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The Policy/Operational Dichotomy in Intra-State Tort Liability: An Example of the Ever-Continuing Transformation of the Common Law

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I. INTRODUCTION

England and several States that were once part of its empire (including the United States, Canada, Australia, and New Zealand) have, in the twentieth century, legislatively waived their common law immunity to certain civil actions filed by citizens who are seeking to recover damages caused by the negligence of the State and/or its servants.[1] This voluntary partial waiver of sovereign immunity now subjects these States to potential liability in an effort to provide the States' citizens with redress for previously unrecoverable damages. And while it was the intent of legal reformers to cause these States to be treated in their own courts in a manner that would be indistinguishable from the treatment accorded to any other party submitting to the jurisdiction of the courts, nevertheless it is crucial to note that certain public policy considerations continue to prevent the complete abandonment of this doctrinal immunity.

Further, the ever-continuing judicial interpretation of the scope of the waiver immunity in the respective courts in these countries virtually guarantees that the delineation of the common law doctrinal defense will continue to evolve in an effort to better reflect the contemporary social, political, and economic values peculiar to each dynamic society. This is because each of the aforementioned countries is working toward an identical goal of securing for its citizens, by means of the application and transformation of their respective common law interpretations of the scope of the waiver, justice, which has been defined as being "a matter of the right outcome of the political system: the right distribution of goods, opportunities, and other resources."[2] Epitomizing the comparative interpretation of the scope of the waiver, a "policy/operational dichotomy" has been introduced in the respective bodies of common law interpreting the scope of the waiver of immunity in the United States, England, Canada, Australia, and New Zealand as each of the forgoing has attempted to distinguish which tort liability actions are justiciable pursuant to their respective waiver efforts and which are not. It is important to observe that all of the aforementioned States have also struggled with the same enigma that has plagued the application of the policy/operational dichotomy since the United States Supreme Court first articulated the delineation in *Dalehite v. United States*, i.e., the demarcation of where policy or discretionary considerations (and immunity) end and where operational activities (and tort liability) begin.[3]

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1 28 U.S.C. §§ 1346; Crown Proceedings Act, 1947, c. 44, § 2 (U.K.); Crown Liability Act, R.S.C., ch. C-50 (1952)(Can.); Judiciary Act, 1903, § 64 (Austl.); Crown Proceedings Act ,1950, §§ 3, 6 (N.Z.).

2 ROLAND DWORKIN, LAW'S EMPIRE 404-05 (1986).

3 Dalehite v. United States, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

This article will analyze the common law origins of the defense of sovereign immunity in the legal systems of England, the United States, Canada, Australia and New Zealand, and it will recognize and address the common, recurring themes characterizing the waiver of immunity as evidenced in the policy/operational dichotomy. More importantly, it will demonstrate that the development of this distinction is an example of the ever-continuing evolution of the common law. Finally, a pragmatic mechanism aiding in the resolution of the policy/operational dilemma in all five of the aforelisted jurisdictions will be suggested and commented upon. The efficacy of this suggestion will justify the conclusion that a legal doctrine originating in a germinating body of common law will uniformly evolve toward the conceptual goal of justice in derivative legal systems regardless of its development in separate and distinct societies.[4]

II. THE EVOLUTION OF THE COMMON LAW

As the common law in England developed its own identity out of a meld of Roman law and German customs, the resulting body of laws reflected social, political and economic factors that comprise English societal history. And as England and the States sharing its common law heritage continued to develop and evolve, their bodies of laws have continued to develop with them by perpetually reflecting and incorporating the evolutions and influences inherent in the growth of each nation. Because the laws of each respective State are continually developing and evolving in an attempt to reflect and define the contemporary values and morals of their society in order to achieve a more perfect sense of justice as viewed from within each State, Oliver Wendall Holmes expounded his very Darwinian conclusion that in the landmark American jurisprudential writing, *The Common Law*:

> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.[5]

Hence, as a society continues to evolve and develop, its common law will

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4 This conclusion is based on the presumption that the States possessing these derivative legal systems will continue to share roughly the same social, political, and economic values.

5 OLIVER WENDALL HOLMES, THE COMMON LAW 36 (1881). This statement is consistent with Holmes' unreconstructed views on social Darwinism on economic issues, and, although he did not read Darwin until almost 1900, the social theory that pervades his work is an obvious byproduct of the enormous influence evolutionary theory had upon his thoughts ("evolution was in the air"). *Id.* at vi; G. EDWARD WHITE, JUSTICE OLIVER WENDALL HOLMES: LAW AND THE INNER SELF 360 (1993). Holmes, however, was not the first to expound this view – Professor Julius Stone observed that jurisprudential philosophers such as Maine in England, Savigny in Germany, and Montesquieu in France had been considering the effect of social and political influences on the evolution of the law long before the concept was ever applied to biology or sociology. JULIUS STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 36 (1966).

also continue to evolve and develop to reflect this dynamism.[6] "As institutions of the state, courts make authoritative decisions about certain matters presented to them. The social, political and economic environment influences, perhaps indirectly, the nature of these matters."[7] Combining with these ancillary societal factors, the shaping influence of legal precedent, as defined by the doctrine of *stare decisis*, in the common law throughout its history is unquestionable. However, the authority and scope of common law precedent has varied greatly in the different legal systems addressed,[8] and the continuing evolutionary nature of the common law has been the subject of debate. As early as the beginning of the seventeenth century, legal scholars actively debated whether common law precedent should continue to expand and evolve to encompass new fact and legal scenarios, or whether the body of laws existing at that time should be viewed as a form of *optima regula*, literally the "best rule" or the "highest rule," which, "after many successions of ages . . . [had been] fined and refined" so as to form a complete referential body of legal authority from which all subsequent legal decisions might be conclusively decided.[9]

The first dramatic confrontation between these two philosophies took place in the jurisprudential debate occurring in *Calvin's Case*, which determined the validity of a claim of a Scottish born individual to be allowed to inherit real property in England.[10] The former position was advocated by individuals such as Lord Ellesmere and Edwyn Sandys, who argued that, "new cases happen every day: no lawe euer was, or euer can be made, that can prouide remedie for all the future cases, or comprehend all circumstances of humane actions which judges are to determine."[11] In rebuttal, lawyers including Sir Edward Coke and Francis Bacon actively opposed the notion of any further evolution of the law, as Coke claimed that there was no need for new laws, as "the laws of England are so copius in this point"[12] that any legal questions might be decided based upon the law expounded in the then-existing precedent. Further, Bacon suggested that, if and when a matter of first impression arose, the courts should not "consult of a

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6 *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 360, 372 (1990), where Judge Posner discusses the ever-continuing evolution of the common law in society as a function of the judiciary promoting a "social policy of making markets work."

7 ROSS CRANSTON, LAW, GOVERNMENT AND PUBLIC POLICY 45 (1987).

8 DWORKIN, *supra* note 2, at 24-25. The degree of application of legal precedent within any given court varies according to the system's adherence to the strict doctrine of precedent or the relaxed doctrine of precedent. Whereas the strict doctrine generally requires courts to follow earlier decisions of similarly situated courts or of courts of superior jurisdiction, the relaxed doctrine of precedent, "on the other hand, demands only that a judge give some weight to past decisions on the same issue, that he must follow these unless he thinks them sufficiently wrong to outweigh the initial presumption in their favor." *Id.*

9 Keechang Kim, *Calvin's Case (1608) and the Law of Alien Status*, 17 J. LEGAL HIST. 155, 161 (1996).

10 Calvin's Case, 77 Eng. Rep. 377 (H.L.1608).

11 The arguments of counsel are collected in 2 COMPLETE COLLECTION OF STATE TRIALS 577 (W. Cobbett et al. eds., 1809). Hence arguments of counsel will be cited to this volume, and this particular quote is from *Id. at* 676.

12 *Id.* at 612.

law to be made, but to declare the law already planted"[13] and thus should rely on the already existing legal rules to make their determination. Coke supported this when he espoused the position that the current law, "as *optima regula* – was therefore given an unassailable and transcendental existence which is entirely removed from the actual workings of the judiciary."[14]

Ellesmere and Sandys' argument that legal precedent must continue to develop in order to deal with new and unforeseen legal questions contributed to their victory in *Calvin's Case*.[15] However, the question next arises of why any given law on any well-considered issue, the parameters of which have been refined and resolved by courts over many years, must continue to evolve into new and different forms? The answer again lies in the evolution of society. Holmes noted that, "However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth."[16] This is true because, as Holmes observed, the law is always approaching, but never reaching consistency. Because there will always be gaps in the law, new situations, vagueness, and indeterminacy, the law will become entirely consistent only when it becomes fixed and ceases to grow.

Accordingly, the interpretation of legal precedent must recognize that "law and legal text are not disengaged from the circumstances of 'the time they were made.'"[17] In order to effectively correspond with and reflect the actual feelings and demands of the community, the courts' present-day interpretation of historical precedent must recognize and address the dynamic that exists between the rationales supported, the historical adoption and growth of the law, and the contemporary values and goals sought by the society and governed by the legal authority applying the precedent. If a contemporary legal authority fails in its application of precedent to recognize any dissimilarities between the parameters and goals of the justice, or public policy, sought in the current legal action and the rationale behind the historical application of the law, the resultant precedent runs the risk of diverging from the values and goals of justice sought by its society. This, in turn, leads to a loss of credibility in the legal systems that govern the society and risks creating "the greater evil of private retribution"[18] by people who, because the law has failed to provide them with a remedy for their injuries, have been caused to abandon their belief in, and thus their abiding respect for, the law.[19]

Developments in tort law responsive to socio-economic changes in society are typified by the contemporary evolution of the defense of sovereign immunity,

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13 *Id.* at 563.

14 *Id.* at 612; Kim, *supra* note 9, at 161.

