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David Cohen\*  
Allan C. Hutchinson\*\*

Of Persons and Property:  
The Politics of Legal Taxonomy

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"No theme is more basic . . . than the importance of taxonomy viewed, not as a neutral hatrack for the objective facts of nature, but as a theory that constrains and directs our thinking . . . Taxonomy is a dynamic and creative science of history."

—Stephen Jay Gould\*\*\*

## I. Introduction

To talk of law without politics or history is nonsensical. All lawyers must concede that what they do takes place in historical circumstances and has political consequences. Every piece of law-making and law-application is a governmental act; it relies on political authority and claims binding force. Moreover, all legal activity occurs within a particular historical context; it is intended to respond to or influence a past, existing or anticipated state of affairs. This means that the study of law must concern itself with politics and history generally: it must not confine itself to only the politics and history of law. To do otherwise would be to distort and trivialise any understanding of law. Within such a broad political and historical appreciation, the focus of enquiry is not so much on 'law' as on 'law-government' because the idea of law without government is almost oxymoronic.<sup>1</sup> Law is not only a symbol and act of power; it is also a major component of the social context in which those symbols and acts of power acquire meaning, significance and effect.

As an instrument of political power and a constituent of historical consciousness, law and its study connect with some of the most profound issues on the sweeping agenda of intellectual research. To understand fully the operation of law, it is necessary to come to grips with turbulent questions of metaphysics, ethics, sociology and ideology. Any act or study of law, including this one, is grounded on assumptions about such matters and which inform the mundane round of legal practice. For instance, beliefs about the nature of individual identity, human

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\*\*\* S.J. Gould, *The Flamingo's Smile* 243-44 (New York: Norton, 1985).

1. K. Llewellyn, *The Common Law Tradition*. (Boston; Toronto: Little, Brown, 1960) at p. 184. However, some have suggested that, in tribal communities, a non-positivistic law exists without a formal government order. See Hyde, *The Gift: Imagination and the Erotic Life of Property*. (New York: Random House, 1983). Of course, the converse is not true. There is a growing and rich tradition of political theory and practice that argues for 'government' without law. See G. Woodcock, *Anarchism: A History of Libertarian Ideas and Movements*. (New York: Meridian Book, 1962).

intentionality, social organisation and moral worth direct and anchor the criminal process. The fact that such operating premises are not evident to those who rely on them attests to their pervasiveness and potency. At its most blunt, understandings about the basic essence and value of humankind influence and contour debate about the historical function, political character and normative authority of law.<sup>2</sup> Any attempt to separate the study of law from politics, history and theory is misguided and misleading.

Although it is a matter of trite learning that law and lawyering are political, there remains the core belief that the interpretation and organization of law is, can, and should be performed in an apolitical manner. 'Formalism', both in rules and categories, continues to be the ruling theory of legal interpretation. Its central credo is that legal taxonomy and interpretation comprises the largely impersonal and determinate operation of practical rationality. While any faith in a crude reliance on some mechanical algorithm or logical parthogenesis has long since been abandoned, there is still a tenacious commitment and aspiration to bounded objectivity and revealed moral truths. While law is embedded in historical contexts and political circumstances, its organization and interpretation possesses an important, if not total, independence from them. As sophisticated formalists like Ronald Dworkin put it, "law . . . is deeply and thoroughly political . . . , [b]ut not a matter of personal or partisan politics".<sup>3</sup>

In contrast to the received wisdom of formalism, we put forward an anti-formalist critique. We argue that the claimed dispositive power of formal rationality is, at best, illusory and, at worst, fraudulent; legal interpretation and legal taxonomy are more a matter of operational logic than logical operations. In almost every case, the ingenious judge is constrained only by the limits of her imagination. Legal doctrine represents a store of normative principles and argumentative techniques which are at her disposal to justify and rationalise her choices. Notwithstanding this, however, the judge is not a conscious manipulator of an independently-existing set of doctrinal materials or a willing party to some vast Machiavellian conspiracy. Legal doctrine is more than the residual traces of the unbounded free-play of the judicial mind. While judges live in history and society, they repay the compliment, or exact

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2. See H. Cantril, *Human Nature and Political Systems*. (New Brunswick: Rutgers University Press, 1961). This insight or understanding is far from original. Thomas Hobbes' work rests upon a very particular and explicit idea of human nature. He argued that, in a state of nature, life is "solitary, poor, nasty, brutish and short." It is a function of political society to provide people with a way of "getting themselves out from that miserable condition." See T. Hobbes, *Leviathan*. (Baltimore: Penguin Books, 1968).

3. R. Dworkin, *A Matter of Principle*. (Cambridge, Mass.: Harvard University Press, 1985).

their revenge, by living in judges. The posited separation between 'that to be organized and interpreted' (doctrine) and 'that which organizes and interprets' (judge) cannot be sustained.

Whereas the formalist locates truth and authority almost exclusively in doctrine, the nihilist confers that logocentric privilege on the judge. Both theories ignore the historical dialectic at work between judge and doctrine; they are situated and shaped by their political milieu, constantly interacting and interpenetrating. Each is implicated by and in the other.<sup>4</sup> Far from loosening the political bite of the critique of formalism, this approach sharpens and deepens it: the nihilist is only one kind of anti-formalist and a misguided one at that. By treating legal categorization and interpretation as distinct forms of social activity, a sophisticated theory of anti-formalism better explains the felt necessities of doctrinal constraints on interpretive freedom. Further, by locating these constraints within contingent socio-historical contexts, it exposes their counterfeit claims to necessity, reveals their political determinants and explains their historical fungibility.

The essay falls into three major parts. In the first part, we explain and describe what we believe to be the core idea of law — that it represents a discursive and taxonomic economy which is used to give meaning to the world by creating a particular and partial reality. The concepts and language lawyers use, the way those media are deployed, the argumentative devices relied upon, and the values inculcated combine in conscious and unconscious ways to constitute law and a legal style of life. In part two, we tell two stories. One involves the Supreme Court's treatment of a young girl whose life was tragically altered after she participated in a public immunization program; the other involves the Court's treatment of a mining entrepreneur whose property had been devalued after he participated in a public parks program. The two stories represent a stark and compelling example of the power of ideas and the politics of taxonomy. In the third and final part, we explore alternative ways of telling these stories and make tentative suggestions for a more egalitarian vision of law and its intellectual foundations.

## II. *Prisoners of the White Lines on the Freeway*

### 1. *Other Worlds, Classical Music and Heavy Metal*

The world is not given to us. While there is some 'there' out there, there is no particular 'there' there until we put it there. To live in a world, that world must first be made. The world is not a hidden chest of existential

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4. See Kennedy, "Toward a Phenomenology of Judging" in *The Rule of Law: Ideal or Ideology*. (Toronto: Carswell, 1987), (A. Hutchinson and P. Monahan eds.).

treasures, waiting to be unearthed and exhibited in some vast National Institute of Canadian Archaeology in Ottawa. Any treasure found will, in an important sense, have been placed there; it can only be re-created or re-activated. The world is a coral reef of the mind; living metaphors that have crystallised and been forgotten, later to be (re)discovered as independent and 'real'. We only find the world we make and, in (re)making it, we often find new worlds.<sup>5</sup> These are not different worlds or alternatives to 'reality', but are new and different realities. The worlds of our historical ancestors and our cultural relations are not our's. The footprint we find on the future and past shores of the unknown is and will be our own.

It is tempting to suggest that, through the use of fictive powers and taxonomic techniques, order is made out of chaos. But the very notion and sense of 'chaos' is itself a construction; it is not a given. Order and chaos are only intelligible in terms of the other; the one relies on the other by its self-defining exclusion of it. Order's critical bite and meaning arise from being set against some pre-existing understanding of chaos and vice-versa: "And now what shall become of us without any barbarians? / Those people were a kind of solution."<sup>6</sup> A better way of grasping the nature of world-making is to think of a vast infiniteness. There are not discrete objects with clear boundaries, but an irreducible continuum with fuzzy and imposed demarcations. Taxonomy and its intrinsic order have a history and, therefore, a politics.

In order to exist in a tolerable way, it is necessary for people to reduce the world to human proportions, finite dimensions and historical specificity. The world must become familiar and manageable, if it is to be less threatening to a continuing sense of existential well-being. By the act of classifying and categorising, a particular reality is created and internalised. In constituting that world, it will be given an appropriate externality and ontological status.<sup>7</sup> Yet, in the essential and creative act of world-making, people also must engage in the equally unavoidable act of world-ending. To make one world is to abandon, at least temporarily, other potential worlds. Sight and blindness are simultaneously experienced. A way of seeing is always a way of not seeing:

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5. For a slightly different development of these themes, see A. Hutchinson, *Dwelling on the Threshold: Critical Essays on Modern Legal Thought*. (Toronto: Carswell, 1988).

6. C. Cavafy, "Expecting The Barbarians" in *The Complete Poems of Cavafy*. (London: Chatto & Windus, 1961) at pp. 18-19.

7. See J. Bruner, *Actual Minds, Possible Worlds* Cambridge. (Mass.: University Press, 1986). W. Quine, *Ontological Reality and Other Essays* (1969); N. Goodman, *Ways of Worldmaking*. (Indianapolis: Hackett Pub. Co., 1978).

If the doors of perception were cleansed every thing would appear to man as it is, infinite.  
 For man has closed himself up, till he sees all things thro' narrow chinks of his cavern.<sup>8</sup>

A high price is exacted for world-making. In order to live, generalisation and selectivity must occur. Yet, in so doing, it will be the case that people will necessarily distort, trivialize and overlook: if something is not excluded, there will be everything and, therefore, nothing. We often inhabit more than one world in and through time. Moreover, these conceptual caverns are built from the bricks of categorization and the cement of exclusion. In this way, caverns become both shelters and prisons. They act as welcome havens from the bewildering storms that buffet people throughout history. But, at the same time, they are dungeons whose walls mark off the limits of a particular world. At best, glimpses of other possible worlds can only be glimpsed through the bars of the existing cell-windows. These Blakean caverns ensure the possibility and parameters of any world: security cuts both ways. The felt incapacity to imagine different forms of social life to the present has less to do with the limits of 'reality' than with the limits of the extant world. The difficulty of learning is negligible as compared to the almost Sisyphean task of unlearning.

