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The Hermeneutics of Jurisdiction in a Public Health Emergency in Canada

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Abstract This paper investigates the state of the law in Canada in regards to a public health emergency, and in particular the jurisdictional logic that might come into effect were a public health emergency to occur. Although there has yet to be a national public health emergency in Canada, threats of such crises are likely to arise in the future. It is therefore recognised as necessary to address Canada's legal preparedness for a public health emergency and evaluate proposed reforms to the legal structure that could facilitate response. This paper contributes to this goal by identifying multiple jurisdictional factors that could inform legal interpretations in a public health emergency. It considers how the legal system and the courts are dealing with public health as a national security issue (political and collective matter) while taking into account s. 7 of the Canadian Charter (individual rights). It also looks at the power of the government defined in the Emergencies Act [1985, c. 22] and a proposed legal reform that would make it easier for the government to act unilaterally in a public health emergency. The paper draws on the legal theory of Robert Cover to analyse the hermeneutics of jurisdiction that characterise legal interpretations of public health in Canada, as well as the relationship between jurisdiction and legal violence that these hermeneutics imply. It then develops a case study of the use of medical triage in a public health emergency to explore the possibility of holding the state liable under private law for harm caused to individuals by public health decisions. The paper concludes by suggesting that the state's public health power can be conceptualised as a form of legal violence and that the courts in Canada should adopt a jurisgenerative approach to legal interpretation in the area of public health.

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1 Introduction

This paper identifies the state of the law in Canada in the case of a public health emergency, and in particular the nature of the jurisdictional structure that might come into effect were a national public health emergency to occur. While such an event has yet to happen in Canada, threats to public health will arise in the future and it is necessary to identify weaknesses in the legal structure and assess possible reforms. This paper will begin to do this by looking at several relevant factors, including the nature of the federal government's power to act in an emergency as defined in the *Emergencies Act* [43, c. 22], as well as jurisprudence related to threats to national security and public health in non-emergency situations. A proposal to change the *Emergencies Act* to make it easier for the government to use it in a public health emergency is also explored and evaluated in light of the fact that in an officially declared emergency normal legal protections accorded to individuals may not apply. It is argued that this proposal is misguided because it does not take into account the relationship between law and violence in a public health emergency. With this in mind, the paper draws on the legal theory of Robert Cover to analyse the hermeneutics of jurisdiction that characterise legal interpretations of non-emergency public health and national security case law, and specifically the forms of legal violence that these imply. It also develops a case study of the use of medical triage to explore the possibility of holding the state liable under private law for harm caused to individuals by official decisions in a public health emergency. The paper concludes by suggesting that public health emergency response should be conceptualised as a form of legal violence and that the courts in Canada adopt a jurisgenerative approach in the determination of the meaning of public health.

Part one of the paper explains the historical context of federal emergency legislation in Canada. Part two considers the current legislative framework governing the government's response in a public health emergency. Part three evaluates a proposed change to the *Emergencies Act* that would make it easier for the government to declare a public health emergency. The fourth part of the paper considers legal interpretations of national security, as well as non-emergency public health to identify the hermeneutics of jurisdiction that could determine the hierarchy between the judiciary and the executive in public health emergency. The fifth part of the paper draws on the legal theory of Robert Cover to analyse the meaning of jurisdiction in the context of the relationship between law and violence. The question of jurisdiction is then explored further through a case study of medical triage and an analysis of the hermeneutics of jurisdiction that inform the state's duty of care in the area of public health. The concluding sections of the paper argues that since the state's public health power is a form of legal violence, the courts should use a jurisgenerative approach to legal interpretation in order to approximate a jurisdictional structure more similar to what exists in the criminal law.

2 History of Federal Emergency Legislation

The history of Canada, like that of many countries, is marked by internal crises that have contributed to the development of an emergency management legal structure. The Halifax Explosion in 1917, which caused close to 2000 deaths, and the 1918 influenza pandemic sounded the alarm for Canadian authorities over the need to develop legal tools that would allow them to respond to emergencies. Several other incidents are also historically significant in this regard: the two world wars, the flooding of the Red River in Manitoba in 1950 and 1997 and the Saguenay in Quebec in 1996, the contaminated water scandal in Walkerton, Ontario, Y2K at the beginning of 2000, forest fires in British Columbia in 2003, and, of course, 9/11. However, there is one event that is particularly significant in the history of the development of the emergency management legal framework in Canada, which occurred in October 1970, when Prime Minister Pierre Eliot Trudeau invoked the *War Measures Act* in response to the kidnapping of two government officials by the *Front de libération du Québec* [19].