15 Calvin's Case, *supra* note 10,at 410-11.

16 HOLMES, *supra* note 4, at 37.

17 Kim, *supra* note 9, at 162 (quoting Lord Ellesmere).

18 HOLMES, *supra* note 5, at 41-42.

19 CRANSTON, *supra* note 6, at 46. "Ostensibly, the operation of the courts is based on the assumption that people know their rights and will take the initiative to enforce them if they expect to be successful."

which reflects a refinement in the common law prompted by the transformation of societal values with respect to the rights of the individual in the nineteenth and twentieth centuries. Hence the retrocession of the sovereign immunity defense is similar to the developments that occurred in the field of workers' compensation law during the same era:

In the nineteenth and first part of the twentieth century, workers might fail completely in a claim for damages for personal injuries, even if their employer was clearly at fault, because of the wide defenses the judges evolved - *volenti* (that employees had voluntarily assumed the risk), common employment (that the injuries arose from the negligence of a fellow worker), and contributory negligence. These defenses to a damages claim were given a wide scope 'in order to ease the employer's financial burden. . . .' Later courts and parliaments gradually whittled them down in response to the growth of the political power of trade unions.[20]

Likewise, and for similar reasons, sovereign immunity has been whittled away since the turn of the twentieth century as societies have increasingly recognized the rights of individuals who have sustained injuries as the result of the negligent acts of the state.

However, it is necessary to refer to the origins of the doctrine in order to better understand the evolution of the scope of the sovereign immunity.[21] Royal courts in the middle ages first applied the doctrine, and their rationale in adopting the feudal principle was that a lord could not be sued in his own court.[22] Blackstone attributed the immunity to the royal prerogative as:

> [T]hat special preeminence which the King hath over and above all other persons, and out of the course of the common law, in the right of his royal dignity. . . The law ascribes to the King the attribute of sovereignty. [He is] sovereign and independent [within his own dominions and] owes no kind of subjection to any potentate on earth. Hence it is that no suit or action can be brought against the King, even in civil matters, because no court can have jurisdiction over him, for all the jurisdiction implies superiority of power.[23]

Edwin Borchard, a professor of law at Yale University in the 1920s, observed that the concept of sovereign immunity developed as a means of promoting the conceptual inviolability of sovereign authority:

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20 *Id.* at 136.

21 Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 84 (1991). Interestingly, court opinions serve a diverse function in documenting this historical approach because they espouse the laws and analyses of the era, and they also serve as a "critical interpreter of and player in historical events, its precedents preserve, illuminate, and provide a perspective on the nation's social, political, and legal traditions." Also, a court's decisions are "often intertwined with historical events to such an extent that it is not possible to understand those events without considering the precedents contributed to their development." *Id.*

22 PETER W. HOGG, LIABILITY OF THE CROWN 3-4 (2nd ed. 1989).

23 Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 4 (1924) (*quoting* 1 WILLIAM BLACKSTONE, COMMENTARIES 239, 241-2).

Chitty adds that 'the inviolability of the King is essential to the existence of his powers as supreme magistrate; and therefore his person is sacred. The law supposes it impossible that the King himself can act unlawfully or improperly. It cannot distrust him whom it has invested with the supreme power; and visits on his advisors and ministers the punishment due to the illegal measures of the government. Hence the legal apothegm that the King can do no wrong.' Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's courts was purely personal.[24]

Accordingly, in response to claims for damages for the negligence of the government, the courts denied relief and cited the maxim that "the King can do no wrong" as grounds for declaring nonsuit. They held in this manner despite the fact that the same courts had applied the aforementioned maxim since the Middle Ages to produce virtually the contrary result.[25] In fact, this maxim was misunderstood even by Blackstone and Coke,[26] who either did not recognize its implication or instead consciously disregarded its original meaning, "that the King was not privileged to do wrong."[27] In medieval England, the King was not regarded as being above the law; on the contrary, he was regarded as under a duty – an unenforceable duty, to be sure – to give the same redress to a subject whom he had wronged as his subjects were bound to give to each other. It was the notion that the King was, by and large, subject to the same law as his subjects which caused the petition of right, which made a legal claim against the King, to be marked off from other petitions to the King by aggrieved subjects.[28]

The petition of right, a proceeding in Chancery by which a subject might recover property in the possession of the king, could be utilized for the enforcement of contractual rights.[29] Equitable relief was also available against the Crown pursuant to the filing of a petition, but its application did not extend to torts.[30] Nevertheless, injured subjects were not necessarily without redress, because in many (but not all) cases, an action in tort could be brought against a Crown servant in his individual capacity, and the Crown would usually defend the action and pay the damages.[31]

The petition of right also proved unsatisfactory as a procedural vehicle. Although the procedure was simplified in England by the Petitions of Right Act of 1860, the petition was limited in that it was subject to the Crown's consent by

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24 *Id.* (*quoting* CHITTY, THE LAW OF ROYAL PREROGATIVES OF THE CROWN 5 (1820)).

25 HOGG, *supra* note 22, at 6.

26 Kim, *supra* note 8, at 161. Interestingly, Coke was also of the opinion that the laws of England had reached the stage of *optima regula*, as opposed to *leges temporis*, after having been refined "in many successions of ages." *Id.* Thus, Coke's own revisionary interpretation of the maxim is immediately and ironically undercut by the fact that his own interpretation of the meaning was a variation from past interpretation and precedent.

27 Borchard, *supra* note 23, at 2, n. 2.

28 HOGG, *supra* note 22, at 4.

29 In Thomas v. The Queen, 10 Q.B. 31 (1874), it was held that the petition of right lay to recover from the Crown unliquidated damages for breach of contract. *See* HOGG, *supra* note 22 at 6.

30 HOGG, *supra* note 22, at 6.

31 *Id.*

endorsing the petition *fiat justitiae* – "let right be done."[32] "Of course, by 1860 responsible government was fully developed, so that the discretion to grant or deny the royal fiat was in reality the discretion of the cabinet. In short, the government could only be sued if it consented to be sued."[33] By that time, however, the public law of England had already migrated to its colonies, and the strained law of Crown liability, along with the rest of the English common law legal system, had been installed in the various colonies as part of the foundation of their own embryonic legal systems.[34] Accordingly, England's colonial governments adopted the petition of right as the procedure for suing the States in tort, and "after the advent of responsible government, each colonial government enjoyed the privilege of granting or denying the royal fiat when faced with a lawsuit. Each colonial government became immune from liability in tort."[35] Thus, while most European states had long admitted liability in such cases by the nineteenth century,[36] England and its colonial offspring continued to uphold and defend the doctrine of sovereign immunity within their respective legal systems to the detriment of their own citizens' legal interests. Thus when Justice Miller of the United States Supreme Court observed in *Gibbons v. United States*[37] that "no government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers or agents," he presumably was talking about States deriving their common law legal systems from England.

Indeed, English constitutional scholar A.V. Dicey went so far as to suggest

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32 *Id.* at 7.

33 *Id.*

34 While the English common law is the primary source for the majority of the United States' initial body of common law precedent, the Supreme Court noted in Fay v. New York, 332 U.S. 261, 294 n.36 (1947), that:

> [I]t must not be overlooked that many [of the individual States] have been deeply influenced by Roman and civil law to which their history exposed them. None of the territory west of the Alleghenies was more than briefly or casually subject to common law before the Revolution. French civil law prevailed in most of the Ohio and Mississippi Valleys from their settlement until Wolfe's decisive victory before Quebec in 1763. Its ascendancy in the north then was broken, and in 1803 the Louisiana Purchase ended French sovereignty in the rest of the Mississippi area. Louisiana continues, however, a system of law based on the Code Napoleon. The Southwest and Florida once were Spanish.

See also Colvin, *Participation of the United States of America with the Republics of Latin America in the Common Herotage of Roman and Civil Law*, 10 Proceedings of the Eighth American Scientific Congress 46.

> [Further,] in New York there was a deep and persistent influence from Roman-Dutch law. Upon capitulation of New Amsterdam, it was stipulated that certain Dutch law, and judgments and customs should be respected. But even beyond this, in the organization of the courts the Dutch rule persisted although contrary to the 'Duke's Laws' enacted by the conquer . . . . The Roman-Dutch element in New York law is recognized by its courts.

E.g., *Dunham v. Williams*, 37 N.Y. 251, 253; *Van Giessen v. Bridgford*, 83 N.Y. 348, 356; *Smith v. Rentz*, 131 N.Y. 169, 175, 30 N.E. 54, 56.

35 HOGG, *supra* note 22, at 7.

36 Borchard, *supra* note 21, at 2.

37 Gibbons v. United States 75 U.S. 269, 274 (1868)

that no preference or disparity of treatment really existed at the turn of the twentieth century in England when he posited, "Why should the government be treated differently in the matter of liability from any other legal person?"[38] Dicey supported his position by noting that, in Britain, "every official, from the Prime Minister down to a constable or collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen." However, "Dicey disregarded the fact that in English law at that time the Crown, legally the embodiment of the central government, enjoyed extensive immunities from being sued in tort, even if officials did not."[39]

In response to the injustice caused by the application of the doctrine in the twentieth century, Borchard noted that the "rule of law" extolled by Dicey was flawed in that:

> [I]t requires but a slight appreciation of the facts to realize that in Anglo-American law the individual citizen is left to bear almost all risks of a defective, negligent, perverse or erroneous administration of the State's functions, an unjust burden which is becoming graver and more frequent as the government's activities become more diversified and as we leave to administration officers in an even greater degree the determination of the legal relations of the individual citizen.[40]

Accordingly, Borchard argued in favor of abolishing the affirmative defense and summarized the sentiments of legal reformers when he declared, prior to the United States' adoption of the Federal Tort Claims Act in 1944, that:

> there is no reason why the most flagrant of injuries wrongfully sustained by the citizen, those arising from the torts of officers, should be allowed to rest, as they now generally do, in practice if not in theory, at the door of the unfortunate citizen alone. This hardship becomes the more incongruous when it is realized that it is greatest in countries like Great Britain and the United States, where democracy is assumed to have placed the individual on the highest plane of political freedom and individual justice.[41]

Borchard opined that, "The reason for this long-continued and growing injustice in Anglo-American law rests, of course, upon a medieval English theory that 'the King can do no wrong,' which without sufficient understanding was introduced into the common law of this country, and has survived mainly by reason of its antiquity."[42] Thus while the disparate treatment afforded to States based

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38 A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 193 (10th ed. 1959)

39 UNITED KINGDOM NAT'L COMM. COMP. LAW, *Governmental Liability: A Comparative Study*, 13 U.K. COMP. LAW SERIES 2 (John Bell & Anthony W. Bradley eds. 1991).