Some examples will serve to concretise these abstract claims — one visual, another aural and a third normative. For many, the world of colours seems to be a perfectly natural occurrence in which the different shades and hues of the spectrum are experienced universally. Yet there is more to seeing than ordinarily meets the eye. While all normal-sighted people experience similar stimuli and make sense of the continuum of electromagnetic radiation by dividing the range of wavelengths into names of colours, some language groups have different schemes by which they effect this process. For instance, English speakers 'see' the colour grey between blue and brown, while the Welsh have no separate designation for grey and identify it as either *glas* (blue) or *llwyd* (brown). Moreover, *glas*, like the Latin *glaucus*, runs over into the English grey and green.<sup>9</sup> It can be grasped how the naturally-experienced world of colour is based upon a scheme of differences that is embedded in the conventional language of a social group. As such, the English and the

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8. William Blake, "The Marriage of Heaven and Hell" in Blake: *Complete Writings of William Blake*. (New York: Random House, 1966) at p. 164. The sexism of this quote is not lost on us. See *infra*

9. See L. Hjelmslev, *A Prolegomena to a Theory of Language* 53 (F. J. Whitfield trans. 1969) and C. Belsey, *Critical Practice*. (London: Methuen, 1980) at pp. 40-42.

Welsh inhabit slightly different worlds and experience slightly different realities.

On a more familiar and personal scale, people often cringe at the strangeness of hearing their own 'different' voices played back on a tape recording or of catching a glimpse of their own 'different' image in a mirror. What we believe is not what we perceive and what we perceive is not what we sense. We hear with more than our ears and see with more than our eyes. Not only does interpretation begin where perception ends, but interpretation is a profoundly political act.<sup>10</sup> When we 'listen to the music' much more happens than the passive physical connection between air molecules and tympanic membranes. To 'listen to the music' involves a whole apparatus of mental images, intellectual habits, social assumptions, emotional sets, political affiliations and imaginary constructs. And, so we do not 'miss' the sound, there has to be a wilful act of attention. As Walt Whitman put it:

All music is what awakens from you when you are reminded by the instruments.

It is not the violins and the cornets . . . nor the notes of the baritone singer. . .

It is nearer and farther than they.<sup>11</sup>

While there may be a similarity of stimuli, there is a very different reception experienced by different listeners. The classical music buff does not listen and hear in the same way as the heavy metal fan. The favoured music of each not only sounds different to the other, but *is* different. The sound of music is in the mind and heart of the beholder as well as her or his ear; sound needs to be placed in an interpretive context before it becomes music. The world of the Beethoven devotee is not the world of the Bon Jovi fan. Facts, sights and sounds are shaped as much by internal considerations as by external signals. Perception is never unaffected by perspective and experience is always conditioned by the assumptions with which it is approached.

A third example takes the point a little further and hopefully begins to support some of our larger claims. In describing the world around us and the things that comprise it, there is a marked tendency to speak in terms that are taken to be value-neutral and that are thought to order, represent or label a pre-given physical world. Allowing for the dissonances between different language groups, it is assumed that there is a fixed

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10. T. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970) at p. 198.

11. W. Whitman, "A Song for Occupations" from *Leaves of Grass* (1955) in *Walt Whitman, Complete Poetry and Collected Prose*. (New York, N.Y.: Literary Classics of the United States; distributed by Viking Press, 1982), at p. 94.

reality out there that is separate from our own attempt to give meaning to it. Surely there are 'trees' that are naturally separate from the flowers and shrubs surrounding them? Unfortunately (or fortunately), the answer is far from obvious or uncontroversial. While there is a whole mass of somethings out there, they do not reveal themselves as particular somethings without our prompting or connivance.

'Tree' does not possess a positive presence by virtue of having an independent treeness within it. Its distinctiveness and meaning are the product of a socially-created and historically-acquired scheme of taxonomic ordering. The language in which 'tree' functions endows certain attributes, such as leaves and bark, with a significance in the meaning-giving enterprise. Within another system of signification, a very different set of identifying attributes might be considered significant and meaningful. For instance, categorisation might depend on (a) whether it can talk; (b) aesthetic appeal; (c) how much it weighed; (d) whether it can be eaten; (e) *et cetera*; (f) how big is it from the distance; (g) the extent of its mathematical possibilities; (h) how much it is worth.<sup>12</sup> Accordingly, a thing's identity and meaning is never simply found or observed, but is always imposed and located within a particular taxonomic structure. It is less a matter of technical refinement and more a case of creative designation. There is no form of pure taxonomy or communication that passively represents instead of actively producing. The world is within the language and the language within the world. The world cannot speak for itself; it must be spoken for. Language is a form of social action and the raw material from which different worlds are forged. It is a cultural artifact of the first order:

We dissect nature along lines laid down by our native languages. The categories and types that we isolate from the world of phenomena we do not find there . . . on the contrary, the world is presented in a kaleidoscope flux of impressions which has to be organised by our minds — and this means largely by the linguistic systems in our minds. We cut nature up, organise it into concepts, and ascribe significances as we do, largely because we are parties to an agreement to organise it in this way . . . . The agreement is, of course, an implicit and unstated one, *but its terms are absolutely obligatory*; we cannot talk at all except by subscribing to the organisation and classification of data which the agreement decrees. [N]o individual is free to describe nature with absolute impartiality but is constrained to certain modes of interpretation even while he thinks himself most free.<sup>13</sup>

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12. These ideas are borrowed in a slightly adapted form from Peller, "The Metaphysics of American Law" (1985), 73 *Cal. L. Rev.* 1151 at 1162-70 and N. Evernden, *The Natural Alien: Humankind and Environment*. (Toronto: University of Toronto Press, 1985) at pp. 98-99.

13. B. L. Whorf, *Language, Thought, and Reality: Selected Writings*, (John B. Carroll ed.).



With the establishment of quantum mechanics, the scientific community has abandoned the view that the physical world is simply 'out there' waiting for us to notice it in all its plenitude: "no elementary phenomenon is a phenomenon until it is an observed phenomenon."<sup>14</sup> Time has well passed when it should be recognised that this insight is doubly true for the social world. Under such a perspective, reality becomes largely a conventional construct and matter of profound habit. Of course, we are not free to construct any world at all for the constraints of our own vulnerability and frailty and the scarcity of different resources foreclose certain options. But, although any world in which people live is not objective (in the sense of having a truth value and universal status that transcends the commitments and interests of its inhabitants), it is not subjective either (in the sense that each individual is free to sanction or abandon it as she or he chooses). If the world is not a mirror of our aspirations, it is not not a mirror either. The world is a communal property; it belongs to particular people at particular moments in history. There is no absolute Truth about ourselves and the world. Nor is truth given over to the private molding of any individual. Knowledge is ingrained in social life and reinforced in social practice.

In order to understand or make a better world, the task is not to amass more information; facts are never independent of the theory in which they achieve their status as facts. What is required is a more appropriate metaphor and intellectual structure for living. In this way, classification is a fundamental human activity: "to exist, humanely, is to name the world."<sup>15</sup> The worth of any scheme of conceptual ordering is not determined by its degree of fit with a pre-given world nor in terms of whether it is natural or artificial. Any taxonomic ordering is to be judged by its capacity to be more or less helpful in making the best of our personal and collective lives. As such, the art and science of taxonomy — for the difference is more a question of style than substance<sup>16</sup> — involves and can never escape the responsibility to take and defend a moral stance.

Categorisation has, therefore, its own history and politics because the privilege of naming also carries with it the power to control. Taxonomy

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(Cambridge: Technology Press of Massachusetts Institute of Technology, 1956) at pp. 213-214. The language of 'dissect' and 'cut up' itself is a very partial way of speaking about the world and, therefore, of relating to that world.

14. J. Wheeler, "Frontiers of Time" in *Problems in the Foundations of Physics*. (Amsterdam; New York: North Holland Pub. Co., 1979) at p. 198. (Toroldo & Francia eds.). See also, Tribe, "The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics" (1989), 103 *Harv. L. Rev.* 1.

15. P. Freire, *Pedagogy of the Oppressed*. (New York: The Seabury Press, 1970) at p. 76.

16. See T. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change*. (Chicago: University of Chicago Press, 1977) at p. 343.

is a major site for the political struggle over the kind of world we want to live in and classification is the historical manifestation of a contingent association between interest and perspective. The point of view that prevails will, at least temporarily, shape and give direction to people's lives, benefiting some and disadvantaging others. There is no neutral or uncommitted place on which to stand and name. And there is no neutral and uncommitted description of the world. The white lines on life's freeway that guide society into the future are projections of deep-seated values and silent aspirations. While the taxonomic map is not the social territory, it is a crucial part of that existential terrain and must be appreciated as such.

## 2. *The Language of Law*

Language is much more than words and there are many different languages that we all speak. Language not only consists of a specialised vocabulary, but a repertoire of argumentative devices and rhetorical strategies for its deployment; it contains and is comprehended in an implicit taxonomy of ordering concepts. These discursive practices, procedures and policies allow people to perceive, understand, act, criticise, change and disagree in a mutually intelligible manner. By simultaneously empowering certain modes of action and foreclosing others, language manages to hold people in a grip that is more powerful than mere force of arms.<sup>17</sup> Also, there are many languages at work in our society or, perhaps more accurately, there are many dialects within a society's language. The dialect of the lawyer is different to that of the layperson. But the difference is much more significant than their different idioms and accents. Through their different languages, they inhabit different worlds; their understanding of the world and their normative response to it are substantially at odds. Neither is more 'right' or 'wrong' than the other in absolute terms. However, lawyers are tempted by professional inclination and social acquiescence to claim an authoritative status for their language that overwhelms or trivializes other's; lawyers treat their language as the only language or, at least, *the* language of languages.

Legal discourse is a particularly potent tool for negotiating and constructing social reality. It is one of the ways society defines itself and presents the world to itself. While the state often relies on crude force or threats to achieve its ends, the law's strength and long-term viability stems from its success as a sophisticated mode of ideology. The discursive

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17. See Hutchinson, A., "Part of An Essay on Power and Interpretation" (1985), 60 *N.Y.U.L. Rev.* 850 at 875-78.

practices that comprise the language of the law structure the world in particular and partial ways. Being normative in nature, it operates as a gatekeeper of the mind which all factual entrants must not only respect and obey, but which designates them as valid facts in the first place. As an intelligible description of and mutual prescription for action, legal discourse pre-disposes its speakers and listeners to certain interpretive choices and social stances. Located and sustained by historical conditions and circumstances, the discourse is socially imposed and, what is often overlooked, unconsciously assumed by its individual users. Indeed, its efficacy is attributable to its achievement of an ostensibly robust, plausibly coherent and functionally dependable image of social life and control.

