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ARTICLES

The Sale of English Justice

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> The first object of any tyrant in Whitehall would be to make Parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen. So that trial by jury is more than an instrument of justice and more than one wheel of the constitution: it is the lamp that shows that freedom lives.[1]

I. INTRODUCTION

The jury system is a cherished fundamental right of English common law laid out in the Magna Carta in the thirteenth century.[2] The jury system was so enshrined in English heritage that while America wished to rid itself of English rule in 1776, America did not shed itself of this English tradition, thus, James Madison adopted the defendant's right to a jury trial in the United States Constitution[3]. An important distinction between the Magna Carta and the US Constitution should be noted, the Magna Carta grants a man judgement by his peers, but not the right to elect a trial by jury trial over a bench trial. Not until 1855 were English defendants given the option of either a summary trial or trial by jury in cases of petty larcenies.[4] By the 1870's, Parliament passed various statutes list-

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* I wish to thank my husband, Pete Pellegrino, for taking the kids to the park in order that I could write this article and for much needed support and proofreading.

1 TREVOR GROVE, THE JURY MAN'S TALE 11 (1998) (*citing* Lord Devlin from TRIAL BYJURY the book based on his 1956 Hamlyn lecture).

2 MAGNA CARTA, Sec. 29, confirmed by the seal of Edward I in 1297, states: "No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right."

3 U.S. CONST. amend. XI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...." *Id.*

4 *Review of Delay in the Criminal Justice System: A Report*, Chptr. 6, *Managing the Distribution of Cases between the Courts*, The United Kingdom Home Office Web Page <www.homeoffice.gov.uk/cpd/pvv/crimrev6.htm> [hereinafter *Narey Report*]. The 1855 Administration of Justice Act allowed justices, with the defendant's consent, to try cases summarily rather than by indictment or jury trial. This idea was suggested to speed trials and diminish expenses. Before the 1855 Act, felonies were solely tried by indictment and there was no election by the defendant. *Review of Delay in the Criminal Justice System: A Report*, Chapter 6, *Election for Trial*,

ing other offences to allow trials either by judge or jury, but the magistrate had the prerogative to overrule the defendant's wishes for a jury trial.[5] The Criminal Justice Act of 1925 included an exhaustive list of triable either way (hereinafter TEW) offences including serious theft, assault and forgery.[6]

Today, the English have a three-tier system of justice where indictment cases of serious crimes such as death, rape, blackmail, robbery, assault and theft, are heard in Crown Courts with a jury; summary cases, where there is no threat to life, are heard in magistrates' court before three judges[7]; and a third tier of TEW crimes like burglary, unlawful wounding, assault without actual bodily harm, and petty theft, which can be tried either in Crown Court or magistrates' court depending on the defendant's discretion and the seriousness of the crimes.[8] Over the last twenty-five years, the number of third tier offences has been slowly defused and thus the defendant's right to elect a jury trial has narrowed. The current government suggests eliminating all TEW offenses so that only a magistrate judge determines if a defendant has a judge or jury trial.

The sole arbitrator of a defendant's fate would rest in the hands of three magistrate judges, who may have no legal background,[9] but can sentence defendants up to six months in prison and a £5,000 fine.[10] In contrast, a legally trained judge in Crown Court regulates a case before a jury.[11] Professionalism comes at a price, however; as a case going through the Crown Courts can cost the government £3,100, whereas a case directed to magistrates' court can cost a mere £295.[12] The number of TEW cases as well as the summary offences rose last year by 1.8%.[13]

The United Kingdom[14] is a country where a balanced budget is not just a

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History, Home Office Web Page <www.homeoffice.gov.uk/cpd/pvv/crimrev6.htm> [hereinafter *Narey Report*].

5 *Id.*

6 *Id.*

7 DAVIES ET AL., CRIMINAL JUSTICE: AN INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM IN ENGLAND AND WALES 158 (1995).

8 *Id.* at 158. Hereinafter these cases will be referred to as TEW or triable either way cases.

9 *Id.* at 152-3. See section IIA for a discussion of magistrates' qualifications.

10 *Id.* at 157. A pound is worth approximately 1.6 U.S. Dollars at the time of this writing, therefore the fine can be up to about $8,000. For the purposes of this article, all monetary figures will be kept in British pounds.

11 *Judicial Statistics, The Crown Court: Committals for Trial* [hereinafter *Judicial Statistics Annual Report*] (1998) *at* <www.open.gov.uk/lcd/courtfr.htm>. TEW cases that are heard in Crown Court are tried by a circuit judge, recorder or assistant recorder, and sometimes by a High Court judge.

12 DAVIES ET AL., *supra* note 7, at 173. A study done in 1988-89 found the difference in the two courts staggering. While no recent study has been done, the cost has most likely not gone down in eleven years.

13 *Crown Prosecution Service, 1998-99 Annual Report* 25 (London: The Stationary Office Lmtd.1998-1999).

