

**DIVERSITY, DISSONANCE AND DENIAL: EXPLORING
THE CANENGUSIAN ENVIRONMENTAL CONNECTION**

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Introduction

This essay seeks to highlight the broad application of Hutchinson and Morgan's analysis of tort law as this is put forward in 'The Canengusian Connection', by showing its relevance to environmental law (a body of law that intersects in a variety of ways with tort law).¹ This seems worthwhile since Hutchinson and Morgan's analysis, masterfully dissecting a fictitious traffic accident and the tort claims that it gives rise to by way of a written decision by the Canengusian Court of Appeal, can be applied to debates on the role and form of environmental regulation. The aim of this essay is to illustrate how the deliberation of the five Canengusian Court of Appeal judges along distinct lines (doctrinal, consequentialist, deontological, socio-legal and critical legal scholarship (CLS)) alerts us to the inherent diversity in law, while highlighting a number of critiques.

In addition to linking 'The Canengusian Connection' to environmental issues, this essay also discusses the themes of diversity and denial as these are identified as subtle premises lurking underneath the deliberations of the five Canengusian Appeal Court judges. As a way of elucidating these themes, we will partly rely on the concept of cognitive dissonance. In the course of developing these themes, this essay argues that the response of the five judges to the diversity identified in 'The Canengusian Connection' is one of denial. This essay argues that the issues of diversity, dissonance and denial are equally applicable to environmental issues. In light of this, this essay seeks to demonstrate that such denial and dissonance may give rise to so-called group polarisation, which in turn can be countered by reliance on concepts of open deliberation and critical rationalism, as these are elaborated by John Dewey and Karl Popper respectively.

The Canengusian Connection

In 'The Canengusian Connection' we learn how tort law as a legal discipline is highly susceptible to judicial discretion and can be moulded in a number

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¹ A. Hutchinson and D. Morgan, 'The Canengusian Connection: The Kaleidoscope of Tort Law' (1984) 22 *Osgoode Hall L.J.* 69.

of different directions. ‘The Canengusian Connection’ plays out on the fictional island of Canengus, situated somewhere in the mid-Atlantic, with a legal system which is a “unique blend of Canadian, English and American sources”.² The central focus in ‘The Canengusian Connection’ is a series of negligence claims before the Canengusian Court of Appeal following a traffic accident. Presented with the question of whether the accident gives rise to liability on behalf of another driver (whose faulty headlight caused the applicant to break abruptly and skid off the road) and/or a local farmer (who overheard the accident from the front porch of his house but failed to investigate it, further resulting in the applicant receiving belated medical attention), the five Court of Appeal judges follow their distinct judicial philosophies when rendering their judgements. Thus, Hutchinson and Morgan foreground the fact of diversity without, however, doing so explicitly and without overtly stating their intentions for doing so. We are hence left to assume that they are seeking to achieve some degree of verisimilitude.

Chief Justice Doctrin emphasises that she is concerned only with “the legal aspects of this case alone” and will resolve the dispute in a manner which is “in accordance with the law as it is, and not as some think it ought to be”.³ Moreover, she interprets the constitutional arrangement of Canengus to be one of exclusive positivism where “arguments of law and morality are rendered mutually exclusive”.⁴ Mill J, on the other hand, favours a strong consequentialist orientation and considers the law’s purpose to be that of economic efficiency. Mill J argues that “the law should seek to simulate an outcome that would be produced by market forces in a world which generates no transaction costs”.⁵ The consequentialist thrust of Mill J’s thinking is found in his broad interpretation of “economic efficiency”, which he considers to be one of overall welfare maximisation. To Mill J, efficiency is Pareto efficiency, whereby “there is no other pattern of allocation that would improve any one person’s welfare without making any other person worse off”.⁶

In contrast, Wright J finds such cost-benefit analysis deplorable and instead espouses a strong deontological approach to adjudication. Wright J argues that individuals are autonomous, deserve respect and “possess certain rights

² Hutchinson and Morgan above n. 1 at 69.

³ *Ibid* at 70-71.

⁴ *Ibid* at 71. See for a critique of this idea of separation between law and morals J. Gardner, ‘Legal Positivism: 5 1/2 Myths’ (2001) *American Journal of Jurisprudence* 199 at 222-225.

⁵ Hutchinson and Morgan above n. 1 at 80.

⁶ *Ibid* at 81.

that cannot be overridden by appeals to general utility”.⁷ Despite expressing intuitive sympathy with Wright J, Prudential J favours an approach to adjudication which takes into account personal (along corrective lines) and social justice.⁸ He argues “we should add a touch of concern and compassion for our fellow human beings to the tort system”.⁹ This compassionate account can be likened to the idea of ‘sympathy’ developed by Adam Smith (although Smith’s account of ‘sympathy’ was not restricted to one of compassion and pity).¹⁰ Smith saw ‘sympathy’ as a technical term facilitating the situation whereby an impartial spectator imaginatively aligns himself/herself with the “fellow-feeling for any passion whatever”, as this is experienced by an agent without necessarily experiencing the same loss or injury.¹¹ Accordingly, Smith’s account of ‘sympathy’ is similar to Prudential J’s attempt to have the Court put itself in the shoes of the tort claimant and appreciate the (to Prudential J) unjust situation and predicaments behind the accident. While Prudential J lets us know that he attaches importance to the doctrine of separation of powers, he emphasises the judicial obligation to “cajole the legislature into action” so the “judges must become constitutional partners”, where the legislator fails to secure society’s reflection in the law.¹² Prudential J hereby emerges as an advocate for the ‘mirror thesis’ which seeks to fashion a body of law that reflects societal norms and customs.¹³

Finally, Lefft J, who tells us that his judgment in the case is to be his last, fires a broadside at the legal establishment when announcing that the “vast paraphernalia of legal rights and entitlements amounts to nothing more than a sugar coating on a bitter pill”.¹⁴ Lefft J’s judgment thereby echoes the arguments of the CLS movement, which claims that the law often serves the interests of the dominant classes. We can consider Lefft J’s approach part of a wider left-of-centre movement, which, as a result of its discontent with the

⁷ *Ibid* at 90.

⁸ We may question whether the pursuit of corrective and social justice at the same time is at all feasible. The answer would to a large degree depend on the definition of ‘social justice’ and what goods we intend to distribute through such justice. See R. Mullender, ‘The Scampering Discourse of Negligence Law’ *infra* at n. 121 and 150.

⁹ Hutchinson and Morgan above n. 1 at 96.

¹⁰ See A. Brodie, ‘Sympathy and the Impartial Spectator’ in K. Haakonsson (ed), *The Cambridge Companion to Adam Smith* (Cambridge, Cambridge University Press, 2006) 158.

¹¹ For an analysis of Smith’s take on sympathy see I. Ward, *Justice, Humanity, and the New World Order* (Aldershot, Ashgate, 2003) at 30-37.

¹² Hutchinson and Morgan above n. 1 at 98.

¹³ See, for instance, B. Tamanaha, *A General Jurisprudence of Law and Society* (New York, Oxford University Press, 2001) at 1-3.

¹⁴ Hutchinson and Morgan above n. 1 at 105.

status quo, seeks sweeping societal changes.¹⁵ We thus see how each of the five justices on the Canengusian Court of Appeal makes explicit use of particular doctrinal or theoretical theories in reaching their respective judgments. While this is done in the context of tort and negligence law, the application of these theories and assumptions is broadly relevant to environmental law. Moreover, a central theme running through ‘The Canengusian Connection’ is that of diversity insofar as Hutchinson and Morgan draw our attention to the many ways in which one can approach tort law. In highlighting diversity by way of the vivid example of the five judges, Hutchinson and Morgan represent a challenge to those who seek to deny that diversity is fact of legal life.¹⁶ It is to this point we will now turn.