More than most languages and taxonomic structures, law has managed to suppress the contingent character of social history. By institutionalizing an entrenched set of social values, legal discourse and classification has succeeded, at least partially, to contain the dynamism of history-making and, in the process, has persuaded people of the 'naturalness' and 'necessity' of current legal constructs which transform as they represent social arrangements. However, while the intellectual categories and rhetorical tropes of legal discourse do provide a minimally operative image of the world, it is so fragile and shallow that it can offer no real conceptual comfort or repose from the continuing history of political struggle: "law is a reiterated failure to classify life."<sup>18</sup> Its prime function is to paper over the endemic cracks and contradictions of contemporary life. Consequently, its authority and appeal as a privileged and heeded voice of society is illusory. The taxonomic categories of the law are neither determinate nor dispositive. Although they do not sanction and produce a detailed set of social prescriptions and consequences, they do stake out the venue, weapons and strategies for political struggle. As such, law is a formidable obstacle to any real social change; the way people think about themselves and their limitations is an integral component of any engaged attempt to change the world.

### III. *A Tale of Two Cases*

#### 1. *The Legal Wager*

As language-users, people are unwitting gamblers in life. They make a critical wager: in return for the privilege of living in *any* world, they are committed to living in *one* particular world. The nature of that world will depend on the language spoken for each language consists of a whole

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18. Milsom, "A Pageant in Modern Dress" (1975), 84 *Yale L.J.* 1585.

package of foundational beliefs and assumptions about reality and the individual's place within it. Linguistic concepts are not terms through which to view and describe an independent reality, but actually constitute that reality. By using a language, its unspoken values and commitments are heard and accepted. As Umberto Eco puts it, "the subject is spoken by language."<sup>19</sup> Under the hard shell of language, there is a soft ideological underbelly. It is not a dessicated husk, but a throbbing and powerful kernel of life:

For with names the world was called  
Out of the empty air,  
With names was built and walled,  
Line and circle and square,  
Dust and emerald,  
Snatched from deceiving death,  
By the articulate breath.<sup>20</sup>

The staple feature of modern legal language is rights-talk.<sup>21</sup> The law insists on characterizing and categorizing social interaction as occasions for the exercise or breach of legal rights. When individuals charge another "You have breached the contract", they have forced their dealings into a particular linguistic and, therefore, ideological strait-jacket: they have entered the world of contractual rights and obligations. By speaking in that way, they have adopted a very partial idiom and have set aside other ways of describing their shared experience. For example, the sterile and impersonal style of rights ignores the understanding of the event as an immediate inter-personal act of shared trust and commitment or as an honourable undertaking. They have given abstract rights-talk an objective existence, treated it as a thing to be grasped and wielded. Moreover, they have brought into play a whole paraphernalia of expectations about their future dealings together. In effect, they have had created for them a distinct past and future scenario for their experience. Discourse has worked a practical and significant exercise of power. By filtering it through the sieve of abstract rights-talk, a rich and complex experience has been diluted and sanitized.

Rationalised by academic scholarship and reinforced by legal education,<sup>22</sup> the law divides social activity into a variety of doctrinal

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19. U. Eco, *Semiotics and the Philosophy of Language*. (Bloomington: Indiana University Press, 1984) at p. 45.

20. E. Muir, *Animals. Collected Poems 1921-58* (London: Faber and Faber, 1960).

21. See Hutchinson and Monahan, "The 'Rights' Stuff: Roberto Unger and Beyond" (1984), 62 *Texas L. Rev.* 1477 at 1479-91.

22. This structuring begins even before law school starts. Although they might not appreciate its import, readers of law school brochures are informed that law divides the world into property, torts, contract, etc.

categories and develops different principles to understand and evaluate that categorised activity. Although borne of historical expediency, these categories are permitted to take on a life of their own and, like Frankenstein's monster, begin to control as much as be controlled by their creators. Unlike 'scientific' behaviour, social activity responds to these conceptual characterisations and begins to reorganise and reproduce itself in accordance with its informing taxonomic structure. This gives the process a degree of self-fulfilling coherence and plausibility. But this apparent rationality is only paper-thin and, when push comes to shove, the whole doctrinal edifice starts to collapse under the weight of its contradictions.<sup>23</sup>

This fragility is especially evident along the edges of the different doctrinal categories; taxonomic borders are fuzzy and places of intellectual danger. These difficulties are not confined to these penumbral regions, but pervade legal discourse and become egregious at the doctrinal limits. A topical example is the interaction between 'contract' and 'tort', in particular the rules governing liability for the negligent infliction of economic loss where there is no physical injury or property damage. In short, should Mrs. Donoghue be able to recover the diminished value of the offending ginger-beer bottle? Anglo-Canadian courts seem to have gone every which way on this question.<sup>24</sup> The main contending argument is that there is no principled distinction between economic loss consequent on physical damage and that which is not. However, to allow recovery for such loss would be to place a plaintiff in as good or better position than those who have a contract with the defendant. Such claims bring into question the whole doctrinal basis for distinguishing between contractual and tortious liability and reveal a distinction that even traditional critics consider invidious, arbitrary and

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23. For an extended account of this critique, see Hutchinson, "The Rise and Ruse of Administrative Law and Scholarship" (1985), 48 *Modern L. Rev.* 198 and "Mice Under a Chair: Democracy, Courts and the Administrative State" (1989), 41 *U. Tor. L.J.* (forthcoming)

24. See Cohen, "Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords" (1984), 18 *U.B.C. L. Rev.* 289. An economic loss case which dramatically illustrates the collapse of contract and tort categories is *B.D.C. Ltd. v. Hofstrand Farms Limited and R. in the Right of British Columbia*, [1986] 3 W.W.R. 216 (S.C.C.). In the future, it can only be hoped that the Supreme Court will be able to recognize the artificiality of the legal world they have created in talking about the tort/contract conflict presented in the economic loss cases. Recent decisions in England indicate that the judges there have retreated from the expansive approach which some have interpreted them to be taking. See *Tate & Lyle Food Distribution v. Greater London Council*, [1983] 2 A.C. 509 (H.L.); *Candlewood Navigation Corporation Ltd. v. Mitsui OSK Lines*, [1985] 2 All ER 935, [1985] 3 WLR 381 (PC); *Muirhead v. Industrial Tank at Specialities Ltd. and Others*, [1985] 3 All ER 705, [1985] 3 WLR 993 (CA).

illogical.<sup>25</sup> In a rare moment of candid criticism, Lord Roskill brings to light, intentionally or otherwise, the deeper jurisprudential issue:

I think today the proper control lies not in asking whether the proper remedy should lie in contract or . . . tort, not in somewhat capricious judicial determination whether a particular case falls on one side of the line or the other, not in somewhat artificial distinctions between physical and economic or financial loss when the two sometimes go together and sometimes do not . . . , but in the first instance in establishing the relevant principles and then in deciding whether the particular case falls within or without those principles.<sup>26</sup>

Even the partial enlightenment of Lord Roskill is sadly lacking at the Supreme Court of Canada; its absence is voluble. If recent events are harbingers of the future, law in Canada is likely to remain as outmoded as its formal trappings.

At the heart of the legal enterprise is a taxonomic structure that does not simply offer the lawyer a way to organise and look at the world, but brings into existence a world and a way of experiencing that world. It is all the more powerful in its effects and infiltration because of its ability to persuade its holders of its status as a natural representation, not a dynamic creation, of an existing world. Through training and interest, the taxonomy of law has become first-nature to most lawyers. This renders it almost invisible to them and, therefore, largely immune from critical appraisal. Accordingly, the task of this article is to bring that taxonomy to visible attention and put it under critical scrutiny. The ambition is to demonstrate the politics of the taxonomic structure at work in one particular region of the law and to suggest ways to revise it in line with more helpful visions of the good life — to paint some fresh white lines and to direct the freeway along a different route.

## 2. *A Man of Property*

Two recent decisions of the Supreme Court of Canada illustrate the importance and force of the legal taxonomy which installs law's world and structures the resolution of disputes within it. On April 4, 1985, the Supreme Court of Canada dismissed an appeal in *Lapierre v. Attorney-General of Quebec*;<sup>27</sup> Nathalie Lapierre had sought compensation for

25. See A. M. Tettenborn, *An Introduction to the Law of Obligations*. (London; Toronto: Butterworths, 1984).

26. *Junior Books Ltd. v. Veitchi Co. Ltd.*, [1983] 1 A.C. 520 at 545 (HL). These words, of course, offer only a very illusory critique, for Lord Roskill implies the existence of some level of fixed and fixable principles that can be resorted to to resolve the dispute. Like Ronald Dworkin, he only 'solves' the problem by hiding it at a higher level of abstraction; see Dworkin, R., *Law's Empire*. (Cambridge, Mass.: Belknap Press, 1986).

27. (1985), 16 D.L.R. (4th) 554, (S.C.C.) dismissing an appeal from the Quebec Court of

personal injuries which she had suffered as a result of a publically funded vaccination program organized by the Quebec government. Thirty-five days later, on May 9, 1985, the Supreme Court upheld a claim for compensation in *The Queen in Right of British Columbia v. Tener et al.*<sup>28</sup> David Tener had claimed compensation for economic losses incurred as a result of the implementation of a provincial parks program by the British Columbia government. Whereas *Lapierre* was perceived to be a 'torts' case, Tener was perceived to be a 'property' case. Those taxonomic intuitions and perceptions — the way the questions were asked and the issues framed — to a large extent determined the outcomes in each case.

There were four possible outcomes to *Tener* and *Lapierre*: both could have won; both could have lost; Nathalie could have won and Tener could have lost; and Nathalie could have lost and Tener could have won. While there is no uncontroversial ordering of these outcomes that would garner unanimous approval, it would seem that, outside of the world of legal doctrine, most people would consider the fourth outcome to be the most horrific. Few would be prepared to argue *ab initio* that Tener's property is more deserving of protection and compensation than Nathalie's life. Indeed, notwithstanding the judgments, most people would more than likely subscribe to the opposite view. But this fourth outcome is exactly what prevailed in *Tener* and *Lapierre*.

