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## MONOLOGISM AND DIALOGISM IN PRIVATE LAW

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### 1. Introduction

Since its publication in 1984, law students throughout the English-speaking world have become thoroughly familiar with Hutchinson and Morgan's 'The Canengusian Connection',<sup>1</sup> the subject of this special issue of *The Journal Jurisprudence*. The authors depict a hypothetical personal injury case featuring five fictitious judges, each of whom represents a major school of thought in legal theory, and, to this extent, the essay might be regarded as tort's version of Lon Fuller's 'Case of the Speluncean Explorers'.<sup>2</sup> In the vein of Fuller, Hutchinson and Morgan skilfully highlight the tensions between the various schools of thought, and, in so doing, capture the 'knock-about' character of much common law argument. But the authors sound a note in 'The Canengusian Connection' that may pain some lawyers trained in the 'grand traditions' of continental Europe, for it reinforces the standard view that the common law is nothing more than a chaotic mishmash of peculiar rules, procedures and accidents of history, lacking a sound systematic structure or core. Sceptical civilians single out the highest common law courts, in particular, on the grounds that their 'judicial monologues' sometimes give rise to vague and indeterminate decisions. The charge is that multiple voices breed incoherence; a court should speak with one voice (*la cour décide, elle ne discute pas!*), in the manner of the European Court of Justice or the French *Cour de Cassation*.<sup>3</sup> On this account, the province of a court is not to provide a forum for individual orations but rather to deliver the ultimate word, or, in the words of Leviathan, to arrive at a 'resolute and final sentence'.<sup>4</sup> While the members of a court might not unanimously agree on a particular course of action, they give the impression

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<sup>1</sup> A.C. Hutchinson and D. Morgan, 'The Canengusian Connection: The Kaleidoscope of Tort Theory' (1984) 22 *Osgoode Hall Law Review* 69.

<sup>2</sup> L. Fuller, 'Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

<sup>3</sup> In fact, the *Code Civil* expressly prohibits judicial law-making. Article 5 *Code Civil* states: 'Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.' (Judges are prohibited from declaring general and regulatory principles in the cases submitted to them). On French formalism, see further V. Grosswald Curran, 'Formalism and Anti-Formalism in French and German Judicial Methodology' in C. Joerges and N.S. Ghaleigh (eds) *Darker Legacies of Law in Europe* (Oxford: Hart, 2003).

<sup>4</sup> T. Hobbes, *Leviathan* (J.C.A Gaskin, ed., Oxford: Oxford University Press, 1996), p 42.

of unanimity for the sake of legal certainty and the rule of law and, ultimately, to preserve a systematic structure where there is always a 'solution' to the *problematique*. In this way, while common lawyers might regard 'The Canengusian Connection' as an exaggerated (but nonetheless insightful) representation of the common law in action, to some sceptical civilians it is undoubtedly further evidence of the erratic and unpredictable nature of the common law.

This essay challenges the notion that the decisions of the highest common law courts can be reduced to mere monologues. Drawing on the work of Martin Buber, Mikhail Bakhtin, Isaiah Berlin and John Rawls, the essay argues that dialogism is the dominant feature of common law decisions. Nevertheless, courts should be on their guard against monologue-creep, a process in which an 'authoritatively persuasive voice', once embraced, begins to exert a stronger hold over the person or persons who have embraced it; thus, it becomes 'internally persuasive'.<sup>5</sup> Gradually, the voice attaches itself to those individuals and becomes part of their self-identity. As a phenomenon, monologue-creep is relatively common and can be partly explained by reference to various anthropological and psychological processes and pressures. In academic law, monologue-creep manifests itself in the desire to belong to a particular school of thought, even if that simply means describing one's approach as 'black-letter.' But the desire to 'belong' highlights another reason why scholars resort to monologue: more often than not, academics pursue an ideal; they latch onto the notion that they have found the 'correct answer' or, at the very least, that they are on the path to finding this answer. These ideals often encourage a utopian outlook in those who embrace them and Utopianism, with a capital 'U', thus pervades academia. This essay does not object to this practice in academic law; far from it – the pursuit of an ideal should be encouraged. For, as Berlin wrote, '[u]topias have their value – nothing so wonderfully expands the imaginative horizons of human potentialities.'<sup>6</sup> But he goes on to say that utopias are not quite as useful as 'guides to human conduct'.<sup>7</sup> On his account, a 'perfect solution' is not possible in practice and 'any determined attempt to produce it is likely to lead to suffering, disillusionment and failure.'<sup>8</sup> In order to illustrate this point, this essay examines the views of a group of lawyers we might label 'Strasbourg enthusiasts' and argues that their optimism concerning the impact of the ECHR and ECtHR judgments on English private law is misguided. Private law, as Hutchinson and Morgan

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<sup>5</sup> W.C. Booth, 'Introduction', in M. Bakhtin, *Problems of Dostoevsky's Poetics* (C. Emerson, ed. and trans., Minneapolis: University of Minnesota Press, 1984), p xxi.

<sup>6</sup> I. Berlin, *The Crooked Timber of Humanity* (London: Pimlico, 2003), p 15.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*, p 48.

recognise, is fundamentally dialogic and if human rights are to influence private law they must do so in a way that allows space for multiple voices, including those that are incommensurable. Before we move on to a discussion of these points, however, we must first carefully consider the meaning of ‘monologue’.

## 2. The Meaning of Monologue

Is the sceptical civilian right to regard the decisions of the highest common law courts as collections of uncompromising judicial monologues? In response to this charge we must first carefully consider the meaning of monologue.

Consider the word itself: *monos* (singular/alone) and *logos* (voice/word). It is the *singular voice* or the *lonely word*, depending on one’s etymological persuasion, but can be understood as both: a monologue is at once singular and lonely (*einzig und einsam*).<sup>9</sup> The Austrian-born philosopher, Martin Buber, attached significance to the loneliness evident in the monologist’s life.<sup>10</sup> In his short book, *Ich und Du*, first published in 1923, Buber regards man as having a ‘twofold attitude’<sup>11</sup> and hence makes a distinction between the *Ich-Du* and the *Ich-Es* relationships.<sup>12</sup> In the *Ich-Du* relationship, the ‘speaker has no thing for his object’,<sup>13</sup> the *Du* is not merely ‘a thing among things’<sup>14</sup> but a unique Other. This relationship is ‘open’<sup>15</sup> and ‘direct.’<sup>16</sup> By contrast, *Ich-Es* is a subject-object relationship where the object is to be

<sup>9</sup> For Heidegger, language is monologue - it is the *lonely word*. Language ‘spricht einzig und einsam, mit sich selber’ (‘speaks singularly and solitarily with itself’). See M. Heidegger, *Unterwegs zur Sprache* (1951), p 241, quoted by K. van Eikels ‘Zwei Monologe: Die Poetik der sprechenden Sprache bei Heidegger und Novalis’ in S. Jaeger & S. Willer (eds), *Das Denken der Sprache und die Performanz des Literarischen um 1800* (Würzburg: Verlag Königshausen und Neumann, 2000), p 229.

<sup>10</sup> For Buber, the monologist ‘is incapable of making real in the context of being the community in which, in the context of his destiny, he moves.’ M. Buber, *Between Man and Man* (R. Gregor Smith, trans., London: Routledge, 2002), p 23.

<sup>11</sup> M. Buber, *I And Thou* (2<sup>nd</sup> edn, Edinburgh: T. & T. Clark, 1958), p 3.

<sup>12</sup> *Ich-Du* and *Ich-Es* are frequently translated as *I-Thou* and *I-It* but some scholars criticise the use of the English versions. Vermes, for example, writes that the ‘German word *du* implies an intimacy and familiarity admittedly not contained in ‘you’, but ‘thou’ in English is now addressed almost exclusively to the Deity. The impression is therefore that the book is about man and God, which is quite misleading, though it is *also* about man and God.’ See P. Vermes, *Buber* (London: Halban, 1988), p 40.

<sup>13</sup> M. Buber, *I and Thou*, above n 11, p 4.

<sup>14</sup> *Ibid*, p 8.

<sup>15</sup> *Ibid*, p 6.

<sup>16</sup> *Ibid*, p 11.

‘experienced’ and ‘used’.<sup>17</sup> Understood in these terms, the *Ich-Du* relationship represents dialogue whereas *Ich-Es* constitutes monologue. According to Buber, ‘[g]rowth of the self does not take place...through our relationship to ourselves but through being made present by the other and knowing that we are made present by him.’<sup>18</sup> Friedman explains that this process is called ‘confirmation’: one becomes confirmed as a unique person when one experiences ‘the other side of the relationship so that one can imagine quite concretely what another is feeling, thinking, perceiving and knowing.’<sup>19</sup> When I ‘open myself to the otherness of the person I meet’, I engage not in dialogue but in monologue, the Other exists ‘only as a content of my experience’.<sup>20</sup> Because the monologist refuses to experience the ‘wholeness’, ‘unity’ or ‘uniqueness’<sup>21</sup> of the Other as is experienced in an *Ich-Du* relationship, he himself is never confirmed as a unique person. He remains a lonely, unheard *individual* rather than a confirmed, unique *person*.

Martin Buber’s work inspired the Russian literary theorist, Mikhail Bakhtin, to develop his own ideas on monologism and dialogism. He regarded Buber as ‘the greatest philosopher of the twentieth century’ and admitted that he was ‘indebted’ to him, especially for ‘the idea of dialogue’.<sup>22</sup> The necessity of dialogism was the dominant feature of Bakhtin’s work and he associated monologue with the single-mindedness found in authoritarian and totalitarian forms of government.<sup>23</sup> In what was arguably his most famous work, *Problems of Dostoevsky’s Poetics*, he contends that monologue:

‘denies the existence outside itself of another consciousness with equal rights and equal responsibilities, another *I* with equal rights (*thon*). With a monologic approach (in its extreme or pure form) *another person* remains wholly and merely an *object* of consciousness, and not another consciousness. No response is expected from it that could change

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<sup>17</sup> *Ibid*, p 40.

<sup>18</sup> M. Buber, *The Knowledge of Man* (M. Friedman and R.G. Smith, trans., Atlantic Highlands, New Jersey: Humanities Press International, 1988), p 61, quoted in M. Friedman, ‘Martin Buber and Mikhail Bakhtin: The Dialogue of Voices and the Word that is Spoken’ in B.H. Banathy and P.M Jenlink (eds), *Dialogue as a Means of Collective Communication* (New York: Kluwer, 2005), p 29.

<sup>19</sup> *Ibid*, pp 29-30.

<sup>20</sup> *Ibid*, p 30.

<sup>21</sup> M. Buber, *On Intersubjectivity and Cultural Creativity* (S.N. Eisenstadt, ed., Chicago: University of Chicago Press, 1992), p 74.

<sup>22</sup> *New York Review of Books Interview* with Bakhtin from 1986 quoted in Friedman, above n 18, p 30.