14 The United Kingdom is comprised of England, Wales, Scotland and Northern Ireland. Great Britain is the island composed of England, Scotland and Wales. This paper deals with just the English and Welsh justice systems.

campaign pledge from a politician's mouth, but a necessity. The British live on an island with a relatively narrow tax base given their commitment to a socialist system of healthcare and welfare. Every section of the government must carefully account for the money they spend, and the Criminal Justice System is no exception. Therefore, in 1997, when the figures showed a rise in TEW cases possibly going to expensive Crown Court, the Conservative Home Secretary[15] proposed changing certain TEW cases to summary cases, thus eliminating the jury trial option for a defendant.[16] At that time the Shadow Home Secretary, Mr. Jack Straw, stated that abolishing the jury trial was "not only wrong, but short-sighted, and likely to prove ineffective."[17]

This past year Mr. Straw reversed himself and proposed the Criminal Justice (Mode of Trial) Bill to Parliament's House of Commons[18] by which TEW cases would to be examined and determined by a magistrate as to whether they could be heard in Crown Court or magistrates' court, rather than by the choice of the defendant.[19] Two versions of this bill[20] have failed to pass the House of

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15 The Home Secretary's office governs a wide range of domestic affairs including proposing legislation on criminal justice matters. The Home Office does not govern the courts, that area is overseen by the Lord Chancellor's office which governs magistrates' court, Crown Court, the Department of Public Prosecutions and the Crown Prosecution Services.

16 Heather Hallett et.al., *Letters to the Editor, Option of Trial By Jury Under Threat*, THE TIMES (London), Sept. 17, 1998, *available in* <http:/www/the-times.co.uk/> or <http:/www.mapinc.org/drugnews/v98.n814.a04.html>.

17 *Id.* The shadow government refers to the party not in power but they have all the leaders of an administration picked out to be able to step into the role of government at any time an election is held and the ruling party ousted. In 1997, the Conservative government led by John Major was in power. Today the Labour Party is in power with Mr. Tony Blair as Prime Minister and Mr. Jack Straw as the Home Secretary overseeing the Home Office. The Home Office manages legislation proposed to Parliament. *See* Home Office Web Site: <http://www.homeoffice.gov.uk>.

18 PAUL SILK & RHODRI WALTERS, HOW PARLIAMENT WORKS 116 (1998)Laws are made by being introduced in either the elected House of Commons or the House of Lords. The House of Lords membership is comprised of peers appointed for life, heredity peers and clergy members of the Anglican Church. Usually a bill becomes law after it has passed through both the House of Commons and the House of Lords and is signed by the sovereign. .

19 Criminal Justice (Mode of Trial) Bill, House of Lords (Session 1999-00) states:

> A BILL TO Make provision for determining the mode of trial in the case of offences triable either summarily or on indictment; and for connected purposes. BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:
>
> 1. The following shall be substituted for sections 19 to 22 of the Magistrates' Courts Act 1980 (offences triable either way: determination of mode of trial):
>
> > 19. - (1) The court shall consider whether the accused ought to be tried summarily or on indictment.
> >
> > (2) For the purpose of subsection (1) above the court-
> >
> > (a) shall permit the prosecutor and the accused to make representations, and
> >
> > (b) shall have regard to any representations under paragraph (a) and to the matters specified in subsection (3) below.
> >
> > (3) Those matters are-
> >
> > (a) the nature of the case;

(b) whether the circumstances make the offence one of serious character;
(c) whether the punishment which a magistrates' court would have power to impose for it would be adequate;
(d) whether the accused's livelihood would be substantially diminished as a result of conviction or as a result of punishment of a kind or magnitude likely to be imposed by the court on conviction;
(e) whether the accused's reputation would be seriously damaged as a result of conviction or as a result of punishment of a kind or magnitude likely to be imposed by the court on conviction; and
(f) any other circumstances which appear to the court to be relevant.
(4) The court may be informed that the accused has a previous conviction and may be given details of the conviction if necessary-
(a) to rebut or explain anything said by the accused, and
(b) for the purpose of enabling the court to consider the matters specified in subsection (3)(e) above.
(5) A justice of the peace who in reliance on subsection (4) above is informed that the accused has a previous conviction shall not participate in any of the following in respect of the offence-
(a) a summary trial;
(b) an inquiry into the information;
(c) an appeal to the Crown Court.
20. - (1) The court shall inform the accused of its decision following consideration of mode of trial under section 19 above.
(2) Where the court decides that the accused ought to be tried summarily then, subject to the outcome of any appeal under subsection (4) below, the accused shall be tried summarily.
(3) Where the court decides that the accused ought to be tried on indictment the information shall be inquired into by examining justices.
(4) The accused may appeal to the Crown Court against a decision of a magistrates' court that he ought to be tried summarily if-
(a) he made representations under section 19(2)(a) above that he ought to be tried on indictment, and(b) he complies with any applicable condition imposed by rules under section 144 below.
(5) If the appeal is allowed the information shall be inquired into by examining justices.
21. - (1) This section applies where a prosecution is being carried on by-
(a) the Attorney General,
(b) the Solicitor General, or
(c) the Director of Public Prosecutions.
(2) If the person carrying on the prosecution applies for the accused to be tried on indictment-
(a) sections 19 and 20 above shall not apply, and
(b) the information shall be inquired into by examining justices.
(3) The Director of Public Prosecutions may not make an application under subsection (2) above without the consent of the Attorney General.
22. - (1) This section applies where the offence charged by the information is an offence listed in the first column of Schedule 2 to this Act (a "scheduled offence").
(2) Before proceeding in accordance with section 19 above, the court shall consider whether the value involved in relation to the offence exceeds the relevant sum.
(3) For the purposes of subsection (2) above-
(a) the relevant sum is £5,000,
(b) "the value involved" means the value identified in the relevant entry in the