Although the values that motivated and informed the decisions are obvious enough, it will be necessary to explain later the values which underlie the decisions. But what is initially remarkable, however, is that neither Mr. Justice Chouinard in *Lapierre* nor Mr. Justice Estey in *Tener* had an inkling that the cases raised much the same issues and problems. Neither judgment refers to the other. Neither judgment alludes to the need for a common underlying justification for state action and accountability in the cases. And neither judgment recognizes openly that the central conundrum in the cases is the extent of social responsibility for the welfare of others. Of course, it would be naive and disingenuous to maintain there is a judicial conspiracy of silence at work; nothing suggests that there was a studied ignorance of the normative similarities nor that an overt manipulation of doctrinal structures and arguments to achieve desired outcomes occurred. Nonetheless, the contiguity of *Lapierre* and *Tener* is a stark example of the tenacity and force of taxonomic structures, their hidden values and their insidious operation.

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Appeal, 7 D.L.R. (4th) 37, 27 C.C.L.T. 190, which had allowed an appeal from the Quebec Superior Court, [1979] Quebec S.C. 907, 13 C.C.L.T. 1.

28. (1985), 17 D.L.R. (4th) 1, (S.C.C.) dismissing an appeal from the British Columbia Court of Appeal, 133 D.L.R. (3d) 168, [1982] 3 W.W.R. 214, which had allowed an appeal from the British Columbia Supreme Court, 114 D.L.R. (3d) 728.

In 1973, as Mr. Justice Lambert put it, “mining in parks was a difficult political issue”.<sup>29</sup> On April 18, 1973 Royal Assent was given to an amendment to the *Mineral Act*, which required any individual exploring for or producing minerals in a British Columbia provincial park to receive prior Cabinet authorization.<sup>30</sup> On the same day, Royal Assent was given to an amendment to the *Park Act*. This Act reclassified Wells Gray Park as a Class A park and preserved its natural resources until a park use permit was issued by the government. Furthermore, no permit could be issued unless it was “necessary to the preservation or maintenance of the recreational values of the park”.<sup>31</sup> David Tener had invested considerable sums in the preliminary development of certain mineral resources which he and others owned in the park. From 1973 until 1977, he engaged in several unsuccessful attempts to obtain the necessary government authorizations to mine and exploit the area. Finally, frustrated with five years of what he considered to be bureaucratic obduracy, he sued the British Columbia government. He claimed compensation for the capital value of the mineral resources, his wasted expenditures and his anticipated profits from the exploitation of the mining claims.

The basis of Tener’s claim was that the Province had expropriated his property and that compensation was payable under the applicable provincial legislation.<sup>32</sup> Alternatively, he argued that his property was injuriously affected by the creation of the park and that compensation was payable under the *Land Clauses Act*. At trial, Mr. Justice Rae held that the claim for injurious affection failed since the provincial legislation applicable in expropriation cases constituted a “complete code” of compensatory entitlements. He maintained that the denial of a permit did not constitute an expropriation of property since Tener continued to own the mineral resources; that their economic value had been reduced considerably was irrelevant. In the British Columbia Court of Appeal, Mr. Justice Lambert agreed, if for different reasons, that no expropriation had taken place. Nonetheless, he awarded compensation to Tener for injurious affection under the *Land Clauses Act*.<sup>33</sup> He interpreted the *Park Act* and the *Ministry of Highways and Public Works Act* as permitting the

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29. 133 D.L.R. (3d) 168 at 173.

30. *An Act to Amend the Mineral Act*, S.B.C. 1973, c.52, s.9.

31. *An Act Amend the Park Act*, S.B.C. 1973, c.67, s.3.

32. *Park Act*, S.B.C. 1965, as amended 1977, c.75, and *The Ministry of Highways and Public Works Act*, R.S.B.C. 1960, c.109, s.15 (as amended), now *The Ministry of Transportation and Highway Act*, R.S.B.C. 1970, c.280.

33. Mr. Justice Lambert focussed on his perception that the Crown did not acquire rights in or to property, and thus that there had been no ‘taking’. *Supra*, note 27 at 133 D.L.R. (3d) 168 at 180 (B.C.C.A.).



operation of the *Land Clauses Act* where injurious affection, in the absence of expropriation, had occurred. While he justified his conclusion through several arguments, he placed emphasis on the principle that compensatory claims should be resolved in favour of the claimant when a person's property had been "injuriously affected by an enterprise carried out by the Crown for the benefit of the public".<sup>34</sup> Finally, he held, in a remarkably revisionist exercise of case analysis, that the denial of a permit could constitute injurious affection notwithstanding that there was no physical invasion of the land itself, no physical obstruction of access and no unlawful act rendered lawful by statutory powers.<sup>35</sup>

At the Supreme Court of Canada, Mr. Justice Estey delivered the majority judgment. He supported Tener's proposition that a property right included a right to minerals as well as a right of access necessary for their development. The focus and definition of the property right allowed him to invoke a remarkable nineteenth century interpretive fiction that "a statute is not to be construed so as to take away the property of a subject without compensation"; this is based on the political belief that deprivation of property rights associated with state action should be shared by the community.<sup>36</sup> He also held, as he was forced to by the logic of the 'property structure', that the denial of access to the mineral resources constituted a recovery of part of the rights granted by the Crown in 1937 and that a "taking" occurred because the value of a state asset — the park — was enhanced. Madam Justice Wilson followed a similar course of argument and insisted that "the vice aimed at is *expropriation* without compensation".<sup>37</sup> In her view, the denial of the access permit deprived Tener of his profit *a prendre* and constituted a taking since the deprivation effectively resulted in the Crown removing an encumbrance from its own property. In short, Tener's loss was the Crown's gain. With a tragic sense of irony, she stated that "it would, in my view, be quite unconscionable to say that this cannot constitute an expropriation in some technical, legalistic sense".<sup>38</sup>

While the conflict between Tener and the state could have been interpreted as a story about what we wish to do and what we can do

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34. 133 D.L.R. (3d) 168 at 178.

35. See Todd, "The Mystique of Injurious Affection in the Law of Expropriation" (1967), *U.B.C.L. Rev.* 127.

36. *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 at 542. (H.L.(E.))

37. (1985) 17 D.L.R. (4th) 1 at 23. (S.C.C.) We do not know what Wilson J. meant by 'vice', but the Shorter Oxford English Dictionary defines it as a "habit or a practice of an immoral, degrading or wicked nature," or "a moral fault or defect (without implication of serious wrongdoing)".

38. (1985), 17 D.L.R. (4th) 1 at 25. (S.C.C.)

when one person's welfare has been diminished as a result of government action to benefit the community, that is not the way the judgments read. The formalistic and analytical framework applied to the reality constructed by the judges transforms that idea (if it ever existed in the minds of the judges) into a claim for compensation on an expropriation of property. Attention is thus focused on historical legal concepts of property, on the formal requirements of a taking, and the interpretation of common law and statutory rights of compensation which 'exist'. In an important sense, all of the judgments operate at this level. Given the pre-understanding of the judges and the internalized structure of law, the judicial exercise is to define property, establish its taking and interpret the relevant legislation and common law cases to provide a right to compensation. The result is presented as flowing inexorably from the initial perception of Tener's welfare as a property right.

### 3. *A Child of Tort*

The courts' initial perception of *Lapierre* was radically different. If *Tener* was a 'property' case, *Lapierre* was a 'torts' case. On September 14, 1972, Nathalie Lapierre, then five years old, received an inoculation of a measles vaccine as part of a mass inoculation program which the Province of Quebec had organized. Within a week, Nathalie began exhibiting symptoms consistent with acute viral hepatitis. She was admitted to hospital and consequently the illness had "entraîné son incapacité permanente quasi totale".<sup>39</sup> Her father sued the Quebec government so that Nathalie might be able to receive special educational and social care for the rest of her 'life'. The Lapierres were successful at trial and were awarded \$375,000.

*Lapierre* would likely be classified as a 'tort' case in common law provinces.<sup>40</sup> In Quebec, the case was argued within the context of two

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39. (1980) 13 C.C.L.T. 1 at 8 (Quebec Superior Court).

40. The categorization would probably have resulted in the dismissal of the law suit for several reasons. First, judicial attitudes towards strict products liability and design defects suggest that the judges would have demanded a demonstration of governmental negligence as a precondition of liability. Second, the decision to implement a mass inoculation program with concomitant risks of personal injury would almost certainly have been labelled a 'policy' decision and thus beyond judicial review. Finally, the provincial crown proceedings legislation almost uniformly predicate vicarious state liability on the demonstration of a common law tort committed by a particular civil servant. Of course, we recognize that potential tort liability can be articulated using common law concepts. See *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (1974), (United States C.A.); *Petty v. United States*, 740 F.2d 1428 (1984). In *Petty*, the plaintiff recovered compensation under the *Swine Flu Act*, 28 U.S.C.A. ss.1346(b), 2671-2680, under which the United States was derivatively liable for the drug manufacturer's liability as well as directly liable for its own negligence.

sections of the Code Civil. Article 1053 imposes liability in the event of fault and Article 1057 imposes liability when the defendant's act is motivated by an (un)fortuitous event, namely a measles epidemic.<sup>41</sup> Article 1057 is admittedly drafted in language capable of a range of interpretations. It had been used in earlier cases to indemnify individuals whose property had been damaged by government acting to benefit the community. At trial, Mr. Justice Nadeau held that Article 1057 could be applied where a fortuitous event (a measles epidemic) resulted in a deliberate act by the government (the establishment of a mass inoculation program), even if implemented after an accurate risk/benefit analysis. The Court of Appeal upheld the government's appeal.<sup>42</sup> It chose to interpret Article 1057 to apply only to obligations imposed independently under other Code or statutory provisions. In the absence of a specific immunization liability section, Article 1057 could not be used to impose liability. The formal analysis reflected in statements that "the courts can only apply law as it exists"<sup>43</sup> apparently overwhelmed sentiments that compensation would have been a better result.