40 Borchard, *supra* note 23, at 1.

41 *Id.*

42 *Id.* at 2. Holmes' jurisprudence supports this position when he also noted that:

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains.

upon the anachronistic legal philosophy espoused by Justice Miller in *Gibbons*, was potentially at odds with the society that it was purported to benefit, nevertheless the courts respecting and applying the common law doctrine continued to uphold, sustain and expand it.

While judicial activists have sought to utilize the law as a means of social control and as an instrument to effect social change,[43] Holmes has concluded that, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[44] Further, he observed that,

> [I]n substance the growth of law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis.[45]

Thus, the common law is not only an instrument for effecting social change, it is a mechanism through which the courts implicitly articulate, legitimize, and codify the evolution of a society's social, political, and economic values.[46]

> The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

HOLMES, *supra* note 5, at 5.

While he was not addressing the current state of the common law evolution of the doctrinal defense of sovereign immunity when he penned this statement, nevertheless Holmes generally supports Borchard's argument in favor of the abolition of the doctrine based upon his averment that the original rationales supporting the doctrine had become obscure and inapplicable (also, Holmes drafted the essays comprising THE COMMON LAW approximately fifty years prior to the printing of Borchard's critical article, and thus could not possibly comment on same). Finally, he noted that, in the growth of the common law:

> The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view.

Id. at 35.

43 CRANSTON, *supra* note 7, at 32.

44 HOLMES, *supra* note 5, at 41.

45 *Id.* at 35-36.

46 Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes' dissenting opinion went so

In contrast to Holmes' socio-evolutionary theory of law, contemporary legal philosophers such as Ronald Dworkin have argued that a society's law is comprised and defined by its rules, policies, and principles.[47] These standards are determined by the "popular morality" of a society, and they are shaped by the "opinions about justice and other political and personal virtues that are held as matters of personal conviction" by the majority of that society.[48] Dworkin explains that the "moral traditions" of a society are comprised of its popular morality as viewed:

> [O]ver some sizeable historic period including the present . . . [and t]he distinction is then fairly straightforward between these ideas and the community's law. Its law belongs to the community not just passively, because its members hold certain views about what is right or wrong, but as a matter of active commitment, because its officials have taken decisions that commit the community to the rights and duties that make up the law.[49]

An empirical study of a society's moral traditions in addition to its contemporary rules will yield, according to Dworkin, the law of a society as defined by its moral standards and legal commitments – the law as integrity.[50]

Dworkin's conception of law can be likened to, but yet it is still conceptually distinct from, the jurisprudential theories of legal positivism[51] and natural law.[52] Determining and defining a society's law as integrity through a study of its moral traditions and contemporary legal rules supposes that an informed empirical study of a society's moral principles and contemporary legal rules will yield a uniquely correct answer to the question of what the law is in a hard case. Judges are to determine the one right answer in a hard case from both the histori-

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far as to refer to judges as "interstitial" legislators. *See also* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-15 (1921).

47 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 22 (1977).

48 DWORKIN, *supra* note 2, at 97.

49 *Id.*

50 *Id.* at 95-96, 97.

51 Dworkin, *supra* note 47 describing the key tenets of "legal positivism" as:

> The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power . . . .The set of these rules is exhaustive of "the law", so that if someone's case is not clearly covered by a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then the case cannot be decided by applying "the law." It must be decided by some official, like a judge, "exercising his discretion," which means reaching beyond the law for some other sort of standard . . . .To say that someone has a "legal obligation" is to say that his case falls under a valid legal rule that requires him to do or forbear from doing something.

DWORKIN, *supra* note 47, at 33.

52 John FINNIS, NATURAL LAW AND NATURAL RIGHTS 280 (1980). John Finnis has defined "natural law" as "the set of principles of practical reasonableness in ordering human life and human community." H.L.A. Hart noted that the classical theory of natural law is "that there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." HART, THE CONCEPT OF LAW 186 (2nd ed. 1997),

cal and contemporary application of legal rules in a society and from their derivation from the values characterizing that society. Further, Dworkin's definition of law suggests that an empirical review of a State's moral history as well as its contemporary common law will yield a determinate concept of law for that society. The law revealed in such an empirical review would represent the pure law[53] relative to such a society, and this concept is similar to (but also distinguishable from) natural law theory because "the set of principles of practical reasonableness in ordering human life and human community" in Dworkin's theory would recognize particularly societal (as opposed to universal) values.

Thus, Dworkin is bent on defining a society's law as a series of standards deriving their legitimacy from certain moral and philosophical judgments that have occurred and developed in the history of the society through and including the present time. He is not unlike Holmes in that he recognizes the effect of societal influences on law. But he is unlike Holmes in that Dworkin defines the law in retrospect based upon the history of society while Holmes postulated that a society's law is more contemporaneously redefined as its courts' rulings react to and reflect the dynamic political, social and economic influences on society. The rise and fall of governments, as well as a society's interactions with neighboring States, affect and shape a State's historical development, and fortune, coincidence, and other innumerable external and internal influences are decisive shaping factors in its historical development. In response to these unforeseeable and chaotic developments, a society and its law react by changing and evolving in unpredictable ways to develop and cope with new conditions and challenges. As Holmes observed, "The life of the law has not been logic: it has been experience."[54]

Holmes' definition of the law is predicated upon his judicial experience in applying laws during the chaotic evolution of society. Dworkin recognizes that a rival to his theory of law as integrity, and to legal positivism, is "legal realism," a semantic theory that the law, as defined by lawyers, is a prediction of what any particular judge will do in a case.[55] Holmes very much epitomizes this theory of predictability when he specifies that, "The prophesies of what the courts will do. . . are what I mean by the law."[56] He is, at best, agnostic about whether any enduring standards might exist, and, even if they do, whether they have any relevance to the law. While cynical in outlook, attorneys who have plead cases before a litany of judges will attest that Holmes' candid description of the law is not

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53 DWORKIN, *supra* note 2, at 407. "Present law gropes toward pure law when modes of decision appear that seem to satisfy fairness and process and bring law closer to its own ambition." He also notes that, "Sentimental lawyers cherish an old trope: they say that law works itself pure. The figure imagines two forms or stages of the same system of law, the nobler form latent in the less noble, the impure, present law gradually transforming itself into its own purer ambition, haltingly to be sure, with slides as well as gains, never worked finally pure, but better in each generation than the last. There is matter in this mysterious image, and its adds to both the complexity and the power of the law as integrity." *Id.* at 400.

54 HOLMES, *supra* note 5, at 1.

55 DWORKIN, *supra* note 2, at 36.

56 Oliver Wendall Holmes, *The Path of the Law, in* COLLECTED LEGAL PAPERS 173 (1920).

necessarily apocryphal and that, while Dworkin's theory of adjudication tells judges how they should decide cases, the outcome of any particular litigation often very much depends to a degree upon the subjective discretionary judgment of the judge who is entrusted on meting out justice. Thus for Holmes, if a society's laws are going to accurately correspond with the actual feelings and demands of the community, whether right or wrong, those laws have to contemporaneously evolve as society's dynamic social, political, and economic values change (whether for good or not). This is not true for Dworkin: the significant role he assigns to morality in his jurisprudence limits the extent to which transformations in the law could legitimately be induced by current social mores alone.

An example of the law evolving to reflect the changing values of society as theorized by Holmes is found in the English House of Lords' treatment of the common law duty of an occupier of land toward trespassers. In 1929 the House of Lords set forth the rule, in *Addie & Sons (Collieries) Ltd. v. Dunbeck*, that an occupier owed no duty of care to a trespasser on his land, but was only liable for causing him harm recklessly or deliberately.[57] In 1972 the House of Lords revisited the issue in *Herrington v. British Railways Board* and, in developing a new rule, the court had to establish a proper balance between property rights of the occupier and the need to protect people against injury.[58] Because the trespasser was an unwanted and uninvited intruder on the land who forced a relationship upon the occupier, it was considered unfair to impose on the latter the same duty as he owed to the people he permitted to come on to his land. The only duty owed was to act as a 'humane man' would do, given his knowledge of the likelihood of trespassers and of any danger there might be on the premises.[59]

Lord Pearson observed in *Herrington*, *inter alia*, that a change in the law was necessitated by "changed social conditions with more people living in towns and a lack of open spaces, so that trespassing, especially by children, was more likely than before."[60] A number of other Lordships "stressed that a new rule was necessary to accommodate changed social attitudes about the duties property owners owed to trespassers."[61] It is argued that the decision of the House of Lords in *Herrington* reflects an even more dramatic evolution in the social awareness of English law. *Herrington* evidences the House of Lords', and thus the law's, recognition of English society's continuing reevaluation of the relative importance of an occupier's rights and duties relating to real property versus the intrinsic value of human life. The original non-liability to trespassers rule drew much of its strength from the unfairness of making landowners owe duties (such as warning, fencing, guarding, etc.) to uninvited and unwelcome trespassers. However, the House of Lords' reconsideration of the fairness of imposing such duties in light of the injuries sustained as the direct result of such a policy evidences the law's continuing reevaluation of individuals' rights versus the protec-

57 Addie & Sons (Collieries) Ltd. v. Dunbeck, 1929 App. Cas. 358.
58 Herrington v. British Railways Board, 1972 App. Cas. 877.
59 JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS 62 (1983).
60 *Id.* at 61.
61 *Id.*

tion of the general welfare as it is currently conceived and valued. Accordingly, the evolution of the English law concerning the duty of care an occupier owes to a trespasser is not based upon any *optima regula*, but rather it is predicated upon the ever-evolving social, political, and economic conditions that define any particular era.

Holmes observed that, "The business of the law of torts is to fix the dividing lines between those cases in which a man is liable for harm which he has done, and those in which he is not."[62] Those "dividing lines" were based upon policy reasons and, according to Holmes, what is generally expedient for the community taken as a whole. So what are the social, political, and economic policy arguments that have been, and still are, accepted by the legal systems in England and its jurisprudential legatees in their continuing partial common law sustention of the doctrinal immunity? Further, what arguments have been offered in rebuttal by legal reformers in the twentieth century as they have sought to mollify the disparate treatment inflicted upon the populace by the doctrine? Finally, which universal legal, sociological, and political factors have caused the five nations under consideration to reach similar conclusions regarding the continued application of the doctrine?