second column of Schedule 2,
(c) the value shall be measured in accordance with the third column of that Schedule,
(d) the material time mentioned in that Schedule shall be taken to be the time when the offence was alleged to have been committed, and
(e) the court shall permit the prosecutor and the accused to make representations and shall have regard to any representations made by either of them.
(4) If the court is satisfied that the value involved in relation to the offence exceeds the relevant sum, sections 19 to 21 above shall apply.
(5) In any other case-
(a) those sections shall not apply, and
(b) the offence shall be treated as if it were triable only summarily.
(6) Where a person is convicted by a magistrates' court of a scheduled offence, it shall not be open to him to appeal to the Crown Court against the conviction on the ground that the convicting court's decision as to the value involved was mistaken.
(7) If the offence charged is one with which the accused is charged jointly with a person who has not attained the age of 18-
(a) that person shall be entitled to make representations for the purposes of subsection (2) above, and
(b) the court shall have regard to those representations.
(8) If-
(a) the accused is charged on one occasion with two or more scheduled offences and the court considers that they constitute or form part of a series of two or more offences of the same or a similar character, or
(b) the offence charged consists in incitement to commit two or more scheduled offences,
this section shall have effect as if a reference to the value involved were a reference to the aggregate of the values involved.
(9) Section 12A(8) of the Theft Act 1968 (which determines when a vehicle is recovered) shall apply for the purposes of paragraph 3 of Schedule 2 to this Act as it applies for the purposes of that section."
2. - (1) Schedule 1 to this Act (minor and consequential amendments) shall have effect.
(2) The enactments listed in Schedule 2 are hereby repealed to the extent specified.

20 The difference made in the second Bill, or Criminal Justice (Mode of Trial) (No.2) Bill, House of Commons (Session 1999-00), is Section 19 (4) & (5) are eliminated and (2) & (3) are replaced with:

> [T]he court *shall* consider (a) the nature of the case; (b) any of the circumstances of the offence (but not of the accused) which appears to the court to be relevant; and (c) whether having regard to the matters to be considered under paragraph (b), the punishment which a magistrates' court would have power to impose for the offence would be adequate.
> (3) For the purpose of subsection (1) above the court-
> (a)shall permit the prosecution and the accused to make representations about the matters to be considered under subsection (2); and
> (b) shall have regard to any representations made under paragraph (a) above. (emphasis added).

Basically, the second version took out the language that a class distinction should be noted. The first version required a magistrate to consider the defendant's reputation and livelihood before choosing between summary or jury trial. The House of Lords rejected the idea that the titled gentry, clergy and professionals should be granted a jury trial.

Lords.[21] However under special Parliament Acts, any bill that passes two successive sessions of the House of Commons, can be presented for the Queen's signature without the agreement of the House of Lords.[22]

The removal of the defendant's right to choose a jury trial for crimes like theft and assault seems inevitable. This article will, in Section II, briefly explain the structure of the English law system discussing the differences between magistrates' court and Crown Court.[23] Section III will examine the viewpoints of the Home Office for restricting jury trials as well as the opposition's opinions. There will be a review of various evaluative studies that have explored how elimination of the jury trial will affect the justice system, with a special look at the Diplock Trials in Northern Ireland where since 1973, criminal cases have been tried by a judge rather than a jury. Section IV will investigate the budgetary savings of dispensing with the jury system to determine whether the cost savings is worth the elimination of the ancient tradition of being judged by ones peers. This article concludes that despite the cost savings of eliminating the defendant's right to choose a jury trial, the alternative of a summary trial is not blind justice, but rather a perfunctory means of granting a guilty verdict.

II. AN OVERVIEW OF ENGLISH CRIMINAL LAW

A trial by jury "keeps the administration of law in accord with the wishes and feelings of the community." Oliver Wendall Holmes[24]

The English Criminal Justice system is adversarial, meaning the defendant must be proved guilty beyond a reasonable doubt.[25] This was not originally the

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21 *See Criminal Justice (Mode of Trial) (No. 2) Bill*, House of Lords (Session 1999-00). The second version of the bill was withdrawn from the House of Lords before it could be rejected. .

22 SILK & WALTERS, *supra* note 18, at 143. The Parliament Acts of 1911 and 1949 allow for a bill to pass without the House of Lords approval after a minimum of a year between the first and second reading periods and the second and third reading periods, and the Lords have received the bill at least one month before the end of each of the two sessions. *See also*, Marie Woolf, *Straw Hit By Revolt on Jury Curbs*, The DAILY TELEGRAPH, Mar. 8, 2000, at 1. *See also* Frances Gibb & James Landale, *Straw Faces Humiliation on Jury Trial*, THE TIMES (London), August 28, 2000, at 1 (reporting that on Aug. 28, 2000 Mr. Straw may have to drop this legislation because of a backlog in the House of Lords. However, that has yet to be seen and it does not preclude Mr. Straw from introducing the bill a third time); *see also* SILK & WALTERS, *supra* note 18, 145 (noting that the last time the Sovereign did not sign a bill from Parliament was in 1707, thus making it an unlikely event that Queen Elizabeth II would deny her signature).

23 The English justice system encompasses England and Wales. Scotland has its own system of justice, as does Northern Ireland. Thus, there is no "British" justice system since each of the Commonwealth states has its own system, foregoing a United Kingdom justice system.