The judgment of the Supreme Court of Canada was given by Mr. Justice Chouinard. Affirming the Court of Appeal decision, he expressed his sympathy for Nathalie, but little else. In legal terms, his judgment is long on authority, but short on analysis. First, he distinguished on formal grounds cases like *Quebec v. Mahoney*,<sup>44</sup> *Dalbec v. Montreal*<sup>45</sup> and *Guardian Insurance Co. v. Chicoutimi*<sup>46</sup> in which compensation was awarded when private homes were damaged or property revenues were diminished by state action. He characterized them as instances of 'tacit' expropriation; *Lapierre* was seemingly not amenable to such characterization. Second, he refused to develop a general theory of equal

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41. We recognize that Canadian law is characterized by two primary ideas — civil law and common law. The structure of law in each province thus compels very different intellectual exercises before we even begin to understand the *Lapierre* and *Tener* cases. Nevertheless, the civil structure of Quebec law and the common structure of British Columbia law do not determine the outcome of these cases. First, the trial judge in *Lapierre*, working within the structure of the Code Civil, could and did provide compensation to Nathalie. French judges in the early 1960s did the same in France. Second, the civilian structure is not monolithic and different judges internalize it to different extents. Common law language and thought, as exhibited in *Tener*, is also not determinative. Again, in *Tener*, the trial judge could and did deny compensation. As well, *Tener* reflects the interpretation of ambiguously worded collections of statutes — and it is fair to say, as the Supreme Court of Canada did, that the internalized structure of private property and ideas about the appropriate role of the state and community were far more important than "technical, legalistic" arguments. See *supra*, note 42.

42. (1984), 7 D.L.R. (4th) 37.

43. *Id.*, at 46.

44. (1901), 10 C.B.R. 378 (K.B.).

45. (1902), 22 C.S. 23 (Superior Court).

46. (1915), 51 S.C.R. 562, 25 D.L.R. 322.

contribution, extrapolated from the Code's theory of general average contribution.<sup>47</sup> In addition, Chouinard J. refused to construct a theory of compensation from Article 407 which provides that "No one can be compelled to give up his property, except for public utility, and in consideration of a just indemnity previously paid". In light of the striking similarity between this provision and the doctrinal rhetoric in *Tener*, the Court's failure to recognize even the slightest conceptual connection between *Tener* and *Lapierre* testifies to the hold that the legal structures of thought have over the collective judicial consciousness.

Third, Chouinard J. said that Article 1057 could not be used to impose liability on the state since the Article did not establish an independent source of obligation. He did not explain why he took that view of the world. Nor did he recount why he rejected the final argument of the plaintiff — that a "theory of risk" could be used to justify an award of compensation. Lapierres' lawyers had uncovered several French administrative decisions of the late 1950's and early 1960's which had awarded compensation to those who had become immunization victims "as the result of efforts to protect the French public, in a pitiless game of chance".<sup>48</sup> The French administrative courts had developed the theory of risk from Rousseauian notions of equality — demanding that individual sacrifice, even in the public interest, represents "a deliberate breach of the equality which should apply between citizens with respect to public burdens, and that equality must be re-established by means of a compensatory payment."<sup>49</sup> Mr. Justice Chouinard simply chose to ignore that idea.

#### 4. *A Matter for Negotiation*

The structure of legal taxonomy in *Lapierre* and *Tener* can best be explained by recognizing the intellectual constructs which the judges used (and were used by) to understand and categorize the social events which

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47. This is perhaps an example of the differences in common law and civil law language. Most lawyers socialized in common law culture will immediately recognize that the idea of extrapolation used by Lapierre's lawyers is a permissible, indeed a powerful, rhetorical device in common law language. Cases like *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) and *Lloyds Bank v. Bundy*, [1975] Q.B. 326 (C.A.) are famous not for their formal rules, but for their formal argumentative devices. This occurs in the case of maritime accidents, with the theory of expenditures in the common interest, as in the case of creditor's insolvency claims, and with the theory of reimbursement of necessary expenditures, as in the case of property improvements.

48. R. Savatier, "Responsabilite de l'Etat dans les accidents de vaccination obligatoire reconnus imparables," *Melange offerts a Marcel Waline*, t.2 (Paris, 1974) at 752-3, translated at (1985), 16 D.L.R. (4th) 554 at 574-75.

49. *Id.* at 575.

led to the two cases. *Lapierre* was a 'tort' case; a personal injury claim with no evidence of a deliberate bureaucratic sacrifice of Nathalie's welfare. *Tener* was a 'property' case; the devaluation of an economic resource with considerable evidence of a deliberate executive choice to sacrifice Tener's property. The way the judges constructed the different universes of *Tener* and *Lapierre* conditioned their whole response to the claims. Once the cases were identified and located in their doctrinal categories, all other considerations became irrelevant or, at best marginal. The operative legal structures were so ingrained that they became a matter of first-nature to them.

The episodes in *Tener* and *Lapierre* are illustrative of how lawyers (and laypeople) treat the law's conceptual apparatus and discursive categories as natural and how, in the process, they confer the status of the real and concrete on the abstract and metaphorical. For instance, when deciding whether a contract exists between two parties, lawyers speak and act as if they were looking for a 'contractual thing' in a drawer full of social events and circumstances. It is assumed that, if all the facts were known, 'the contract' would somehow body forth and bring the dispute to a demonstrable close. Yet, as all law students know, a contract is an idea, not a thing; it is an abstraction. It exists in the realm of metaphysics, not in the world of physicality; a written contract is not *the* contract, but simply evidence of the contract. Similarly, property, does not comprise the tangible objects in the physical world, but the abstract relation between such visible effects and people.<sup>50</sup>

Although born of historical expediency and sustained by political convenience, legal categories, like contract and property, take on a life of their own. Unlike the life of the so-called natural world, social activity responds to these conceptual metaphors and reproduces itself in accordance with them. Not only does this give the law a patina of plausibility and coherence, it allows lawyers to refer to 'reality' as confirmation of the naturalness and inevitability of prevailing legal structures and its underlying values. The fact that this process occurs unconsciously makes it no less political and much more effective. The judges have managed to construct and perpetuate a doctrinal schema that places property above persons. Whereas the notion of strict liability is standard in property, losses lie where they fall in tort unless there is a finding of fault. Through the vehicle of doctrinal principles and

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50. See Leff, "Contract as Thing" (1970), 19 *Am. U. L. Rev.* 131 at 157 (property is "a sort of vector analysis with time coordinates [of a bundle of forces]") and Hohfeld, "Some Fundamental Conceptions As Applied in Judicial Reasoning" (1913), 23 *Yale L.J.* 16 and (1917), 26 *Yale L.J.* 710.

classifications, values of the past are sustained in the present and judges are able to disclaim responsibility for this state of affairs.

There are two major and related lessons to be learned from the judicial tandem of *Tener* and *Lapierre* — doctrinal indeterminacy and taxonomic malleability. Even once the situations were recognised as belonging to the tort and property categories, it is far from self-evident as to what the correct resolution should be as a matter of legal wisdom. As the varied judgments from the different levels of courts show, the doctrinal corpus is sufficiently rich to sustain a range of equally plausible and perfectly contradictory outcomes. But, for the purposes of this paper, this phenomenon is not as important as the plasticity of the informing doctrinal categories.<sup>51</sup> The conditions for entry into any doctrinal category are neither fixed nor certain; they are as open-ended and malleable as the doctrinal materials within the category itself. Events or categories can be re-described and re-worked to contain what is presently considered irrelevant or incompatible.

For instance, an immediate response to Nathalie's dilemma might be to retain the intellectually comfortable and existentially familiar structures and simply reclassify Nathalie's body as her property.<sup>52</sup> Such a suggestion is hardly radical. John Locke is perhaps the best known of the "body as property" theorists, writing that "every Man has a Property in his own Person. Thus no Body has any Right to but himself".<sup>53</sup> People have been treated as property in the past when it has served the purposes and interests of other dominant persons.<sup>54</sup> Although less obviously crass, the law continues to follow a similar line today in some contexts.<sup>55</sup> The inhumanity of treating persons as property can be rejected and resurrected in the reconceptualization of human rights as property rights.

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51. For an extensive development and explanation of doctrinal indeterminacy, see Hutchinson, "Democracy and Determinacy: An Essay on Legal Interpretation" (1989), 43 *U. Miami L. Rev.* 541.

52. This idea was developed in a provocative essay in C.B. MacPherson, *The Rise and Fall of Economic Justice and Other Papers*. (Oxford; New York: Oxford University Press, 1985). We recognize, of course, that some judges might reject the 'body as property' thesis. In *Loge v. U.S.* 622 F.2d 1268 (1978), the Federal Court of Appeal rejected the argument in the case of a claim for compensation by a victim of a polio vaccination program.

53. J. Locke, *Second Treatise of Government*, Chapter 5 (1690) Locke, J., *The Second Treatise of Government*, 3rd ed. (Oxford: Blackwell, 1966). See M.J. Sandel, *Liberalism and the Limits of Justice*. (Cambridge, New York: Cambridge University Press, 1982) at p. 116.

54. The language in *Bonne v. Eyre* (1777), 1 H.B.L. 273, 126 E.R. 160 (Court of Common Pleas) a pre-eminent 'contract' case, which speaks of the lawful possession of negroes and of a negro being the property of the plaintiff, shows how comfortable ideas become to us.

55. The Supreme Court itself in speaking of compensation awards in personal injury cases talks of "justice and humanity" and compensation for "a reduced capital asset" in the same breath. See *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 at 474-75 per Dickson J. (S.C.C.).

Property can be made to mean one's own person, capacities and life. Thus the choice to protect property from state action becomes a choice to preserve quality of life and not merely ownership of wealth and material objects. Individual property in "life, liberty and capacities" is more egalitarian than the more modern and limited notion of property, if only because everyone would have the same enforceable claims to their own selves.

But the recategorization of well-being from rights through quality of life to property is merely a strategic calculation and simply effects instrumental restructuring of our thinking. Apart from perpetuating the dubious provenance of rights-talk, the recognition of the "whole prestige of property" works against the successful assertions of claims to human dignity and equality. Accordingly, within existing schemes, Nathalie Lapierre's protection would require a relabeling of her humanity as a property right. The worth of such a strategy is hopelessly transparent; the approach is facile and self-defeating. Shifting Nathalie's welfare into the 'property room' of the taxonomic castle retains and actually strengthens the existing intellectual structure of legal discourse. Further, such manoeuvring can bring about only modest improvements in social welfare. Nathalie Lapierre can obtain compensation within the existing structure of law, but that would simply be to throw good money after bad. Reality has not changed, events have not changed, but our understanding and conceptualization of them has. So has the language we use to think about them. And that is all that matters.