<sup>23</sup> Gurevitch argues that Bakhtin’s work has resonance beyond literature as it is ‘the actualisation of what is primary and primordially human in us.’ See Z. Gurevitch, ‘Plurality in Dialogue: A Comment on Bakhtin’ (2000) 34 *Sociology* 243, 244.

everything in the world of my consciousness. Monologue is finalized and deaf to the other's response, does not expect it and does not acknowledge in it any *decisive* force. Monologue manages without the other, and therefore to some degree materializes all reality. Monologue pretends to be the *ultimate word*. It closes down the represented world and represented persons.<sup>24</sup>

Understood in this way, monologue is a wholly negative and destructive exercise because dialogue is vital for man's very existence. For Bakhtin, '[t]o be means to communicate dialogically...Two voices is the minimum for life, the minimum for existence.'<sup>25</sup>

But if monologue is so destructive,<sup>26</sup> what explains the tendency to engage in it, to treat the other as an 'object of consciousness' rather than an equal consciousness? Buber identified an historical trend and suggested that the 'history of the human race' indicates 'a progressive augmentation of the world of *It* [in the sense of the *Ich-Es*, subject-object relationship or monologue].'<sup>27</sup> Science is concerned with the acquisition of 'items of knowledge' and thus persons increasingly become objects of 'specialised utilisation.'<sup>28</sup> The same holds true for economic development. But while Buber's account is enlightening, there are at least three further explanations as to why we resort to monologue.

First, there is a potential anthropological or psychological dimension. In Bakhtinian theory, polyphony or heteroglossia is the ideal, but humans tend to gravitate towards monologic unity because we are not only influenced by centrifugal but also centripetal forces, a desire to bring about coherence or 'formal unity' rather than face the overwhelming chaos of multiple voices.<sup>29</sup> Booth argues that the 'centripetal' force 'provides us with the best experience we have of what Coleridge called "multeity in unity", a unity that does justice to variety. But we are always tempted to follow that drive too far in the direction of imposing a monologic unity.'<sup>30</sup> This latter idea chimes with those who point to the relevance of cognitive dissonance theories in

<sup>24</sup> M. Bakhtin, *Problems of Dostoevsky's Poetics*, above n 5, pp 292-293.

<sup>25</sup> *Ibid*, p 281.

<sup>26</sup> Not everyone sees monologue as a destructive force. Brown and Keller distinguish between two types of monologue: exploratory and narcissistic monologue. Exploratory monologue is a 'natural part of human development' while narcissistic monologue is for the 'purpose of self-adoration, rather than for the exploration of one's thoughts'. See C.T. Brown and P.W. Keller, *Monologue to Dialogue, An Exploration of Interpersonal Communication* (Englewood Cliffs: Prentice-Hall Inc, 1973), p 188.

<sup>27</sup> M. Buber, *I and Thou*, above n 11, p 37.

<sup>28</sup> *Ibid*, p 38.

<sup>29</sup> W.C. Booth, above n 5, p xxi.

<sup>30</sup> *Ibid*, pp xxi-xxii.

human psychology. As Pedersen explains, 'when faced with dissonance i.e. conflicting information, people seek to reduce such dissonance and avoid situations and information which are likely to increase [it].'<sup>31</sup> He points to research which demonstrates that individuals tend to dismiss those arguments which might lead to dissonance. On this account, when we engage in monologue we are in fact retreating to the comfort zone of our individual *Weltanschauungen*, for it is in this place, where we insulate ourselves against the 'overwhelming chaos' of the outside world, that we are seemingly most content. We shall revisit this argument later.

Second, monologue is particularly common among policy-makers and academics because it is associated with the pursuit of the ideal.<sup>32</sup> The Platonic ideal assumes that all genuine questions have one true answer and all other answers are simply erroneous.<sup>33</sup> The monologist convinces himself, and perhaps even others, that he has discovered the ideal, or is on the path to finding it, and this optimism can generate large ambitions, grand schemes of social engineering or enterprise association.<sup>34</sup> He knows how and where 'to drive the human caravan.'<sup>35</sup> But in the practical world, the monologist is confronted with other monologues, and this is where the third explanation for our tendency towards monologue comes into play. The lonely monologist defends his position against the world, but the more he becomes embattled, the more the monologue becomes an aspect of his self-identity and the stakes become ever-higher. The preservation of the singular voice becomes a necessity – *es muss sein*<sup>36</sup> – not only because the monologist seeks to preserve an ideological position, but also because the other voices have assumed the character of an existential threat. This also partly explains the phenomenon of denial: why some individuals refuse to give ground, even in the face of overwhelming evidence that their argument is wrong. The monologist endeavours to save face. To do otherwise, to give ground to multiple voices, would undermine his identity.

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<sup>31</sup> See O. Pedersen's essay in this issue, 'The Canenguisan Environmental Connection: Diversity, Dissonance and Denial.'

<sup>32</sup> On the pursuit of the ideal, see I. Berlin, above n 6, pp 5-7.

<sup>33</sup> *Ibid*, p 5.

<sup>34</sup> On 'enterprise association', see M. Oakeshott, *On History and Other Essays* (Oxford: Blackwell, 1983). See also R. Mullender, 'Human Rights, responsibilities, and the pursuit of a realistic Utopia', (2010) 61 *Northern Ireland Legal Quarterly* 33.

<sup>35</sup> I. Berlin, above n 6, p 15.

<sup>36</sup> In light of these points, we can press the analysis further by drawing on Milan Kundera. Kundera, in *The Unbearable Lightness of Being*, captures the intensity of the struggle between multiple voices. When we take the view that a particular course of action is right, the assumption that 'es muss sein' (it must be so) looms to prominence in our minds. Thus we demonstrate an intransigence that, in practical contexts, may give rise to problems.

Each of us is familiar with monologue, whether the authoritarian and totalitarian ideologies of the twentieth century or examples from our own lived experiences. But to what extent is monologue a feature of our judicial system? Does 'The Canengusian Connection', as a representation of the common law in action, provide some insights?

### 3. Monologism in 'The Canengusian Connection'?

On reading this hypothetical case, the sceptical civilian might suggest that each judge expects to have the Bakhtinian 'ultimate word', that they seem intent on discrediting the arguments of their colleagues rather than acknowledging 'any decisive force' in them. Each judge views the other judgments as lacking in some way. Sometimes this is simply the result of misplaced optimism in the capacity of legal doctrine to provide solutions to disputes. Wright J, for example, speaks of the 'doctrinal swamp into which Doctrin CJ and Mill J have allowed themselves to be lured'.<sup>37</sup> But often the criticism is that there are mischievous ideological undertones in the judgments. The judges single out Mill J for particular criticism on this ground, but each engages in his/her own individual monologue and thereby pursues a distinct ideal. Lefft J attempts to set himself apart, arguing that all the other judgments are 'nothing more than a crutch for terminally ill society'.<sup>38</sup> However, this argument has hints of the Marxist thesis of 'false consciousness' and his CLS-informed ideal, arguably a type of purer egalitarianism, becomes apparent.

In each case, the judges highlight shortcomings in the other judgments in order to bolster their own arguments, to demonstrate why theirs is the 'correct', 'fairest' or most 'practical' judgment. Mill J, for instance, argues that 'it is readily...apparent that [Doctrin CJ's] conception of the judicial role is confused, schizophrenic, and altogether too restricted'.<sup>39</sup> By contrast, his own costs-and-benefits account of negligence law 'clears away the rhetoric behind which [Doctrin CJ's] cloak-and-dagger approach to public policy lurks'.<sup>40</sup> But this tendency to buttress an individual argument by pointing to the inadequacies of alternative positions does not necessarily add rational force to the argument. Instead, it emphasises the weaknesses of the other arguments, thus strengthening the individual argument's comparative attractions. The tendency is even present in situations where a judge appears to give ground; where he/she admits that another argument is ostensibly

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<sup>37</sup> A.C. Hutchinson and D. Morgan, above n 1, 92.

<sup>38</sup> *Ibid.*, 106.

<sup>39</sup> *Ibid.*, 76.

<sup>40</sup> *Ibid.*

persuasive. Prudential J, for example, argues that Wright J's judgment has 'intuitive appeal; it seems ethical, practical and efficient.'<sup>41</sup> But on further analysis, Prudential J contends that Wright J 'still lives in the Platonic realm of abstract justice' and concludes that he 'is not only naïve, but dangerous. Common sense', he continues, 'is a notoriously unreliable source of guidance for practical affairs.'<sup>42</sup>

Faced with exchanges of this sort, the sceptical civilian might conclude that in discrediting alternative arguments, the judges acknowledge each other's existence but do not perceive 'equal consciousness', acting in a manner that undercuts any hope of reciprocal recognition. Whether the result of centripetal forces, the pursuit of an ideal or the exercise of denial, the other judgments become 'objects of consciousness'; they are not simply discarded, but are utilised by each individual judge to help carve out his/her own distinctive position. Wright J, for example, begins his judgment by focusing on Mill J's 'utilitarian ethic', a philosophy which Wright J views as 'incapable of furnishing sufficiently compelling reasons to deserve the allegiance and support of actual human beings.'<sup>43</sup> Positioning himself in this way, Wright J does not simply reject his colleague's argument but depicts Mill J's utilitarianism as an extreme position in order to highlight the more humane, deontological aspects of his own judgment.

Moreover, as further evidence of Bakhtinian monologism the sceptical civilian might argue that the Canengusian judges do not expect a response from their colleagues which 'could change everything in their world'. Do the judges – in any genuine sense – talk to one another? Take Wright J, for instance, who states:

'As is often the case, I have the dubious distinction of following Justice Mill. It will come as little surprise to those who follow the proceedings of this Court that Justice Mill and I do not see eye to eye on the proper basis for compensation for injuries.'<sup>44</sup>

The arguments become quotidian: we are left with the impression that the facts of the case may change, but the arguments remain the same.<sup>45</sup> This chimes with Buber's notion of 'speechifying' where 'people do not really speak to one another, but each, although turned to the other, really speaks

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<sup>41</sup> *Ibid*, 94-95.

<sup>42</sup> *Ibid*, 95.

<sup>43</sup> *Ibid*, 87.

<sup>44</sup> *Ibid*.

<sup>45</sup> See D. Kennedy, 'Legal Education as a Training for Hierarchy', (1982) 32 *Journal of Legal Education* 591.

to a fictitious court of appeal whose life consists of nothing but listening to him.<sup>46</sup> Understood in these terms, speechifying is part of a wider phenomenon in contemporary society in which monologue increasingly disguises itself as dialogue; it is where ‘two or more men, meeting in space, speak each with himself in strangely torturous and circuitous ways and yet imagine they have escaped the torment of being thrown back on their own resources’.<sup>47</sup> In a very real sense, then, it is a conversation ‘in which each regards himself as absolute and legitimate and the other as relativized and questionable’,<sup>48</sup> a type of behaviour which manifests itself on the Canengusian bench.

We thus see evidence of monologic tendencies in ‘The Canengusian Connection’, but we even see glimpses of ‘pure’ monologism, a type of monologism more intense than the everyday centripetal desire to bring about uniformity. In Bakhtinian theory, there are three principal elements to ‘pure’ monologism. First, it is a way of ‘visualizing and representing the world’.<sup>49</sup> It is the principle that lies behind the choices we make and the way we unify material, the principle ‘behind the ideological single-toned quality’ of the work.<sup>50</sup> Second, the monologist presents his ideas ‘as a more or less distinct or conscious deduction drawn from the represented material.’ Finally, the monologist assumes ‘the ideological position of the main hero.’<sup>51</sup>

In ‘The Canengusian Connection’, these features of ‘pure’ monologism are most apparent in Lefft J’s judgment. Of all the judges, our impression of him is that he cuts a lonely figure on the bench; his oration or monologue is not just a ‘singular voice’, it is also a ‘lonely’ or ‘solitary’ word and he turns himself into the Other by abandoning the law. We are presented with his visualisation and representation of the world, a reality in which ‘[h]umanity stands on the edge of an abyss.’<sup>52</sup> It is a socially unjust world where ‘deprivation and degradation’ are commonplace. Like the other judges, Lefft

<sup>46</sup> M. Buber, *The knowledge of man: Selected essays*, above n 18, p 69, quoted in M. Cooper, “‘I-I’ and ‘I-Me’”: Transposing Buber’s Interpersonal Attitudes to the Intrapersonal Plane’, (2003) 16 *Journal of Constructivist Psychology* 131, 139.