The Canadian Parliament had adopted The *War Measures Act* in 1914 just after the beginning of WWI. The use of the Act in 1970 was controversial because it suspended the civil liberties of the residents of the province of Quebec allowing the warrantless arrest and detention of hundreds of people. When asked how far the government was willing to go in suspending individual rights to secure public order, Trudeau's response, "Just watch me," was a reflection of the extent of the powers conferred by the Act on the executive branch of the government. Therefore, until that point, natural disasters and accidents had highlighted the importance of establishing an emergency management system, but the controversial use of the *War Measures Act* during peacetime led to a reassessment of the measures that had been in place up until that time. This reassessment culminated 17 years later in the adoption of the *Emergencies Act* [43, c. 22], which created more limited and specific powers for the government to deal with emergencies.

3 Federal Emergency Laws in Canada

There are actually two federal laws that have been created based on the government's authority to govern national emergencies. First, the *Emergency Management Act* (EMA) [44],[1] which provides a legislative framework for assisting provincial authorities if they request help from the federal government in an emergency. The EMA establishes the role and responsibilities of the Federal Minister of Public Safety in the coordination of the emergency management activities of federal institutions in cooperation with the provinces (s. 15). However, it does not allow for unilateral intervention on the part of the federal authorities; it only provides a structure for voluntary collaboration between the different levels of government. Thus, the *Emergency Management Act* enshrines a cooperative approach to public health but does not impose of jurisdictional hierarchy.

[1] Emergency Management Act [44, s. 15].

The second law, the *Emergencies Act*, goes much further. It bestows authority on the federal government to declare a national emergency and respond without provincial approval. In the Act, a "national emergency" is defined as "an urgent and critical situation of a temporary nature that… cannot be effectively dealt with under any other law of Canada" [44, s. 3]. Within this, four types of emergency are defined: war emergencies, international emergencies, public order emergencies, and public welfare emergencies. A public health emergency would fall into the category of "public welfare emergency" defined under s. 5:

> "public welfare emergency" means an emergency that is caused by a real or imminent

(a) fire, flood, drought, storm, earthquake or other natural phenomenon,
(b) disease in human beings, animals or plants, or
(c) accident or pollution

and that results or may result in a danger to life or property, social disruption or a breakdown in the flow of essential goods, services or resources, so serious as to be a national emergency.

Subsection (b) makes it clear that the outbreak of a communicable disease could be a legitimate basis for declaring a national public welfare emergency if it posed a risk to the health of the population [25]. However, the Act stipulates that to qualify as an "emergency" a crisis must "exceed the capacity or the authority … [of the province]… to deal with" [43, s. 14.2]. As it stands, therefore, this legislation would only apply in public health emergencies that have exceeded the capacity of the province in which they occur to control [43, s. 6.1].

3.1 A Lower Threshold for a Public Welfare Emergency

Assessing the effectiveness of emergency legislation involves identifying weaknesses in authorities' response capacities [20: 674, 680]. In the Canadian context, the effectiveness of *The Emergencies Act* in a public health emergency is questionable because the power it creates is at once too much and too little. It offers extraordinary power to the Executive, but can only be invoked if a province asks for help or a crisis situation extends beyond a single province [28, 29]. Under the current legal framework, if a province does not ask for assistance in responding to a crisis, federal authorities can intervene only once it has spread to another province.

The SARS crisis in Toronto in 2003 is illustrative in this regard. During the outbreak of SARS both quarantine and isolation measures were used. Afterwards, the Commission to Investigate the Introduction and Spread of SARS issued a damning report that blamed the lack of a hierarchical jurisdictional structure in the area of public health as the barrier to a coordinated response. It described a "damaging combination of problems" evident in the response to the outbreak caused by the "lack of any federal-provincial machinery of agreements and protocols to ensure cooperation" and "a lack of cooperative, collaborative spirit"

[5]. This alarm had been sounded in 1999 and 2002 as well, when the Auditor-General issued reports stating that national public health surveillance and response systems were inadequate [1, 2]. The SARS outbreak crisis simply threw the situation in stark relief. Such jurisdictional limitation might be appropriate in the case of natural disasters and accidents, but it seems questionable in a public health emergency because of the different relationship to territory. The best way of mitigating the impact of an outbreak of a communicable disease is stopping the spread as soon as possible. Natural disasters and accidents are by their nature confined to a geographic area. In contrast, the outbreak of a communicable disease is defined not by geographic location but by the health of a population, which is a moving target [28].