24 GROVE, *supra* note 1, at vii (*citing* Oliver Wendell Holmes).

25 *See* JOHN JACKSON & SEAN DORAN, JUDGE WITHOUT A JURY: DIPLOCK TRIALS IN THE ADVERSARY SSYTEM 56 (1995). This is in contrast with most of Europe in which a majority of the courts act as the fact finder and take on an inquisitorial role. To distinguish exactly what the adversarial system is, the best definition comes from Justice Felix Frankfurter as the "requirement of specific charges, their proof beyond reasonable doubt, the protection of the accused from confessions... the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when... necessary, the duty to advise the accused of his constitutional

case in 12th-century England when justice was sought through trial by ordeal, such as putting one hand into boiling water or holding a red-hot poker. If the defendant's hand healed quickly, innocence was proclaimed because God intervened on the defendant's behalf. A person who sank when thrown in the water was considered not guilty, whereas a floating defendant was unnatural and therefore guilty. The biggest problem was the "innocent" usually drowned.[26]

In June 1215, trial by ordeal was put to an end when King John signed the Magna Carta at Runnymede. His grandson, King Edward I confirmed the veracity of the promised charter by signing it into statute in 1297, so that no freeman would be condemned without lawful judgment of his peers. [27]

In the early days of the jury, being a member was not a popular pastime. Jurors were sequestered (meaning no food or drink) until they reached a unanimous verdict.[28] In one libel case, the largest man refused to find a landowner libel against a very influential brewer who wanted the jurors held until they found the landowner libel. The stout juryman reminded his fellow jurors he was the biggest and strongest thus starvation could take the rest before he would vote for libel. The brewer finally ordered their release and accepted their contrary verdict.[29]

English jurors were often punished in Tudor[30] times if they did not return verdicts in deference to the Crown. It was not until 1670 that jurors' independence was firmly established with the trial of Quakers William Penn and William Mead.[31] Despite the overwhelming guilty evidence, the jury refused to convict the men of seditious assembly and the judge furiously locked up the jury for two nights without food, drink, fire, tobacco or chamber pot.[32] The judge then fined

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rights." Watts v. Indiana, 338 U.S. 49, 54 (1949).

26 GROVE, *supra* note 1, at 87 (providing a range of medieval methods of accessing guilt, all of which were put aside on the urging of the Vatican which decided maybe God did not intervene as often as we would like).

27 JULIET GARDINER & NEIL WENBORN, THE HISTORY TODAY COMPANION TO BRITISH HISTORY 492 (1995)The Magna Carta was a new type of rebellion by noblemen who usually fought in revolt against the King's policies. King John signed the charter of rights to gain time from the arguments. However, within three months, the noblemen resumed fighting and attempted to dethrone John. The charter was not made into statute until 1225 under Henry III. *See also*, MAGNA CARTA, *supra* note 2, Sec. 29.

28 GROVE, *supra* note 1, at 90. There were no majority verdicts as there are in modern-day English law.

29 *Id.* It was not until 1870 that English law changed to allow jurors food and a warm fire, as long as jurors paid for such amenities.

30 Welford and Wickham Primary School: *History of the Tudors and Stuarts Page*: <http://www.wickham.newbury.sch.uk/topics/tudors/tudors.html>. The Tudors were the Sovereigns reigning from 1485-1603 and include Henry VII, Henry VIII, and his children Edward VI, Mary, and Elizabeth I.

31 GROVE, *supra* note 1, at 91-92. This is the same William Penn who founded Pennsylvania.

32 *Id.* Penn and Mead were clearly guilty of preaching at a church, but the highly unpopular seditious acts were aimed at nonconformity. Penn and Mead shouted encouragement to the jurors to "Mind your privilege. Give not away your right." *Id.*

each juror 40 marks[33] and imprisoned them until the fine was paid. After months of imprisonment, a writ of habeas corpus garnered their release. The jurors' verdict was then accepted, despite the judge's persuasion.[34] Thus England moved into the modern acceptance of jury verdicts as we know today.

A. The Steps From Crime to Trial

A trial "seeks not to establish the truth, but provides a process for the conviction or acquittal of the accused which affects the kind of evidence the police must secure."[35]

The English police have far more "sentencing" discretion than an American police officer. After a crime is committed, the police, or bobby,[36] may arrest a suspect or request a person report to the police station for questioning.[37] After questioning, the police decide whether to charge the suspect. If charged, the suspect can be given bail or kept in custody.[38] The defendant is then brought before a magistrates' court to decide the mode of trial[39] that determines, "length of delay before the trial, the probability and duration of remand in custody, the anxiety for defendants, the probability of acquittal, the severity of sentence if convicted, [and] the cost to the public." The mode of trial is not determined solely by the magistrate's whim, but by statute. Offences are divided into three categories: (1) Offences triable by indictment are sent to Crown Court, (2) Offences triable by summary trial are heard only in magistrates' court, and (3) TEW offences which are dependant upon whether the defendant wishes a trial in Crown Court or magistrates' court.[40] Before the mode of trial process is discussed, an explanation of the magistrates' courts is necessary.

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33 *Id.* at 92. One mark, or "merk" as the Scottish called it, is approximately 6 shillings, 8 pence. Today this amount is worth £32.00. JOE CRIBB ET AL., THE COIN ATLAS 18 (1999).