Public authorities proffer many public policy[63] arguments in favor of the preservation of the doctrine. One such argument is the protection of the public treasury,[64] a rationale that is predicated upon the philosophy that the government exists for the benefit of the community and cannot lose all of its wealth or the general public will suffer.[65] The origins of this argument can be traced back to the time of the initial fragmentation of England's colonial empire.[66] And, it has been proffered in the United States by no lesser authority than the Supreme Court, which, in the same vein of utilitarianism, noted in *Robertson v. Sichel*,"[The Government] does not guarantee to any person the fidelity of any of its officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments and difficulties, which would be subversive of the public interests."[67] It is still proffered in the United States as an argument against increasing the scope of any waiver of immunity in order to prevent damage to the public interests. This theory is evident in the State of Utah's *Report of the Governmental Immunity Committee iii*, wherein the committee noted that, "Supporters of the doctrine believe it is a necessary one to prevent diversion of

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62 HOLMES, *supra* note 5, at 79.

63 CRANSTON, *supra* note 7, at ix. "Public policy is an ill-defined term. As used in legal discourse, it indicates the non-doctrinal factors which may be used in some judicial decision making. . . it connotes the 'product' of state decision and action, in other words the decisions and actions of government departments and agencies, courts, and other bodies able to allocate values authoritatively in society."

64 JAMES HUFFMAN, GOVERNMENT LIABILITY AND DISASTER MITIGATION 451 (1986).

65 BELL, *supra* note 59, at 2.

66 Russel v. Devon County, 2 T.R. 667 (H.L. 1788)(wherein the Court noted, in an act of classical utilitarianism, that, "it is better for the individual to suffer than for the public to be inconvenienced").

67 Robertson v. Sichel, 127 U.S. 507, 515, 8 S.Ct. 1286 (1886).

funds from needed public expenditures to the compensation of individuals."[68]

Additional arguments proffered in support of maintaining the scope of immunity include: the avoidance of disruption in public services and risk to public safety;[69] the potential negative or defensive effect on legislative and/or administrative policy decisions based upon the threat of potential tort liability;[70] the avoidance of public embarrassment, negative publicity, and other public relations-related difficulties resulting from any adverse legal actions;[71] and the economic distinction deriving from the recognition that government, unlike private enterprise, exists only to serve the public and not to derive a profit.[72] This last argument suggests that sovereign States should not be subject to the same economic costs and penalties [73] that might be inflicted upon other, profit-oriented market operators.

Legal authorities arguing for reducing the scope of government immunity have responded to the referenced arguments by proffering alternative arguments seeking to eviscerate the rationales proffered in support of the doctrine. In rebuttal to the previously discussed economic identity argument, legal scholars have responded that since the public purpose undertaken by the State involves an injury-producing activity, any resulting injuries or damages should be viewed as part of the overall economic cost of the public enterprise, and not simply as an additional, ancillary cost.[74] Additionally, it has been argued that it is far better to distribute the cost of government-caused injuries among the beneficiaries of the government actions than to impose them in their entirety on innocent victims. Further, while the government does not profit from its activities, the taxpayers do and thus they should have to bear the cost of government liability.[75] Finally, it has been argued that ordinary private tort suits that might be brought against the government generally do not involve any attempt to control government activity[76] and should instead serve as an impetus for the government, acting in a manner similar to comparably situated private actors, to act in a reasonable manner so as to avoid injury to innocent third parties.[77]

Accordingly, if Holmes was correct when he posited:

> every important principle which is developed by litigation is in fact and at the bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less

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68 State of Utah's Report of the Governmental Immunity Committee iii.

69 HUFFMAN, *supra* note 64, at 451.

70 BELL, *supra* note 59, at 2.

71 HUFFMAN, *supra* note 64, at 451.

72 *Id.*

73 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW (2nd ed. 1977).

74 HUFFMAN, *supra* note 64, at 451.

75 *Id.*

76 *Id.*

77 *Id.* at 451, 514-15 (wherein Learned Hand's theory of tort liability is discussed in terms of economic reasonableness and efficiency).

> traceable to views of public policy in the last analysis, [78]

then it would follow that the public policy arguments set forth above and proffered in support of, and in opposition to, the ever-continuing efforts to delineate scope of sovereign immunity as a bar to individual recovery in contemporary society must reflect the unsettled and diverse social, political, and economic values of the society espousing those opinions. And if Dworkin's definition of justice within a society ("a matter of the right outcome of the political system: the right distribution of goods, opportunities, and other resources") is correct, then the difficulties encountered by courts as they attempt to delineate, by means of the common law, the contemporary scope of sovereign immunity so as to promote justice by making the law reflect the values of society, the incongruities in the common law must reflect the society's continuing struggle to achieve a consensus of social, political, and economic values.

The Historical Development and Current Delineation of the Policy/Operational Dichotomy in the United States, England, Canada, Australia, and New Zealand

A. The United States

The Federal Tort Claims Act, 28 U.S.C. § 1346(b), authorizes suits against the United States for damages "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The Act also sets forth that the United States shall be liable with respect to tort claims "in the same manner and to the same extent as a private individual under like circumstances."[79]

The legislative history of the Federal Tort Claims Act is set forth in great detail in the majority opinion authored by Justice Reed in *Dalehite v. United States*.[80] Briefly summarized, the opinion observes that the Seventy-Ninth Congress passed the Federal Tort Claims Act in 1946 after nearly thirty years of Congressional consideration. Justice Reed noted that the Act was intended to provide an efficient means for individuals to obtain redress for the torts of its agents, and "It was the offspring of a feeling that the Government should assume the obligation to pay damages for the misfeasance of employees in carrying out its work."[81] He further noted, in a footnote to the opinion, that:

> Certain tentative experiments in this direction should be noted. In 1855, Congress established the Court of Claims and consented to suit therein on claims

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78 HOLMES, *supra* note 56.
79 28 U.S.C. § 2674 (2000).
80 Dalehite, *supra* note3.
81 *Id.* at 24.

> based on contract or federal law or regulation. This consent was enlarged in 1887 to include all cases for damages not sounding in tort. At the same time United States District Courts were given concurrent jurisdiction of claims up to $10,000. In 1910, Congress consented to suits in the Court of Claims for patent infringement. When the Government took over the operation of the railroads during the First World War, Congress made the United States subject to the same responsibility for property damage, personal injury, and death as the private owners would have been. In 1920 and 1925, the Government consented to suits in the district courts upon admiralty and maritime torts involving government vessels, without limitation as to amount.
>
> From the Committee hearings we learn that the previous 85 years had witnessed a steady encroachment upon the originally unbroken domain of sovereign immunity from legal process for the delicts of its agents. Yet a large and highly important area remained in which no satisfactory remedy had been provided for the wrongs of government officers or employees, the ordinary "common law" type of tort, such as personal injury or property damage caused by the negligent operation of an automobile.[82]

However, it was not Congress' intention to waive the sovereign immunity of the United States in all respects. The United States can be sued only to the extent that it has waived its sovereign immunity,[83] and the party asserting a cause of action against the government has the burden of proving an unequivocal waiver of immunity.[84] Congress intentionally and specifically excepted several classes of tort claims from being actionable under the Act, including, *inter alia*, 28 U.S.C. § 2680(a), which specifies that the Act shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[85]

Perhaps Judge Edward R. Becker of the United States District Court, Eastern District of Pennsylvania, most articulately explained the rationale underlying this exception in his opinion in *Blessing v. United States*.[86] According to Judge Becker, § 2680(a) prevents: tort actions from becoming a vehicle for judicial in-

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82 *Id.* at 25, n. 10. It is interesting to contrast the very different tone of this statement with that evidenced by Justice Miller almost a century earlier in Gibbons v. United States. Gibbons, *supra* note 7. This radical reevaluation of policy reflects the changes that occurred in the United States between the nineteenth and twentieth centuries as the law's emphasis shifted from ideal rule utilitarianism to individual rights and liberties.

83 United States v. Orleans, 425 U.S. 807, 814 (1976).

84 Baker v. United States, 817 F. 2d 560, 562 (9th Cir. 1987), *cert. denied*, 487 U.S. 1204 (1988).

85 28 U.S.C. § 2680(a).

86 Blessing v. United States, 447 F. Supp. 1160, 1170 (E.D.Pa. 1978).

terference with decision making that is properly exercised by other branches of the government and of protecting "the government from liability that would seriously handicap efficient government operations" (Citations omitted). Statutes, regulations, and discretionary functions, the subject matter of § 2680(a), are, as a rule, manifestations of policy judgments made by the political branches. In our tripartite governmental structure, the courts generally have no substantive part to play in such decisions. Rather, the judiciary confines itself—or, under laws such as the FTCA's discretionary function exception, is confined—to adjudication of facts based on discernible objective standards of law. In the context of tort actions, with which we are here concerned, these objective standards are notably lacking when the question is not negligence but social wisdom, not due care but political practicability, not reasonableness but economic expediency. Tort law simply furnishes an inadequate crucible for testing the merits of social, political or economic decisions.

In creating the discretionary function exception, Congress expressed its intention that activities undertaken by agents of the United States that resulted in injury to the populace would not be actionable under the Act if they occurred in the direct implementation of a statutory or regulatory policy. The existence of a duty of care that might be owed by the government authority is not even addressed, because the issue becomes moot if immunity for the conduct in question has not been specifically waived. Thus when the statute dictates that claims predicated upon, "an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty," the result is that these types of activities simply become nonjusticiable because they are still barred by sovereign immunity. Thus, garden-variety negligence actions such as those deriving from the careless operation of an automobile are actionable, but claims for damages attributable to the operational application of discretionary policy decisions regulating or governing the type or maintenance schedule of the government automobile in question afford no such recourse.[87]

Justice Reed discussed the nature and scope of the exceptions delineated in § 2680(a) in extensive detail in *Dalehite*, which involved multiple large claims for damages against the United States arising out of an explosion of ammonium ni-

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87 United States v. Gaubert, 499 U.S. 315, 325 n. 7 (1991), the Supreme Court explained the rationale for this distinction:

> There are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish. If one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy.