These issues have led Wilson and Lazar [28] to suggest that the *Emergencies Act* could be changed to make it easier for the federal government to declare a public welfare emergency. They argue a provision could be added that would authorise the federal government to declare a public welfare emergency if there is reason to believe that it *risks* becoming a national emergency, even if the crisis is restricted to one province and the province does not consent to the intervention. The threshold for declaring the other three types of emergency would remain high. The rationale for the lower threshold of public welfare emergencies is that war emergencies, international emergencies, and public order emergencies all involve violence or the threat of violence, and certain groups (opposition parties, human rights activists, minorities, etc.) may oppose the declaration of an emergency. In contrast, 'public welfare' is a common good and public welfare emergencies are not associated with violence [28: 22–23].[2] I believe that these latter assumptions must be interrogated more deeply, for they imply quite a bit about the nature of law and its relationship to society that should be critically evaluated before any legal proposals are advanced.

For instance, while public health emergencies are different from other types of emergency in their relation to territory I suggest that their relation to violence and the common good is not so clear. First, public health emergencies do involve violence in the form of the public power that responds. This is usefully illuminated through an analogy between public health powers and the State's powers in criminal matters. Both the criminal law and public health powers use similar measures to protect society, specifically identifying and removing a threat through restrictions on individual freedoms [6: 76]. In criminal law, preventive detention refers to confinement of a person who has not yet been found guilty of a crime, and incarceration is a broader term associated with confinement as punishment for committing a crime. The practice of isolation in public health is similar to incarceration in that it separates a person who has a communicable disease from the healthy population, while quarantine is similar to preventative detention in that it restricts the movement of individuals who have been exposed to a communicable disease but are not themselves symptomatic [6: 77–78].

[2] Critics recognise that this power would be controversial given provincial jurisdiction in the area of health, and constitutional issues would arise if the federal government gave itself such powers. To mitigate this, any new laws could be limited by a legal test to ensure that the encroachment on provincial jurisdiction is constitutionally justified. See Wilson and Lazar [28] and Wilson [27].

Despite these similarities, the jurisdictional structure that characterises the criminal law is very different from public health law.[3] In the criminal law, there is a division between legal interpretation by the judiciary and the enactment of punishment by the criminal legal system. There is no similar jurisdictional division in the area of public health. These powers seem to be unified in the name of collective priorities. Thus, to fully critically explore and address the proposal discussed above, it is necessary to understand the jurisdictional hierarchy between the judiciary and the government in public health law.

4 Individual Rights and Public Health

In legal orders characterised by a separation of powers, such as Canada, there is a tension between the primacy of law and the decisions made by the executive and legislative branches of the government [7: 318]. This tension is exacerbated in an emergency situation when the executive claims authority to operate beyond normal legal limits for the sake of the common good. In a public health emergency, for example, individual rights are called into question. The right to privacy can be infringed if a surveillance report is required; the security of person can be violated in the case of mandatory vaccination, testing, or treatment; and, as mentioned above, an individual's autonomy may be restricted in the case of quarantine or isolation [18: 513].[4] To explore how this tension in the event of a public health emergency in Canada, it is useful to consider how the legal system and the courts are dealing with other political and collective matters while taking into account individual rights as contained in. s. 7 of the Canadian *Charter of Individual Rights and Freedoms*, which recognises the right to life, liberty, and security of the person.

Jurisprudence in public health is a rare commodity and the Canadian legal corpus says little about the application of the Canadian *Charter* in the event of a public health emergency [24]. However, a few cases pertaining to public health in non-emergency situations exist. In *Canadian AIDS Society v. Ontario* [32], the Court of Ontario ruled on whether the Red Cross was obliged to inform donors who gave contaminated blood and declare them to provincial authorities under the Health Protection and Promotion Act. The Canadian AIDS Society argued that the obligation was a violation of s. 7 of the Charter. Although the court found no effective violation of s. 7, it specified that even if there has been a violation, it would have been justified given the State's responsibility to protect public health (para. 133).[5]

[3] There are more parallels between public health power and the criminal law power. Beyond limitations on physical freedom, there is also stigmatisation, which is one of the purposes of criminalisation. Stigmatisation is also in play in the context of public health. During the quarantine period of the SARS crisis, for example, those quarantined paid a "liberty cost" but the affected regions were also stigmatised.

[4] It is recognised that authorities responsible for adopting public health measures must therefore make an effort to balance individual rights with the public good. The WHO *International Health Regulations* refer to the importance of respecting basic individual rights. Article 3(1) stipulates that the implementation of the *Regulations* shall be with full respect for dignity, human rights and fundamental freedoms of persons. Article 42 stipulates that public health measures should be applied in a transparent and non-discriminatory manner. Free and informed consent and information privacy are also mentioned [21].

[5] The Court of Appeal for Ontario upheld the decision [32].

Another Ontario court applied the same logic in *Toronto (City, Medical Officer of Health) v. Deakin* [41]. In this case, a patient suffering from tuberculosis was detained for treatment. He had at times been held prisoner so that he would not leave. The man argued that this was a violation of his right to liberty and security of the person protected by s. 7 and tried to convince a court to order his release. However, the judge ruled in favour of the City of Toronto, stating:

> What was done to [the patient] was carried out for the protection of public health and the prevention of the spread of tuberculosis, a disease that [a medical specialist] described as extremely contagious. [The patient] is in the early stages of the disease, it is eminently treatable now, but will become less responsive and more virulent if not treated (para. 26).