34 GROVE, *supra* note 1, at 92. Today a plaque hangs in the main criminal courthouse in London, the Old Bailey, to remind jurors they can vote their conscience without fear of reprisal, thanks to the stubbornness of Penn and Mead's jurors.

35 DAVIES ET. AL., *supra* note 7, at 16.

36 This term comes from the name of Robert Peel, who founded the London Metropolitan Police.

37 DAVIES ET. AL., *supra* note 7, at 18. The police have five avenues after a crime is committed: (1) The police can interview a person and write a report for a summons which results in either no formal action, a written caution or is forwarded to magistrates' court; (2) An informal caution can be given to a person, and that is the end of the matter; (3) An arrest is made; (4) A suspect can voluntarily accompany the police to their station, or; (5) The police can request that a person report to the police station.

38 *Id.*

39 *Id.* at 19.

40 ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY 228-29 (1994). Neither England nor Wales has a written penal code or even a definitive statement of its criminal justice principles. DAVIES ET. AL., *supra* note 7, at 10. The sources of law are from legislation passed by Parliament, case law or common law, which still governs some serious crime and murder. *Id.* at 37.

B. Magistrates' Court

> I will do right to all manner of people after the laws and usages of the realm, without fear or favour, affection or ill will.[41]

Magistrates, or Justices of the Peace, came about in 1264 when Simon de Montfort appointed a keeper of the peace.[42] The Justices of the Peace Act of 1341 gave magistrates power to investigate and arrest suspects.[43] Until 1905 the magistrates had to be men owning a certain amount of property.[44] Today, about 95% of all criminal cases have some dealing with the magistrates' court.[45] Therefore, it is almost certain that defendants will deal with the magistrates who run these courts. The magistrates are unpaid lay people with no legal qualifications, aged between 27-65 who wish to serve their community by sitting on the courts.[46] The Lord Chancellor's office appoints magistrates to the bench after an interview and attempts to represent a cross section of the community with people who have integrity and local standing.[47] Once appointed, the magistrates sit on a bench of three judges with a legally qualified clerk as an advisor.[48] In criminal matters the magistrates decide on guilt or innocence in summary trials, matters of bail, requests for warrants of arrest and searches, and sentencing. Magistrates can also sit in on Crown Court appeals from magistrates' court convictions and

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41 BRYAN GIBSON, AN INTRODUCTION TO THE MAGISTRATES' COURT, 11 (1995) (*citing* The Magistrates' Oath).

42 *Id.* at 11-12. When landowners were away, they appointed others to decide disputes.

43 *Id.* at 12.

44 *Id.*

45 *How to Become a Magistrate, Lord Chancellor's Department*, http://www.open.gov.uk/lcd/magist/mag2.htm>. *See also* DAVIES ET. AL., *supra* note 7, at 152, (stating that 93% of all cases end in magistrates' court).

46 *How to Become a Magistrate*, *supra* note 45. Applicants must live with 15 miles of the boundary they wish to serve. They need to have satisfactory sight and hearing, but do not need to be a British citizen. While they are unpaid, they may be reimbursed for travel, subsistence and financial loss. Currently, the magistrates are battling an image of being only white middle-aged men and women from the upwardly mobile middle-class. However 6.7 percent of all magistrates are minorities, which is slightly higher than minorities in the general population. Frances Gibb, *Give JPs Some Street Cred.*, THE TIMES (London), Apr. 4, 2000, Law Section, at 9.

47 DAVIS ET. AL., *supra* note 7, at 153. However the Lord Chancellor's office does not appoint police officers or civilian employees of the police or armed forces, their spouse or partners thereof, traffic wardens, full-time members of Her Majesty's forces, employees of the Crown Prosecution Service, Prison Service, Probation Service or Magistrates' Courts Service, nor someone with a non-discharged bankruptcy or someone convicted of a serious offence or a number of minor offences, nor a member of Parliament or perspective candidate. The Lord Chancellor's office wants independent minded people, not an influential person with an agenda. *Id. See also How to Become a Magistrate*, *supra* note 45. The Lord Chancellor's office sights six key qualities for a ideal magistrate as: good character, understanding and communication, social awareness, maturity and sound temperament, sound judgment, commitment and reliability. *Id.*

48 DAVIES ET. AL., *supra* note 7, at 152 (stating that he senior magistrate acts as the spokesperson). *See also* GIBSON, *supra* note 41, at 26 (describing how the magistrates are given legal training before they sit on the bench and then are expected to re-train every three years. Training is compulsory and missing a session means the magistrate must resign. *Id.*

sentencing.[49]

The other persons practicing in magistrates' court include barristers or solicitors for the defendant and the Crown Prosecution Services (CPS). Barristers[50] are equivalent to American attorneys in their duties in court. Only recently are solicitors allowed to advocate for a defendant in magistrates' court rather than merely advise.[51] The role of the CPS is to give pre-charge advise to police, review all cases for sufficiency of the evidence and proceed where it is in the interest of the public, as well as conduct the prosecution of cases in magistrates' court.[52] The types of cases tried summarily in magistrates' court by CPS are driving with excess alcohol, common assault, assaulting a police officer, and taking a vehicle without the owner's consent.[53] The TEW offences include theft, burglary, assault occasioning actual bodily harm, criminal damage and unlawful wounding.[54]

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49 *How to Become a Magistrate*, *supra* note 45. The magistrates also hear civil matters pertaining to Family Court proceedings and non-payment of council tax. Special magistrate committees also decide on liquor licensing and regulate licenses and permits for betting and gaming clubs. *Id.* On the average they sit in court from 26 half-days a year, up to 35 half-days a year. They are instructed to sit whole days if necessary. *Id.*

50 Barristers do not usually meet the defendant initially in simple cases, but arrive on the scene when a case is about to go to trial. All preliminary negotiations and meetings with the defendant are discussed with a solicitor. Barristers must complete more years of training and work unpaid in the court system before earning their title, whereas solicitors are allowed a sponsor who may eventually offer the solicitor a job upon completion of course work. Barristers have no guarantee of work upon completion of their coursework. Therefore the student wishing to become a barrister must take out large loans or have family money.