Id. at 325 n.7.

trate fertilizer which had been produced and distributed under the direction of the United States for export to devastated areas occupied by the Allied Armed Forces after World War II. The majority opinion concluded that the allegedly negligent acts of the government in loading and storing the fertilizer were governmental duties protected by the discretionary function exception and held the action was barred by § 2680(a). Describing the discretion protected by § 2680(a) as "the discretion of the executive or the administrator to act according to one's judgment of the best course,"[88] the Court also noted that:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the 'discretionary function or duty' that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable.[89]

Thus the majority determined that all of the alleged tortious conduct attributed to the Government by the plaintiffs fell within the discretionary penumbra of the exception, as opposed to determining that at some point during the implementation of the policies in question the activities became operational in scope. This decision recognized that policy considerations implemented in the form of discretionary activities could extend throughout the operational implementation of a government function, and the policy/operational dichotomy was thus predicated upon the way that a particular activity was interpreted by the courts. The distinction thus appears to be based almost entirely on semantic arguments based upon subjective interpretations of the law in light of Congress' articulated intent in passing the Act. This semantic nature of the distinction is observed in *Dalehite* when the reader notes that the dissenting justices' opinion disagreed with the majority's conclusion after applying the distinction, and the dissent supported its contrary determination with the same facts.[90] The problem was, and continues to be, that the policy/operational dichotomy suggests no clear delineation between the two positions so as to provide guidance for jurists making this problematic determination.

The Supreme Court readdressed the policy/operational dichotomy[91] in its opinion in *United States v. S.A. Empresa de Vicao Aerea Grandense* (Varig Airlines). The *Varig* Court noted that:

> As in *Dalehite*, it is unnecessary—and indeed impossible—to define with preci-

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88 *Dalehite*, *supra* note 3, at 34.

89 *Id.* at 35-36 (footnotes omitted).

90 *Id.* at 57-58.

91 *See also* Indian Towing Co. v. United States, 350 U.S. 61, 76 S. Ct. 122 (1955), Rayonier, Inc. v. United States, 352 U.S. 315 (1957), and Eastern Air Lines, Inc. v. Union Trust Co., 221 F.2d 62 (D.C. Cir. 1955), *cert. denied* United States v. Union Trust Co., 350 U.S. 907 (1955). The Supreme Court has also addressed the dichotomy in its opinions in these cases/

> sion every contour of the discretionary function exception. From the legislative and judicial materials, however, it is possible to isolate several factors useful in determining when the acts of a Government employee are protected from liability by § 2680(a). First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case. As the Court pointed out in *Dalehite*, the exception covers '[n]ot only agencies of government . . . but all employees exercising discretion.'[92]

Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.[93]

The *Varig* Court did not present a bright line test that would determine what behaviors constituted policy or operational conduct, and it instead simply delineated who might be an agent of the government when the determination is being considered. Further, since the rank of the government agent is not relevant to the determination of whether the activity in question might be discretionary in nature, the discretionary function exception arguably extends through every aspect of the operational implementation of a policy.

In *Berkovitz v. United States*, the Supreme Court declared that the discretionary exception only covers acts that "involv[e] an element of judgment or choice," and so, when properly construed, it "protects only government actions and decisions based upon considerations of public policy."[94] Three years later, the Supreme Court, in *United States v. Gaubert* mandated that:

Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.[95]

Accordingly, the *Gaubert* Court expanded its holding in *Varig*, and held that a discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policymaking or planning functions.[96] Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses

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92 United States v. S.A. Empresa de Vicao Aerea Grandense (Varig Airlines), 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 660 (1984).

93 *Id.*

94 Berkovitz v. United States, 486 U.S. 531, 536-37, 108 S. Ct. 1954, 81 L. Ed.2d 531 (1988).

95 Gaubert, *supra* note 87.

96 *Id.* at 325

is the wisest.[97] Discretionary conduct is not confined to the policy or planning level. "[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[98]

It is also important to note that the *Varig* Court further observed that an underlying basis for the inclusion of the discretionary functions exception in the Act was that:

Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."[99]

By noting that it was Congress' legislative intent to prevent the courts from usurping the legislative and executive roles of promoting social, economic, and political policy, the Supreme Court declared its recognition that the exemption was a legitimate means for retaining and applying the affirmative defense of sovereign immunity in certain situations. However, implicit in this statement is the notion that, in their judicial decisions, the courts shall interpret and apply this exception in a spirit the courts determine to be consistent with the intent of Congress in creating the exception. Thus attributing the interpretation to enabling and protecting the social, economic, and political policy intentions of the drafters of the Act may now legitimize any contemporary common law elucidation of exemption provided by § 2680(a). Accordingly, because the language of the Act and the circumstances of any subsequent case applying same are viewed in light of the then-existing social, political, and economic values held by the court considering the case, the contemporary interpretation of the scope of the exemption provided by the Act (and thus the scope of the defense of sovereign immunity) allows for, and legitimizes, the ever-continuing evolution of the common law delineation of the scope of the waiver.

B. England

In England, the petition of right remained the sole mechanism available to individuals for suing the Crown in tort until 1947. The Crown Proceedings Act of 1947 abolished the petition of right, including the requirement of the fiat, and allowed individual citizens to sue the Crown in the same fashion as they might another private party.[100] Further, although modified forms of redress were available against the Crown's agent in tort, the Crown Proceedings Act was the first legal authority to impose general tortious liability upon the Crown "in respect of

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97. *Id.*
98. *Id.* (*citing* Varig).
99 *S.A. Empresa, supra* note 92, at 814.
100 HOGG, *supra* note 22, at 7.

torts committed by its servants or agents."[101]

Section 2 of the Crown Proceedings Act defines the scope of the waiver of immunity, and, in pertinent part, it declares that:

> [T]he Crown shall be subject to all those liabilities in tort to which, if it were a private person of full age and capacity, it would be subject:
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> - in respect of torts committed by its servants or agents;
>
> - in respect of any breach of those duties which a person owes to his servants at common law by reason of being their employer; and
>
> - in respect of any breach of the duties attaching at common law to the ownership, occupation, possession or control of property.[102]

However, unlike the Federal Tort Claims Act, no statutory provision is made in the Crown Proceeding Act providing for the exclusion of discretionary functions or duties on the part of a government authority from the waiver of immunity. Instead, this policy-oriented case law limitation on the waiver has been shaped by the courts, which consider whether the injuries sustained were foreseeable, whether the parties were sufficiently proximate, and, if so, whether it is fair, just and reasonable to impose upon the public authority a duty of care in the discharge of its responsibilities to the individuals claiming that they are entitled to damages from the authority as the result of its activities.[103]

In an effort to delineate which torts attributable to the government may be actionable, the policy/operational dichotomy emigrated from the United States to the English legal system.[104] The policy issue was originally recognized in the House of Lords' opinion in *East Suffolk Rivers Catchment Board v. Kent*, in which Lord Romer summarized the issue of whether a government authority had acted reasonably was "a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of economy and thrift."[105] The House of Lords first addressed the dichotomy, although not explicitly, in *Dorset Yacht Co. Ltd. v. Home Office*, when Lord Diplock recognized that Parliament had entrusted a discretionary duty to a public authority in charge of running a juvenile detention facility as to how to best achieve the public purposes assigned to that authority.[106] Lord Diplock opined that a court should not substitute its own view of the appropriate means for the department through the granting of an action for negligence.[107] "To ask whether the defendant had been negligent in adopting [the policies governing the structure of the

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101 *Id.* at 82-83.

102. Crown Liability Act, *supra* note 1.

103 Caparo Indus. Plc. v. Dickman, [1990] 2 App. Cas. 605, 618 (appeal taken from Eng.); PAUL P. CRAIG, ADMINISTRATIVE LAW 864-67 (4th ed. 1999).

104 CRAIG, *supra* note 103, at 123.

105 East Suffolk Rivers Catchment Board v. Kent, App. Cas. 74, 86 (1941)(appeal taken from England).

106 Dorset Yacht Co. Ltd. v. Home Office, 1970 App. Cas. 1004 (1970).

107 *Id.* at 1067-68.

program] would be to ask the court to balance the competing interests [of society], a task which, as Lord Diplock stated, the court is not competent to perform."[108]

The House of Lords first explicitly explored the dichotomy in its decision in *Anns v. Merton London Borough Council.*[109] In *Anns*, the defendant municipal council was sued by real property owners who alleged that the council had breached a claimed duty imposed by a building statute by either not inspecting the foundations of their edifice during its construction or by inspecting it in a negligent manner. This purported breach of duty allowed the building to be constructed upon an inadequate foundational base, and it was averred by the plaintiffs that they suffered damages as a result of the council's negligence.

In his opinion in *Anns*, Lord Wilberforce noted that the duty of care owed by a public authority to an individual, "may be limited by considerations of policy. Where the defendant is the Crown, or any other public authority, an important consideration of policy is the concern of courts not to disturb decisions made by public officials who are ultimately accountable to the electorate."[110] Lord Wilberforce then directly addressed, for the first time in English law, the distinction between planning and operational decisions. He substituted the term "policy" for "planning" in his determination of the issue, and he observed that "many 'operational' powers or duties have in them some element of 'discretion'. It can safely be said that the more 'operational' a power or duty may be, the easier it is to superimpose a common law duty of care."[111] Thus, a public authority's activities deriving from policy decisions concerning the allocation and distribution of scarce resources and assets would not be reviewable by the courts, but a reviewable duty of care might be determined to exist when the cause of action arose out of the alleged careless or negligent operational implementation of those policies. This position was summarized in *X (Minors) v Bedfordshire County Council,*[112] where Lord Browne-Wilkinson formulated a three-stage test to accommodate the application of the policy/operational distinction:

[First] Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not for the courts, to exercise the discretion: nothing which the authority does within the ambit of the discretion can be actionable at common law. [Second] If the decision complained of falls outside the statutory discretion, it *can* (but not necessarily will) give rise to common law liability. However, if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist . . . .

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108 Paul P. Craig, *Negligence in the Exercise of a Statutory Power*, 94 L. Q. Rev. 428, 437 (1978).

109 Anns v. Merton London Borough Council, App. Cas. 728 (1978).

110 HOGG, *supra* note 22, at 122.

111 Anns, *supra* note 109, at 754.

112 X (Minors) v Bedfordshire County Council, 2 App. Cas. 633 (1995).

[Third] If the plaintiff's complaint alleges carelessness, not in the taking of a discretionary decision to do some act, but in the practical manner in which that act has been performed . . . the question whether or not there is a common law duty of care falls to be decided by applying the usual principles . . . .[113]

Accordingly, an action against a public authority could only succeed if the activities made the basis of a plaintiff's claims occurred outside the authority's discretionary authority, and in making this determination "the court could not assess factors which were felt to be non-justiciable, or within the policy category of the policy/operational dichotomy."[114] Thus, in the event that a trial court determines that a public authority owes a common law duty of care to a plaintiff, that plaintiff must then prove that the authority's conduct was justiciable because it was acting outside its statutory discretion.