<sup>47</sup> According to Buber, monologue disguised as dialogue can take the form of a ‘conversation characterised by the need neither to communicate something, nor to learn something, nor to influence someone, nor to come into connexion with someone, but solely by the desire to have one’s own self-reliance confirmed by marking the impression that is made, or if it has become unsteady to have it strengthened.’ See M. Buber, above n10, *Between Man and Man* pp 22-23.

<sup>48</sup> *Ibid.*

<sup>49</sup> M. Bakhtin, above n 5, p 82.

<sup>50</sup> *Ibid.*, p 83.

<sup>51</sup> *Ibid.*

<sup>52</sup> A.C. Hutchinson and D. Morgan, above n 1, 111.

J presents his conclusions as deduced from the social reality he describes, and defends his position against the other judges, regarding his colleagues as 'culprits' in legitimating this unjust society.<sup>53</sup> In doing so, he depicts himself as a hero, imploring us to follow him in this just cause:

'In taking my leave of this court, I implore you to follow my lead. I dedicate my remaining years to this struggle. ... We must regroup and make good on our commitment to ourselves. Love and power must converge. We must give voice to the inarticulate speech of the heart. Victims of the world unite.'<sup>54</sup>

While Lefft J's judgment has monologic characteristics in the Bakhtinian sense, we can also compare it a more familiar type of monologism: the literary genre of 'dramatic monologue'. The idea of monologue as a feature of literary works is not new, and, as Byron illustrates, it 'came into its own' as a genre in Victorian England, particularly with the work of Alfred Tennyson and Robert Browning.<sup>55</sup> According to Byron, dramatic monologue has 'survived Modernism and its aftermath in a more vigorous state than is generally believed,' but is now generally used as an 'instrument of social critique.'<sup>56</sup> Byron puts forward the examples of Duncan Bush's 'Pneumoconiosis' (1985), in which, against the backdrop of the miners' strikes, a coalminer speaks about the effects of his lung disease and Paula Meehan's 'The Statue of the Virgin at Granard Speaks' (1991) which addresses the question of abortion in Irish society.<sup>57</sup> The dramatic monologist tends to 'project and fantasise a listener'<sup>58</sup> and is 'concerned with persuasion of one kind or the other.'<sup>59</sup> Byron argues that the link between twentieth century political oratory and dramatic monologue is particularly noticeable and he goes on to remind us of Churchill's wartime speeches and Edward VII's abdication speech.<sup>60</sup> Rhetoric is undoubtedly a feature of these speeches, but also the 'political speakers assume specific personae for the purposes of specific occasions.'<sup>61</sup> Lefft J firmly belongs to this category of monologist. What this means, in effect, is that he is at once

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<sup>53</sup> *Ibid*, 106.

<sup>54</sup> *Ibid*, 111.

<sup>55</sup> G. Byron, *Dramatic Monologue* (London: Routledge, 2003), pp 30-33.

<sup>56</sup> *Ibid*, p 120.

<sup>57</sup> *Ibid*, p 133.

<sup>58</sup> *Ibid*, p 23, quoting L.D. Martin, *Browning's Dramatic Monologues and the Post-Romantic Subject* (Baltimore: John Hopkins University Press, 1985), p 138.

<sup>59</sup> *Ibid*, p 145.

<sup>60</sup> *Ibid*.

<sup>61</sup> *Ibid*.

the Bakhtinian and the dramatic monologist, adopting the role of the ‘hero’ in the political struggle before him.

Does Lefft J’s judgment then indicate that he is a monologist in the purest form and that ‘The Canengusian Connection’ is simply a collection of uncompromising judicial monologues? The sceptical civilian might reach this conclusion. On reading ‘The Canengusian Connection’, he/she might argue that the ‘egocentric’<sup>62</sup> judges appear more concerned with defending their own individual philosophies than promoting legal certainty and defending the rule of law. But, as we will see in the next section, such a representation of common law judgments, and even ‘The Canengusian Connection’ itself, is altogether inaccurate.

#### 4. Dialogism as a Feature of the Common Law

There are two reasons why the sceptical civilian is mistaken. First, as Mullender points out in his essay, the Canengusian judges ‘exaggerate certain features that we might find in the responses made by common law judges to negligence claims’.<sup>63</sup> Hutchinson and Morgan employ a Dickensian approach – they ascribe a limited number of ‘salient features’ to the judges in an attempt to convey a sense of character to each. But in order to achieve coherence, the authors surrender, almost exclusively, to centripetal forces. While this is an understandable, if not an inevitable, feature of literary works, the centrifugal forces of real life mean that real judges are more eclectic. Consider, for example, Lord Steyn’s judgment in *White v. Chief Constable of South Yorkshire*,<sup>64</sup> in which he recognises that the police officers have a plausible case and maintains that, ideally, ‘all those who have suffered as a result of the negligence ought to be compensated’.<sup>65</sup> But these corrective justice sentiments are qualified by distributive justice concerns. For him, any alteration to the special rules on liability for psychiatric harm would ‘greatly increase the class of persons who can recover damages in tort’ and this may result in a ‘burden of liability on defendants which may be disproportionate’ to the initial wrongful act.<sup>66</sup> The eclectic nature of Lord Steyn’s judgment contrasts markedly with the single-mindedness of the judgments in ‘The Canengusian Connection’ in which, as

<sup>62</sup> The Russian social theorist Lev Vygotsky regarded monologue as ‘egocentric speech.’ But according to him, this type of speech was a necessary stage in a child’s development, when ‘internalizing’ language. See C. Emerson, ‘Bakhtin, Vygotsky – the internalization of language’ in H. Daniels (ed.), *An Introduction to Vygotsky* (1st edn., London: Routledge, 1996).

<sup>63</sup> See R. Mullender’s essay in this issue, ‘The Scampering Discourse of Negligence Law’.

<sup>64</sup> [1999] 2 A.C. 455.

<sup>65</sup> *Ibid.*, at 491 (*per* Lord Steyn).

<sup>66</sup> *Ibid.*, at 494 (*per* Lord Steyn).

Arvind notes, the 'positions taken by the judges cluster around the extremes'.<sup>67</sup>

We can further object to the sceptical civilian's argument by demonstrating that dialogism is in fact present in 'The Canengusian Connection'. On the face of it, the judges appear to have come to completely different conclusions. This is unsurprising given that each of us, as Rawls puts it, is 'shaped by our total experience, our whole course of life up to now; and our total experiences must always differ.'<sup>68</sup> But on the Canengusian bench, not only are there some points of agreement,<sup>69</sup> the tension between the judgments give them force – the contrasts between the various ideals make the judgments more vivid. In his essay, Mullender draws on the work of the physicist Niels Bohr and argues that 'complementarity', i.e. the notion that 'opposing views can augment – or complement – one another in practically significant ways', is a feature of 'The Canengusian Connection'.<sup>70</sup> A similar notion finds expression in Bakhtinian theory: there is 'constant interaction between meanings, all of which have the potential of conditioning others'.<sup>71</sup> In this way, even though each individual has been shaped by a different 'total experience' in the Rawlsian sense, there is, at the same time, a common, shared experience to a degree, because each statement we make, each 'utterance', is conditioned by both 'preceding voices'<sup>72</sup> and its 'addressivity'.<sup>73</sup> Whether we realise it or not, our speech is conditioned by the persuasive voices that have shaped our 'total experience' *and* by the real

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<sup>67</sup> See T.T. Arvind's essay in this issue, 'The tortological question and the public-private relationship in tort law.'

<sup>68</sup> J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp 56-57.

<sup>69</sup> For example, Mullender, above n 63, identifies that Doctrin CJ and Mill J agree with each other on one point. Both think that judges must 'be careful not to encourage or facilitate bogus claims'.

<sup>70</sup> *Ibid.*

<sup>71</sup> M. Bakhtin, *The Dialogic Imagination: Four Essays*, (M. Holquist, ed., Austin: University of Texas Press, 1981), p 426.

<sup>72</sup> Our own utterance is conditioned by previous utterances but in a 'complicated' manner. Bakhtin explains that '[u]tterances are not indifferent to one another, and are not self-sufficient: they are aware of and mutually reflect one another. These mutual reflections determine their character. Each utterance is filled with echoes and reverberations of other utterances to which it is related by the community of the sphere of speech communication. ... Each utterance 'refutes, affirms, supplements, and relies on the others, presupposes them to be known, and somehow takes them into account'. See M. Bakhtin, *Speech Genres and Other Late Essays*, (C. Emerson and M. Holquist, eds., V.W. McGee, trans., Austin: University of Texas Press, 1984), p 91. See further J.A. Cheyne and D. Tarulli, 'Dialogue, Difference and Voice in the Zone of Proximal Development', in H. Daniels (ed.), *An Introduction to Vygotsky* (2<sup>nd</sup> edn., Hove: Routledge, 2005). Cheyne and Tarulli note, at p 132, that in Bakhtinian theory our 'utterances are thereby inhabited by the voices of others.'

<sup>73</sup> M. Bakhtin, *Speech Genres and Other Late Essays*, above n 72, p 95.

or imaginary addressee who stands before us, as, ‘from the very beginning, the utterance is constructed while taking into account possible responsive reactions.’<sup>74</sup> In a very real sense then, no matter how monologic the Canengusian judges may appear, they are in fact engaging in dialogue. For their ‘unique speech experience’ is ‘shaped and developed in continuous and constant interaction with others’ individual utterances’.<sup>75</sup> Bakhtin goes on to explain that:

‘[i]n each epoch, in each social circle, in each small world of family, friends, acquaintances, and comrades in which a human being grows and lives, there are always authoritative utterances that set the tone – artistic, scientific, and journalistic works on which one relies, to which one refers, which are cited, imitated and followed. In each epoch, in all areas of life and activity, there are particular traditions that are expressed and retained in verbal vestments: in written works, in utterances, in sayings and so forth.’<sup>76</sup>

In this passage, we can identify some points of intersection with the communitarian ‘embeddedness’ thesis, which argues that a person’s character is ‘shaped’, although not wholly ‘determined’, by the social context.<sup>77</sup> The distinguishing feature here is that *both* the ‘preceding utterances’ and the ‘addressivity’ of the utterance mould our identity and our speech.

Individuals, judges included, do not usually invent new philosophies on the spot; rather they carve out their distinctive positions over time and in reaction to the emerging or established philosophies of others. Booth explains that in Bakhtinian theory, individuals reach this point by first accommodating all those voices that are ‘authoritatively persuasive’ and then gradually learning to accept those that are ‘internally persuasive’.<sup>78</sup> We therefore engage in what Bakhtin terms a ‘process of assimilation’;<sup>79</sup> over time we become more critical, we develop a ‘reflective critical attitude’ as Hart says of the internal point of view.<sup>80</sup> Bakhtin believes that we behave in this way because life is fundamentally dialogical:

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<sup>74</sup> *Ibid*, p 94.

<sup>75</sup> *Ibid*, p 89.

<sup>76</sup> *Ibid*, pp 88 – 89.

<sup>77</sup> See S. Caney, ‘Liberalism and Communitarianism: A Misconceived Debate’, (1992) 40 *Political Studies* 273, 276.

<sup>78</sup> W.C. Booth, above n 5, p xxi.