51 DAVIES ET. AL., *supra* note 7, at 9. Barristers are primarily court advocates that can work in both magistrates' and Crown Court. For a solicitor to advocate, the solicitor must take a special course and be certified as a solicitor advocate. A visual distinction can be made between barristers and solicitors in the courtroom, in that only barristers have the privilege of wearing a wig.

52 *Id.* at 122. The CPS also instructs the Queen Counsel that prosecutes cases in Crown Court and liaises with other criminal justice agencies. CPS is a relatively young organization started in 1985 after a White Paper recommended one organization to conduct all criminal proceedings instituted by the police. Prior to 1985, the police investigated and prosecuted routine offences in magistrates' court and 1 of 43 authorities in England and Wales handled more complex cases in magistrates' court. The Director of Public Prosecutions, which was established in 1879 and now oversees CPS, handled the prosecutions of murder, national security cases and prosecution of police and public figures in Crown Court, while all other Crown Court cases were prosecuted by individual barristers on behalf of the police. *Id.* at 121-22. A Royal Commission on Criminal Procedure known as the Phillips Commission recommended that England and Wales needed a uniform and independent system of prosecution rather than the muddled role of police being both investigators and prosecutors. Thus one of the roles the CPS does not play is that it cannot initiate proceedings or direct police to investigate matters. *Id.* While CPS handles most criminal prosecutions, other agencies do prosecutions for consumer protection, environmental health, health and safety violations, pollution control, customs and excise taxes, inland revenue taxes, frauds, and trade and industry matters. *Id.* at 133.

53 *Id.* at 157. Statutes define which offences are designated for summary trial.

54 *Id.* at 158. The seriousness of the crime is determined by whether the prosecution recommends the charge be summarily tried in magistrates' court or as a TEW offence for which the defendant is allowed to elect the type of trial. If a case has damage less than £2000 and no knowing or reckless damage to property or person, CPS will recommend a summary trial. Common assault

On October 2, 2000, magistrates will be required to give a written judgment for all findings of guilt and sentencing, thereby giving structure to the criminal justice system and guarding against arbitrary and biased judgments.[55] Currently, the mode of trial decisions are not written decisions. The court asks both the prosecution and the defense to make a representation of the type of trial the case should be committed. If the prosecution suggests a summary trial and the magistrates agree, the defendant is asked to submit consent.[56] If the defendant submits to summary trial, the case is tried in magistrates' court; otherwise the defendant has the absolute right to a jury trial in Crown Court.

Since 1991, magistrates were instructed to assess TEW cases using the criteria in National Mode of Trial Guidelines.[57] The prosecution's Code for Crown Prosecutors instructs them to use the same guidelines and further consider:

Speed must never be the only reason for asking for a case to stay in the magistrates' court. But Crown Prosecutors should consider the effect of any likely delay if they send a case to the Crown Court, and any possible stress on victims and witnesses if the case is delayed.[58]

In 1991 there were 490,000 defendants charged with TEW or indictment only offences, of which 80,000 were committed for jury trial to the Crown Court.[59] Therefore, 84% of the cases were summary tried or plead guilty to in magistrates' court. Despite Crown Court having a mere 16% of magistrates' court cases, from Crown Court prospective, 76% of its cases come from TEW elections.[60] In 1998, these figures rose to magistrates' court dealing with 1.4 million cases and around 125,000 cases in Crown Court.[61] Because of these figures, the Crown Courts are feeling overworked and researching ways to reduce

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and driving while disqualified used to be TEW offences, but the 1988 Criminal Justice Act made them summary offences. *Id.* at 158-59. There has been a slow whittling down of the number of offenses classified as TEW as more and more of such offences are reclassified as summary trial only.

55 *Id.* On October 2nd, the European Convention on Human Rights will be incorporated into British law. Jon McLeod, *England's gift to the world- Magna Carta*, THE TIMES (London), June 27, 2000, Law Section, at 13. The Human Rights Act will require a structured and clear approach to sentences and findings of guilt. This will aid defendants in deciding whether to appeal a magistrates' decision.

56 ASHWORTH, *supra* note 40, at 229. In a study, 96% of magistrates decided consistent with the prosecution as to the type of trial it recommended in TEW cases. Suggesting a pro-prosecution stance on the bench. *Id.* at 234, (*citing* DAVID RILEY & JULIE VENNARD, TRIABLE-EITHER-WAY CASES 11 (1988)).

57 SECRETARIAT OF THE CRIMINAL JUSTICE CONSULTATIVE COUNCIL, MODE OF TRIAL GUIDELINES (HER MAJESTY'S STATIONARY OFFICE 1995) [hereinafter CJCC SECRETARIAT]. The Mode of Trial Guidelines' purpose are to aid the magistrates but not direct them in deciding where it is appropriate for a case to be tried summarily or by jury.