Diversity and Denial

By highlighting the different legal approaches to the particular problem of negligence law, Hutchinson and Morgan alert us to the presence of diversity in law. In doing so, Hutchinson and Morgan tentatively fall in line with the CLS movement, which sought to challenge previously held assumptions emphasising consensus on values and the neutrality of law. Emerging from American universities in the 1970s, the CLS movement challenged and partly attempted to break the ‘particular sense of consensus’ which was prevalent in legal thinking.¹⁷ Drawing inspiration from the political left, this movement, which has been labelled as a group of ‘college Marxists’, sought to highlight the differences between the law as it was taught in law schools and the law as it played out in the real world, where racial and sex discrimination was rife (thus rehearsing the theme of difference between law

¹⁵ It is even possible to link the CLS movement to the American New Left movement which was prominent on American university campuses in the 1960s and which sought to challenge traditional liberal virtues on the ground that they were essentially repressive. See for instance, N. Duxbury, *Patterns of American Jurisprudence* (Oxford, Oxford University Press, 2001) ch. 6.

¹⁶ For a discussion on indeterminacy in law see C. L. Kutz, ‘Just Disagreement: Indeterminacy and Rationality in the Rule of Law’ (1994) *Yale Law Journal* 997, who argues that “the conflict and indeterminacy that is inherent in the law is both ineradicable and deeply valuable to a self-scrutinizing moral and political culture” at 999. See also D. Price, ‘Taking Rights Cynically: A Review of Critical Legal Studies’ (1989) 48 *Cambridge L. J.* 271, who argues that “If a “real theory” is understood to refer to a unitary theory behind the actual doctrines, then there *is* no “real theory” [of contract law]...The conclusion to draw from this fact is not that the legal system is on the brink of destruction from without or within, but instead that legal doctrines are made by imperfect human institutions, are the result of high-minded and low-minded compromises, and must continually be elaborated further and revised in response to new situations. The argument that competing conceptions exist in the law has neither the novelty nor the destructive significance that the CLS adherents claim.” at 288 (original emphasis).

¹⁷ Duxbury above n. 15 at 424.

in the books versus law in action, as emphasised by the American Realist scholars).¹⁸ A central theme of the CLS movement was the notion of ‘trashing’, which assisted CLS scholars in attacking legal discourses “to show their premises to be contradictory or incoherent and their conclusions to be arbitrary or based on dubious assumptions or hidden rhetorical tricks”.¹⁹ Unger thus notes that lawyers dogmatically assume a number of causes and effects when interpreting law while infusing the law with a particular purpose before deciding on what reasonable interpretation best conforms to this purpose.²⁰ We witness vivid examples of this throughout ‘The Canengusian Connection’ where the five judges each instil their interpretation of the case before them with their purposes ranking from Lefft J’s ‘informed consent’ to Mill J’s consequentialist emphasis on efficiency.

While the CLS movement was clearly much more than just a critique of the law and the workings of legal institutions, it would seem fair to say that a central (if not defining) feature of its work centred on critiquing existing legal discourses. One central critique pursued by the CLS movement was the Marxist inspired contemplation that the law often works in the interest of the powerful.²¹ Law is consequently not considered apolitical. The CLS movement was very much alert to the political nature of law as are Hutchinson and Morgan in ‘The Canengusian Connection’. A distinct feature of this alertness to law’s political nature is that the CLS movement brings to the foreground the issue of denial, which was arguably present in the legal discourses that the movement criticised. Unger, for instance, highlights that the appeal to abstract categories of legal rights represents a truncation which is inherently silent with regard to the “divergent schemes

¹⁸ Duxbury above n. 15, who uses the term ‘campus Marxism’ by virtue of it being “strong on exhortation, weak on practicalities” when describing Duncan Kennedy’s 1979 critique of US law schools at 493.

¹⁹ R. W. Gordon, ‘Law and Ideology’ (1986) 3(1) *Tikkun* at 17.

²⁰ R. M. Unger *The Critical Legal Studies Movement* (Cambridge, Harvard University Press, 1983) at 16. See also R. M. Unger, ‘The Critical Legal Studies Movement’ (1983) *Harv. L. Rev.* 561 at 571, where Unger criticises the ‘sanctification of the actual’: “For it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. The many conflicts of interest and vision that lawmaking involves, fought out by countless minds and wills working at cross-purposes, would have to be the vehicle of an immanent moral rationality whose message could be articulated by a single cohesive theory. This daring and implausible sanctification of the actual is in fact undertaken by the dominant legal theories and tacitly presupposed by the unreflective common sense of orthodox lawyers.”

²¹ Unger above n. 20. Unger notes how “established forms of economic and political organizations enable relatively small groups of people to control the basic terms of collective prosperity by making the crucial investment decisions” at 28.

of social life that are manifest in conflicting bodies of rules, policy and principle”.²²

In order to advance this argument, we can borrow an example touching on denial from ‘The Canengusian Connection’, notwithstanding that Hutchinson and Morgan never explicitly refer to the issue. The most striking example of denial in Hutchinson and Morgan’s essay is arguably Doctrin CJ’s strict adherence to legal doctrine. While Doctrin CJ’s argument that judges interpret the law and that the legislature makes the law is simplistically appealing, it is fundamentally at odds with important parts of the common law. Her assertion that the “law is insulated from political controversy” arguably reveals a trait of denialism, which the CLS movement would waste no time in challenging.²³

Wright J’s strictly deontological approach to the law likewise represents a form of denialism, albeit to a lesser extent. His strong emphasis on individual freedom and intrinsic worth, while admirable, overlooks some of the qualifications which society places on deontological theories. For instance, few rights are absolute in the way that Wright J would seem to prefer and his dismissal of ‘contributory negligence’ ignores important statutory developments in English negligence law.²⁴ His criticism of acts of rescue likewise overlooks the fact that a large number of civil law jurisdictions maintain provisions on duty to rescue on their statute books.²⁵

This subtle theme of denial which is arguably present in ‘The Canengusian Connection’ is, however, not unique to the essay nor to judicial decision-making in general. It is a phenomenon that is widespread and that we find in many contexts. In order to explain (at least in part) its presence, we can look to the concept of cognitive dissonance, as this is deployed in social psychology.²⁶ Cognitive dissonance seeks to explain the actions and thoughts people take and have when they are faced with dissonance that is psychologically uncomfortable. In other words, faced with dissonance, i.e. conflicting information, people seek to reduce such dissonance and avoid situations and information which are likely to increase the dissonance.²⁷ Smokers (faced with the dissonance that one of their basic enjoyments

²² *Ibid* at 21.

²³ Hutchinson and Morgan above n. 1 at 71.

²⁴ See J. Steele, *Tort Law* (Oxford, Oxford University Press, 2010) at 277-278.

²⁵ See Art. 2 Chapter I of the Quebec Charter of Human Rights and Freedoms.

²⁶ See L. Festinger, *A Theory of Cognitive Dissonance* (Stanford, Stanford University Press, 1957), for some of the original studies and S. Plous, *The Psychology of Judgment and Decision Making* (New York, McGraw-Hill, 1993), for an overview of cognitive dissonance.