<sup>79</sup> M. Bakhtin, *Speech Genres and Other Late Essays*, above n 72, p 89.

<sup>80</sup> H.L.A. Hart, *The Concept of Law* (2<sup>nd</sup> edn., Oxford: Oxford University Press, 1997), p 57.

'Life by its very nature is dialogic. To live means to participate in dialogue: to ask questions, to heed, to respond, to agree, and so forth. In this dialogue a person participates wholly and throughout his whole life: with his eyes, lips, hands, soul, spirit, with his whole body and deeds. He invests his entire self in discourse, and this discourse enters into the dialogic fabric of human life, into the world symposium.'<sup>81</sup>

To live is to 'participate in dialogue'. The impulse to engage in dialogue is such that monologism, in its purest form, is rare or perhaps even non-existent in real life. In common law systems we see several examples of dialogism, and we now move on to consider two of the most familiar: incrementalism and the notion of the community.

### *(i) Incrementalism*

Incrementalism embodies dialogue.<sup>82</sup> In response to novel claims and changing social circumstances, judges articulate new legal rules by engaging in dialogue with pre-existing law. As we have seen, for Bakhtin, 'monologue manages without the other', but judges require the existence of 'another consciousness,' i.e. precedent, in order to 'go on'.<sup>83</sup> While precedent has 'decisive force', it never pretends to be the 'ultimate word' – there are ways and means of distinguishing or departing from precedent. When judges develop the law incrementally, they attempt to accommodate the voices of past decisions in a new coherent liability rule. Influenced by centripetal forces, judges attempt to achieve a 'multeity in unity.'

Frankfurter throws light on the process by which judges seek to achieve this type of 'multeity in unity.' Writing in 1923, he emphasised the 'creative power' exercised by judges in 'decisive cases' and explained that judges have to make 'great choices, which are determined in the end by their breadth of understanding, experience in affairs, imagination, intellectual humility, and insight into governmental problems.'<sup>84</sup> On this account, when faced with hard cases, judges draw on their past experience, those 'authoritatively' and

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<sup>81</sup> Bakhtin, *Problems of Dostoevsky's Poetics*, above n 5, p 293.

<sup>82</sup> On the distinction between 'wide' and 'narrow' incrementalism see L. Dolding and R. Mullender, 'Tort Law, Incrementalism, and the House of Lords', (1996) 47 *Northern Ireland Legal Quarterly* 12.

<sup>83</sup> See B. Bix, *Law, Language and Legal Determinacy* (Oxford: Clarendon Press, 1993), p 42, in which he refers to secs. 224-225 of L. Wittgenstein, *Philosophical Investigations* (3<sup>rd</sup> edn, G.E.M. Anscombe, trans., New York: Macmillan, 1968) and p 344 of L. Wittgenstein, *Remarks on the Foundations of Mathematics* (rev. edn., G.H. von Wright, R. Rhees and G.E.M. Anscombe, eds., G.E.M. Anscombe, trans., Cambridge: MIT Press, 1978).

<sup>84</sup> F. Frankfurter, 'Twenty Years of Mr. Justice Holmes' Constitutional Opinions' (1923) 36 *Harvard Law Review* 909, 911.

‘internally’ persuasive voices that have helped to carve out their distinctive philosophies. They exact, what Unger calls, ‘revisionary power’.<sup>85</sup> But whereas individual ‘understanding’, ‘experience’, ‘imagination’ and ‘insight’ tend to be products of centripetal forces, ‘intellectual humility’ ensures that judges see ‘decisive force’ in precedent, dissents and persuasive authority in the voices of others.<sup>86</sup> Intellectual humility is a respect for the Other; the Other remains another consciousness rather than merely an ‘object of consciousness’.

Intellectual humility is necessary because all human knowledge is fallible.<sup>87</sup> Rawls makes a similar point when describing the ‘duty of civility’; he insists that the ‘ideal of citizenship’ obliges us to explain to fellow citizens why, when faced with ‘fundamental questions’, we make the decisions we do.<sup>88</sup> We must explain how our position can be ‘supported by the political values of public reason.’<sup>89</sup> Rawls goes on to state that the duty ‘also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made.’<sup>90</sup> Judges are sometimes accused of conservatism when they ‘cautiously’ develop the law, but while judges are admittedly apprehensive about ‘unintended consequences’,<sup>91</sup> we should bear in mind that they are also being intellectually humble, they are revealing a preparedness to engage in dialogue. Incrementalism is thus a willingness to accept that ‘I might be wrong.’<sup>92</sup> Within this context, judges are indeed conservative, but, as Cass

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<sup>85</sup> R.M. Unger, *What Should Legal Analysis Become?* (London: Verso, 1996), p 67.

<sup>86</sup> Intellectual humility is also a feature of the system of majority decision-making. Alder explains that ‘[t]he justification for majority decision-making is as a device to achieve certainty of outcome in the particular case which, unlike a requirement of unanimity, is conducive to equality of respect for all participants.’ See J. Alder, ‘Dissents in Courts of Last Resort: Tragic Choices?’, (2000) 20 *Oxford Journal of Legal Studies* 221, 222.

<sup>87</sup> See K. Popper, *Conjectures and Refutations* (2<sup>nd</sup> edn., London: Routledge, 2002). It is for these reasons that Sunstein advocates the dialogic ‘incompletely theorized agreements’ as ‘a crucial part of the lawyer’s distinctive solution to social pluralism’ rather than the monologic ‘general theories.’ According to Sunstein, the latter are an ‘unlikely foundation for judge-made law’ and he advises that ‘caution and humility about general theory are appropriate for courts, at least when multiple theories can lead in the same direction.’ In attempting to achieve a ‘multeity in unity’, incremental decisions are thus often incompletely theorized agreements. See C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 2000), p 59.

<sup>88</sup> J. Rawls, *Political Liberalism*, above n 68 p 217.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> C.R. Sunstein, *Designing Democracy* (New York: Oxford University Press, 2001) p 64.

<sup>92</sup> C.R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts are Bad for America* (New York: Basic Books, 2005), p 35.

Sunstein argues, 'sensibly so.'<sup>93</sup> Related manifestations of this conservatism include the ongoing commitment to refining a general duty of care test in England and the efforts of the Canadian courts to ensure that the *Anns* test reflects Canadian cultural particularity.<sup>94</sup> Understood in these terms, courts are charged with the task of giving expression to the *Sitten* (mores)<sup>95</sup> of the community, to which we now turn.

### *(ii) Community and the Common Law*

In classical common law theory, the common law was understood to be the 'accumulated wisdom of the ages',<sup>96</sup> giving expression to the mores of the community. According to this view, the 'community' was *Gemeinschaftlich*, it was the source or 'bank' of collective knowledge and wisdom,<sup>97</sup> the sum of multiple voices and thus achieved a type of 'multeity in unity'. The notion of 'community' has retained significance in the common law and nowadays finds expression in the 'reasonable person' and notions of 'what is fit and proper.' A similar argument has been advanced by Robert Post who argues that the common law regards the individual as both independent and socially dependent.<sup>98</sup> Interests attached to the human personality such as reputation and privacy, for example, are socially contingent, i.e. the individual might experience wounded feelings in the event of injury to these interests but their worth and the success of any civil action is also dependent on the views and assessments of others.<sup>99</sup> Consider the traditional tests used to ascertain whether a statement was defamatory:

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<sup>93</sup> C.R. Sunstein, *Designing Democracy*, above n 91, p 64.

<sup>94</sup> On English law, see, in particular *Donoghue v Stevenson* [1932] AC 562; *Anns v Merton London Borough* [1978] AC 728; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 2 ALL ER 484; *Murphy v Brentwood District Council* [1990] 2 ALL ER 908; *Caparo Industries plc v Dickman* [1990] 1 ALL ER 568 (HL); *Spring v Guardian Assurance plc* [1994] 3 ALL ER 129; *Marc Rich & Co and others v Bishop Rock Marine Co Ltd & others* [1995] 3 ALL ER 307; *Stovin v Wise (Norfolk County Council, Third Party)* [1996] 3 WLR 388; See further K. Stanton, 'Professional Negligence: Duty of care Methodology in the Twenty-First Century' (2006) 22 *Professional Negligence* 134. On Canadian law, see *Kamloops v Neilson* [1984] 5 WWR. 1; *Cooper v Hobart* (2001) 206 DLR (4th) 193; *Edwards v Law Society of Upper Canada* (2001) 206 DLR (4th) 211; *Hill v Hamilton-Wentworth Regional Police Services Board* (2007) 285 DLR (4th) 620. See further N. Rafferty, 'The Canadian Supreme Court's Approach to the Duty of Question and the Tort of Negligent Investigation' (2008) 24 *Professional Negligence* 78.

<sup>95</sup> See G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986).

<sup>96</sup> *Ibid*, p 63, quoting Blackstone (1 Comm. 442).

<sup>97</sup> *Ibid*, p 66.

<sup>98</sup> R. Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution', (1986) 74 *California Law Review* 691.

<sup>99</sup> See T. Gibbons, 'Defamation Reconsidered', (1996) 16 *Oxford Journal of Legal Studies* 587, 592.

whether the statement subjected the individual to ridicule or contempt, whether it lowered the individual in the eyes of right-thinking members of society or whether it caused the individual to be shunned or avoided.<sup>100</sup> Each test is dependent on the moral judgement and core values of the community and it is for this reason that Post suggests defamation law ‘presupposes an image of how people are tied together, or should be tied together in a social setting.’<sup>101</sup>

On this account, defamation law concerns itself not only with corrective justice but also with distributive justice, as both reputation and free speech are ‘social primary goods’ in the Rawlsian sense.<sup>102</sup> We also find reference, albeit implicitly, to both corrective and distributive justice in recent privacy case law, particularly in the construct of the ‘reasonable expectation of privacy’ test.<sup>103</sup> In the event of an unauthorised disclosure of private facts, courts first consider whether, on a subjective level, the aggrieved individual felt she had a reasonable expectation of privacy in the case at hand. But even if she insists that this expectation was present, it does not follow that she will be entitled to a remedy. For the court must also consider, on a more general and objective level, whether the community agrees with her. And so we return to the issue of distributive justice. Among other things, this ideal maintains that the law should not compensate trivial claims because, as Pound noted, a reciprocal sharing of the benefits and burdens of society or ‘give and take’ is the unavoidable consequence of the way in which we choose to live. When weighing competing interests, the ‘oversensitive must give way.’<sup>104</sup>

The emerging law of privacy is thus illustrative of the enduring influence the notion of ‘community’ has had on the common law. But we can find further evidence in private law. The determination of causation in individual cases is another example. Writing in the *Law Quarterly Review* in 2005, Lord Hoffmann referred to the ‘great achievement of Hart and Honoré’, who were able to ‘unpack the concept of causation’ and ‘showed that when judges say that it is a matter of common sense, they usually mean that it accords with ordinary moral notions of when someone should be regarded

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<sup>100</sup> See L. McNamara, *Reputation and Defamation* (Oxford: Oxford University Press, 2007).

<sup>101</sup> Post, above n 98, 693.

<sup>102</sup> See J. Rawls, *A Theory of Justice* (Revised edn, Cambridge: Harvard University Press, 1999), pp 90-95.

<sup>103</sup> See *Campbell v. MGN* [2004] 2 AC 457. See also N. Moreham, ‘Privacy in the Common Law: A Doctrinal and Theoretical Analysis’ (2005) 121 *Law Quarterly Review* 628.