While England's government authority tort liability scenario became quite similar to that of the United States with respect to its adoption of the policy/operational distinction, the basis underlying the application of the dichotomy in English law is a judicially created discretionary function exception. Further, if a plaintiff demonstrates that an authority acted outside its discretion, the court must determine whether a duty of care might actually be owed to the plaintiff. Alternatively, the United States' statutory discretionary function exception makes no effort to articulate this legal basis for non-suit, as the duty of care question is a moot issue due to the fact that the government's sovereign immunity in this realm has never been waived. Hence the dichotomy in these countries evolved in separate but comparatively similar manners that reflect the distinctions typical of the jurisprudence of their particular states.

However, England's public liability case law has recently encountered an impediment to its natural evolutionary growth. The Human Rights Act, 1998 (HRA), incorporated the European Convention of Human Rights (ECHR) into English domestic law. Section 6 of the HRA requires that the courts interpret legislation in accordance with the ECHR. Section 2 of the HRA provides that the national courts, in making their determinations of law, must consider the decisions of the European Court of Human Rights (ECtHR), although the ECtHR's decisions are not binding as precedent. Accordingly, the common law of England must now be viewed in light of Article 6 of the ECHR, and acts of public authorities that are incompatible with those rights are unlawful.[115]

In 1998 the ECtHR determined in its decision in *Osman v. United Kingdom*, that the decision in the underlying suit was contrary to the provisions of Article 6 of the ECHR.[116] In the underlying suit, a domestic court determined at the outset of litigation that the public authority in question owed no duty of care to a plaintiff, and thus the plaintiff's case was struck for failing to state a viable claim.

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113 *Id.* at 738-739.

114 Paul P. Craig & Duncan Fairgrieve, *Barrett, Negligence and Discretionary Powers*, 1999 Pub. L. 627, 631.

115 CRAIG, *supra* note 103, at 445.

116 Osman v. United Kingdom, 5 B.H.R.C. 293 (1998).

The House of Lords affirmed the lower court, and the ECtHR essentially determined that the plaintiff's human rights were violated by the English legal system when it denied him a hearing on the merits of his claim. The decision of the ECtHR did not, however, directly address the issue concerning the fact that the claim was struck because there was no viable cause of action asserted under English substantive law. Regardless, the ECtHR resolved that the plaintiff was entitled to argue his case so that his allegations of tortious conduct might be investigated.

Accordingly, when the House of Lords was confronted with another government liability case where the plaintiff's claim had been struck[117] at the outset of litigation at the county court level based on the lack of existence of a duty of care in *Barrett v. Enfield LBC*[118], Lord Browne-Wilkinson found the *Osman* precedent difficult to apply. Theoretically, the House of Lords could have opted to disregard the *Osman* precedent and might have ruled according to established English law,[119] but the plaintiff would have almost certainly taken his case to the ECtHR in an effort to enforce the *Osman* reasoning in *Barrett*. So, in an effort to comply with the spirit of the ECtHR's decision in *Osman*, the House of Lords accepted the appeal. The case was sent back to the county court to make a reasoned decision of whether it would be fair, just, and reasonable to impose a duty on the public authority in this instance based upon a reasoned consideration of the detriment to the public interest, should liability be held to exist as against the total loss to all potential plaintiffs were there held to be no viable cause of action.[120]

The English common law delineating the policy/operational dichotomy is thus confronted with an unexpected hurdle in its evolutionary development as it seeks to define and delineate the scope of sovereign immunity as it currently stands in England today. The imposition of an external due process standard will certainly have a chilling effect of any trial court confronted with a Motion to Strike a claim based upon a government-plead claim that the conduct in question is not actionable based upon its public policy nature. Rather, it would certainly appear more expedient to deny such a request and let discovery proceed regardless of the viability of either party's claim.

At least one English legal scholar has thus suggested that the policy/operational distinction be abandoned in favor of simply addressing the justiciability of the plaintiff's action.[121] However, this results in what is basically a semantic change, as evidenced by the fact that the same salient dilemma still faces courts in the United States, which has arguably already based its exception on this position, as the same viability issues would exist regardless of what the distinction is called. Thus in a typical case, the plaintiff would ask the court to

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117 English civil procedure uses a *motion to strike* in the same manner that the United States uses a *motion to dismiss*, and the two are very similar with respect to their procedural application and effect.

118 Barrett v. Enfield LBC, 3 All E.R. 19 (1999).

119 Craig & Fairgrieve, *supra* note 114, at 631.

120 Barrett, *supra* note 118, at 199f-j; Craig & Fairgrieve, *supra* note 114, at 631.

121 CRAIG, *supra* note 114, at 862-63.

consider the merits of his claim (based upon the degree of harm sustained) in light of the adverse effects the viability of same would have on any public interest benefits (social, economic, and political) that are derived from preserving the government authority's claim of non-suit in response to the authority's motion to strike. Accordingly, the evolutionary trend of the policy/operational dichotomy should and will continue as the English appellate courts seek to surmount this most recent obstacle in their efforts to secure justice through the application of the common law.

C. Canada

The petition of right, including the requirement of the fiat, remained the procedure for suing the Crown in Canada until after the enactment of the Crown Proceedings Act, 1947, in the United Kingdom. The Federal Parliament acted in stages, abolishing the fiat requirement in 1951, and it adopted the Crown Liability Act in 1952 (now codified as the Crown Liability Act, R.S.C., ch. C-50 (1985)(Can.)). However, it retained the procedural requisite of the petition of right until 1971.[122] It is important to note that, until 1949, the Judicial Committee of the Privy Council in England was "the major interpreter of the Canadian constitution and the major expounder of explicit views on the nature of Canadian federalism" until appeals to this body were abolished by the British North America Act, 1949.[123] Thus, it was not until after 1949 that Canadian common law was necessarily a more accurate reflection of the social, political, and economic values of Canadian society (or at least the empowered element of same), as it was not until this time that Canada had the final (and only) say in the interpretation of its laws.

The Crown Liability Act was modeled after the English Crown Proceedings Act, 1947,[124] and it allowed that the federal government (the Crown) would be liable:

> - in tort for the damages for which, if it were a private person of full age and capacity, it would be liable
>
> - in respect of a tort committed by a servant of the Crown; or
>
> - in respect of a breach of duty attaching to the ownership, occupation, possession or control of property.[125]

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122 HOGG, *supra* note 22, at 7-8.

123 GARTH STEVENSON, UNFULFILLED UNION: CANADIAN FEDERALISM & NATIONAL UNITY 43, 259 (rev. ed. 1982).

124 HOGG, *supra* note 22, at 84-85.

125 Crown Liability Act, supra note 1, § 3; "A special problem with respect the Crown in right of Canada, in situations where it is liable in tort, is the choice of applicable law. Tort law is generally provincial, not federal. The best view seems to be that the federal Crown's liability in tort should be determined in accordance with the law of the province in which the cause of action arose." HOGG, *supra* note 22, at 86 n. 33.

The Act also allowed that, "The Crown is liable for the damage sustained by any person by reason of a motor vehicle, owned by the Crown, on a highway, for which the Crown would be liable if were a private person of full age and capacity."[126] Hence, in its partial waiver of the Crown's common law immunity form suit, the Crown Liability Act also did not specifically reserve the government's immunity with respect to discretionary duties and functions. Rather, the policy/operational distinction developed out of the court's consideration of the duty of care issue and was implemented by means of case law in the same manner as it did in England.

The foremost case delineating the liability of public authorities is the Supreme Court of Canada's opinion in *Nielson v. Kamloops (City)*.[127] In resolving the issue of the potential liability of a public authority involved in a fact scenario that is quite similar to the fact scenario considered by the House of Lords in *Anns*, the *Kamloops* majority opinion held that liability might lie against a municipality for failing to enforce a stop work order issued to a builder after the municipality's inspector discovered faulty foundations during the construction of a property. The stop work order was issued for the express purpose of protecting the plaintiff's predecessor's interest in the real property. The builder failed to abide by the order and the municipality did not attempt to enforce it.[128]

The Supreme Court relied heavily upon Lord Wilberforce's opinion in *Anns* in its consideration of whether the municipality owed a duty of care to the plaintiff,[129] and, accordingly, the majority held that the decision of the public authority as concerning whether or not it should enforce its own order was operational in nature and gave rise to a duty of care to the plaintiff.[130] However, the majority also noted that the municipality would not have breached any duty of care if its affirmative decision not to enforce the stop work order was based on legitimate public policy reasons: "If it decided against taking them, say on economic grounds, then it would be a legitimate policy decision within the operational context and the courts should not interfere with it."[131] The municipality's duty of care required, "at the very least, a conscious decision not to act on policy grounds."[132] Because the evidence suggested that the issue of enforcement was simply not addressed by the municipality, Justice Wilson, writing for the majority, concluded that, "In my view, inaction for no reason or inaction for improper reason cannot be a policy decision taken in the *bona fide* exercise of discre-

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126 Crown Liability Act, *supra* note 1, § 4.

127 Nielson v. City of Kaloops et al., [1984] 2 S.C. R. 2.

128 *Id.* at. 6-7.

129 *Id.* at 117. The two-step test concerning whether a duty of care might be owed, as set forth in *Anns*, *supra*, was adopted by the Canadian Supreme Court in its opinion in *Kamloops*, and it has subsequently been readopted by the Supreme Court as the "Anns/Kamloops test" in Just v. British Columbia, [1989] 2 S.C.R. 1228; Hercules Management Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165; and Ryan v. Victoria (City), [1999] 168 D.L.R. 513.