²⁷ Festinger *ibid* at 3.

constitutes a serious health risk), for instance, are notorious for seeking to reduce this dissonance by justifying their smoking, despite the evidence that smoking is bad for them.²⁸ One way in which cognitive dissonance relates to denial is the way in which persons take to ideas and statements that are dramatically different from the ideas they hold themselves.²⁹

Research on cognitive dissonance indicates that people are more likely to not think about and dismiss arguments which cause dissonance.³⁰ This in turn leads to so-called information bias whereby people, when confronted with evidence that gives rise to a dissonance, often criticise, distort or dismiss disconfirming evidence.³¹ These developments are strongly linked to what O’Callaghan, relying on Bakhtin, considers ‘monologue creep’.³² This is directly applicable to the ‘theatre of roles’ playing out in ‘The Canengusian Connection’. Here it is evident that each of the five judges holds deep-rooted assumptions on the nature of negligence law (and, in Prudential J and Lefft J’s judgments, accident compensation law more generally). These entrenched assumptions lead each of the five judges to dismiss the opinions and ideas of the other judges. Most strikingly this is seen in the judgment delivered by Mill J. He dismisses Doctrin CJ’s emphasis on legal doctrine as “confused, schizophrenic, and altogether too restricted” before setting out his own and no doubt, in his eyes, more plausible account of negligence law.³³ This strongly dismissive utterance of disapproval is arguably a form of ‘naive realism’ (a desire for simplicity), whereby people are more inclined to believe that the opinions they hold themselves are the most reasonable ones. In other words, if people “disagree with us, they obviously aren’t seeing clearly.”³⁴ Thus, when scratching the surface of ‘The Canengusian Connection’, it becomes clear that it gives rise to a number of relevant lines of enquiry beyond the relatively narrow boundaries of negligence law. The

²⁸ See E. Aronson et al, *Social Psychology* (Upper Saddle River, Prentice Hall, 2002), discussing the smoking example at 176.

²⁹ See also C. Sunstein, *Going to Extremes: How Like Minds Unite and Divide*, (New York, Oxford University Press, 2009) on cognitive dissonance and conspiracy theories at 110-112.

³⁰ Aronson et al above n. 28 at 177, referring to a study by Jones and Kohler indicating that people in the study group were more likely to dismiss a sensible argument on the other side of the relevant debate than an implausible argument on their own side of the debate as this would minimise dissonance.

³¹ See C. Tavis and E. Aronson, *Mistakes were Made (But Not by Me)*, (London, Pinter Martin, 2008) at 18.

³² See P. O’Callaghan, ‘Monologism and Dialogism in Private Law’ *infra*.

³³ Hutchinson and Morgan above n. 1 at 76.

³⁴ Tavis and Aronson above n. 31 at 42. See also J. Ehrlinger, T. Gilovich and L. Ross, ‘Peering Into the Bias Blind Spot: People’s Assessment of Bias in Themselves and Others’ (2005) 31 *Per. Soc. Psychol. Bull.* 68.

aim of highlighting this undercurrent of dissonance and denial which runs through ‘The Canengusian Connection’ is to underline its applicability to other legal settings, including environmental law where issues of diversity, dissonance and denial equally form part of a ‘theatre of roles’.

The Canengusian Environmental Connection

While Lefft J’s doomsday pitch of humanity standing “on the edge of the abyss” resonates all too well with the tone of many environmental debates of the last four decades (Matt Ridley calls this the ‘fashionable gloom’),³⁵ the five judgments each hold ideas and presumptions that are broadly applicable to environmental issues in general.³⁶ At the outset, we can argue that Prudential J’s argument in favour of not only compensating the injured but “to reduce the incidence of injury” on grounds of safety has similar broad environmental law appeals along the lines of precaution. Lefft J’s arguments for “equaliz[ing] risk throughout society”, securing consent to any risks and access to proper information about risks, likewise intersect with environmental law in the broad sense.

Wright J’s calls for strict liability can also be linked to the prominent polluter pays principle.³⁷ Originally the polluter pays principle emerged as a principle of cost-allocation, arising as a result of pollution; it has since been adopted as a principle of liability.³⁸ More to the point, Wright J’s plea for a strict liability regime has already found its way into environmental legislation and s. 32-33 of the *Pollution Prevention and Control (England and Wales) Regulations 2000* provides for strict liability where the Regulations are contravened.³⁹

What is more, the deontological leanings of Wright J are arguably echoed in the theoretical literature on foundations of environmental law discussing the relationship between man and the environment. Here, it is often argued that man owes a duty to protect the environment on deontological grounds.⁴⁰

³⁵ M. Ridley, *The Rational Optimist* (London, Fourth Estate, 2010) at 283-297.

³⁶ For an analysis of the environmental movement’s doomsdays prophecies see M. Sagoff, *The Economy of the Earth*, (New York, Cambridge University Press, 2008) ch. 6. See also B. Lomborg, *The Skeptical Environmentalist*, (Cambridge, Cambridge University Press, 2001) at 12-18.

³⁷ See in general N. De Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press, Oxford, 2002).

³⁸ *Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on Environmental liability with regard to the prevention and remedying of environmental damage*, Art. 1.

³⁹ S. 32-33 of *The Pollution Prevention and Control (England and Wales) Regulations 2000*. See also *Environment Agency v Empress Car Co.* [1999] 2 A.C. 22.

⁴⁰ For an overview of the theoretical foundations of environmental law, see in general J. Alder and D. Wilkinson, *Environmental Law and Ethics* (Palgrave Macmillan, Houndmills,

One such deontological base is found in the argument that non-sentient beings hold an intrinsic value regardless of the instrumental value which humans may attach to them. Advocates of such a theory include philosophers, such as Arne Naess and Holmes Rolston, among others. Most famous within this group is arguably Norwegian philosopher Arne Naess and his ideas on deep ecology.⁴¹ Within this body of thought, Naess distinguishes between shallow and deep ecology. The former promotes fights against pollution and resource depletion, but has as its objective the health and rising affluence of people in the developing countries. The latter completely rejects any ideas of ‘man in the environment’ and dedicates itself to the environment only.⁴² On various levels, the deep ecologists point towards an intrinsic value in non-human entities as a justification for their emphasis on the environment. A good example of this is Rolston’s argument that “humans arrived so late on the evolutionary scene that to claim they brought all values with them shows a remarkable subjective bias.”⁴³ Critics, however, could forcefully assert that these approaches overlook Hume’s famous ‘is/ought’ distinction, stipulating that normative arguments cannot be derived from factual observations.⁴⁴ In other words, while ecologists are capable of ontologically observing the workings of nature and the environment, we cannot base any normative arguments as to the relationship between man and the environment, or other species and the environment, on these observations.

These ideas differ dramatically from the ideas of some of the earliest thinkers, who pondered the relationship between man and the natural environment. For example, Aristotle thought that animals existed for human purposes only. Thomas Aquinas argued that man’s right to exploit animals was a matter of divine providence.⁴⁵ Once, however, intrinsic value has been ascribed to the environment and animals within it, such value forms a base on which we can grant normative theories establishing that harming the environment is inherently wrong, as non-sentient beings are deemed to have inherent worth on their own. A prominent example of such a deontological

1999) and S. Coyle and K. Morrow, *The Philosophical Foundations of Environmental Law* (Oxford, Hart Publishing, 2004).

⁴¹ A. Naess, *Ecology, Community and Lifestyle*, Translated and edited by David Rothenberg, (Cambridge, Cambridge University Press, 1989).

⁴² A. Naess, ‘The Shallow and the Deep, Long-Range Ecology Movement. A Summary’ (1973) 16(1) *Inquiry* 95.

⁴³ H. Rolston, ‘Value in Nature and the Nature of Value’ in R. Attfield and A. Belsey (eds), *Philosophy and the Natural Environment* (Cambridge, Cambridge University Press, 1994) 25.

⁴⁴ See D. Hume, *A Treatise of Human Nature* (London, Penguin Books, 1969) Book III, Part I.