<sup>104</sup> R. Pound, ‘Interests of Personality’ (1914) 28 *Harvard Law Review* 343, 354.

as responsible for something which has happened.<sup>105</sup> Hart and Honoré use 'ordinary language philosophy'<sup>106</sup> to elucidate the concept of causation and, in doing so, they show that the 'ordinary moral notions' which inform it stem from the community. Thus 'common sense' and community mores are firmly interlinked. Postema explains that in classical common law theory, judges drew on 'common reason' or the mores of the community in a novel case. According to these theorists, 'common reason' is, 'we might say, juridical common sense.'<sup>107</sup>

If the communitarian 'embeddedness' thesis is correct,<sup>108</sup> then the community, although it does not feature in modern discourse as prominently as it did in classical law theory, will always inform judicial decision-making. In determining what is 'fit and proper', courts have regard to the *Sitten* of the community and, like incrementalism, the use of dissents and persuasive authority, this exercise is necessarily dialogic. Thus, those who insist that common law judgments are no more than monologues have (perhaps intentionally, or through ignorance or a lack of charity) overlooked the importance of these features of our legal system. In attempting to achieve a 'multeity in unity', we see a strong commitment to dialogism rather than monologism in the common law. However, like other institutions, the legal system does not remain impervious to the effects of monologue creep, which we now consider.

## 5. Monologue-Creep

As we noted earlier, individuals tend to gravitate towards monologue. This is often the consequence of anthropological and psychological centripetal forces, the pursuit of an ideal or simply an attempt to preserve and maintain self-identity. Polyphony or heteroglossia unnerves us; we are intimidated by the prospect of an overwhelming chaos of multiple voices and instead seek to base ourselves in the familiarity of our internal monologues. Moreover, given that we are prone to acting in this way, we are prey to the monologue 'out there' in society: e.g. the 'visions' of the party-hack or ideologue.

Yet no matter how much we seek to resist the impulse to engage in monologue, we are forever vulnerable to a process which we might term monologue-creep. In our formative years, when faced with multiple voices,

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<sup>105</sup> Hoffmann, The Rt Hon Lord, 'Causation' (2005) 121 *Law Quarterly Review* 592, 593. See further H.L.A. Hart and T. Honoré, *Causation in the Law* (2<sup>nd</sup> edn, Oxford: Oxford University Press, 1985).

<sup>106</sup> F. Schauer, '(Re)Taking Hart', (2006) 119 *Harvard Law Review* 852, 852-853.

<sup>107</sup> G.J. Postema, above n 95, p 71.

<sup>108</sup> S. Caney, above n 77.

we latch onto those that are ‘authoritatively persuasive’. Over time, perhaps tentatively, we begin to accept those that are also ‘internally persuasive’. Emerson explains that in Bakhtinian theory the ‘[i]ndividuation of the personality is the process of a consciousness working over the “ideological themes” that penetrate it “and there take on the semblance of individual accents”’.<sup>109</sup> Thus, these voices begin to exert a stronger hold on us; not only do they become our *Weltanschauung*, they also become intertwined with our *Persönlichkeit*, our sense of who we are. Hence, we resort to monologue, or at least tend towards it, in order to preserve self-identity. Some even go so far as to identify an age at which voices become ‘internally persuasive’. Lord Hoffmann, writing extra-judicially in 2005, refers to Maynard Keynes’ observation that ‘there are not many who are influenced by new theories after they are 25 or 30 years of age.’ For Lord Hoffmann, ‘[if] therefore, you are looking for the intellectual influences on the older judicial members of the House of Lords, the best way is to ask what was new and exciting in legal philosophy 50 years ago.’<sup>110</sup>

Monologue-creep can impact on individuals, groups or even nation states and the examples are plentiful – consider teenagers who define themselves as ‘goths’ or the emerging ‘Tea Party’ movement in the United States. Monologue creep may also assume less obvious forms such as the ‘soft-power’ influence of US culture globally following World War II.<sup>111</sup> Once an idea is embraced by a group, the phenomenon of group dynamics<sup>112</sup> ensures that the thought ingrains itself on those who embrace it and thus we see in this process the existence of memes, in Dawkin’s terminology.<sup>113</sup> Monologue-creep is particularly common in academia, where many feel the need to align themselves to a particular ‘school of thought’, and it is at this point that we examine the views of a group of lawyers we might label Strasbourg enthusiasts. They exhibit a high degree of optimism concerning the ECHR and the jurisprudence of the ECtHR. But this enthusiasm seems to tend in a utopian direction, which means, in the words of Berlin, that their enterprise ‘is likely to lead to...disillusionment and failure.’<sup>114</sup>

## 6. The Strasbourg-Enthusiasts - Monologism in Action?

<sup>109</sup> C. Emerson, above n. 62, p 127.

<sup>110</sup> Hoffmann, above n105, 594.

<sup>111</sup> See J.S. Nye, *Soft Power: The Means to Success in World Politics* (New York: Public Affairs, 2004)

<sup>112</sup> On group dynamics, see O. Pedersen, above n 31.

<sup>113</sup> R. Dawkins, *The Selfish Gene* (Oxford: Oxford University Press, 1989), ch. 11.

<sup>114</sup> Berlin, above n 6, p 48.

The Strasbourg-enthusiast believes that the application of Strasbourg principles and case law will automatically lead to an improved state of affairs. Among other things, they are concerned with 'tidiness' in the law,<sup>115</sup> i.e. the notion that one can design a friction-free and distributively just scheme of allocating burdens and entitlements. Speaking in 1997, Lord Irvine, for instance, insisted that judges were 'pen-poised' to develop a right of privacy in the common law.<sup>116</sup> He explained that the new privacy law would be a 'better law' as judges would have to balance Arts. 8 and 10 ECHR.<sup>117</sup> Strasbourg-enthusiasm is even more common in academia. Bennett, for instance, in this issue, proposes an action based on Art. 8 ECHR that would encompass dignitary interests generally.<sup>118</sup>

The ECtHR itself has spurred these enthusiasts on. As a result of its 'assertive jurisprudence'<sup>119</sup> over the past twenty years, the Strasbourg Court has expanded the remit of ECHR rights to private law relationships. According to the Court, a state has, in some circumstances,<sup>120</sup> a positive obligation to take active measures to ensure that an individual's rights under the ECHR are not infringed by another private party.<sup>121</sup>

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<sup>115</sup> In *Canadian National Railway Co v. Norsk Pacific Steamship Co Ltd* (1992) 91 DLR (4th) 289, 365, McLachlin J 'refus[es] to accept injustice merely for the sake of doctrinal tidiness' quoted by R. Mullender in 'The Reasonable Person, The Pursuit of Justice, and Negligence Law' (2005) 68 *Modern Law Review* 681, 690.

<sup>116</sup> House of Lords, Debates (24 November 1997) C 784.

<sup>117</sup> *Ibid.*

<sup>118</sup> See T. Bennett's essay in this issue, 'Corrective Justice and Horizontal Privacy'.

<sup>119</sup> R.S. Kay, 'The European Convention on Human Rights and the Control of Private Law' (2005) 5 *European Human Rights Law Review* 466, 466.

<sup>120</sup> Those situations in which positive obligations can arise were set out by the ECtHR in *Özjür Gündem v. Turkey* (2001) 31 EHRR 49, at para 42: 'Although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. The Court has found that such obligations may arise under Article 8. Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Articles 2 and 3, while a positive obligation to take steps to protect life may also exist under Article 2.'

<sup>121</sup> See *X and Y v. Netherlands* (1985) 8 EHRR 235, in which the Court stated that the obligations on the State involved 'the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.' See also the decisions of the ECtHR in *A v. United Kingdom* (1998) 27 EHRR 611, *Refah Partisi and Others v. Turkey* (2003) 37 EHRR 1; *MC v. Bulgaria* (2005) 40 EHRR 20, *Pla and Puncernau v. Andorra* (2006) 42 ECHR 25; *von Hannover v. Germany* (2005) 40 EHRR 1. See also A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: OUP, 2006) at 349-352.

While this obligation has been recognised by the UK courts in privacy cases,<sup>122</sup> these positive obligations affect a wide range of private law relationships. The ECtHR, for instance, has held that a state has a positive obligation to protect immigrant tenants who wish to receive satellite television from their home country, even in cases where the private tenancy agreement expressly prohibits the installation of satellite dishes for reasons of safety or aesthetics.<sup>123</sup> On the ECtHR's account, a human right to receive satellite television stems from Art. 10 ECHR.

For this reason, the Strasbourg court insists that we must be ever-vigilant about human rights and considers that Art. 8 ECHR, for example, pervades all human relationships. Unlike the UK courts, the European Court of Human Rights (ECtHR) presumes that victimhood, or the potential for it, is ubiquitous. According to the Court, Art. 8 protects:

‘...a person’s physical and psychological integrity; the guarantee afforded by Art. 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life”.’<sup>124</sup>

As Kay emphasises, there are ‘few grievances that cannot be accommodated to a claim of interference with this kind of interest.’<sup>125</sup> He argues that if we were to apply this in private law, ‘we could, effectively have a situation where the Convention obliges every person to respect every other person’s “physical and psychological integrity” – except when, all things considered, it is better not to do so.’<sup>126</sup> On the ECtHR's account, Art. 8 stretches across public and private law; it becomes a general monologue.

As in every instance of Bakhtinian ‘pure’ monologism or dramatic monologue in the literary sense, the Strasbourg enthusiasts also have their ‘main heros’, those individuals who know ‘how to drive the human

<sup>122</sup> ‘[T]he ECtHR has recognized an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member State to interpret legislation in a way which will achieve that result.’ (*per* Lord Phillips MR) in *Douglas v. Hello* [2006] QB 125, at 149.

<sup>123</sup> See *Autronic AG v. Switzerland* (1990) 12 EHRR 485; *Khursbid Mustafa and Tarzibachi v. Sweden* (2009)

<sup>124</sup> *von Hannover*, above n 121, [50].

<sup>125</sup> R.S. Kay, above n 119, 477.

<sup>126</sup> *Ibid.*

caravan.<sup>127</sup> One such hero is the Vice-President of the European Human Rights Commission, Mr Sperduti, who has highlighted the 'precarious position' of individuals and has argued that it is 'necessary to expand the interpretation of the European Convention in order to find therein means of protecting the individual against his fellow-men.'<sup>128</sup>

Heroes, such as Mr Sperduti, are perhaps well-intentioned and there are indeed some compelling arguments as to why human rights should be applied in private law.<sup>129</sup> First, since the 1950s, private companies and organisations have enlarged to the point that their financial income now dwarfs that of many small nation states.<sup>130</sup> In such circumstances, the individual is equally vulnerable when dealing with either a large corporation or state authorities. Second, with increasing privatisation it is 'difficult to see how a function ceases to be a public function simply because of a change in who carries it out.'<sup>131</sup> Third, critics question why a small municipality with a limited budget is obligated to comply fully with all constitutional human rights provisions, while large corporations are rarely subjected to the same level of scrutiny.<sup>132</sup>

The human rights monologist seeks to protect and empower the vulnerable individual. At the same time, human rights are deontological constructs and, quite understandably as such, are assessed from the 'victim-perspective'.<sup>133</sup> Vulnerability can be a feature of private law as well as public law relationships, and the argument that judges should apply a general human rights monologue in private law is compelling if one agrees that corrective justice and the protection of weaker individuals are important ideals in a democratic society. But we should remember that private law is dialogic. Classical private law is concerned with complex relationships between

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<sup>127</sup> I. Berlin p 15

<sup>128</sup> 'Oral Interventions', Fourth International Colloquy (n 56) 111, 113 quoted by A.I.L. Campbell, 'Positive Obligations under the ECHR: deprivation of liberty by private actors' (2006) 10 *Edinburgh Law Review* 399, 408.

