributing to a symposium on 'Law Beyond the Nation State', Halpin distinguished between two types of philosophy – the 'elevated' and the 'exploratory'. Elevated philosophy claims to offer a secure basis on which to capture the reality to which it applies (and so has about it the character of a 'final vocabulary' as described in R. Rorty, n 16, above, 122). Exploratory philosophy, by contrast, is more tentative *vis-à-vis* the nature of the field it surveys and the language it uses to advance claims that are nonetheless oriented towards the pursuit of truth. For a tentative claim as to how things stand in such-and-such a field nonetheless exhibits what John Searle has called a 'mind-to-world direction of fit'. See J.R. Searle, *Making the Social World: The Structure of Human Civilization* (Oxford: Oxford University Press, 2010), 28. Halpin also insists that both the explorer and that which he or she explores undergo change as the process of exploration unfolds. See A. Halpin & V. Roeben (eds), *Theorising the Global Legal Order* (Oxford: Hart Publishing, 2009), 2.

²³ Cf A.C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995), 88 (describing law as a bottomless pit on the ground that '[i]t is capable of accommodating all manner of philosophical insight, ideological choice, and hermeneutical possibility').

²⁴ For a brief but powerful statement on the relationship between 'thoughtful' (or exploratory) legal research and risk-taking, see J. Waldron, 'Dignity and Defamation: The Visibility of Hate' (2010) 123 *Harvard LR* 1596, 1615..

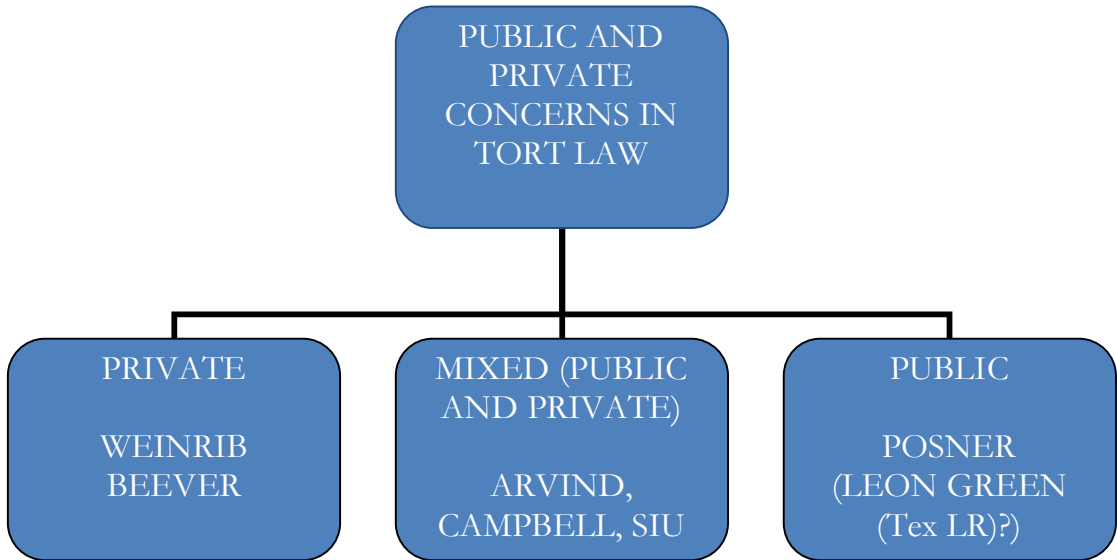
years ago.²⁵ But, if this collection has value, it is (in significant part) as a demonstration of the fact that this sort of thing is still possible.

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²⁵ See A. Giddens, *Modernity and Self-Identity: Self and Society in the Late-Modern Age* (Cambridge: Polity Press, 1992), 41 (on the relationship between creativity ('which means the capability to act or think innovatively in relationship to pre-established modes of activity') and high levels of trust).

APPENDIX 1



APPENDIX 2