⁴⁵ See in general J. R. DesJardins, *Environmental Ethics* (Belmont, Wadsworth, 2006) at 96.

approach is found in the work of Regan, who favours the allocation of rights to animals on the basis that they are, in his words, subject to a life.⁴⁶ Regan accordingly considers it wrong to, for instance, carry out laboratory testing on animals not because they suffer any harm but because doing so violates their right to equal respect, which an animal is entitled to when it is subject to a life.⁴⁷

Broadly similar ways of ascribing intrinsic value to inanimate objects are based on the aesthetic value the environment has, without being intentionally designed to hold such value, as is the case with, for instance, a building possessing incidental aesthetic value.⁴⁸ For example, Edinburgh Castle will, to most people, have some aesthetic value. This is in spite of it being intentionally designed by human beings, albeit for other non-aesthetic purposes (as a defensive stronghold). It may likewise be claimed that the extinct volcano upon which the Castle is resting has aesthetic value without having been intentionally designed.⁴⁹ Insofar as the objective is deemed to hold a value on its own, we can use this as a platform on which to ground intrinsic value.⁵⁰

⁴⁶ T. Regan, *The Case for Animal Rights* (London, Routledge, 1983). To Regan a creature is subject to a life when it possesses beliefs, desires, perception, memory, sense of future, emotional life and feelings, pleasures and pains, preferences and interests, ability to initiate action in pursuit of desire.

⁴⁷ This contrasts with Kant's deontological theory. Kant argued that no direct duties could be owed to animals as these lack reason and are not rational beings able to judge or obey the moral law. This is not to say that animals cannot benefit from human duties and obligations. Kant thought, on the contrary, that animals would benefit from indirect duties owed to humans. See E. Kant, *The Metaphysics of Morals* edited by M. Gregor (Cambridge, Cambridge University Press, 2007) at 192-193 and E. Kant, *Lectures on Ethics* translated by L. Infield (London, Methuen, 1930) at 239-241.

⁴⁸ R. Elliot, 'Ecology and the Ethics of Environmental Restoration' in R. Attfield and A. Belsey (eds), *Philosophy and the Natural Environment* (Cambridge, Cambridge University Press, 1994) 36.

⁴⁹ See also R. Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, (New York, Vintage Books, 1994) at 74-76.

⁵⁰ This kind of intrinsic value is what might be called the objectivist approach to valuation, where a subject is afforded value without a human valuer (see also Mullender, above n. 8). Examples of this could be the fact that history exists without historians, biology exists without biologists or the argument that the colour green remains green even where there are no humans to see it. This notion of value is contrasted by the subjective theory of valuation, where no values exist without a valuer. Examples of this could be the lack of thoughts without a thinker, lack of deals without a dealer or no religion without a believer. See Rolston above n. 43 at 29. Again, however, this is open to the Humean criticism on grounds of it conflating facts with values. See above n. 44 and accompanying text.

The legal implications for such theories become immediately clear when we consider Christopher Stone's epic essay *Should Trees Have Standing*.⁵¹ In his essay, Stone argues, based on the intrinsic worth of the environment, in favour of giving natural objects human proxies, in the shape of a guardian, to serve the object's interests.⁵² Stone argued that, for instance, NGOs can take upon them the role of guardians and make sure that when damage occurs to the natural object, it should be fully compensated for its 'own injuries' and not just property or monetary loss suffered by a human being.⁵³ More recently, the 2008 constitution of Ecuador affords nature a right "to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution".⁵⁴ This provision is a particularly strong deontological example in that it is not qualified – at least from a strict reading of the provision.

The deontological approach to environmental problems is likewise found in the increasing attention which is afforded environmental issues in human rights contexts. Here the deontological emphasis on principles and respect for particular virtues regardless of consequences is applied not to non-sentient beings but to human beings. The human rights approach to environmental problems essentially rests on the assumption that every human being has an equal right to environmental protection and the benefits that this gives rise to.⁵⁵ Hence, adequate environmental conditions are considered paramount to the extent that they deserve protection alongside the right life and privacy.⁵⁶ One important limitation here though is the fact that these rights are often limited. This throws into sharp relief the fact that

⁵¹ C. Stone, 'Should Trees Have Standing? – Toward Legal Rights for Natural Objects' (1972) 45 *S. Cal. L. Rev.* 450.

⁵² *Ibid.* To some, this 'instrumentalising' of the guardian/agent to serve the interest of the object/non-agent would, however, seem counterintuitive.

⁵³ *Ibid.* at 473. To critics, however, the idea that non-sentient beings can incur 'injuries' comes across as a category mistake. See for a critique of Stone P. S. Elder, 'Legal Rights – The Wrong Answer to the Right(s) Question' (1991) 22 *Osgoode Hall L. J.* 284.

⁵⁴ See website of Community Environmental Defense Fund which helped to draft the chapter on Rights of Nature on <http://celdf.org/article.php?id=185>.

⁵⁵ This reading excludes much of the case law emanating from the European Court of Human Rights on the environment. Although this case law recognises the increasing importance of environmental protection, many of the Court's decisions essentially relate to the enforcement of domestic environmental provisions where domestic authorities have ignored their responsibilities. See for this 'rule of law' approach: O. W. Pedersen, 'The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law' (2010)16(4) *European Public Law* (forthcoming).

⁵⁶ See D. Shelton, 'The Environmental Jurisprudence of International Human Rights Tribunals' in Romina Picolotti and Jorge Daniel Tillant (eds), *Linking Rights and the Environment* (Tucson, University of Arizona Press, 2003) 1 (for an argument on the normative compatibility between human rights and environmental protection).

qualified deontology informs the law in this area. The environmental jurisprudence of the European Court of Human Rights contains numerous examples of situations where violations by the State are justified by reference to executive discretion or economic importance.⁵⁷ In addition, a number of domestic constitutions contain rights to safe and healthy environmental conditions along the lines of, for instance, the 1988 *Constitution of Brazil*, which states that “[e]veryone has the right to an ecologically balanced environment”.⁵⁸ Although such approaches are arguably more aspirational than effective, constitutionally entrenched environmental provisions can have positive effects where such provisions serve as an informative foundation for general legislation or serve as an instrument which the local population identifies with.⁵⁹

In addition to the implicit environmental application of Leff J’s arguments on risk and informed consent noted above, the almost Unger-like call for a dramatic change in societal priorities made by Leff J can be likened to the many similar assertions which have called for an entire re-thinking of man’s relationship with the natural environment, often made within environmental ethics. One such prominent call was made by Aldo Leopold who, in his *Land Ethic*, favoured an eco-centric and holistic approach, considering the natural environment and its entire groups of species, of which man is just one, as one community of interdependent parts not dissimilar to the Gaia hypothesis developed by James Lovelock in the 1960s.⁶⁰ In this setup, man holds no special or higher position and the protection of particular species is not an aspiration. Instead the emphasis is on the protection of all species and biodiversity. This is because Leopold argues that “a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community” and on the other hand “it is wrong when it tends to otherwise”.⁶¹ Leopold’s idea of rethinking man’s role in the wider

⁵⁷ See Pedersen above n. 55 and *Hatton and others v. United Kingdom*, (2003) 37 EHRR 28 (relating to the extension of Heathrow Airport) and *Fagerskjöld v. Sweden*, decision of 26 February 2008 (Appl. no. 37664/04) (concerning the noise from windmills).

⁵⁸ Constitution of Brazil Article 225 reprinted in H. Flanz, *Constitutions of the Countries of the World*, (Dobbs Ferry, Oceana Publications) Release 2000-2, March 2000 Articles 129 and 225. See J. R. May and E. Daly, ‘Vindicating Fundamental Environmental Rights: Judicial Acceptance of Constitutionally Entrenched Environmental Rights’ (2009) 11 *Oregon Review of International Law* 365, for a recent analysis of constitutional approaches to environmental protection.

⁵⁹ See C. Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *U. Pa. L. Rev.* 2021, on the use of legal statements to change behaviour.

⁶⁰ Aldo Leopold, *A Sand County Almanac and Sketches Here and There*, (New York, Oxford University Press, 1949).