130 Kaloops, *supra* note 127, at 24.

131 *Id.*

132 *Id.*

tion."[133]

The Supreme Court of Canada next addressed the policy/operational distinction in *Just v. British Columbia*[134]. In *Just*, Justice Cory, writing for the majority, recognized the "dilemma giving rise to the continuing judicial struggle to differentiate between 'policy' and 'operation.'"[135] He reviewed English, United States, and Australian case law addressing the underlying rationale for the distinction, and he concluded that:

> The decisions in *Anns v. Merton London Borough Council* and *City of Kamloops v. Nielson* indicate that a government agency in reaching a decision pertaining to inspection must act in a reasonable manner which constitutes a *bona fide* exercise of discretion. To do so they must specifically consider whether to inspect and if so, the system of inspection must be a reasonable one in all of the circumstances . . . . Thus a true policy decision may be made at a lower level provided that the government agency establishes that it was a reasonable decision in light of the surrounding circumstances.[136]

Justice Cory then proceeded to set forth examples of policy considerations that would fall within the "policy" distinction, and he noted that the "manner and quality" of the public authority's implementation of an otherwise policy-oriented program "is clearly part of the operational aspect of a government activity and falls to be assessed in the standard of care issue."[137]

Accordingly, the common law development of the policy/operational dichotomy in Canada can be viewed as generally falling in line with the English and United States case law interpreting the issue. However, Canada is not bound to follow the decisions of the ECtHR, as is its English counterpart, and thus it is unlikely that it will impose the same awkward procedural hurdles into its case law interpreting and delineating the distinction. Thus, while it will continue to view English substantive law as persuasive in its determinations, the actual procedural evolution will be far more akin to the United States' interpretive common law.

D. Australia

The Australian Commonwealth maintains a formal Constitutional link with the British Crown, however like Canada the decisions of Australia's courts are no longer appealable to the Judicial Committee of the Privy Council in England. Nevertheless, Australian courts look to English case law for persuasive precedent

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133 *Id.*

134 Just v. British Columbia, [1989] 2 S.C.R. 1228.

135 *Id.* at 1239.

136 *Id.* at 1242-43.

137 *Id.* at 1244-45. Justice Cory also noted that, "[T]he requisite standard of care to be applied to the particular operation must be assessed in light of all the surrounding circumstances including, for example, budgetary restraints and the availability of qualified personnel and equipment." *Id.* at 1245.

in interpreting their own common law. Also, Australia was the first of the countries considered in this article to partially waive its immunity, and it did so in § 64 of the Judiciary Act, 1903. In pertinent part, § 64 provides that "in any suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same, and judgment may be given and costs awarded on either side, as in a suit between subject and subject."[138]

This statutory waiver of immunity predates the English Crown Proceedings Act, 1947 by almost half of a century, and this partially explains why the Australian common law interpretation of the waiver is occasionally divergent from the English, Canadian, and New Zealand law despite the fact that the Australian courts rely heavily on the decisions of the House of Lords in this area.

The Australian common law starting point in determining whether liability might exist against a public authority is found in the decision of High Court of Australia in *Sutherland Shire Council v Heyman*.[139] In *Heyman*, Justice Mason observed that:

> Generally speaking, a public authority which is under no statutory obligation to exercise a power comes under no common law duty of care to do so . . . . But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. A common illustration is provided by the cases in which an authority in the exercise of its functions has created a danger, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory powers or by giving a warning . . . .[140]

The policy/operational distinction was first introduced into Australian common law by the Supreme Court of the Northern Territory in *L. v. Commonwealth*.[141] In *L v. Commonwealth*, the plaintiff was a temporary prisoner in an "obsolete, over-crowded and grossly inadequate" facility who was placed by prison authorities in a cell with two other prisoners, both of whom had known violent propensities.[142] The plaintiff was assaulted and raped by his cellmates, and he sued the Commonwealth for damages sustained as the result of the negligence of the prison officials in allowing this assault to take place.[143]

In determining that liability could lie against the government, Justice Ward accepted the distinction between the policy and operational levels of government activity.[144] While he determined that the physical inadequacy of the prison structure (in that it was not large enough to segregate prisoners for their own protec-

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138 Australian Judiciary Act Section 64 (1903).

139 *Sutherland Shire Council v Heyman*, (1985) 157 C.L.R. 424.

140 *Id.* at 459-60.

141 *L. v. Commonwealth* (1976) 10 A.L.R. 269 (N.T.S.C.). This case preceded the House of Lords' decision in *Anns* by approximately two years, making Australia the first country outside of the United States to adopt the distinction.

142 *Id.* at 278-80.

143 *Id.* at 270-71.

144 *Id.* at 276.

tion) was a deficiency at the planning level and therefore not actionable, he also determined that the prison authority's operational activities in placing the plaintiff in a cell with prisoners with a known propensity for violence and in failing to take adequate remedial measures to protect the plaintiff's welfare once the threat was known amounted to actionable negligence.[145]

Like all legal systems implementing the distinction, the courts in Australia have also recognized the difficulties inherent in its application and have made efforts to delineate the distinction. Justice Mason, in his reasons for decision in *Heyman*, observed that:

The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness.[146]

Australia has followed English common law precedent in interpreting the distinction, and the High Court looked to, *inter alia*, the House of Lords' opinion in *X v Bedfordshire County Council* in its opinion *Crimmins v Stevedoring Industry Finance Committee*[147] addressing the issue of when the policy/operational distinction would preclude consequent consideration of whether a duty of care might exist.

In *Crimmins*, the High Court considered the issue of whether a public authority might owe a duty of care to an individual,[148] and it extensively considered the decisions of the House of Lords discussed previously in this article addressing the issue of when liability might be allowed to lie in making its own determination. In *Crimmins*, the plaintiff sued a public authority in a common law negligence action. The trial court found for the plaintiff, and the Victorian Court of Appeal set aside the verdict, holding that the statutory authority did not owe a common law duty of care to the plaintiff.[149] In his reasons for decision-reversing the Court of Appeal, Justice McHugh of the High Court of Australia (with Chief Justice Gleeson, author of the lead decision, agreeing)[150] resolved that a duty of care did, in fact, exist, and he explained his reasoning by opining:

> In my opinion, therefore, in a novel case where a plaintiff alleges that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power, the issue of duty should be determined by

145 *Id.* at 276, 281.
146 Heyman, *supra* note 139, at 469.
147 Crimmins v Stevedoring Industry Finance Committee, (1999) 167 A.L.R. 1, 22.
148 *Id.* at 1, 3 and 13.
149 *Id.*
150 *Id.* at 4.

the following questions:

> 1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.
>
> 2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.
>
> 3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or those interests from harm? If no, then there is no duty.
>
> 4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.
>
> 5. Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty.
>
> 6. Are there any other supervening reasons in policy to deny the existence of a duty of care (e.g., the imposition of a duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.

If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority.[151]

Thus, the High Court utilized the legal precedent set forth in the English House of Lords' decisions to formulate and justify their own test for when liability may lay and when policy issues may bar an action's viability. Accordingly, while Australia's legal system still looks to and is influenced by English common law precedent in determining the scope of immunity still enjoyed by government authorities, its courts have developed their own unique interpretation of when the dichotomy might preclude liability. And while the dichotomy is applied in tandem with the consideration of whether a duty of care might exist, as opposed to subsequent to the consideration of the issue as it occurs in England and Canada (and New Zealand, as will be shown), the initial pleading by a government authority of the preclusion of liability in an action based upon policy considerations

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151 *Id.* at 24-25.

would still bar an action at its outset. Hence, the dichotomy has developed in Australia in a manner that is distinct from, but also similar to, its evolution in the other States considered in this article.

E. New Zealand

New Zealand's Parliament adopted the Statute of Westminster in 1947, and thus New Zealand's relationship with England is predicated upon its "common history and culture."[152] Regardless, New Zealand still retains a formal link with the laws of England, and, unlike Canada and Australia, decisions of New Zealand courts are still appealable to the Judicial Committee of the Privy Council (which applies New Zealand law in its review).[153] Further, English case law from the House of Lords is controlling precedent in interpreting New Zealand cases in New Zealand courts.[154] It is important to note, however, that the legal decisions of New Zealand's courts are not appealable to the House of Lords, and this discrepancy is explained when one notes that the reason "that the hierarchy of precedents . . . has one tier more than the hierarchy of courts" is that "the uniformity of the common law of the United Kingdom and the parts of the Commonwealth that still permit appeal to the Privy Council can be maintained only by recognition of the ultimate authority of a single court . . . ."[155]

The laws of other countries in the Commonwealth (most importantly Australia's) are viewed as persuasive precedent in New Zealand law,[156] but New Zealand's Crown Proceedings Act, 1950, was modeled after the English Crown Proceedings Act, 1947, and bears very little resemblance to Australia's statutory waiver of liability.[157] The Crown Proceedings Act, 1950, is not a general waiver of immunity, and, like the Federal Tort Claims Act, instead, "the general principal of immunity is left but very wide exceptions are carved out of it."[158]

The policy/operational dichotomy developed in New Zealand as it did in England and Canada as its courts sought to delineate the scope of the government's immunity, and the foremost New Zealand case addressing the distinction is ironically the Privy Council's opinion in *Rowling v. Takaro Properties* [1988] App. Cas. 473 (P.C. 1987)(appeal taken from N.Z.). The New Zealand courts are bound by precedent to accept the House of Lord's decision in *Anns v. Merton London Borough*, as controlling precedent in the interpretation of the policy/operational dichotomy as it has been developed in New Zealand's common law, but the distinction was further explored in *Rowling*. In *Rowling*, Lord Keith addressed the policy/operational dichotomy in the contemporary English common

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152 JAMES HUFFMAN, GOVERNMENT LIABILITY AND DISASTER MITIGATION 260 (1986).

153 *Id.*

154 *Id.* at 260.

155 *Id.*; K.J. SCOTT, THE NEW ZEALAND CONSTITUTION 157 (1962).

156 HUFFMAN, *supra* note 152, at 260.

157 *Id.* at 303.