These cases reflect a judicial tendency to accept the limitation of individual rights in the name of collective health as defined by state authorities. This judicial deference to the government's interpretation of what constitutes public health is exhibited by the use of state narratives. Though these rulings occurred in non-emergency situations, they suggest that the courts could apply a similar approach in a public heath emergency, with the result that any restrictions to individual rights and freedoms would be legitimate if the government interprets them as necessary to protect public health [21]. To assess how such deference is likely to occur in an emergency situation, it is useful to consider jurisprudence related to other forms of national emergency, such as national security since 9/11, which destabilised the protection of individual rights at a time when the collective health was seen to be at risk [11].

4.1 National Security Precedent

The case *Suresh v. Canada* [39] is interesting in this regard. Suresh had his refugee status refused by the Department of Immigration because he was a deemed a "danger to the security of Canada," which triggered his deportation (par. 85). Suresh challenged his deportation, alleging fear of persecution in his home country and an infringement of his right to security of person (s.7) under the *Charter*. At stake before the Supreme Court of Canada (SCC) was whether his right to security of person was unreasonably violated by the immigration designation. Although the SCC acknowledged that there was considerable ambiguity in the meaning of 'danger to the security of Canada,' it took the position of Lord Hoffman of the British House of Lords with regard to the government's action:

> The events of 9/11 "are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the Executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons

> responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove (*Secretary of State for the Home Department v. Rehman*, [2001] 3 WLR 877, par. 62, cited in *Suresh v. Canada*, par. 33, emphasis added).

Although the Suresh case was associated with immigration, nothing prevents the same reasoning from being applied in the context of a threat to public health. In fact, it is easy to imagine that a public health emergency could be regarded as a threat to national security [12]. As Murphy and Whitty [21] point out, an epidemic can cause severe economic and political damage. It can even erode the ability of the state to govern and the effectiveness of the military. For these reasons, Daube [11] argues that the judiciary's position in an emergency should be one of deference because the legal system moves slowly and lacks logistical resources for emergency response.

Thus, existing precedent and legal commentary on the question of national security suggest that the determination of what constitutes a threat to public health could likely be interpreted by the courts as being within the government's jurisdiction. This is potentially problematic because of the relationship between public health powers and legal violence discussed above. To assess this, it is necessary to understand on a deeper level the relationship between the hermeneutics of jurisdiction and the law's use of violence. To do this, the next section draws on the legal theory of Robert Cover, who explored the meaning of jurisdiction in legal orders characterised by a federalist separation of powers like Canada's.

5 Jurisdiction, Legal Interpretation, and Violence

Law is traditionally equated with sovereign authority found in institutional rules and principles originating variously from a constitution, Parliament, and/or a system of courts. Cover's legal theory departs from this view by conceiving law as a broader social activity that consists in "normative world-building" [8].[6] The creation of law, or "jurisgenesis," is a process that is inseparable from a broader cultural world, or "*nomos*," in which it takes place [8: 103]. *Nomos* can be understood as a kind of language that includes all social narratives in a community, including narratives about the origin and constitution of the community, as well as about the competing moralities and texts that are definitive within the community. Legal interpretation must draw on cultural narratives within the *nomos* in which it takes place. Jurisgenesis is therefore an act of interpretation that participates in broader culture narratives and is inseparable from its narrativisation within a given *nomos*. Legal interpretation, from this perspective, involves a "corpus juris," which is a body of laws and case law, as well as "narratives in which the corpus juris is located by those whose wills act upon it" [8: 101].

In this sense, legal interpretation is inseparable from social action. It must trigger the committed action of numerous individuals. Unlike literary or aesthetic

[6] Cover [8, 103].

interpretation, legal interpretation is a "bonded interpretation" because it depends on commitments to those interpretations within a structure of institutionally organised modes of action [10: 223]. Commitment to this legal action involves taking legal interpretations as objectified narratives. That is, positing law as an object to which one is committed. This "entails the disengagement of the self from the 'object' of law, and at the same time…an engagement to that object as a faithful 'other'" [8: 145]. The objectified 'other' is a legal text or precedent. Cover's emphasis on narrative, therefore, does not imply a subjective dimension to law so much as legal interpretation is inseparable from a *nomos* that functions as "a repertoire of moves—a lexicon of normative action" in which legal interpretation must participate [8: 101]. Cover writes, "the very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative" [8: 103]. In this sense, law "builds relations between the normative and material universe" [8: 101]. The notion of law as collective bridge building is metaphoric in a very material sense. Legal interpretation bridges material and normative worlds. Law is "the committed social behaviour which constitutes the way a group of people will attempt to get from here to there" ([9: 176]; see also [10]). As Cover [9] writes, legal interpretation bridges "a concept of reality" and "an imagined alternative;" between "the world that is" and "worlds that might be" [9: 176].