⁶¹ *Ibid.* Again, this can be criticized on the ground that Leopold conflates facts with norms cf. above note 44.

ecosystem(s) of the earth is similar to the despairing call from Lefft J whose ideas are radically transformative.⁶² While the outcomes sought by Lefft J and Leopold are significantly different from one another (informed consent and eco-centrism respectively), the point to be made here is that they share a common theme of unprecedented societal change. Again, this can be linked to the above discussion on diversity and cognitive disorder. Where we are faced with great difficulties, complexities and frustration as a result of this (as are Lefft J and Leopold), it is easy to be enticed by the comfortable prospects of radical (some would say utopian) transformation. In other words, when faced with a series of serious challenges it is easy to lose sight of the concrete problems at hand and automatically opt for the most drastic option in the hope that this would efficiently solve the difficulty.⁶³

We may find further similarities to Lefft J's call for change within the context of global climate change. Here it is often asserted that what is needed in order for humanity to address the apocalyptic nature of the problem is wide-scale and unprecedented societal changes. The eminent scientist James Lovelock even speculates whether humanity is too stupid to handle the problem of climate change and if current democratic structures are in the way of effective solutions.⁶⁴ This questioning of existing structures is a telling example of the denial which is often equally present in environmental debates. Ever since Rachel Carson portrayed pesticides as the elixirs of death in *Silent Spring*, stories of environmental apocalypses have been abundant.⁶⁵ In the 1970s, Ehrlich predicted that human over-population would lead to environmental crisis which "will persist until the final collapse" and The Club of Rome likewise predicted that the world would run out of many of the natural resources which we continue to enjoy by the 1990s.⁶⁶ This is not to say that any of these accounts are wrong in their entirety but to highlight that what Lovelock, Carson, Ehrlich and The Club of Rome have in common is the questioning of existing social structures on grounds of sustainability. This echoes Lefft J's assertion that

⁶² A related question is whether humans are at all capable of being radically transformative and if so to what extent. Critics may question whether the strong role played by social traditions limits our imaginative capacities.

⁶³ This may in turn foster so-called 'monologue creep'. See O'Callaghan, above n. 32.

⁶⁴ L. Hickerman, James Lovelock: Human Are too Stupid to Prevent Climate Change' *The Guardian*, 29 March, 2010.

⁶⁵ R. Carson, *Silent Spring* (Boston, Houghton Mifflin, 2002).

⁶⁶ P. Ehrlich, *The Population Bomb* (New York, Ballantine Books, 1971) at 47 and D. Meadows et al, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York Universe Book, 1974). See for updated scenarios P. Ehrlich and A. Erhlich, *One with Nineveh* (Washington, Island Press, 2004) and D. Meadows et al, *The Limits to Growth: The 30-Year Update* (London, Earthscan, 2005).

humanity is facing descent into the abyss. Once again, this represents an example of the aversion to cognitive disorder. Arguably humans are prone to turning to the siren song of radical change as a result of vulnerability towards tempting appeals exerting influence on our emotions (Carson is a good example of this).

We find an altogether different analysis in the judgment rendered by Mill J, although it may be informed by a similar motive of aversion to complexity. The consequentialist tone of Mill J's judgment is equally detectable in environmental debates. Just as protection of non-human species is afforded along deontological lines, consequentialist theories have been used in support for protection of inanimate objects. Bentham, for example, questioned man's treatment of animals on the premise that, although animals could not reason or talk, they could suffer.⁶⁷ This line of thought has been continued most prominently by Peter Singer, who, in his *Animal Liberation*, argues that the ability to suffer should be taken as a premise that supports consideration for the interests of animals.⁶⁸ Under this approach, Singer argues that not affording animals protection amounts to speciesism akin to the arbitrary discrimination to which slaves were subjected prior to slave trading being outlawed.⁶⁹

The consequentialist approach found in environmental law becomes apparent when we consider the strong role that cost-benefit analysis plays in decisions as to whether to adopt particular environmental regulations. When environmental officials consider whether to ban in whole or in part particular substances or actions presumed harmful to the environment, it helps to know the benefits and costs associated with these decisions.⁷⁰ Very simply, this entails a weighing of the total costs and benefits obtained by affording a value (usually ascertained through questions of willingness to pay or willingness to accept) on the benefits and costs allowing regulators to establish which option yields the most cost-effective outcome.⁷¹ In the UK, we see this in *The Environment Act (1995)*, facilitating the creation of The

⁶⁷ H. Burns and H. L. A. Hart (eds), *An Introduction to the Principles of Morals and Legislation* (London, Athlone, 1970) at 283.

⁶⁸ P. Singer, *Animal Liberation* (London, Pimlico, 1995).

⁶⁹ See also S. W. Wise, 'Animal Rights, One Step at a Time' in C. Sunstein and M. Nussbaum, *Animal Rights: Current Debates and New Directions* (New York, Oxford University Press, 2004) 19.

⁷⁰ See F. Ackerman and L. Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York, The New Press, 2004) (for a critical analysis of the role of cost-benefit analysis).

⁷¹ See in general C. Sunstein, *The Cost-Benefit State: The Future of Regulatory Protection* (Chicago, American Bar Association, 2002).

Environment Agency and The Scottish Environment Protection Agency, which (in s. 39) makes it a statutory duty for the agencies to take into account the costs and benefits associated with them exercising their powers.⁷² Support for such aggregation and consequentialism is likewise found in some of the decisions rendered by the European Court of Justice (ECJ) on nature conservation. In *Commission v. Federal Republic of Germany*, relating to the construction of dykes in a protected area, the ECJ partly relied on the fact that Germany was taking steps to offset the detrimental effect that the dykes would have by opening up other areas to flooding.⁷³

A striking example of cost-benefit analysis applied to environmental discussion is seen in the work by Bjorn Lomborg. In his *The Skeptical Environmentalist*, Lomborg examines the aftermath of the Exxon Valdez spill while questioning whether the costly clean up was cost-effective.⁷⁴ Lomborg notes that the number of birds dying as a result of the spill was less than the number of birds killed by domestic cats every two days in the UK or the number of birds killed every day as a result of them colliding with plate glass in the US.⁷⁵ Lomborg moreover cites a report from the *Scientific American* stating that “the public wants the animals saved – at \$80,000 per otter and \$10,000 per eagle”.⁷⁶ Cost-benefit analysis has likewise been used as a blueprint for how to get most value for money when policy-makers and governments are faced with a limited amount of money but a growing list of international problems, including climate change, access to education, malnutrition and armed conflicts.⁷⁷ The Copenhagen Consensus, a group of distinguished economists headed by Lomborg, has argued that the money currently invested in combating climate change could be spent more wisely on other problems such as, for instance, malnutrition.

Needless to say, this aggregation of benefits and costs is not popular among environmentalists who consider the reduction of the environment to mere numbers to be a violation of the inherent value which the environment possesses. In other words, the environment and monetary value are incommensurable insofar as by comparing and ranking one against the other

⁷² *Environment Act 1995* s. 39.

⁷³ *Commission of the European Communities v Federal Republic of Germany* Case C-57/89.

⁷⁴ Lomborg above n. 36 at 193-194.

⁷⁵ *Ibid.*

⁷⁶ *Ibid* at 194.

⁷⁷ B. Lomborg (ed), *Global Crises, Global Solutions* (Cambridge, Cambridge University Press, 2004). See also website of the Copenhagen Consensus project <http://www.copenhagenconsensus.com/CCC%20Home%20Page.aspx> and O. W. Pedersen, ‘Benefits and Costs of the Environment: Copenhagen Consensus 2008’ (2008) 20(3) *Journal of Environmental Law* 465.

we do violence to the “considered judgment about how these goods are best characterized”.⁷⁸ The dislike which many environmentalists have of such aggregation is echoed in Wright J’s critique of Mill J’s consequentialist focus on cost-benefit. Wright J wastes little time in making it clear that he finds “cost-benefit analysis [...] deplorable”.⁷⁹ Despite this and in light of the role which cost-benefit analysis plays in regulatory settings, environmentalists have increasingly joined the cost-benefit bandwagon and started to phrase their arguments for environmental protection in economic terms and begun to emphasise so-called ecosystem services.⁸⁰ As a consequence, cost-benefit analysis becomes almost hegemonic. Against this, however, are those who consider such services to be more than just a value to which we can attach an economic price. Sagoff considers ecosystem services to be of the same kind as concepts of liberty – worthy of protection but not something that can be priced.⁸¹ Sagoff favours a religiously inspired deontological emphasis on moral and ethical obligations.