58 *Crown Prosecution Service. supra* note 13.

59 ASHWORTH, *supra* note 40, at 229. Ashworth cites the figure as 490,000, but approximates that less than 20,000 were indictment only cases.

60 *Judicial Statistics Annual Report, supra* note 11 (stating that the Crown Court received 104,754 cases for trial, sentence and appeals in 1991).

61 *Crown Prosecution Service. supra* note 13, at 4.

delays.[62] CPS embraced the Government priority to reduce crime to propose its new objective of "deal[ing] with prosecution [of] cases in a timely and efficient manner in partnership with other agencies."[63] It is this goal that focuses attention on how cases come to Crown Court from magistrates' court through mode of trial hearings.

C. *Mode of Trial Decisions*

> [The purpose of the Mode of Trial Guidelines] is to provide guidance not direction. They are not intended to impinge upon a magistrate's duty to consider each case individually and on its own particular facts.[64]

Although most offences are governed by statute for the mode of trial, in TEW cases, the magistrates are guided by the following criteria:

-nature of the case

-seriousness of the offence

-magistrates' powers of punishment (including compensation)

-other circumstances making one venue more suitable than the other

-representations of prosecution and defendant.[65]

The magistrates also are to consider that:

-mode of trial should never be decided because it is convenient or speedy

-Crown Court is the proper venue for difficult questions of law or fact

-the presumption is for summary trial, subject to the defendant's consent.[66]

Most importantly, the general observations of the guidelines state that "except where otherwise stated, either way offenses should be tried summarily" unless certain facts present themselves in the case.[67] The magistrates are to override the presumption for summary trial if their sentencing powers are insufficient, and the offence included the use of a weapon that possibly could have or

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62 *Id.* at 13. The Crown Prosecution Service (CPS) cites the *Narey Report* on reducing delays, as prompting it to initiate programs to reduce the number of cases in Crown Court. CPS tested assisting police in file preparation, designating lay presenters to manage straightforward guilty pleas, and new procedures for fast tracking more serious indictable only cases so they do not spend as much time in magistrates' court. The latter fast tracking initiative was scheduled to be initiated this summer.

63 *Id.* at 20. The Government aim is "[t]o contribute to the reduction both of crime and the fear of crime and to increase public confidence in the criminal justice system by fair and independent review of cases and by firm, fair, and effective prosecution at court." *Id.*

64 CJCC SECRETARIAT, *supra* note 57, at 1.

65 DAVIES ET. AL., *supra* note 7, at 171. *See also* CJCC SECRETARIAT, *supra* note 57, at 1.

66 CJCC SECRETARIAT, *supra* note 57, at 2.

67 *Id.* The Guidelines state specific features that call for a jury trial under the offences of burglary, theft, fraud, handling or possessing stolen property, social security fraud, violence or assault and domestic violence, Public Order Offences, violence to and neglect of children, indecent assault, unlawful sexual intercourse, drugs, dangerous driving, and criminal damage.

did cause serious injury, serious injury was caused by head butting, kicking, or similar force, serious violence was against a taxi driver, police officer or other similar official, the victim was very young or elderly, or the offence was racially motivated.[68] The word "and" insures most cases remain in magistrates' court unless the defendant elects otherwise. If the Criminal Justice Mode of Trial Bill becomes law, the defendant will not have the jury option because most cases will be tried summarily.

In TEW cases, once the magistrates have decided the case should be heard summarily, the defendant is then asked for their venue of choice; magistrates' court or Crown Court.[69] If the defendant decides the case is for magistrates' court and pleads, the plea is heard and sentencing may or may not be postponed for a pre-sentencing report. If the defendant or the magistrate elects a jury trial, the case is adjourned until the case is transferred to Crown Court.[70]

Numerous studies were done surrounding the defendant's wishes for a jury trial. Research by the Home Secretary's office in 1992 regarding why defendants preferred Crown Court found 81% of solicitors felt a defendant had a better chance of acquittal in Crown Court, as did 69% of defendants.[71] Other studies point to a lack of confidence in the fairness of the magistrates' courts.[72] This bias may have a factual basis as the acquittal rate for trials in magistrates' court was 30% in 1985, versus 57% in Crown Court.[73] More recently, the CPS Annual Report shows the magistrates' court now has a case load of 1.4 million cases with 569,976 (40%) being for indictable or TEW offences, this is up by 1.8% from 1987-88. Of the 989,831 cases to remain in magistrates' court, 98.3% of the hearings resulted in a conviction![74] This number contrasts sharply with the 1998 Crown Court statistic, where 64% of the defendants who plead not guilty to all counts were acquitted,[75] and in 1999, where 74% of all cases going to trial in

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68 *Id.* at 9 (criteria under violence against the person).