Notably, this concept of law denies the state a special status for creating legal meaning, as well as for the actions of its officials or their interpretation of cultural narratives. Law is an activity in which a diversity of normative communities can engage, and the state must share its status as a creator of legal meaning with other social understandings related to what certain communities believe and their commitments to those beliefs. However, Cover suggests that there is a distinguishing feature of state law that makes it central to the process of jurisgenesis:

> The state becomes central to the process not because it is naturally suited to jurisgenesis and not because the cultural processes of giving meaning to normative activity cease in the presence of the state. The state becomes central only because… an act of commitment is a central aspect of legal meaning. And violence is one extremely powerful measure and test of commitment [8: fn 103].

The meaning of violence becomes clear in the phenomenon of criminal punishment, specifically when understood as mediating the experience of the judge and the accused in a criminal trial. In a criminal trial, the accused sits and listens to a sentence imposed on them by the judge as if engaged in a civil and consensual discourse. However, each party's participation in the proceeding is not based on a common understanding of the event. Cover writes, "it is grotesque to assume that the civility façade is 'voluntary' except that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry" [10: 211]. The control of the body of the accused is central to the criminal process. While the judge can present any interpretation, the accused is there because they know that if they do not go

willingly, they will be dragged in. For Cover, this is a violence that is both essential to law and a limit to the extent to which legal meaning can be shared.

It is from the perspective of law's violence that the meaning of jurisdiction becomes significant. In a constitutional political system characterised by a separation of powers, legal violence is articulated through a jurisdictional structure that ensures that no single branch of the state is solely responsible for creating legal meaning. This happens by organising the "violent outcomes that follow from interpretive commitments" through an institutional hierarchy of force that ensures that "responsibility [for legal violence] must be shared" [10: 237]. For example, the criminal law separates the act of legal interpretation and the carrying out of that interpretation in a penal sanction. It is the responsibility of a judge or a jury to make the determination of guilt and they play no part in meting out the actual punishment, which depends on the actions of many individual agents of the criminal legal system. The jurisdictional separation ensures that "no single individual can render any interpretation operative as law—as authority for the violent act" [10: 237]. In this sense, jurisdiction is not simply a set of formal rules contained in legal documents and case law but a set of limits that establishe the boundaries between law and non-law [8: 158]. Jurisdiction can therefore be conceived as an internal limit to the activity of legal interpretation that makes possible legal violence in the form of committed social action.

The meaning of jurisdiction comes to the fore in cases where the courts have the option of claiming jurisdiction over state action through their interpretations.[7] Threats to national security are examples of situations of this type. In *Suresh*, for example, the Court did not have to adopt Lord Hoffman's position. It could have opted to make another determination that did not involve deferring to state definitions, but instead claiming jurisdiction over the interpretation of 'national security.' However, as is usually the case according to Cover, the hermeneutics of jurisdiction were instead used to limit legal interpretation and "subordinate the creation of legal meaning to the interest of public order" [8: 159]. This makes sense in some situations, perhaps when the government acts from a secure basis in the legitimating structure of popular will or representational government, but it also affirms a hierarchical order over legal interpretation. However, Cover writes, "it cannot be ignored that the tie between administration and coercive violence is still always present, while the relation between state law and popular will may vary from close identity only an attenuated relation to majoritarian values" [8: 159]. Moreover, the hermeneutics of jurisdiction normally aligns "the interpretive acts of judges with the acts and interests of those who control the means of violence," which sanctions legal violence through "a commitment not to the end that the violence serves but to the structure of jurisdiction itself" [8: 159, 160].

From this perspective, the idea that the *Emergencies Act* should be changed to give the federal government more jurisdictional authority to declare and act in a public welfare emergency is questionable given the existing precedent of judicial deference in the area of national security. The proposal does not take into account

[7] The role of jurisdiction also comes to the fore in cases where other normative communities challenge the authority of the state to make law and wish to make a law apart from the state.

the legal violence involved in public health powers nor the relation between the hermeneutics of jurisdiction and this violence. Consequently, it does not account for the organisation of violence involved in such interpretations, and in fact, seems to disavow that violence by assuming that the common good is served by the jurisdictional hierarchy. To further evaluate the implications of this jurisdictional structure, it is useful to consider an example of a public health emergency response policy.