The theme pursued in Prudential J’s judgement of social justice and compassion is likewise one we recognise in debates pertaining to that of environmental regulation. This is most clearly seen in the concept of environmental justice, which seeks to address the perceived injustices that certain population groups face when it comes to enjoying clean and healthy environments. One of the central tenets of the environmental justice argument is the observation that low-income groups often suffer from greater exposure to a number of environmental harms including high levels of air pollution, closer proximity to industrial pollution sources and fewer local amenities in general – a point which Lefft J is explicitly alive to.⁸² Environmental justice questions the distribution of and effects of environmental harms, along the same social justice lines as Prudential J questions the current Canengusian regime of negligence law.

⁷⁸ C. Sunstein, ‘Incommensurability and Valuation in Law’ (1994) 92 *Mich. L. Rev.* 779 at 796.

⁷⁹ Hutchinson and Morgan above n. 1 at 88.

⁸⁰ See G. C. Daily (ed), *Nature’s Services* (Washington, Inland Press, 1997) (for an introduction to the concept of ecosystem services).

⁸¹ Sagoff above n. 36 at 89.

⁸² Hutchinson and Morgan above n. 1 at 108-109. For some of the empirical environmental justice data see G. Walker, G. Mitchell, J. Fairburn and G. Smith, ‘Industrial Pollution and Social Deprivation: Evidence and Complexity in Evaluating and Responding to Environmental Inequality’ (2005) 10(4) *Local Environment* 361-377, and J. Fairburn, G. Walker, G. Smith, ‘Investigating Environmental Justice in Scotland: Links between Measures of Environmental Quality and Social Deprivation’ *Scottish Executive* (2005).

The environmental justice argument differs dramatically from the approach which emphasises a strict adherence to the text of the law regardless of whether this may have unwarranted distributive consequences. We find evidence of such an approach in the US decision of *Bean v. Southwestern Waste Management Corp.*, where plaintiffs alleged that the siting of a solid waste site near a high school predominantly servicing African-American students was racially motivated.⁸³ Although a previous application for the waste site had been turned down years earlier when the area was predominantly White, the court found no discrimination noting that “this court has a different role to play, and that is to determine whether the plaintiffs have established a substantial likelihood of proving that TDH’s [Texas Department of Health’s] decision to issue the permit was motivated by purposeful discrimination in violation of 42 U.S.C. s 1983 as construed by superior courts”.⁸⁴

The decision reached in *Bean* would clearly upset Prudential J, who would likely consider the strict adherence to precedence as going against the need for “concern and compassion for our fellow human beings”.⁸⁵ Moreover, Lefft J and critical legal scholars would find in decisions like *Bean* evidence to support the claim that the law merely secures the interests of the powerful.

One way to further our analysis of the Canengusian environmental connection and the associated themes of diversity and denial would be to consider how each of the above discussed theories may play out in the situation where an environmental decision has to be made.⁸⁶ If we imagine, for example, that an application for a housing development in an area of outstanding natural beauty has found its way to the court, we can (albeit somewhat simplistically) apply the five different theories to how we might solve this application. Firstly, we can consider that the deontological approach may start by questioning whether the development will threaten any of the many endangered species found in the area. If so, the deontologist may, by reference to the intrinsic value of such species, be hesitant to grant permission. Alternatively, the deontologist may favour an approach which emphasises aesthetic significance as a base for intrinsic value and find against the development.⁸⁷ On the other hand, a judge of a

⁸³ 482 F.Supp. 673 (S.D. Texas 1979).

⁸⁴ *Ibid* at 681.

⁸⁵ Hutchinson and Morgan above n. 1 at 96. Prudential J likewise argues that “it is unclear why rules laid down in the days of the horse and carriage should continue to govern us today” at 96.

⁸⁶ This example is partly borrowed from Alder and Wilkinson above n. 40 at 37.

⁸⁷ Support for this aesthetic approach can arguably be found in Lord Denning’s dissent in *Miller v. Jackson* [1977] Q.B. 966, relating to the nuisance arising from a cricket ground,

consequentialist leaning would not rule out the development outright by reference to the harm suffered by an unspecified number of animals or plants. The consequentialist would instead seek to ascertain whether the suffering endured by the endangered species would be offset by the benefit gained from the development. Thus he/she would likely employ the above discussed cost-benefit analysis in the attempt to derive the overall benefits and costs associated with the development and its impacts.

The social justice-orientated judge, such as Prudential J and Lefft J, would likely discuss the social costs which the development will bring with it and seek to establish whether the development has a disproportionate effect on low-income groups. As a result, he/she would perhaps question whether the development will go towards securing affordable housing (advancing the cause of social justice), will it restrict access to the countryside for low-income urban families or whether the development would merely be another exclusive greenbelt development for the well-off. An adjudicator with a doctrinal inclination would, in the words of Doctrin CJ, be likely to interpret and apply the law before him/her with little regard to consequences in a manner alike to Pound's 'mechanical jurisprudence'.⁸⁸ This is likely to entail an examination of the statutory planning provisions and an assessment of the material considerations these give rise to. This may be followed by an argument laying down that in matters like these significant discretion is afforded local planning authorities as these are by far the best placed to make a decision like this. As long as these authorities have not fettered any discretion, taken into account irrelevant considerations or neglected material considerations, the separation of powers considerations urge the judge to refrain from imposing his/her inclinations as to the desirability of the development.⁸⁹ This contrasts with the stance which the followers of Lefft J's views may take. They may lament the status quo approach favoured by the doctrinally inclined judged when in fact humanity is under threat from

where Lord Denning argues "After all they have their rights in their cricket ground. They have spent money, labour and love in the making of it: and they have the right to play upon it as they have done for 70 years. Is this all to be rendered useless to them by the thoughtless and selfish act of an estate developer in building right up to the edge of it? Can the developer or a purchaser of the house say to the cricket club: "Stop playing. Clear out." I do not think so." at 978. Arguably there is a consequentialist element to Lord Denning's dissent as well as he ponders the consequences of the cricket club ceasing to exist: "The cricket ground will be turned to some other use. I expect for more houses or a factory. The young men will turn to other things instead of cricket. The whole village will be much the poorer. And all this because of a newcomer who has just bought a house there next to the cricket ground." at 976. See for a very useful analysis D. Klinck, 'The Other Eden: Lord Denning's Pastoral Vision' (1994) 14(1) *OJLS* 25 at 44-45.

⁸⁸ R. Pound, 'Mechanical Jurisprudence' (1908) 8 *Colum. L. Rev.* 605.

⁸⁹ *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 K.B. 223.

the evil of climate change which requires us to make drastic changes in our lifestyles. Instead, what is needed is not more development in out-of-town greenbelt areas but an entirely new approach to the way we live our lives, build and sustain our communities, grow our food and consume it on this planet. We can imagine Lefft J and his supporters arguing that facilitating these changes is the real purpose of the planning system.