Thoughts about Nathalie Lapierre need not involve talk of human welfare as a property right in order to provide her with a better life. In comparing these ways of retelling *Tener* and *Lapierre*, it becomes apparent that judges, like everyone else, are captives of their own conscious and unconscious imaginings. The structure of law — the role of judges and representative institutions; the categorization of events as property, tort or contract cases; the classification of relationships as disputes; the application of 'external' sanctions' etc. — is all-embracing. Yet the cynical recategorization of humanity as 'property' or the marginal restructuring of law to include 'rational' dialogue about the underlying values and instrumental effects of our choices do not exhaust the imaginative limits of the human condition. For instance, within legal doctrine, there is only the most attenuated discussion of communitarian values and the different choices they nurture. But it is exactly this kind of thinking that needs to be explored rather than suppressed — if only as a counterpoint to the fearful lack of vision in the status quo.

What this article proposes is a recognition of structure — the existing ideas and language which are used to think about events like David Tener's economic well-being in British Columbia in 1973 and Nathalie

Lapierre's physical and emotional well-being in Quebec in 1972. Once the power of discursive assumptions and taxonomic classifications are more fully recognised, it might be possible to begin the essential project of beginning to talk differently. While some discursive commitment is necessary, no one particular structure is inevitable. There are other possible ways to think about and engage in the world. While the legal structures of the conceptual status quo are disciplining, we are not entirely disciplined; there exists some room for re-negotiation and re-construction. The remainder of the paper adumbrates some of the avenues that might be travelled in the journey toward an improved vision of the legal world.

#### IV. *Alternative Avenues*

##### 1. *Government Liability or Community Responsibility*

The questions to be addressed in thinking about "government liability" for the welfare of individuals and groups in the community are these — To what extent, and through what institutional processes, ought the community to be responsible for the losses suffered by individuals and groups as a result of state action? How is the institutional competence of the courts or alternative dispute-resolution agencies to be assessed? Should responsibility be limited to entitlements to rights to compensation or should additional community responses be considered? Is the traditional judicial reluctance to impose positive obligations on private individuals (reflected in the misfeasance/nonfeasance dichotomy in tort law) appropriate in the case of governmental action and inaction liability? How is it to be decided if the state is responsible when it acts through relatively independent private and corporate agents? What is the appropriate response to the self-interested acts of public bureaucrats? When should the activities of decentralized government bodies expose public funds to liability? What aspects of human welfare should be protected from state action? Should compensation be limited to traditional property rights or ought the question to be approached unconstrained by private law considerations? What are the regulatory effects on public bureaucracies and private behaviour of alternative compensation regimes? What is the symbolic role of government immunity and governmental responsibility? What is the best use to be made of law's symbolism?

Recent developments in tort law represent a critical shift in the development of public liability law. In particular, the decision of the Supreme Court of Canada in *City of Kamloops v. Nielsen*<sup>56</sup> acknowl-

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56. (1984), 10 D.L.R. (4th) 641 (S.C.C.).



edges explicitly that government liability for accidents and for deliberate distributive choices must be thought about in a significantly different manner than issues of private tort liability. It represents a deliberate decision by the courts that the regulatory activities of public institutions should be subject to review consisting of awards of compensation to adversely affected individuals. This development in tort law gives us some hope that the reactionary ideology reflected in *Tener* is not as pervasive as it might appear.

A critical assessment of the current regime of government liability and the design of alternatives cannot avoid the intractable, highly contentious, and overtly political character of the exercise. It speaks to profound questions about the nature of democratic governance and responsibility.<sup>57</sup> Furthermore, it is unnecessary to limit discussion to “public” tort remedies. Asking such large questions forces an appraisal of the role of the modern Canadian state and public bureaucrats. In short, there must be a willingness to tackle the fundamental problem suggested, but ignored in *Tener* and *Lapierre*. And we must ask the ultimate question, what is the responsibility of some members of the community to others? In the absence of a social consensus as to the responsibility of the Canadian community and the role of the state in defining that responsibility, there must be the same dialogue and resolutions in legal forums as is required in the political arena. Law must embrace rather than eschew ideology; the choice is only between candour and subterfuge.

Tort law is one legal concept, along with promise (contract) and ownership (property), which can be used to define the scope of permissible conduct and to justify the imposition of obligations on private actors for the losses which their activities impose on others. It is extraordinarily broad in scope and encompasses, at least in theory, the entire range of human activities and interests. It is also the vehicle which has been chosen to impose liability on the state through the crown liability legislation. Accordingly, focusing on tort law in state liability cases signals the implicit adoption of a particular set of normative presuppositions. While it might be concluded that it is appropriate to apply private law concepts of tort to the state, *beginning* an enquiry with that assumption is very troublesome and likely dangerous.

There are, of course, an infinite number of alternative liability regimes which might be considered in thinking about these questions and in particular, about how to respond to *Tener* and *Lapierre*. It is useful to keep in mind several of the more obvious choices. First, there is a “no

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57. Schuck, P., *Suing Government*. (New Haven: Yale University Press, 1983).

liability” regime under which no claims to compensation either against the state or against individual public bureaucrats would be recognized. This represents the political ideology of a totalitarian state — with no individual or group interests being respected under any circumstances in respect of the acts of a particular sub-group who can organize and mobilize force. The only constraint or response to state action in such a world would be an opposing source of violence. While it might constrain those who enjoy the legal authority to exercise force for the time being, it cannot realistically be conceived of as a compensation or regulatory system.

Second, a “no liability” regime might be coupled with a comprehensive or limited compensation system. This could be funded out of general revenues or through an insurance system which would necessarily include a specific fee generating process. For example, one response to individual welfare losses resulting from governmental or community action is legislation mandating compensation for vaccine injuries which exists in the United States and has been proposed in Canada.<sup>58</sup> For example, it can be asked whether compensation rights which provide a patchwork of entitlements and are largely self-enforcing might be replaced by a comprehensive public compensation program; this would provide for the provision of services or money on the complainant’s demonstration of a casual relationship between a private injury and government action. Such a definition, however, is far too simplistic. In designing such a program, it is necessary to decide which interests are compensable, define the amount of compensation, list the circumstances under which the “government action” criteria for compensation would be met,<sup>59</sup> concede that determinations of causation would incorporate normative choice, and provide an institutional infra-structure for implementing and administering the compensation system. The basic

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58. See “Canada eyes compensation plan for vaccine injuries”, *The Medical Post*, December 9, 1986 at 39; McIntosh, “Liability and Compensation Aspects of Immunization Injury: A Call for Reform” (1980), 18 *Osg. Hall. L.J.* 584; Reitze, “Federal Compensation for Vaccination Induced Injuries” (1986), 13 *Bost. Coll. Environ. Aff. Law Rev.* 169. But even equating compensation only with financial reparation can often represent a choice to maintain the existing distribution of wealth and work to isolate the injured person from their community. See Hutchinson, *supra*, note 5 at ch. 10.

59. This would mean detining and distinguishing between action and inaction. This is an horrendously complex task. See Hutchinson and Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988), 38 *U. Tor. L.J.* 278. As well, if one chose to limit compensation to cases of losses associated with government action, one would have had to justify the implicit, conservative/libertarian philosophy to preserve the status quo by predicating compensation on cases of state action making the complainant worse off than she was prior to the alleged wrong.

point, of course, is that the development of social welfare and insurance programs has made it impossible to think of liability regimes as a purely "private law" matter.

A third possible way of thinking about *Tener* and *Lapierre* is to treat the state like a private firm where claims are made in tort, contract and property. This was the implicit model relied on by the Supreme Court in both these cases, and with limited exceptions, it represents the liability regime operating in Canada since 1953.<sup>60</sup> Virtually every agency which has studied government liability has proposed that the Crown be treated "as nearly as possible" as a private individual.<sup>61</sup> It is also the favourite of conservative academics. Their Diceyan thinking is threefold: that public bureaucrats ought not to enjoy any special privileges and must be subject to the same law as private persons; that the civil compensation system should not recognize anything more than common law entitlements; and that unarticulated judicial values which inhere in private law concepts

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60. Of course, property claims were compensated prior to 1953 and restitutionary claims were recognized as well. Nonetheless, there was no general regime of liability applicable against the federal government prior to the enactment of the *Crown Liability Act*, S.C. 1952-53, c. 30. There had, however, been several incremental attempts to expand the liability of the government in tort beginning with *An Act Respecting Official Arbitrators*, S.C. 1886, c. 40, s. 6, and ending in 1938 with an amendment to the *Exchequer Court Act*, R.S.C. 1927, c. 34, s. 19(c).

It is the model currently adopted in all provincial and federal crown liability legislation and in most English speaking countries after the Second World War. For example the American *Federal Tort Claims Act*, 1947, provides that the federal government in the United States is liable for torts "in the same manner and to the same extent as a private individual under like circumstances", incorporating the relevant state law applicable to the plaintiff's claim. In New Zealand, the *Crown Proceedings Act*, enacted in 1950 is modelled on the comparable English legislation of 1947. Both statutes impose vicarious liability on the Crown for the common law torts of civil servants.

61. See Law Reform Commission of New South Wales, *Report on Proceedings by and Against the Crown* 13 (1975). The Law Reform Commission considered that an analysis and evaluation of each specific Crown privilege presented an insurmountable task, and thus proposed that:

claims against the Crown [should be] as justiciable as claims against the subject, leaving it to the courts to resolve by judicial determination such particular difficulties as may occasionally arise from the fact that the role of the Crown may be special.