<sup>129</sup> See G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union: Volume 1* (Cambridge: Cambridge University Press, 2010).

<sup>130</sup> See, for example, the news story from 2007, 'Tesco: Richer than Peru' <http://www.guardian.co.uk/business/2007/apr/15/supermarkets.uknews>

<sup>131</sup> The Rt. Hon. Lord Justice Sedley, *Freedom, Law and Justice* (London: Sweet & Maxwell, 1999), p 28. Campbell, above n 128, 403, provides the example of *Storck v. Germany* (2006) 43 EHRR 6, in which the ECtHR found that the applicant's right to liberty under Art. 5 (1) ECHR had been infringed. The applicant had been admitted and confined to a private psychiatric institution without a court order.

<sup>132</sup> See A. Barak, 'Constitutional Human Rights and Private Law', in D. Friedmann and D. Barak-Erez (eds.) *Human Rights in Private Law* (Oxford: Hart, 2001), p 20.

<sup>133</sup> A. Freeman, 'Legitimizing Racial Discrimination with Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine', (1978) 62 *Minnesota Law Review* 1049, 1051.

actors in society and the economy; relationships founded on principles of freedom of choice, contract, autonomy and action. Sometimes they may prove mutually beneficial but these relationships are not always harmonious or devoid of friction. Such is the reality of life. For, under the Bakhtinian 'law of placement', each of us is situated differently.<sup>134</sup> We may occupy the same space but our cognition of this space is unique to us; there are, as Holloway and Kneale explain, 'differences in simultaneity'.<sup>135</sup> While there are limits such as public policy, the starting point in classical private law is that sellers may discriminate against buyers, just as testators may discriminate against potential heirs.<sup>136</sup> It may even be the case that the seller or testator has acted in a manner which not only offends the other party but also offends other members of the community. The human rights monologist, concerned as he is with tidiness in the law, might regard this as an unsatisfactory state of affairs, a clear instance in which the right to equal treatment has been infringed.<sup>137</sup> The monologist may even wish to step in and settle disputes where the actions of a private party, although not unlawful on the basis of the present private law, nonetheless offend 'civil mores'.

While possibly well-intentioned, there are at least three objections to applying a general human rights monologue in private law. We will examine each of these objections in turn:

- i) First, we cannot simply assume that human rights discourse can provide 'reasonable answers' to all complex private law disputes.
- ii) Second, on an operational level, how do we decide who is vulnerable? Is there a standard against which we can measure degrees of vulnerability?
- iii) Third, like Lefft J in 'The Canengusian Connection', the monologist assumes that private law is unwilling or simply unable to protect vulnerable parties and, as we shall see, this is a rather bold assumption.

### **(i) *Can Human Rights Discourse Provide 'Reasonable Answers'?***

Civilians often refer to the notion of 'solving cases' (*Lösen von Fällen*). In the English language, at least, the word 'solution' is not an altogether satisfactory way of describing how judges, bearing the 'burden of

<sup>134</sup> J. Holloway and J. Kneale, 'Mikhail Bakhtin: Dialogics of Space' in M. Crang and N.J. Thrift (eds.) *Thinking Space* (London: Routledge, 2000) p. 74.

<sup>135</sup> *Ibid.* Bakhtin speaks of 'simultaneous coexistence'. See M. Bakhtin, above n 5, p. 29.

<sup>136</sup> See P. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979).

<sup>137</sup> *Cf. Pla and Puncernau v. Andorra* (2006) 42 ECHR 25.

judgment',<sup>138</sup> decide cases. In developing the Kantian idea of 'Public Reason',<sup>139</sup> Rawls argues that we must come to a 'reasonable answer' in 'all, or nearly all,' cases 'involving constitutional essentials or basic questions of justice.'<sup>140</sup> The 'reasonable answer' attempts to 'balance', 'combine' or 'otherwise unite' the values of a pluralistic society. But importantly, unlike the judges in 'The Canengusian Connection', he believes that this cannot be achieved by resorting to 'philosophical doctrines – to what we as individuals or members of associations see as the whole truth.'<sup>141</sup>

We arrive at 'reasonable answers' by overcoming the 'burdens of judgment.' As 'rational' and 'reasonable' individuals we are faced with choices, often conflicting and sometimes equally compelling. Rawls lists six sources of 'reasonable disagreement':<sup>142</sup> cases where there is 'conflicting and complex' evidence, where there is disagreement about the weight that should be attached to various considerations, where we have to interpret 'vague' and 'indeterminate' concepts, where our 'total experiences are disparate enough for [our] judgments to diverge', where we have to make an 'overall assessment' about 'normative considerations of different force', and finally, where we must select between competing values because of 'limited social space.'

Judges encounter these burdens in every case where there is a 'basic question of justice' and, as Rawls puts it, '[m]any hard decisions may seem to have no clear answer.'<sup>143</sup> But does rephrasing the detail of private law disputes in human rights language makes things any easier?

This essay argues that it does not. For almost every legally protected interest can be classified as, or stretched to be, a human right in one way or the other. This also includes the basic operating of principles of classical private law: freedom of contract and action can be classified as human rights in

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<sup>138</sup> J. Rawls, above n 68, pp 54-58.

<sup>139</sup> For Rawls, *Ibid*, pp 212-213, 'public reason' affords a political society a 'way [to] formulat[e] its plans, to [put] its ends in an order of priority and to [make] its decisions accordingly.' The capacity to achieve this is 'rooted' in the 'human members' of the society. On questions of 'constitutional essentials' and 'basic justice', p 224, the 'principle of political legitimacy' requires that the 'basic structure and its public policies are to be justifiable to all citizens.' But in making these justifications, we draw on a limited number of sources, namely 'presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial.'

<sup>140</sup> *Ibid*, p 225.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid*, pp 56- 57.

<sup>143</sup> *Ibid*, p 57.

themselves.<sup>144</sup> On a Nietzschean view, the proponent of slave morality assumes that we are *all* vulnerable *all* of the time; the result is that *jedermann* becomes the hopeless victim.<sup>145</sup> But to what extent does this constitute a ‘reasonable answer’? The difficulty with this approach is that we find not only compatible but also incommensurable voices in real life.<sup>146</sup> Those who carry the ‘burden of judgment’ on their shoulders must continue to make what Berlin terms ‘tragic choices’.<sup>147</sup> Relying on Strasbourg principles will not make these decisions any easier because ‘[w]e are doomed to choose, and every choice may entail an irreparable loss’<sup>148</sup> and for each problem we ‘solve’, another predicament arises. If anything, a judge who chooses to apply Strasbourg principles *without* engaging in dialogue with precedent and the community will appear to be deciding the case arbitrarily, thus accentuating any feeling of loss. Talk of ‘balancing’ or ‘weighing’ competing interests will not help either. As Alder points out, this metaphor is ‘inappropriate because there is no common scale against which the different components can be compared.’<sup>149</sup>

Strasbourg enthusiasts, like Mr Sperduti, earnestly pursue an ideal, but in doing so they are locked in monologue, however one which pursues a utopian ideal, the ‘notion of the perfect whole, the ultimate solution, in which all good things coexist.’ But such lofty plans are always doomed to fail.<sup>150</sup> Utopianism can only be a product of monologue, whether on the part of the individual thinker or as a result of group dynamics. Moreover, utopias are designed on the premises of ‘correct’ answers and can never reflect the reality of multiple voices in the ‘world symposium’. According to Berlin, those who pursue an ideal in this monologic way ‘rest on ... comfortable beds of dogma’ and ‘are victims of forms of self-induced myopia, blinkers that may make for contentment, but not for understanding of what it is to be human.’<sup>151</sup>

<sup>144</sup> See R. Brownsword, ‘Freedom of Contract, Human Rights and Human Dignity’ in D. Friedmann and D. Barak-Erez, above n 132.

<sup>145</sup> According to Nietzsche this is a ‘pessimistic distrust of the whole human condition’ (‘ein pessimistischer Argwohn gegen die ganze Lage des Menschen’). See sec. 260 of *Jenseits von Gut und Böse* (1886) in G. Colli and M. Montinari (eds) *Nietzsche Werke* (Berlin: de Gruyter, 1968).

<sup>146</sup> On incommensurability, see I. Berlin, above n 6, p 55; J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), ch 13; R. Chang (ed.) *Incommensurability, Incomparability and Practical Reason* (Cambridge: Harvard University Press, 1997).

<sup>147</sup> Alder makes this point, above n 86, 224.

<sup>148</sup> I. Berlin, above n 6, p 13.

<sup>149</sup> J. Alder, above n 86, 224.

<sup>150</sup> I. Berlin, above n 6, p 13.

<sup>151</sup> *Ibid*, p 14. In relation to the contentment point, see Pedersen, above n 31, on the avoidance of cognitive dissonance.

We find several examples of this myopia in English law. Consider the use of Art. 8 ECHR by the UK courts in developing a new privacy action. Art. 8 has given new ‘strength and breadth’<sup>152</sup> to the doctrine of breach of confidence, and the new action affords a remedy to individuals in cases where private information has been unlawfully disclosed to third parties. But while Strasbourg enthusiasts may celebrate the arrival of a ‘privacy tort’, this new action does not actually fill the privacy vacuum in English law; far from it – importing a right of privacy into English private law raises more questions than answers. Are claimants in *Wainwright*-type situations (where there is an invasion of physical space rather than informational privacy) protected by the new tort?<sup>153</sup> What occurs when there is a misappropriation of personality? Does a post-mortem right of privacy/publicity exist in English law? Focused on importing Art. 8 into a limited number of disputes involving high-profile celebrities, UK courts have not even begun contemplating such important questions. These questions will only be meaningfully addressed when courts engage in dialogue with precedent, the community, persuasive authority and work, as the common law does, from the bottom-up, rather than deducting from the Strasbourg provisions. For, as Mullender argues, the Strasbourg principles are not only ‘powerful reasons for action’ but are also ‘invitations to more work’.<sup>154</sup>

### (ii) *Assessing Vulnerability*

The second objection against the application of a general human rights monologue in private law is that it would cause significant operational problems. As argued above, human rights are assessed from the ‘victim-perspective’<sup>155</sup> and the protection of the vulnerable individual is thus central to human rights law. But in private law, this raises some difficult questions. How do we decide who is vulnerable? Should we measure degrees of vulnerability in order to ensure that the truly vulnerable are protected? As we will see, problems of this kind are pervasive in the recent privacy case law.

Privacy has long been a neglected interest in English law and the lack of a distinct remedy has led to distinctly awkward decisions in the past, in which courts acknowledged that a significant interest had been infringed but were

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<sup>152</sup> *A v B* [2003] QB 195, 202 (*per* Lord Woolf CJ).

<sup>153</sup> See below for a description of the *Wainwright* case and the problems which result from it.

<sup>154</sup> R. Mullender, ‘Tort, Human Rights and Common Law Culture’ (2003) 23 *Oxford Journal of Legal Studies* 301, 316.