Another brief example that can illustrate how the different theoretical foundations can serve as justifications for a particular outcomes is the decision reached by the New York Court of Appeal in *Boomer v. Atlantic Cement Co.*⁹⁰ In *Boomer*, the Court allowed an injunction against a cement factory which would be vacated upon payment of permanent damages to the plaintiffs as a result of the nuisance caused to the plaintiffs. In allowing the injunction to be vacated by payment (\$185,000 to all plaintiffs), the Court relied on the “the large disparity in economic consequences of the nuisance and of the injunction.”⁹¹ Hence, the Court weighed the costs of closing the plant against the damages incurred by the plaintiffs. From this short description of the facts, it is evident that Mill J would wholeheartedly endorse the Court’s decision, whereas Wright J would in all likelihood be outraged that such efficiency calculations may set aside the moral entitlement that the plaintiffs enjoy to an environment that is not polluted. Prudential J would perhaps seek to cajole the cement company into changing and updating its practices and techniques in order to avoid further damage.

These examples highlight how the ‘theatre of roles’ on display in ‘The Canengusian Connection’ is easily applicable to environmental issues. Needless to say, this is done in an overstated way here in order to underline the overall argument of Hutchinson and Morgan’s methods being applicable outside negligence law. Likewise, the problem of denialism has obvious relevance in environmental debates where answers to environmental problems are often seen as black and white. Thus, diversity, dissonance and denial are a fact of life in environmental issues as much as when it comes to negligence law and tort law more generally.⁹² While this is hardly surprising, we still need to contemplate how to cope with such pluralism and uncertainty. It is to this question we will now turn.

⁹⁰ 26 N.Y.2d 219, 257 N.E.2d 870 (N.Y. 1970).

⁹¹ *Ibid* at 223.

⁹² See also G. Turton, ‘Connecting Canengus to the University Curriculum’ *infra*, noting how the quest for certainty and the ‘answer’ has made it into the teaching at law schools.

Coping with Dissonance and Denial

While we should be grateful to Hutchinson and Morgan for pointing us in the direction of the themes of denial and cognitive dissonance, we ought to be critical of their silence on the issue of how we best deal with these problems. Hutchinson and Morgan offer little in the way of assistance when it comes to striking a path through, firstly, diversity of theory and, secondly, denial.⁹³ Hence, we need assistance when responding to (a) the fact that there are a number of discordant views within a particular field of law (e.g. tort or environmental law) and (b) what are we to do about the associated problem of denial which manifests itself as a result of this?

In addressing this question, our reliance on the ideas of the CLS movement will cease. In fact, we may question whether one of the movement's foremost proponents himself is inclined towards denialism when faced with challenges bordering despair as he emphatically calls for divine intervention.⁹⁴ Instead we will briefly turn to the works of Karl R. Popper, John Dewey and Richard Rorty.

From the outset, it is worth emphasising that the plurality and diversity in opinion and theory which is highlighted by Hutchinson and Morgan should not be suppressed nor be avoided. In fact, such diversity is often useful in that it assists us in advancing our understanding of legal concepts, practices and institutions.⁹⁵ But how may we best achieve these gains? Here we could start by looking to Karl Popper's concept of critical rationalism. The central tenet of Popper's understanding of critical rationalism is that proposed solutions to a particular problem should be subject to vigorous attempts at overthrowing the proposed solution.⁹⁶ In other words, theories and propositions should be open to criticism and falsifiability. This should be done through critical discussion in order to ascertain the plausibility and robustness of a proposed solution.

The main application of this idea to this essay is the fact that Popper's theory provides a way in which to counter the problem of denial. A feature

⁹³ Here we can once more link Hutchinson and Morgan to the CLS movement which was likewise criticised for doing a lot of trashing without necessarily offering any viable solutions. See Price above n. 16 at 292-298.

⁹⁴ R. M. Unger, *Knowledge and Politics* (Free Press, New York, 1975) at 295.

⁹⁵ See C. Sunstein, 'Legal Reasoning and Political Conflict' (New York, Oxford University Press, 2000) at 58 (arguing that, in "law, as in politics, disagreement can be a productive and creative force, revealing error, showing gaps, moving discussion and result in good directions") and Kutz above n. 16..

⁹⁶ K. R. Popper, *The Logic of Scientific Discovery* (Hutchinson, London, 1959) at 16.

of Popper's critical rationalism is that it is "bound up with the idea that the other fellow has a right to be heard, and to defend his arguments."⁹⁷ While Popper's arguments clearly have democratic and institutional tones, they are equally applicable on the micro level of individual deliberation.⁹⁸ Popper's account of rationalism, however, should be distinguished from the one described by Michael Oakeshott in his *Rationalism in Politics*.⁹⁹ Here Oakeshott describes the political rationalist (who, to Oakeshott, is a prominent and disturbing figure in European politics) as seeing 'reason' as the only authority worth adhering to. While this seems appealing, Oakeshott's portrait of rationalism has an individualistic streak which significantly hinders its application if we are seeking to reach a common ground between a series of different propositions. Oakeshott explains that the rationalist is prone to over-confidence insofar as he or she assumes that the requirements of reason are clear to him or her; the rationalist finds it "difficult to believe that anyone who can think honestly and clearly will think differently from himself".¹⁰⁰ Here, we can forge a link to O'Callaghan's essay in this collection.¹⁰¹ For Oakeshott's rationalist may slide into 'monologue creep'. As we have seen, this 'naive realism' is not an uncommon feature in everyday life as people are often more likely to think more highly of their own beliefs and more likely to disregard the opinions of others as biased or wrongheaded.¹⁰² In this light, a sense of humility and appreciation of falsifiability would not go amiss.

We can link this to John Dewey's work on the wider context of ethics and morals. Dewey argues that we must come to anticipate diversity in ethics and that the best way to deal with this is through tolerant inquiry and

⁹⁷ K. R. Popper, *A Pocket Popper*, edited by D. Miller (Fontana Press, London, 1987) at 43. See also J. Alder, 'Dissents in Courts of Last Resort: Tragic Choices' (2000) 20(2) *OJLS* 221 (arguing that one purpose of law is to manage disagreement) as well as M. C. Siu, 'Conflict in Canengus: The Battle of Consequentialism and Deontology' *infra* (describing a similar process playing out behind Rawls' veil of ignorance while applying his to Prudential J's judgement).

⁹⁸ Institutional is here used as a reference to describe the attempt, by a multiplicity of people, to capture some feature of the world or the requirements of a practice.

⁹⁹ M. Oakeshott, 'Rationalism in Politics' in M. Oakeshott, *Rationalism in Politics and other Essays* (Liberty Press, Indianapolis, 1991) 5. We may further distinguish the rationalism pursued here from the one described by Rawls (who argues that rational agents lack the particular form of "moral sensibility that underlies the desire to engage in fair cooperation as such, and to do so on terms that other as equals might reasonably be expected to endorse"). J. Rawls *Political Liberalism* (Columbia University Press, New York, 1993) at 51 and 50-58 in general.

¹⁰⁰ *Ibid* at 6.

¹⁰¹ O'Callaghan above n. 32.

¹⁰² Above n. 30 and accompanying text.

reflection.¹⁰³ Thus, preconceived ideas and theories become an instrument for more effective and open deliberation.¹⁰⁴ In line with Popper's falsifiability arguments, it becomes clear that in order to facilitate such deliberation the wisdom of the multitude plays a central role; "one needs many eyes, not just two", in the words of Jeremy Waldron.¹⁰⁵ And these eyes of others can serve as external constraints restraining 'monologue creep', partly facilitate falsifiability and save us from foolishness, hobby-horsicality, and the slippery slope of solipsism.¹⁰⁶

This is important in the context of denialism as one significant consequence of denial is the danger it entails of group polarisation.¹⁰⁷ Group polarisation is the phenomenon used to explain the effect that in-group deliberation has on a group's belief towards a particular subject. Often, a group tends to move towards a more extreme position, while reducing diversity, as a result of in-group deliberation. One way to counter this would be through external constraints such as tolerant criticism and open deliberation which can assist us in ascertaining the plausibility and robustness of a particular approach.¹⁰⁸ Popper's idea of falsifiability is here applied more widely as this will help us to avoid dogmatic adherence to particular doctrines asserting claims of 'truth' and overly individualistic approaches to 'reason' before these turn hubristic and (worse still) hegemonic.