The British Columbia Law Reform Commission made the identical recommendation several years earlier in its *Report on Civil Rights, Part I, Legal Position of the Crown*, (LRC 9, 1972). The result was the enactment of the *Crown Proceeding Act*, R.S.B.C. 1979, c. 86, section 2(c) of which provides that "the Crown is subject to all those liabilities to which it would be liable if it were a person". There have been no empirical studies in either jurisdiction which reveal the impact of such dramatic reforms. Recently, the New Zealand Public and Administrative Law Reform Committee in its *Report on Damages in Administrative Law* (1980) recommended the enactment of a provision which would make the Crown "subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject."

like 'reasonableness' are sufficiently flexible to permit them to be used in the context of public liability.<sup>62</sup>

A fourth possibility would be a unified and comprehensive *public* liability regime which would be applied specifically to state actions and to state activities. This would differ in a number of respects from the liability regime applied to private firms.<sup>63</sup> Issues such as strict liability or fault, compensation for pain and suffering, excuses relating to statutory authority and the like could be grafted on to the system without replicating the detailed solutions arrived at in the law of torts.<sup>64</sup> While courts might be retained as the institutional mechanism to give effect to this substantive liability regime, they could also be replaced with an alternative review institution, like the ombudsman.

Finally, and fifth, a government liability regime might consist of a melange of the previous proposals. This would demand an assessment of the range of claims to compensation made in connection with different regulatory activities, would involve the creation of a number of different liability, insurance or compensation systems which would be sensitive to the particular bureaucratic activity which generated the injury, would reflect a consideration of the private interests recognized in each case, would take into account the regulatory impact of the compensation/liability regime on bureaucratic behaviour, and so on.

## 2. *Toward Communal Responsibility*

Any choice between and among these alternative regimes necessarily involves the development of a model of community action and responsibility. In determining the possible liability of government to private individuals and firms, a number of normative assumptions central to an understanding of the concept of government liability can be identified. These norms permit an explanation and evaluation of "government liability". Only after completing that exercise will it be possible to understand how we should think about cases like *Tener* and

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62. See Bailey and Bowman, "The Policy/Operational Dichotomy — A Cuckoo in the Nest" (1986), 45 *Camb. L.J.* 430.

63. This approach was rejected at least in part by the New Zealand Public and Administrative Law Reform Committee, *supra*, note 61.

64. One idea of a public liability regime might be represented by the recognition of a general right of recovery of compensation for "unlawful" or "unauthorized" administrative action. However, concerns with the current conclusory analysis and manipulation of jurisdictional errors in administrative law, with an inability to distinguish between egregious and trivial errors, with the potential for judicial interference with bureaucratic discretion, and with the demonstrable plaintiff bias inherent in the recommendation, can easily be offered in support of rejecting such a proposal. See J. Evans, De Smith's "Judicial Review of Administrative Action" (3rd ed. 1983).

*Lapierre* that is appropriate to the prevailing institutional milieu and ideological climate in Canada.

Such a project must commence from the understanding that law is inescapably normative; any liability regime comprises a public expression and embodiment of deep-seated beliefs about communal ethics. A central and informing belief of our analysis is that the institutions of private law contain a set of normative and political ideas that are inimical to a humane and progressive response to human suffering and losses. The current liability regime reflected in *Tener* and *Lapierre* reflects a set of normative presuppositions which are not difficult to identify. It expresses the lingering values of a narrow political strategy that bears the imprint of late nineteenth century thinking in England. It is an ideology that has little relation to the pluralism which characterizes the modern Canadian state.<sup>65</sup> As such, it becomes incumbent on any advocate of reform to articulate the values which inhere in or are aspired to by any particular society and, in light of those normative commitments, propose a scheme for communal assistance and care.

The most disturbing characteristics of the liability regime reflected in *Tener v. Lapierre* are the retention of personal bureaucratic legal responsibility for common law torts, the imposition of *vicarious* liability on the Crown, and the denial, with few exceptions, of direct obligations by the Canadian community to its members. The choice of personal bureaucratic liability maximizes the deterrent effect of legal rules on the behaviour of bureaucrats and can be perceived as an expression of the political ideology of the Rule of Law. The retention of personal bureaucratic liability is a decision which denies public civil servants any immunities based simply on their status as public bureaucrats and creates incentives for bureaucratic conservatism.<sup>66</sup> Moreover, using the common law of torts as the touchstone of liability means that only those interests protected by the judiciary in relations between private persons will be recognized in relations between individuals, the community and the state.

The reliance on 'corrective justice' models of law-making, in defining relations between individuals, not only ignores the instrumental and

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65. See L. Panitch, *The Canadian State: Political Economy and Political Power*. (Toronto: University of Toronto Press, 1977). Arthurs, H.W., "*Without the Law*": *Administrative Justice and Legal Pluralism in Nineteenth-Century England*. (Toronto: University of Toronto Press, 1985).

66. Justification for their activity must be found in legislation and the interpretive rules used to articulate that justification are themselves based on anti-legislative biases. These include implied rights of compensation in the case of property rights, implied terms that state action will take place without negligence, and interpretive rules which preserve judicially defined common law entitlements unless expressly abrogated. See Cohen, D., *Accident Compensation and the State*, forthcoming Ch4.

social-ordering ideas commonly associated with legal decision-making, but also reflects a conservative ideology which denies the existence of the state or community in cases like *Tener* and *Lapierre*. The idea of corrective justice asks only that it be determined whether a person has unlawfully caused an injury to another. If the answer to that question is in the affirmative, the injurer is required to restore the victim to the position she was in prior to the wrongful interference with her rights. Whatever merits corrective justice — the restoration of the status quo where the complainant demonstrates that the defendant has wrongfully interfered with her entitlements — has in defining and legitimizing private relations,<sup>67</sup> it has only the most limited pertinence to state-individual relations. It presumes that the two parties are equal in all respects and that it is already known what entitlements ought to be recognized in the case of state action. In short, proponents of corrective justice beg the very question to be answered — what elements of human welfare ought to be protected?<sup>68</sup>

Being inherently ahistorical and asocial in its construction and application, a model of corrective justice is ill-suited to the existence and commitments of the modern activist welfare state in Canada. Corrective justice ignores the legitimacy of collective action through public bureaucracies. To contend that the protection of individual rights always demands government liability is to maintain that government ought to be constrained from acting and that individual economic welfare as defined by judges must always prevail over the collective good. At the very least, any model of government liability must acknowledge and struggle with the inherent tension between individual rights and the collectivity. While a final resolution is unlikely, its continued presence transforms this acknowledgement and struggle into a fundamental matter.

In contrast to such traditional models, very different values are expressed in alternative models of public compensation law. The idea of equal treatment has been recognized as a normative foundation of public liability in civilian jurisdictions. In France, for example, the Conseil d'Etat will order compensation from the government when one person has been forced to bear a disproportionate share of the costs associated with public activities. The English courts have also justified compensation on equal treatment grounds, but the justification has been limited to "takings" of property.

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67. See A. Linden, *Canadian Tort Law* 4th ed. (Toronto: Butterworths, 1988) at pp. 3-5.

68. For an elaborate defence of 'corrective justice' see Weinrib, "Legal Formalism, On the Immanent Rationality of Law" (1988), 97 *Yale Law Journal* 949.

A different perspective points to the interaction of government liability and the modern redistributive state. Judges have, if somewhat belatedly, realized that in imposing liability on the state they are in effect (re)allocating public resources. Similarly, judges have attempted to exempt so-called 'policy' decisions from judicial review; this categorization has been justified in part on their self-confessed inability to develop legitimate grounds for the distribution of public resources in a different way than that originally chosen by elected officials and accountable bureaucrats.<sup>69</sup> All responses to state action must recognize the political status of the defendant and the legitimacy of redistributive decisions which adversely affect the welfare of private citizens. While many, including judges, might disagree with the redistributive policies of any particular government, it is inconceivable that a "distributive judgement review tribunal" could be established which would have greater political legitimacy than the current representative institution. Any liability regime must defer to and complement, rather than subvert and stymie, the distributive policies and choices made by the democratic institutions of the state.

A related normative idea in responding to state action is an appreciation of the development of communities and vehicles to ensure and facilitate sharing. One of the most powerful ideas describing social organization is that of the community as a form of social ordering through which its members can participate in sharing the losses experienced by others: people are interconnected and interdependent. We can exist as individuals, and achieve our potential as autonomous beings, only if there is a social community in which we participate. We live together in part because we can assist one another when we suffer losses as a result of events over which we have little or no control.<sup>70</sup> It finds

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69. See *Cleveland-Cliffs Steamships Co. and Cleveland-Cliffs Iron Co. v. The Queen* (1957), 10 D.L.R. (2d) 673 at 679-80 (S.C.C.); *Barratt v. District of North Vancouver* (1980), 114 D.L.R. (3d) 577 (S.C.C.). This is one of the ideas reflected in *Welbridge Holdings Ltd. v. Metropolitan Corp of Greater Winnipeg*, [1971] S.C.R. 957. Where the Supreme Court refused to impose liability for unauthorized legislative acts. Finally, this is the rationale for section 3(8) of the *Federal Crown Liability Act* which excludes from tort liability all bureaucratic activities carried out pursuant to statutory power or authority. However, the courts have interpreted this provision restrictively, stating that there is a presumption against statutory powers authorizing acts which would be tortious at common law. Only if the injury is an "inevitable" consequence of the exercise of statutory powers will the Crown escape liability. Similarly, section 6 of the *Act* suggests that the introduction of legislation will not give rise to liability.

70. This notion of community and of individual responsibility for the welfare of others is recognized in Article 13 of the *Declaration of the Rights of Man*, 1789 which states that "For the maintenance of the forces of law and order and for the expenses of administration a general contribution is indispensable; it must be equally shared among citizens according to their means."

expression in decisions like *Tener* providing compensation when state action results in losses to property owners but not, apparently in cases like *Lapierre* when public health measures result in injury to children as a necessary consequence of immunization programmes. The community benefits as a result of the individual's sacrifice and egalitarian ideals suggest that the loss should be shared equally.

All of these ideas can be expressed under the rubric of compensation rather than deterrence or justice as the fundamental value underlying an appropriate response to cases like *Tener* and *Lapierre*. Most tort theorists recognize the role of compensation, regulatory deterrence<sup>71</sup> and corrective justice<sup>72</sup> in private tort law. Yet notions of regulatory deterrence and corrective justice are not simply transposed to "public" liability. The unique political, economic, and bureaucratic characteristics of the state suggest that thinking about government liability requires a more sensitive and sophisticated approach to the nature of the state. The ineffectiveness of tort law as a regulatory instrument and the prevailing ideals of social justice compel the selection of compensation as the primary object of a "liability regime" which responds to the injury-causing behaviour of public institutions.