<sup>155</sup> A. Freeman, above n 133.

forced to conclude that a remedy was unavailable. *Kaye v. Robertson*<sup>156</sup> concerned a prominent actor who had suffered severe injuries in a car accident. While in hospital, reporters for a tabloid newspaper, *The Sunday Sport*, gained access to his private room, interviewed and photographed him, before being ejected by the hospital security staff. Medical evidence indicated that Mr Kaye's condition was such that he was unable to give informed consent and the judges of the Court of Appeal highlighted his particularly vulnerable position. Bingham LJ, for example, was sympathetic:

'If ever a person has a right to be let alone by strangers with no public interest to pursue, it must surely be when he lies in hospital recovering from brain surgery and in no more than partial command of his faculties.'<sup>157</sup>

But English law, as it stood at that time, could offer little protection to the claimant. He (just about) succeeded in bringing an action in malicious falsehood but that, in itself, was unsatisfactory as the claimant was forced to jump through the proverbial hoops and prove special damage under the action.<sup>158</sup> The potential for judicial paralysis in such cases was highlighted by Bingham LJ who warned that had the claimant failed to establish a cause of action the court would have been 'powerless to act, however great [the] sympathy for the plaintiff and however strong [the] distaste for the defendant's conduct.'<sup>159</sup>

Similarly, in *Wainwright v. Home Office*,<sup>160</sup> a mother and her mentally impaired son were subjected to a strip search by prison officers on their visit to a prison. It emerged in court that the officers failed to conduct the search in accordance with the Prison Rules 1964 and the claimants asserted that they had been humiliated and that their right to privacy had been invaded as a result. However, Lord Hoffmann emphasised that the common law was 'unwilling' if not 'unable' to 'formulate any such high-level principle.'<sup>161</sup>

One would think that a finding of vulnerability would be uncontroversial in cases where there has been a physical intrusion into a private space,

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<sup>156</sup> [1991] FSR 62.

<sup>157</sup> *Ibid*, at 70 (*per* LJ Bingham).

<sup>158</sup> Glidewell LJ, *Ibid* at 68, reasoned that Mr. Kaye had 'a potentially valuable right to sell the story of his accident and his recovery'. If the defendants were allowed to publish the article in the way they proposed, the 'value of this right would...be seriously lessened, and Mr. Kaye's story thereafter would be worth much less to him.' At a stretch, therefore, the Court was able to identify special damage and award an interlocutory injunction.

<sup>159</sup> *Ibid*, at 70.

<sup>160</sup> [2004] 2 A.C. 406.

<sup>161</sup> *Ibid*, at 419.

particularly where the claimant is interacting with state authorities, as in *Wainwright*, or is seriously ill, as in *Kaye*. But courts remain opposed to 'a judicial power'<sup>162</sup> declaring a general right of privacy because a general wrong would result in 'an unacceptable degree of uncertainty.'<sup>163</sup> While decisions such as *Wainwright* and *Kaye* were widely criticised, many commentators insisted that this anomaly would be rectified by the coming into force of the Human Rights Act 1998. We need only remind ourselves of Lord Irvine's insistence that judges were 'pen-poised' to develop a right of privacy in the common law.<sup>164</sup> The Human Rights Act has certainly given courts the impetus to develop a new privacy action, but while some commentators regard these developments as evidence of progress in the protection of human rights in the UK, a closer examination of the case law reveals that the new tort has a very narrow remit.<sup>165</sup> The new action can best be described as a disclosure of private information tort and, as such, does not extend to the other forms of invasion of privacy.

This new tort caters for a particular type of claimant, generally a public figure or celebrity who complains that a media outlet has published or is about to publish information concerning his private life. Although non-public persons can avail of this action, the case law of other countries shows that such claims are uncommon.<sup>166</sup> There are, of course, cases where the public spotlight has fallen on non-public figures who have, for example, become victims of high profile crimes. But, generally, complaints from non-public persons concerning informational privacy relate to questions of data protection and will fall under relevant domestic and EU legislation in this area.<sup>167</sup> By contrast, the bulk of the disclosure cases involve individuals whose 'trade' is publicity,<sup>168</sup> celebrities who cannot be conveniently described as 'vulnerable'. Rather these cases are often characterised by celebrities attempting to preserve, control or manage their public persona and/or image for commercial gain.<sup>169</sup> In the recent case of *Terry v. Persons Unknown*, for example, Tugendhat J thought it 'likely' that the 'real concern of the applicant in this case [was] the effect of publication upon the

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<sup>162</sup> *Ibid*, at 421 (*per* Lord Hoffmann).

<sup>163</sup> *Ibid*, at 422.

<sup>164</sup> House of Lords, Debates (24 November 1997) C 784.

<sup>165</sup> See P. O'Callaghan, 'Privacy in Pursuit of a Purpose', (2009) 17 *Tort Law Review* 100.

<sup>166</sup> See J. Krzeminska-Vamvaka and P. O'Callaghan, 'Mapping out a Right of Privacy in Tort Law' in G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds) *Fundamental Rights and Private Law in the European Union: Volume II* (Cambridge: Cambridge University Press, 2010).

<sup>167</sup> Directive 95/46/EC and Directive 2002/58/EC.

<sup>168</sup> *Campbell*, above n 103, at 470 (*per* Lord Hoffmann)

<sup>169</sup> See *Douglas v. Hello (No. 3)* [2006] QB 125.

sponsorship business'.<sup>170</sup> Similarly in *Campbell*, Lord Hoffmann described the claimant as:

‘a prima donna celebrity against a celebrity-exploiting tabloid newspaper. Each [party] in their time has profited from the other. Both are assumed to be grown-ups who *know the score*.’<sup>171</sup> [Emphasis added]

For Strasbourg enthusiasts, *Douglas* and *Campbell* are cases involving circumstances where important human rights have been infringed. But using human rights language in this context has the effect of masking the real dispute, which is often nothing more than an old-fashioned civil action between two parties ‘who know the score’.<sup>172</sup> Thus the Strasbourg enthusiast demonstrates – like the Canengusian judges – that his views are narrowly focused and this suggests that Strasbourg enthusiasts apprehend a distorted reality through a prism that filters out much of what is relevant.<sup>173</sup>

### (iii) *Protecting the Vulnerable Individual in Dialogic Private Law*

Presumptions that both parties ‘know the score’ are not uncommon in civil actions. Contract law operates on the presumption of capacity to contract; in tort, ‘knowing the score’ is expressed through the principle of personal responsibility:<sup>174</sup> damages, for example, can be apportioned where contributory negligence is present.

But while private law often presumes that private parties ‘know the score’, it does not ignore the plight of the vulnerable individual: the presumption can be rebutted in cases where an individual has been exploited or otherwise wronged. Consider the case of an individual standing surety for the business debts of his/her spouse, but when the lender attempts to implement the agreement, the individual claims that his/her spouse forced him/her to sign

<sup>170</sup> [2010] EWHC 119 (QB), at [131] (*per* Tugendhat J).

<sup>171</sup> *Campbell*, above n 103, at 498 (*per* Lord Hoffmann).

<sup>172</sup> Sometimes there are significant personal interests at stake e.g. where an individual is being harassed or ‘hounded’ by the press (see *von Hannover*, above n 121) or where children are the subjects of the news reports (see *Murray v Express Newspapers* [2009] Ch 481).

<sup>173</sup> On the ‘theory of aspects’, see E. Mickiewicz’s essay in this issue, ‘An Exploratory theory of Legal Coherence in Canengus and Beyond’.

<sup>174</sup> ‘Personal responsibility’ is used in a general way here, not just focusing on the behaviour of the wrongdoer but also on the conduct of the injured party or the party alleging injury. On responsibility generally, see T. Honoré, *Responsibility and Fault* (Oxford: Hart, 1999); on the behaviour of the plaintiff see, in particular, pp 89-90. See also A. Beever, ‘Corrective Justice and Personal Responsibility in Tort Law’ (2008) 28 *Oxford Journal of Legal Studies* 475.

the agreement in the first place.<sup>175</sup> One could perhaps argue that there are significant human rights at stake here, but judges have developed a means to protect the legitimate interests of the vulnerable party in this case without the need to apply a general human rights monologue. The equitable doctrine of undue influence arises in cases where one party is in a more powerful position than the other and coerces the weaker party into a transaction, which is disadvantageous to that weaker party.<sup>176</sup> Equitable principles and doctrines such as these provide relief in cases where a strict application of the law would otherwise lead to injustice or unfairness. Through the doctrine of undue influence, fashioned by incremental development, courts have managed to find a way to accommodate the security interests of the claimant, as well as those of the defendant, in freedom of action.<sup>177</sup>

To describe this as a 'balance' might be too optimistic, but in accommodating the conflicting interests in this way, the doctrine arrives at a 'reasonable answer' for it also gives expression to the principle of personal responsibility. While equity will intervene to protect a vulnerable individual from being wronged by another party in a more powerful position, it will not protect individuals from their own foolishness. In the seminal case of *Allcard v. Skinner* (1887),<sup>178</sup> Lindley J questioned whether 'it is right and expedient to save persons from the consequences of their own folly' or whether it 'is right and expedient to save them from being victimised by other people?' He decided that undue influence sought to achieve the latter. He went on to state that:

'It would obviously be to encourage folly, recklessness, extravagance and vice if persons could get back property which they foolishly made away with, whether by giving it to charitable institutions or by bestowing it on less worthy objects. On the other hand, to protect people from being forced, tricked or misled in any way by others into parting with their property is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the

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<sup>175</sup> On these classic 'unfair suretyships' cases see A. Colombi Ciacchi and S. Weatherill (eds) *Unfair Banking Practices in Europe: The Case of Personal Suretyships* (Oxford: Oxford University Press, 2010). See also M. Kenny, 'Standing Surety in Europe: Common Core or Tower of Babel?', (2007) 70 *Modern Law Review* 175.

<sup>176</sup> See *Royal Bank of Scotland v. Etridge* (No 2) [2002] 2 AC 773, at 794 – 800 (*per* Lord Nicholls).

<sup>177</sup> This argument is open to criticism. Unger argues that principles associated with the market and the 'pitiless world of deals' triumph over those associated with community. See R.M. Unger, 'The Critical Legal Studies Movement', (1983) 96 *Harvard Law Review* 561, 625.

<sup>178</sup> (1887) L.R. 36 Ch. D. 145.

necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud.<sup>179</sup>

Equity protects vulnerable individuals when they have been wronged, but this protection is curbed by the principle of personal responsibility. Equity acts to secure the interests of the vulnerable, but if judges advert to the principle of personal responsibility as a salient concern, it may check their urge to act in inappropriate cases and thereby throw light on genuine instances of vulnerability. By contrast, a human rights monologue with deontological impulses, focused on victimhood and oppression, does not measure the victim's personal responsibility. Naturally, it would be absurd to view a victim's foolishness as some sort of mitigating factor where human rights are infringed; it would be absolutely abhorrent to argue that victims of genocide were somehow contributorily negligent. But this point highlights the very real difference between human rights discourse and private law. Within human rights discourse, the status of victim is such that the victim's actions are usually considered inconsequential, but in a classic private law dispute where both parties are deemed to 'know the score' the question of personal responsibility or even foolishness on the part of the claimant is often pivotal. Two examples from recent privacy case law are illustrative here.

In *Campbell*, the claimant had publicly denied ever taking drugs and thus the Law Lords unanimously agreed that the press had the right to correct this misdescription.<sup>180</sup> The question of personal responsibility on the part of the claimant also rears its head in *Mosley v. News Group Newspapers Ltd.*<sup>181</sup> Details of the claimant's liaison with prostitutes appeared in a published newspaper article, which accused him of being involved in a 'sick nazi orgy.'<sup>182</sup> It emerged in court that the claimant had received warnings from friends that he was being 'watched by some unidentified group of people hostile to him' but he continued to arrange his parties.<sup>183</sup> For this reason, Eady J remarked that to 'a casual observer... it might seem that the claimant's behaviour was reckless and almost self-destructive.'<sup>184</sup> He went on to explain that while this

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<sup>179</sup> *Ibid*, at 183.