158 *Id.* (quoting from the Public ADMINISTRATIVE LAW REFORM COMMITTEE, DAMAGES IN ADMINISTRATIVE LAW 37 (1980)).

law tradition by enquiring as to whether (and when) a duty of care on the part of a government minister to a private party may arise.[159] The plaintiff's Complaint was initially struck for failing to state a claim based upon the trial court's determination that no duty of care existed based on the minister's purported *ultra vires* exercise of his statutory powers.[160] After many levels of appeals and reverses in the New Zealand legal system, the trial court determined that a duty of care to the plaintiff existed and it eventually entered a judgment on the merits for the plaintiff.[161]

In the opinion deriving from the eventual appeal by the government minister to the Privy Council on, *inter alia*, the discretionary authority issue, Lord Keith quoted extensively from that part of the opinion of the New Zealand appellate court recounting the problems they encountered in applying the dichotomy, and noted that "Their Lordships feel considerable sympathy with . . . [the New Zealand court's] difficulty in solving the problem by simple reference to this distinction."[162]

Lord Keith noted that the policy/operational distinction does not provide a touchstone of liability, but rather is expressive of the need to exclude altogether those cases in which the decision under attack is of such a kind that a question whether it has been made negligently is unsuitable for judicial resolution, of which notable examples are discretionary decisions on the allocation of scarce resources or the distribution of risks. If this is right, classification of the relevant decision as a policy or planning decision in this sense may exclude liability; but a conclusion that it does not fall within this category does not, in their Lordships' opinion, mean that a duty of care will necessarily exist.[163]

Correspondingly, the Privy Council determined that even if the minister misinterpreted his statutory power and acted outside the scope of his discretion as the result of his error, the activities performed that were predicated upon his mistaken beliefs would not be characterized as negligent if the erroneous interpretation was clearly "a tenable one."[164]

The common law development of the policy/operational dichotomy in New Zealand is generally governed by English case law interpretation of the issue, and the distinction's development in New Zealand will most likely mirror its development in England. Like Canada, however, New Zealand is not bound to consider the decisions of the ECtHR, and thus it is unlikely that it will impose the same procedural obstacles into its case law interpreting and delineating the distinction.

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159 Rowling v. Takaro Properties [1988] 1 A.C. 473, 500 (U.K.).
160 *Id.* at 497.
161 *Id.* at 498-99.
162 *Id.* at 501.
163 *Id.*
164 *Id.* at 507.

IV. A UNIVERSALLY APPLICABLE PROCEDURAL MECHANISM WOULD ALLEVIATE THE DILEMMAS ENCOUNTERED IN THE APPLICATION OF THE POLICY/OPERATIONAL DISTINCTION

The common law judicial systems in each of the States under analysis are still remarkably similar in procedural structures regardless of the form of government employed by these States. Further, their respective judiciaries continue to refer to each other's common law developments as persuasive precedent in resolving their own related legal issues. The policy/operational dichotomy that originated in the United States and emigrated back to England is also utilized in roughly the same manner in Canada, Australia, and New Zealand. And despite the attention received by the dichotomy in the courts of each of the forgoing, the most enigmatic question, i.e., the demarcation of where policy or discretionary considerations (and immunity) end and where operational activities (and tort liability) begin, continues to vex the courts attempting to apply the distinction. Further, England's submission to the jurisdictional authority of the ECtHR has presented a new obstacle in the evolutionary development of the dichotomy, and, as noted supra, some legal authorities are suggesting that it is now time to abandon the distinction as untenable. This, however, is not necessarily the case. Rather, this development is a natural and logical subsequent evolutionary step in the development of this complex legal distinction.

It is proposed in this article that the policy/operational dichotomy should continue to remain a test of the viability of an action in negligence against a State. However, it should be implemented in a bifurcated two-step form. The first step of the test would be to determine whether, as a matter of law at the time of the filing of a Motion to Dismiss or Motion to Strike based upon the governmental authority's defense that immunity has not been waived in this area, the plaintiffs' Complaint alleges on its face that the State is liable to the plaintiffs for breaching a duty of care as predicated upon policy issues that are clearly not viable (such as the discretionary allocation of scarce resources or the allocation of risks). In the event that a claim was determined to be non-viable for such reasons, the action would be precluded as a matter of law and dismissed at that time.

However, in the event that it is not readily apparent that the Complaint is not actionable for policy reasons at the outset of litigation, the next step, or second stage, would require that the court weigh the discretionary reasonableness of the conduct exercised by the governmental body in light of both the injury sustained by the claimant and the public policy issues influencing the government body's conduct. This question would be of a quasi-legal/quasi-factual nature, as it would require the court to consider the injuries sustained by the claimant in light of public policy. It should be considered at the end of a shortened discovery process that would be specifically tailored to resolve the viability issue. In the event that the court determined that, as a matter of law, the government authority proffered sufficient admissible evidence to demonstrate that it had acted reasonably in light of the applicable government policies and that it had not caused the claimant to sustain injuries that were unreasonable in light of the goals

sought to be achieved by the government body, then the suit would be barred as non-viable.[165] If any questions of fact preclude the court's denial of the viability of the claim as a matter of law after the second stage of the test is applied, the claim should be allowed to go to trial for a determination of the issue on the merits of the case.

This evolutionary development of the policy/operational dichotomy would be consistent with the state of the law in the United States, England, Canada, Australia, and New Zealand, and it would allow the English legal system to reconcile its common law with the requirements set for the ECtHR in its opinion in *Osman*. Further, the bifurcated nature of the test is consistent with and would greater satisfy the goals of legal reform and fairness by allowing courts, in the application of the second stage of the test, to take into consideration the injuries averred by plaintiffs and would afford plaintiffs an opportunity to challenge the reasonableness of the governmental authority's immunity claim in light of the real burden borne by individuals within society. The second stage of the test would also aid the courts in resolving difficult cases, as it is not merely an application of the orthodox distinction but rather it is an interpretary, evolutionary outgrowth of the doctrine that is designed to further promote its fair implementation. It expands upon the theory of the dichotomy by allowing the courts to consider evidence on the issue of viability while still allowing government authorities to reasonably contain and limit legal actions by providing for the efficient disposal of claims that are legitimately barred by public policy considerations. Accordingly, it would allow the courts to apply the policy/operational dichotomy in a manner that is consistent with the original intentions of its creators but yet still is mindful of the dynamic social, political, and economic factors that are continuously redefining societal goals and values.

Authority for the viability of this proposal can be found in the United States Supreme Court's majority opinion in Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034 (1987). *Anderson* dealt with the reasonableness of a trial court's grant of a "motion to dismiss or for summary judgment" based on qualified immunity grounds that was filed in response to the plaintiffs' (the Creightons') complaint and before any discovery occurred.[166] The Eighth Circuit Court of Appeals reversed the trial court and held that factual disputes concerning the vi-

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165 While it is true that a party who sues the United States has the burden of pointing to a Congressional act that provides the government's consent to the suit (*See* Malone v. Bowdoin, 369 U.S. 643, 648 (1962)), the burden of proving the non-viability of an action plead under the Federal Tort Claims Act should be borne by the defendant governmental authority. This is because the governmental authority, as the movant and the profferer of an affirmative defense, should bear the onus of demonstrating the viability of its own motion. This is also because the government authority, in precluding the viability of the plaintiffs' claims with its sovereign immunity defense, will be infringing upon the plaintiffs' human and fundamental right to due process. Thus, the government authority should be saddled with the burden of proving that its activities were reasonably related to the implementation of the public policy submitted as the basis for immunity and that it had not caused the claimant, in the application of this policy, to sustain injuries that were unreasonable in light of the goals sought to be achieved in the implementation of the policies.

166 Anderson v. Creighton, 483 U.S. 635, 637 (1987).

ability of the governmental agent's (Anderson's) claim of qualified immunity remained unresolved.[167] The Supreme Court vacated the judgment of the Court of Appeals, and Justice Scalia, the author of the majority opinion, noted that qualified immunity questions should be resolved at the earliest possible stage of a litigation.[168] Nevertheless, the case was remanded back to the trial court so that limited discovery on the immunity issue could take place.[169] In his opinion, Justice Scalia observed that "one of the purposes. . . of qualified immunity is to protect officials from the 'broad ranging discovery' that can be 'peculiarly disruptive of effective government,'" and thus he directed that:

> [O]n remand, it should first be determined whether the actions the Creightons allege Anderson to have taken are actions that a reasonable officer could have believed lawful. If they are, then Anderson is entitled to dismissal prior to discovery. If they are not, and if the actions Anderson claims are different from those the Creighton's allege (and are actions that a reasonable officer could have believed lawful), then discovery may be necessary before Anderson's motion for summary judgment on qualified immunity grounds can be resolved. Of course, any such discovery should be tailored specifically to the question of Anderson's qualified immunity.[170]

While this note is not directly dispositive of procedural handling of the dichotomy, Justice Scalia's directions on remand in Anderson provide an instructive guide as to how to begin to resolve the policy/operational distinction in the future. Further, the fact that the *Anderson* Court has already directly supported this procedural mechanism suggests that United States courts would welcome this proposal. Finally, because of the jurisprudential borrowing that has characterized the respective evolutions of the policy/operational dichotomy in all of the countries addressed in this article, it is foreseeable that all of the legal systems considered could adopt this bifurcated test in an effort to manage the opacity that continues to make the dichotomy a difficult distinction to apply.

V. CONCLUSION

The United States, England, Canada, Australia, and New Zealand have sought to remedy the inherent inequities encountered in the sovereign immunity provisions remaining in their respective common laws by legislating a partial waiver of their immunity from suits filed by private individuals. At this time, public policy considerations still require that the immunity from suit enjoyed by public authorities not be fully and entirely waived. In an effort to impose order upon a chaotic situation, the policy/operational dichotomy has emerged in all of the forgoing countries as their courts have attempted to delineate the scope of their respective society's waiver of immunity. However, this dichotomy is not,

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167 *Id.*
168 *Id.* at 646, n. 6.
169 *Id.*
170 *Id.* at 646, n. 6.

at present, the panacea that the legal systems might have hoped it would be. Rather, it must continue to be developed and refined, as are all other doctrines in the common law, in order that the dichotomy might be more useful to the courts in the elusive task of attempting to mete out the justice demanded by the parties submitting to the jurisdiction of their legal systems.

However, the policy/operational dichotomy is more than a remedial distinction: its evolutionary development is an example of the ever-continuing transformation of the common law. The dichotomy is always seeking, but never quite achieving, a state of perfection through which justice can reliably be achieved. Accordingly, although the courts continue to revise the common law in order to reflect society's ever-changing (and rarely concurring) social, political, and economic values, the difficulty inherent in applying the dichotomy is not unlike the difficulty inherent in achieving justice through the application of the common law to a dynamic society. The proposed bifurcated application of the policy/operational dichotomy would aid in this effort, and, because it is a simple procedural mechanism that would be universally applicable in the common law legal systems found in all of the forgoing States germinating from England's common law legacy, its facilitation of the substantive development of the common law would benefit the forgoing legal systems in achieving their commonly held goal of securing justice for their respective societies.