It is commonly argued that "the notion of comparative utility suggests that the aggregate utility of a group of individuals may be increased by taking a small amount of goods and services from all individuals to compensate an injured individual".<sup>73</sup> This is one element in reducing the consequences of losses which occur in society; the consequences of accidents which do occur can be reduced through loss shifting arrangements.<sup>74</sup> In this model, compensation represents a mechanism whereby collective groups can 'bribe' victims of collective action. In these circumstances, the role of the state is to minimize the transaction costs

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71. This is the model which finds expression in the law and economics literature, "One of the main purposes of law, from an economic standpoint, is the control of externalities . . . [L]iability rules . . . are devices by which people are given incentives to internalize the costs and benefits of their actions so that an efficient allocation of resources is achieved". Posner, "Some Uses and Abuses of Economics in Law" (1979), 46 *U. Chi. L. Rev.* 281 at 305.

72. This is the traditional view which still holds in the minds of most Canadian judges, academics and lawyers. The law of torts is seen as a study in corrective justice — an effort to articulate a coherent, internally consistent set of rules and principles to decide whether a particular plaintiff has a right to recover compensation from a particular defendant. Issues of public policy and regulation are, at best, subsumed in the rules. See C. Gregory, H. Kalven and R. Epstein, *Cases and Materials on Torts* xxii, 3rd ed. (Boston: Little, Brown, 1977) and Weinrib, "Toward a Moral Theory of Negligence Law" (1983), 2 *J. of Law & Phil.* 37.

73. See Spitzer, "An Economic Analysis of Sovereign Immunity in Tort" (1977), 50 *S. Cal. L. Rev.* 515 at 520.

74. G. Calabresi, *The Costs of Accidents; a Legal and Economic Analysis*. (New Haven: Yale University Press, 1970).



otherwise associated with organizing the collective group and, also, to prevent free-rider problems.

The strongest arguments in favour of compensation on these grounds can be made in the context of state-individual relations. Compensating one individual by ordering another individual to pay him or her a sum of money is simply injuring the latter to benefit the former. There is no *a priori* reason to believe that the injured is better than the payer or that the injured's utility associated with the money is greater than the payer's. Even if there were, serious doubts must be harboured as to the ability to achieve any consensus among people whose social rankings are not consistent; that is, it is difficult to engage in interpersonal comparisons of utility when *only* compensation is being assessed and when questions of the past and future behaviour of the injured and of the payor as well, which might justify the loss-shifting, are excluded from inquiry. State-individual relations, however, can be analyzed on quite different terms.

First, it is feasible to anthropomorphize a community which consists of large numbers of individuals and hypothesize that it will be less risk-averse than the potential victim of its activities. If that is so, welfare gains are generated by shifting the risk of injury from the potential individual victim to the community. Second, if the losses represented by the compensation are internalized by the state, they will be borne by all private individuals who stood to gain from the deployment of those resources in their next best bureaucratic use. The disappointed potential beneficiaries will be impossible to identify as they will very likely not know that they are victims. Also the forgone opportunity of benefiting from state action is likely to be perceived to be less significant than the actual loss suffered by the victim. Third, in the case of state-individual relations, the potential beneficiaries who are victimized by the loss-shifting will often outnumber the victims. In such circumstances, the secondary cost avoidance advantages of loss-spreading, will be present. If the losses are externalized over time, the welfare gains associated with the loss-spreading will increase.<sup>75</sup> Loss-spreading rationales, of course, have enormous implications when the defendant is the community and the loss-spreading mechanism is either taxation or increases in the money supply.<sup>76</sup> Fourthly, compensation arguments also draw on the idea of

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75. Of course, those gains will be offset by an increase in the magnitude of loss perceived by the "insurers" who will pay out a portion of their existing wealth, rather than simply fail to receive some unknowable portion of state largesse.

76. While loss-spreading may not be a rationale for the development of tort law, there is little doubt that the reallocation of losses over large numbers and over time is a significant *consequence* of the implementation of tort law. See A. Linden, *Canadian Tort Law*, 4th ed. (Toronto: Butterworths, 1988). The available evidence suggests that the federal government

“fairness as equality”. Many Continental writers in thinking about state responsibility begin their analyses with Article 13 of the Declaration of the Rights of Man as the origin of the French administrative concept of “equality before public charges”. That concept is reflected in the current Quebec Civil Code and was offered as justification for compensation in *Lapierre*.<sup>77</sup> The interpretive rule has been justified on the ground that the burden of public action ought to be borne by the community rather than imposed on a particular victim. In a sense, the concept can be understood as a reflection of *ex post* equal protection — that state action should not arbitrarily discriminate among members of the public.

Finally, and perhaps most important, in thinking about distributional equity and loss-spreading, two related ideas must be kept in mind. The first idea is that the class of injuries to be redistributed must be identified. Will redistribution include losses associated only with property ownership, with personal liberty, with personal bodily integrity, with economic wealth, with psychological well-being, and so on? The second idea is that the groups of people to whom the losses will be shifted must be determined — that is, distribution of losses across the community must take into account the particular fiscal or taxation policies that the state employs as its loss-spreading mechanism.<sup>78</sup> Identification of the particular injuries and groups will require a wide-ranging debate of a political rather than technical content and character.

The design and evaluation of public liability regimes can only be undertaken after there has been a full airing of ideas about a variety of issues — the legitimacy of public bureaucracies, wealth redistribution, the role and meaning of community, equal treatment, utilitarianism, loss-shifting, corrective justice and so on. Only after some agreement about

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does not procure market insurance in respect of contingent tort liability, nor are associated costs passed on to the community through increases in product prices, with concomitant reductions in product usage. Whatever the incentive effects of legal risks might be in the private sector, they are unlikely to operate in the same fashion in the case of public institutions.

77. It also underlies some decisions of English judges who have created interpretive rules protecting a limited class of property owners from the redistributive judgments of the legislative branch of government. See *Attorney General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 at 542. (H.L.(E.)) However, such judicial intervention is largely conservative in nature and runs foul of the usual objections.

78. During the nineteenth century, the recognition of property and contract claims was coupled with taxation policies which taxed the wealth of property owners and of the commercial classes through excise and sales taxes. Thus, if judges had chosen to recognize non-property and non-economic interests they would have implicitly been shifting wealth to a broad range of potential victims from a relatively narrow range of taxpayers. Stated implicitly in Risk, R.C.B., “Lawyers, Courts and The Rise of the Regulatory State” (1984), 8 *Dalhousie L.J.* 31. See also Pery, Harvey, *Taxes, Tariffs and Subsidies*. (Toronto: University of Toronto Press, 1955) a factual and descriptive study of taxation and fiscal policy in Canada.

how those ideas are combined to comprise the Canadian body politic, can there be a serious evaluation of the current liability regime and the best scheme with which to replace it. Such a project demands not only a sophisticated intellectual apparatus, but a solid grounding in practical details. It is a daunting, ambitious, but vital undertaking.

## V. Conclusion

It should be understood that the criticisms made of *Tener* and *Lapierre* are not simply criticisms of particular judges or judgments. The critique is intended to cut much deeper and touch on the whole legal way of thinking about the world and ourselves. Law does not simply serve society, it defines and helps to constitute that society and its members: law is one of the discursive practices, institutional structures and intellectual media for organising and acting in the world. There is nothing beyond, above or below interpretation, but more interpretation. The belief in a possible rendezvous with an ultimate reality, unmediated by discourse, is mistaken. It is a romantic conceit, a dangerous deceit and, for many, a disabling crutch. It is too simplistic to presume that lawyers stand outside the world and can understand, evaluate and control the world without being part of it. By being in the world, they are front-line combatants, whether they like it or not, in the political struggle to resist, reproduce or change that world. Rightness is not about correspondence with an external world nor a solipsistic harmony with our own prejudices. It is to be found in the historical and reflective negotiation between the two.

However, we are not condemned either to idolize the existing discursive practices in their literalness or to engage in a demoralizing solipsism. Lawyers must take responsibility for the world as it and for its discursive and taxonomic supports. Insofar as these structures and categories have been made, they can be re-made. But first, there must be a greater understanding and appreciation of how they were made, why they were made that way and how they function. While we can never be outside the world's abstractions, we can "smash the semantic box in which our current thinking is locked . . . [and] craft a better cabinet out of materials really available in a real world."<sup>79</sup> Such knowledge is a form of empowerment in itself: it gives perspective and purchase on the 'fabricatedness' and 'non-naturalness' of present arrangements. Social justice can be realized through and in the process of world-(re)making. The accent of truth must be detached and emancipated from the

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79. Leff, "Contract as Thing" (1970), 19 *Am. U. L. Rev* 131 at 157.

particular social, economic and cultural relations that comprise the status quo. Accordingly, the theoretical enterprise must undergo a radical re-orientation. Philosophy (of law) becomes not a task of refined description, but a project of engaged construction; (legal) hermeneutics will replace epistemology.<sup>80</sup> The theorist will not seek to pin down foundational truths, but will strive to open up the essential dialogue of world-making.

One place to begin would be to become aware of our existing structures and lives — to recognize the intellectual constructs and language of contracts, torts, and property. We are all prisoners of *our* white lines on the freeway. It is true that we cannot navigate our lives without some lines to follow; they tell us what we have come from and what we are going to. Nonetheless, we must not forget that, in some profound sense, we have not only painted those white lines, but we have built the freeways as well. In our small legal world, we can begin to rethink our categories, our curriculum, and our pedagogical techniques. We must become receptive to a dialogue which replaces the perceived reality of contracts, torts, property, and the like. Instead of reinforcing the illusion of one reality, courts must open up the law to different voices and realities; it must become “a medium through which particular people can engage in the continuous work of making justice.”<sup>81</sup> That recognition and achievement can take place incrementally. Perhaps that is all we can hope for or want.

A story has a beginning, a middle, and an end, Aristotle said, and nobody has proved him wrong yet; and that which has no beginning and no end but is all middle is neither story nor history. What is it, then?<sup>82</sup>

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80. See Hutchinson, “The Three ‘Rs’: Reading/Rorty/Radically” (1989), 103 *Harv. L. Rev.* 555.

81. Minow, “Foreword: Justice Engendered” (1987), 101 *Harv. L. Rev.* 10 at 95.

82. Ursula K. Le Guin, *Always Coming Home*. (New York: Harper & Row, 1985) at p.63.