6 Case Study: Medical Triage

The concept of triage was invented by Baron Dominique Jean Larrey, Chief Surgeon of the French army during Napoleon's campaign in Egypt in 1798 (See [3, 16]). Larrey revolutionised medical treatment in the context of war by a variety of means, including developing an organised way of delivering care to individuals so as to more effectively maintain the function of the army. His system involved the use of field hospitals that sorted wounded soldiers in order of priority for treatment. Larrey's process involved identifying those who could be treated and returned to battle quickly, while deprioritising those with injuries that would require more treatment or for whom full recovery was not possible. The aim was to use medical treatment as efficiently as possible to maximise the health of the population of soldiers for the sake of the fighting function of the army.[8] 'Triage' became the name for the process of sorting individuals and allocating medically necessary resources based on collective priorities, with the well being of any particular individual being a secondary concern. The technique transformed warfare, and armies around the world began rapidly adopting similar procedures. By the First World War, all countries were using sorting stations to identify wounded soldiers who could be treated and returned to battle; those who could not return to battle were deprioritised and at times left to die [15].

In contemporary health care, triage still refers to prioritising patients for treatment based on their health status with the aim of using medical resources as efficiently as possible. Under normal circumstances, it involves identifying those that require medical treatment most urgently and separating them out from those who can wait for treatment or do without. In a hospital emergency room, for example, a nurse is responsible for evaluating patients in this way and determining the order in which they will be treated. This simple form of triage is based on a distributive notion of justice, that is, the fair distribution of limited resources [26: 754]. In the event of an emergency, however, the triage logic changes dramatically. An event that generates a large number of casualties, for example, might oblige health care authorities to adjust the moral compass. In an emergency situation, triage is aimed at protecting as many people as possible with the recognition that this will be to the detriment of some individuals [17: 59]. This involves separating

[8] Prior to this sorting method, wounded soldiers were simply collected at the end of battle in a medically unorganised way and sent to civilian hospitals. Wounded soldiers were sometimes collected based on rank or else even more randomly (see [22]).

out those individuals who, even without treatment, are more likely to live and those individuals who, even with treatment, are more likely die. These two groups are deprioritised and effort is focused on patients in between, i.e. those who have a good chance of survival but only if they receive medical care. Within this group, patients may be further sorted according to those with the most urgent and least complex needs [17: 61].

In a public health emergency, triage policies could be problematic because the shortages and scarcity inherent in emergency situations mean that some people will not receive the care they need at the appropriate time. For example, an analysis of emergency triage protocols found that the algorithms designed to allocate medical resources during an outbreak systematically excluded patients with physical or mental disabilities [14: 723]. In some cases, a particular disability ended up being excluded because it negatively affected the likelihood that the medical intervention would succeed. In other cases, individuals were excluded because they would need a longer period of time to recover, were anticipated to have a poor quality of life post-treatment, or otherwise had a limited long-term prognosis. These determinations were based on criteria of "medical effectiveness," which are seen as neutral; "unlike subjective interpretations regarding quality of life," they involve an empirical evaluation of a patient's individual health condition [14: 723]. However, if medical effectiveness is determined on the basis of pre-existing conditions, the outcome will be systematic exclusion of disabled persons from care during a public health emergency. This might make sense from a public health perspective but it could problematic from a moral, social justice or rights-based perspective (see [26]).

In an officially declared emergency, nonetheless, the protections of the *Charter* would be suspended so algorithms like those described above would not be open to judicial scrutiny on the basis of having violated individual rights. However, there exists another legal option, which is holding the state liable under private law for harms caused to individuals in the course of emergency response. Thus, to further assess the jurisdictional structure that might apply in a public health emergency the questions of state liability and whether tort (private law) offers a jurisdictional hermeneutic that could limit the legal violence of the state is worth exploring. The next section considers whether decisions associated with medical triage procedures in the context of public health emergency response would be immune from civil liability.

7 Civil Liability and the Immunity of the State

The state has historically been immune from civil liability claims, originally justified by the maxim, "The King can do no wrong." This has meant that the government could not be held liable by a court for wrongdoing in the administration of the law, including for damage that its officials or their decisions cause to individuals, whether intentional or by negligence [4]. However, the development of the modern welfare state shifted the meaning of government to where it is understood as having a responsibility for the health of the population. Consequently, the individual right to legal recourse for harm caused by the administration of law has become an important contemporary issue in law, particularly in the area of health.

7.1 State Immunity and Public Health

Contemporary legislation in Canada reflects this shift toward limiting the government's historic immunity.[9] For instance, the *Emergencies Act* absolves all state representatives of personal liability for acts of good faith made with a view to administering the law. However, it does not explicitly relieve the state itself of liability.[10] Thus, the provision seems to leave open the possibility of state liability in some contexts. Yet, if we turn to the case law, it appears that while it is technically possible for an individual to make a claim against the government, the outcomes are significantly limited by the hermeneutics of jurisdiction invoked by the courts. There are two main forms that these hermeneutics take. One is a statute-centred form of interpretation and the other is an interpretation that makes an exception for political action.