On this point, we ought to take Richard Rorty's advice in relation to truth to heart.¹⁰⁹ Rorty advises that caution should be exercised in attaching too much importance to it. To Rorty, "there is less to be said of truth than one might think".¹¹⁰ We can link Rorty's aversion towards truth claims to his work on 'final vocabularies' which he describes as "a set of words which

¹⁰³ J. Campbell, *Understanding John Dewey* (Open Court, Chicago, 1995) at 118-120.

¹⁰⁴ *Ibid* at 119.

¹⁰⁵ J. Waldron, 'The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics' (1995) 23(4) *Political Theory* 563-584 at 568.

¹⁰⁶ At this juncture we ought to note that, as far as constraints on such inquiries go, these ought to be conversational restraints only. See I. Ward, 'Bricolage and low Cunning: Rorty on Pragmatism, Politics and Poetic Justice' (2010) 28(2) *Legal Studies* 281.

¹⁰⁷ See S. Moscovici and M. Zavalloni, 'The Group as a Polarizer of Attitudes' (1969) 12(2) *Journal of Personality and Social Psychology* 125 and in general Sunstein above n. 29. See also O. W. Pedersen, 'Climategate', Group Polarisation and Hockey Tricks' (2010) 18(1) *Environmental Liability* 11, for an analysis of group polarisation and climate change.

¹⁰⁸ See also Ward, above n. 106, on tolerance noting that 'the only thing which a good society should not be prepared to tolerate is intolerance' at 302.

¹⁰⁹ R. Rorty, *Truth and Progress, Philosophical Papers Vol. 3*, (Cambridge, Cambridge University Press, 1998) at 1-42.

¹¹⁰ *Ibid* at 22.

[humans] employ to justify their actions, their beliefs, and their lives.”¹¹¹ Anyone who offers a final vocabulary, in Rorty’s eyes, automatically assumes that they know the ‘truth’. Assertive claims to ‘truth’ (whether asserted in Canengus or in or other legal debates) ought to set the alarm bells tolling.

Not surprisingly, to Rorty, vocabularies are contingent and reflect the particular problems and solutions which we are currently engaged in.¹¹² In the spirit of pragmatism, Rorty is critical of metaphysical claims and does not see truth *per se* to be the goal of inquiry. Instead he favours an emphasis on justifiability (which, however, is inevitably contingent on the particular audience at hand).¹¹³ The validity of a particular assumption is not derived from its relationship to truth but by virtue of whether it has been adequately justified: “If I have concrete, specific doubts about whether one of my beliefs is true, I can resolve those doubts only by asking whether it is adequately justified – by finding and assessing additional reasons *pro* and *cons*”.¹¹⁴ While Rorty’s argument of justification being contingent may strike some as relativism by the backdoor, Rorty reminds us that justification does not, unlike truth, have metaphysical implications. This takes us right back to our earlier point about diversity being a fact of life which denialism will do little to counter. In a sense, the job of the pragmatist is partly to highlight this. As Rorty observes: “The pragmatist regrets the prevalence of this representationalist picture and of the “realist” institutions that go with it, but

¹¹¹ Rorty defines ‘final vocabularies’ further by noting that these “are words in which we formulate praise of our friends and contempt of our enemies, our long-term projects, our deepest self-doubts and our highest hopes. They are the words in which we tell, sometimes prospectively and sometimes retrospectively, the story of our lives. [...] A small part of our final vocabulary is made up of thin, flexible, and ubiquitous terms such as “true,” “good,” “right,” “and beautiful.” See R. Rorty, *Contingency, Irony and Solidarity* (Cambridge, Cambridge University Press, 1989) at 73.

¹¹² Rorty associates the usage of ‘final vocabularies’ with the Western tradition of philosophy (which espouses a heavy emphasis on metaphysical questions) which he traces back to Plato. This Rorty contrasts with the “ironist” approach to philosophy which Rorty finds in Nietzsche among others. Rorty *ibid* at 76-83.

¹¹³ Rorty notes that: “justification is relative to an audience and [...] we can [...] never exclude the possibility that some better audience might exist, or come to exist, to whom a belief that is justifiable to us would not be justifiable [...] For any audience, one can imagine a better-informed audience and also a more imaginative one – an audience that has thought up hitherto-undreamt-of alternatives to the proposed belief.” above n. 107 at 22. It is worth noting, however, that the contingency of a particular audience may come down to no more than a ‘local enthusiasm’. See R. Mullender, ‘Law, Morality and the Egalitarian Philosophy of Government’ (2009) 29(2) *OJLS* 389.

¹¹⁴ Rorty above n. 109 at 19.

she cannot get rid of these unfortunate cultural facts by more refined analyses of contemporary common sense.’¹¹⁵

Thus, the theme pursued here highlighting that diversity may lead to denial (which in turn can lead to group polarisation) is to be countered, first, by the observation that diversity is here to stay and not necessarily a bad thing, and, second, that the best way to avoid entrenchment is through open, tolerant and rational inquiry. Moreover, inquiry on the open, tolerant model described here affords a means by which to pursue falsifiability.¹¹⁶

Conclusion

While the tone of the five judges of the Canengusian Appeal Court is appropriately exaggerated in order to emphasise each position, it is clear that Hutchinson and Morgan’s paper has a wider application beyond the boundaries of negligence and tort law. In this paper it has been underlined how some of the moral impulses which influence negligence and tort law equally influence environmental law and policy. This is not surprising given that the theoretical influences which are found in ‘The Canengusian Connection’ and in environmental law and policy, to a great degree are found in a long line of other social contexts. Debates as to whether we should favour a consequentialist or deontological approach are likewise found in debates relating to national security and foreign affairs.

This diversity, however, gives rise to associated dissonance as people are faced with a multiple of impressions. In turn, this may lead to a form of denial whereby the evidence causing the dissonance is deliberately ignored and discounted. One way to counter such developments would be to bear in mind that, first, diversity is inevitable and, second, that we can strike a way towards consensus by striving towards tolerant, critical and constructive deliberation without striding into solipsistic relativism. While such deliberation may be prone to ‘monologue creep’ and/or ‘hobby-horsicality’, we ought to at least seek a practice which is reflective and critically rational.¹¹⁷ In this process, we could do a lot worse than taking inspiration

¹¹⁵ *Ibid* at 41. See also Ward above n. 106 at 289, noting that ‘the liberal ironist appreciates two things. First, he or she appreciates that life is bifocal, a selfhood that is contracted by an ongoing relation of the private and the public; such a relation, of course being a matter of constant readjustment rather than demarcation. Secondly, the liberal ironist is, being ironic, also a poet, someone aware that the pretences of objective truth have been fatally crippled by the liberating play of metaphor.’

¹¹⁶ We might consider the model contemplated her as establishing a ‘marketplace of ideas’ as hinted at in *Gertz v. Robert Welch* 418 U.S. 323 (1974) per Justice Powell at 339-340. For a more recent application of the ‘marketplace of ideas’ see [2010] EWCA Civ 350.

¹¹⁷ On ‘monologue creep’ see O’Callaghan above n. 32 and R. Mullender above n. 8.

from Judith Shklar, who wrote that: “We all carry with us a mixed bag of *idée reçus*, and in order to travel with it through an everchanging world we must shift it around occasionally – drop something here and add something there.”¹¹⁸ Likewise, we must bear in mind that once we have embraced a particular view or made a particular choice, we must be open to the possibility that it is falsifiable and embrace the eventuality that we were wrong.

¹¹⁸ J. Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge, Harvard University Press, 1986) at 28.