<sup>180</sup> In this case, the defendant conceded that the *Mirror* was 'entitled to publish the fact of her drug dependency and the fact that she was seeking treatment [because] she had specifically given publicity to the very question of whether she took drugs and had falsely said that she did not.' Lord Hoffmann accepted that 'this create[d] a sufficient public interest in the correction of the impression she had previously given'. See *Campbell*, above n 103, at 474.

<sup>181</sup> [2008] EMLR 20.

<sup>182</sup> *Ibid*, at [1].

<sup>183</sup> *Ibid*, at [225].

<sup>184</sup> *Ibid*, at [226].

did 'not excuse the intrusion into his privacy' it '*might* be a relevant factor to take into account when assessing [causation]'.<sup>185</sup> Was the claimant therefore 'the author of his own misfortune?'<sup>186</sup> Eady J mused that a public figure who regularly meets prostitutes, for example, risks public exposure or blackmail. But in this particular case, the judge found no evidence to suggest that the 'surveillance [the claimant] was warned against had any connection with [the defendant]' and thus presumably the claimant's actions were not considered to be a relevant factor in assessing causation.<sup>187</sup> Nonetheless, the judge's remarks on causation deserve close attention because he underscores the importance of dialogue with the community. But we are not concerned here with the ideal of a Kantian ethical community; rather, this is a dialogue among the law's addressees that is relevant to the law's operations. The judge reaches out into practical life or 'public reason' and finds support for his approach in it – he engages in a type of empirical dialogue. Unlike the Strasbourg enthusiast who knows how to 'go on' in a world full of victims, the judge in this case assumes that he does not have all the answers.

But more significantly still, *Campbell* and *Mosley* demonstrate that judges are willing to regard the actions of the claimant as consequential in privacy cases. Among other things, therefore, these cases highlight that private law is unsuited to the application of a general human rights monologue. For this reason, presumably, academics and judges have favoured indirect horizontal effect over direct effect in fashioning the new privacy action.<sup>188</sup> And so the question arises: does indirect effect fare any better in providing 'reasonable answers'?

## 7. Human Rights and Private Law: 'Multeity in Unity'?

Under the indirect effect model, human rights are but one of a number of voices that inform private law, albeit they are part of a 'higher-order' public law.<sup>189</sup> Treating human rights as higher order rights may look like monologue-creep but while we should avoid monologic utopianism at all

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<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*, at [225].

<sup>187</sup> *Ibid.*, at [226].

<sup>188</sup> See M. Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *Public Law* 423; G. Phillipson 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 *Modern Law Review* 824; W. Wade, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review* 217; A.L. Young, 'Horizontality and the Human Rights Act 1998' in K.S. Ziegler (ed) *Human Rights and Private Law: Privacy as Autonomy* (Oxford: Hart, 2007); I. Leigh and R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford: Hart, 2008).

<sup>189</sup> J. Laws 'Law and Democracy' [1995] *Public Law* 72, 84.

costs, on Berlin's account '[p]riorities, never final and absolute, must be established' so that a plural society can function.<sup>190</sup> Indirect effect is thus the closest we come to reconciling incommensurable values and to achieving a 'multeity in unity'. In privacy law, for example, courts have developed the equitable doctrine of breach of confidence into a *de facto* tort of misuse of private information. In doing so, they have given effect to Arts. 8 and 10 ECHR while simultaneously taking account of the complexity of private relationships.

Before courts balance Arts. 8 and 10 ECHR, they must first establish whether the claimant had a reasonable expectation of privacy. This first step is crucial as it prevents taking into account 'considerations which should more properly be considered at the later stage of proportionality.'<sup>191</sup> Rather than assuming that human rights are at stake and that a balancing of conflicting rights is therefore warranted, the claimant must first show that Art 8 may be at stake: that there has been a *prima facie* infringement of her right. Thus, at an operational level, a presumption of victimhood is avoided. Moreover, as Moreham argues, the reasonable expectation test goes 'some way towards striking an appropriate balance between objective and subjective measures: "reasonableness" acts as an objective check without removing the subjective focus of the action'.<sup>192</sup> The test, assessed from the claimant's perspective, is subjectively sensitive. Did the individual have an expectation of privacy? However, the use of the term 'reasonable' acts as an 'objective check'<sup>193</sup> and thus ensures that the risk of viewing this solely from the 'victim perspective' is reduced.

The net result is that courts are provided a means to categorise claimants, as is common in other legal systems.<sup>194</sup> Thus, we find a number of distinctions in the law between voluntary and involuntary public figures, between individuals who actively seek publicity and those who avoid it. For instance, in disclosure cases courts have afforded a higher level of protection to children or relatives of public figures than to publicity-seeking celebrities themselves.<sup>195</sup> The reasonable expectation test also allows courts to take

<sup>190</sup> I. Berlin, above n 6, p 17.

<sup>191</sup> *Campbell*, above n 103, at 466 (*per* Lord Nicholls).

<sup>192</sup> N. Moreham, above n 103, 645.

<sup>193</sup> N. Moreham, *Ibid*, maintains that the test enables 'a court to distinguish between X, an outspoken, "out" campaigner for gay rights, and Z, who has never discussed his homosexuality, and between Y, who voluntarily appeared on a 24-hour surveillance "reality TV" show, and Z, who has never sought publicity'.

<sup>194</sup> German courts distinguish between absolute and relative persons of contemporary history (*Personen der Zeitgeschichte*). See O'Callaghan, above n 165.

<sup>195</sup> *Cf. Murray* above n 172 and *Campbell* above n 103.

account of the nature of the information in question. While the significance attached to the 'nature' of the information will invariably depend on the standpoint from which one views it, the test itself affords judges space to engage in dialogue in order to tease out the significance they should attach to it in the individual case. Thus the judge has to pay attention to the world around him – not something we see all that much of in the egotistic Canengusian judges. Such attention to fine-grained detail is evident in *Campbell*. In this case, there were two types of information at play: first, the information that the appellant had been using drugs, a charge which she vehemently denied in the past. Noting that the claimant was a voluntary public figure, the Court unanimously found that the press had the right to correct this information. The second type of information, the photographs of the appellant taken outside a Narcotics Anonymous meeting, related to her medical treatment, information of an intimate nature, and the majority of their Lordships held that Ms Campbell was entitled to damages for the publication of these photographs, recognising that a celebrity who actively seeks publicity has the right to keep certain intimate information private.

The reasonable expectation of privacy test is a product of indirect horizontal effect; it is a product of a private law informed by multiple voices, including human rights discourse. Of course much work remains to be done, but the test constitutes a more suitable construct for private law actions than the general human rights monologue espoused by the ECtHR obliging each individual to respect each other's 'personal and psychological integrity.' Indirect effect is the closest we come to 'multeity in unity' when attempting to accommodate human rights discourse in private law. But in developing this doctrine, UK judges have been more respectful of others and more attentive to factual complexity than the judges of 'The Canengusian Connection.' While the Canengusian judges note the facts in the case before them and describe social problems as they see them, they are so preoccupied with their own 'speechifying' that they fail to engage in dialogue in any meaningful way. Not only does this mean that the judges miss an opportunity to engage with one another and find a way to accommodate their competing interests in the case before them, it also means that their own individual philosophies suffer as a result. To paraphrase Arvind, for all the room the judges devote to refuting the arguments of their fellow judges, they do not question the fundamental assumptions of their own philosophies.<sup>196</sup> Buber and Bakhtin would find conduct of this sort contemptible and an affront to the very nature of what it means to be human.

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<sup>196</sup> See T.T. Arvind, above n 67.

## 8. Conclusions

Human rights discourse and adjudication is a necessary component of every modern and democratic society. But in taking account of these rights, we should not simply cast aside the classical operating principles of private law. For the fundamental principles of autonomy, freedom of contract and certainty, and the presumption that parties 'know the score' serve important purposes. While protecting and empowering the vulnerable individual is a function of human rights law, vulnerability is not always clear-cut in private law relationships. Of course, it does not follow that the vulnerable individual should be neglected by the existing private law regime and, although some will regard them as imperfect, we find many examples of 'reasonable answers' in private law. We see, for instance, in the doctrine of undue influence that judges have found a means to protect vulnerable individuals while also preserving the basic operating principles of private law. Likewise, in tort law, the 'reasonable expectation of privacy' test demonstrates that we can accommodate competing interests, even in those cases where an ECHR right is the impetus behind the action. The test does not presume that vulnerability is present; rather the onus is on the claimant to show that his vulnerable position has been exploited by the defendant. Moreover, the court enjoys space to engage in dialogue and to take account of a wide range of salient features.

Of course we must not forget that ECHR rights are important values in themselves and the Human Rights Act has imposed new duties and responsibilities on courts to ensure that existing law is compatible with the ECHR.<sup>197</sup> But, in doing so, courts should continue to work from the bottom-up, to engage in dialogue with past decisions and the community rather than resort to applying a general human rights monologue. For the Strasbourg enthusiast becomes the classic *Ich-Erzähler*, a narrator with a limited perspective, when he assumes that complex private law disputes can be solved by applying Strasbourg principles alone. He becomes the victim of 'self-induced myopia'. Rather than concern ourselves with 'tidiness' in the law and the pursuit of a utopian 'perfect whole', we should pay close attention to Rawls' conception of a 'realistic utopia', the idea of a 'social world [which] allows a reasonably just constitutional democracy existing as a member of a reasonably just Society of Peoples', accommodating, among other things, 'reasonable pluralism'.<sup>198</sup> Mullender argues that 'utopia' in this

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<sup>197</sup> See sec. 2(1), sec 3 and sec. 6(1) , (2) and (3) HRA 1998. But this does not mean that they must follow ECtHR in every instance. On this point, see G. Robertson and A. Nicol, *Media Law* (5<sup>th</sup> edn., London: Sweet & Maxwell, 2007), pp 69-70. See also J. Wright, *Tort Law and Human Rights* (Oxford: Hart, 2001).

<sup>198</sup> J. Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999, pp 11 -12.

sense has 'some plausibility in the British context' as it probes 'the bounds of political possibility'.<sup>199</sup> He provides the examples of the extension of the franchise and the development of the welfare state.<sup>200</sup> But Rawls' conception of a 'realistic utopia' is appealing for another reason. For unlike utopianism in Berlin's sense, which is characterised by monologue and nothing else, the 'realistic utopia' is fundamentally dialogic. Rawls elucidates that '[b]y showing how the social world may realize the features of a realistic utopia, political philosophy provides a long-term goal of political endeavor, and in working toward it gives meaning to what we can do today'.<sup>201</sup> For a 'realistic utopia' is essentially about 'endeavor' rather than the declaration of a perfect end-state; we are not in possession of all the answers and hard cases will continue to arise. But if we refrain from 'speechifying' and monologue, we can, collectively through dialogue, work towards 'reasonable answers' and a 'realistic utopia'. As Rawls puts it, this idea 'describes what is possible and can be, yet may never be, though no less fundamental for that'.<sup>202</sup>

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<sup>199</sup> R. Mullender, 'Human Rights, responsibilities, and the pursuit of a realistic Utopia' above n 34, 50.

<sup>200</sup> *Ibid*, 51.

<sup>201</sup> J. Rawls, *The Laws of Peoples*, above n 198 p 128.

<sup>202</sup> J. Rawls, *Political Liberalism*, above n 68, p 213.