In general, to establish civil liability under common law, a claimant(s) must prove the defendant's duty of care at the time of the alleged facts.[11] For a duty of care to be established, a relationship of proximity must exist between the plaintiff and the defendant. In *Cooper v. Hobart* [33], the Supreme Court recommended using a contextual approach to establishing a relationship of proximity, which would consider the existence of "expectations, reliance and property or other interest involved" in a particular situation (para. 34). However, in the context of state action, establishing a relationship of proximity is interpretated differently. When the liability of the state is at stake, the SCC favours establishing a relationship of proximity based on written statutes, in contrast to the contextual approach applied in normal circumstances. The difficulty this presents is that written legislation typically defines general responsibilities of the government to the public at large, not to particular individuals or groups of individuals. Therefore, a relationship of proximity, which implies something that distinguishes a relationship so as to trigger a duty of care, is difficult, if not impossible, to establish with the state, with the practical result of greatly limiting the liability of the state.

This is evident in cases involving the health care system. In the aftermath of the SARS epidemic in 2003, for example, some of those infected filed lawsuits that alleged that the province failed to cooperate with the other levels of government, failed to maintain the equipment and infrastructures required to control the crisis, prematurely terminated the preventive measures, and neglected to inform the public of the dangers of SARS [36, 42]. Some health care professionals infected with SARS also made claims that the government failed to provide the necessary

[9] It has been noted that the absence of immunity in the context of the regulatory and administrative functions of the health care system could lead to an avalanche of legal claims (see [4: 116]).

[10] Emergencies Act [43, s. 47.1 and 47.2]. Although beyond the scope of this paper, some consideration could be given to the question of fiduciary duties in an emergency, since these are well recognized in health care in person-to-person contexts. Initial speculation, however, suggests that the fact that the *Emergencies Act* proscribes personal liability of government agents and identifies the population as the object of care, would likely affect the existence of fiduciary duties and any remedies arising from breaches thereof.

[11] To establish liability, the claimant must also prove the violation of this duty of care, the harm suffered, and the relationship of causality between the violation of the duty of care and the harm suffered.

information in a timely manner, and issued inadequate instructions to hospitals, thereby exposing the claimants to an unreasonable risk of harm [30, 35, 38].

Ultimately, these cases were unsuccessful because the courts applied a statute-centred approach to the determination of the state's duty of care. This hermeneutic of jurisdiction "encourages judges to conclude at the policy stage of the analysis that a duty to individual plaintiffs would conflict with the government's broader obligation to act in the public interest" [13: 539, 561]. For instance, in *Williams v. Ontario* [42], the Court of Appeal for Ontario refused to establish a relationship of proximity between the plaintiff and the Ontario government, concluding that the instructions issued under the *Health Protection and Promotion Act* are intended to protect the health of the general public, not of individuals (para. 25). Thus, the court adopted a statute-centred approach and found that pursuant to the Act the government's duty of care exists toward the population at large, not to any one individual or class of individuals.[12] Similarly, in *Eliopoulos v. Ontario* [34], the court reiterated the impossibility of suing the state in matters of public health policy, explaining that "[p]ublic health priorities should be based on the general public interest," and "public health authorities should be left to decide where to focus their attention and resources without the fear or threat of lawsuits" (para.32).[13]

The courts could opt to use a contextual approach to determining the state's duty of care, as is the norm. However, this would require rejecting the statute-centred approach. Thus, the affirmation of a hermeneutic of jurisdiction over legal interpretation effectively establishes immunity for the government in the area of public health. However, even if a duty of care could be established through statutes, state liability is further limited by another jurisdictional hermeneutic, and that is the policy/operation dichotomy used by the courts to limit the extent that government immunity even in the context of a duty of care [23: 54]. For instance, in *Just v. British Columbia* [37], a distinction was drawn between the policy decisions of a government or 'public authority' and its operational decisions and actions, suggesting that the state could be liable for the latter but not the former:

> The duty of care should apply to a public authority unless there is a valid basis for its exclusion. A true policy decision undertaken by a government agency constitutes such a valid basis for exclusion (para. 20).[14]

[12] "When assessing how best to deal with the SARS outbreak, Ontario was required to address the interests of the public at large rather than focus on the particular interests of the plaintiff or other individuals in her situation. Decisions relating to the imposition, lifting or re-introduction of measures to combat SARS are clear examples of decisions that must be made on the basis of the general public interest rather than on the basis of the interests of a narrow class of individuals" (para. 31).

[13] To impose a private law duty of care on the facts that have been pleaded here would create an unreasonable and undesirable burden on Ontario that would interfere with sound decision-making in the realm of public health. Public health priorities should be based on the general public interest. (para. 32).

[14] The policy/operation dichotomy was further elaborated in [31]:

> True policy decisions involve social, political and economic factors…. The operational area is concerned with the practical implementation of the formulated policies, it mainly covers the performance or carrying out of a policy (see also [40]).

The scope of what counts as a policy decision was recognised to be very wide: "what constitutes a policy decision may vary infinitely and may be made at different levels, although usually at a high level" (para. 20). Thus, even if a duty of care can be established the government cannot be held liable for wrongdoing with respect to development, planning, or carrying out of a policy.

In addition to the policy/operation dichotomy, there is a another distinction that could limit state liability even further. In *Cooper v. Hobart* [33], the SCC provided a partial list of "political considerations" that could further limit the state's duty of care, even in an operational context; these include the impossibility of another type of recourse, avoiding unlimited liability with respect to an unlimited number of people, and "other reasons of broad policy that suggest that the duty of care should not be recognized" (para. 37). Thus, while theoretically it is possible that state liability could be affirmed if the statute-based test for duty of care is met, the fact that policy decisions are recognised as varying "infinitely" suggests that the courts would interpret policy action very broadly, especially in the context of an emergency, and even within an operational context political considerations associated with an emergency would effectively exclude state liability. In the context of a public health emergency, therefore, judicial deference to statue, policy, and political considerations effectively establish immunity for the government. These hermeneutics of jurisdiction effectively place the administration of public health emergency response beyond the reach of the 'law.'

8 Jurisgenesis in a Public Health Emergency

There is yet to be a national public health emergency in Canada, but the case study of medical triage gives a sense of the kind of policies that could come into force if such an event were to occur, and how they would limit citizens' ability to assert themselves against government action. In effect, government action in an emergency would be immune from legal redress. This presents a counterpoint to the legal debate in Canada over emergency preparedness, which is focused on how the law should be changed to facilitate public health response in an emergency. This is an important focus but currently the concept of public health is assumed to be a common good. What is occluded by this assumption is the relationship between law and violence. Cover's concept of law enables us to take into account the legal violence necessarily implicated in the public health power. At the same time, while Cover suggests that the hermeneutics of jurisdiction are a "largely apologetic, state-serving enterprise," he also stresses they do not *necessarily* have to have state-serving implications [9: 177]. Legal interpretations can draw on narratives independent of the state in order to claim authority over legal violence. In fact, this "jurisgenerative" approach is the judiciary's only means of "partially extricating" itself from state violence [8: 162]. The more that the courts use their interpretive acts to "oppose the violence of the state and coercion of other organs of the state," the more they resemble "other jurisgenerative communities of the world" [8: 160].

Right now in Canada the courts have taken a deferential stance in regards to national security threats and public health imperatives, which involve invoking a hermeneutics of jurisdiction that limits legal interpretation and affirms a hierarchal order of government over legal interpretation. However, the courts could take a different approach at would open up the possibility of a judicial reassessment of the current legal framework in regards to national security, public health, and the state's duty of care. This judicial approach would involve considering narratives of collective wellbeing beyond those determined by the state.

9 Conclusion

This review of the state of the law in Canada reveals a legal structure that is not prepared for a public health emergency. Indeed, there is increasing recognition of the need to develop legal preparedness in public health in Canada. However, this paper argues that it is important to critically consider the jurisdictional structure that might apply in an emergency because it collapses the division between legal interpretation and the organisation of legal violence. This dynamic was explored by considering how the courts are dealing with non-emergency public health and national security as political and collective matters while taking into account individual rights. The possibility of private liability claims was also explored and it was shown that legal interpretations of the state's private duty of care make it almost impossible to hold the state liable for harm to individuals in an emergency. Together this jurisprudence suggested that state action will be completely unlimited by any legal limitation in the event of a pubic health emergency. This is important because the public health power that is unleashed in an emergency is analogous to the criminal law power, which is widely recognised as a form of legal violence.

There is no doubt that legal reforms are needed to facilitate response to a public health emergency in Canada. Yet the idea of changing the *Emergencies Act* to give the federal government more authority to declare a public welfare emergency does not take into account the role of legal violence, and is in fact premised on a denial of its presence. Robert Cover's concept of law suggests that legal violence is inseparable from legal interpretation and that legal interpretations of emergency powers are also part of the organisation of legal violence. Normally, jurisdictional hermeneutics divide the responsibility for this violence among different parts of the legal system, which is why the courts in Canada could consider adopting a jurisgenerative approach that is open to alternative narratives of the meaning of public health.

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