69 DAVIES ET. AL., *supra* note 7, at 172. After a decision for summary trial by the magistrates, the clerk turns to the defendant to say: you have the right to be tried at the Crown Court by a judge and jury, but should be aware that if you are found guilty or plead guilty you may be committed to the Crown Court later for sentence if, on hearing more about the facts of the case, you and your background, the magistrates feel that their own powers of punishment are inadequate. *Id.*

70 *Id.*

71 *Id.* at 173. 70% of solicitors and 62% of the defendants also cited the magistrates were on the side of the police. 59% of defendants thought they could get a lighter sentence in Crown Court, whereas only 38% of solicitors cited this as a reason to choose Crown Court. This perception seems in error as magistrates' court can only sentence defendants to 6 months jail and a £5,000 fine, in contrast to Crown Court which has no such restrictions. However, 45% of solicitors and 48% of defendants thought by going to Crown Court they could get more information about the case from the prosecutor. *Id.*

72 ASHWORTH, *supra* note 40, at 230.

73 *Id.*

74 *Crown Prosecution Service. supra* note 13, at 39 (stating that 82% of the cases resulted in guilty pleas, 11.5% were cases where the defendant was absent but found guilty, 4.8% were convictions after a trial, and the Magistrates' court dismissed 1.7% its cases, (down from 1.9% in 1997-98 and 2% in 1996-97); in Crown Court, the acquittals were 10.9% of all trials, and of these total acquittals, 21.1% were directed by the judge and 78.8% of were from a jury). *Id.* at 42.

75 *Judicial Statistics Annual Report supra* note 11, at 10, Table 6.9. Of the acquittals, the judge

Crown Court resulted in acquittal.[76] With such striking differences between the rate of acquittal between Crown Court and magistrates' court it is a wonder any defendant would elect a summary trial.

D. How Did Defendant's Trial Election Become Endangered?

We do not think that the defendant should be able to choose their court of trial solely on the basis that they think that they will get a fairer hearing at one level than the other.[77]

In 1975, the James Committee[78] recommended that the six types of offenses be consolidated into three: summary offences, indictable offences and TEW offences.[79] The James Report found that while judges and court staff favored eliminating TEW offences and allowing only the magistrates to choose the course of trial, barristers and solicitors wrote to the contrary.[80] The subsequent 1999 Narey Report of the Review of Delays in the Criminal Justice System, cited that defendants elected Crown Court over magistrates' court because they wished to delay proceedings, they wished to remain in a local prison that was close to family and friends and lastly, because they hoped for acquittal.[81] Currently, of the defendants who chose to have their cases heard by jury in Crown Court, two-thirds change their plea to guilty before the trial.[82] The added cost of taking a case to Crown Court gives rise to the question of why a defendant would risk a higher fine and jail sentence rather than merely pleading guilty in magistrates' court.[83]

Before the 1999 Narey Report, but after the 1975 James Report, there was the 1993 report by the Royal Commission, better known as the Runciman Commission. The Runciman Commission favored considering the defendant's reputation and past history, the gravity of the offence, the complexity of the case, and the likely effect on the defendant, before a magistrate decided upon the mode of

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discharged 50%; 15% were acquitted through the discretion of the judge and 35% were acquitted by the jury. *Id.* at Table 6.10. Of the 10,761 defendants convicted after a plea of not guilty, 80% were from a unanimous verdict and the rest were from a majority verdict, (the statistics were the same in 1997). *Id.* at Table 6.11.

76 *Crown Prosecution Servic, supra* note 13, at 42. This percentage is derived from total convictions after trial (11,561) + acquittals (8,668), then divided by convictions.

77 DAVIES ET. AL., *supra* note 7, at 174 (*citing* the Royal Commission on Criminal Justice 1993: 87-88).

78 *Narey Report, supra* note 4, The James Committee The James Committee published The Distribution of Criminal Business Between the Crown Court and Magistrates' Courts: Report of the Interdepartmental Committee 1975.

79 *See Id.* There were three confusing hybrid offences of the right to elect a jury trial.

80 *Id.*

81 *Id.* Reasons for electing trial. It should be noted that by remaining in a local prison before they were sentenced, a defendant was given more visits than a condemned prisoner.

82 ASHWORTH, *supra* note 40, at 232.

83 A defendant cannot avoid Crown Court merely by pleading guilty in magistrates' court, because a magistrate can take a guilty plea and move the sentencing to Crown Court if the magistrate does not think the sentencing power of magistrates' court is appropriate.

trial. In cases where the prosecutor and defendant agreed to the mode of trial, the magistrate was not to be involved in the decision.[84]

More specifically the Runciman Commission stated:

> We believe that the procedure for determining mode of trial should be changed in order to secure a more rational division of either way cases between the magistrates' court and the Crown Court. . . We recommend that, where CPS and the defendant agree that the case is suitable for summary trial, it should proceed to trial in magistrates' court without further ado. Similarly a case should go to the Crown Court for trial if both prosecution and defence agree that it should be tried on indictment. We see no reason why the courts should be concerned with mode of trial where the prosecution and defence both agree. . .Where, however, the defence do not agree with the CPS's proposal on which court should try the case, the matter should be referred to the magistrates for a decision as happens now under section 19 of the Magistrates' Court Act.
>
> We do not think that the defendant should be able to choose their court of trial solely on the basis that they think that they will get a fairer hearing at one level than the other. Magistrates' courts conduct over 93 per cent of all criminal cases and should be trusted to try cases fairly. Aggrieved defendants have in any case a right of appeal by way of a complete rehearing of the evidence by a judge and two magistrates at the Crown Court. Nor in our view should the defendant be able to choose the mode of trial which they think will offer them a better chance of acquittal any more than they should be able to choose the judge who think will give them the most lenient sentence.[85]

While the current proposed bill does not take into consideration the reputation and standing of the defendant, it is interesting to see that the rest of the Runciman recommendation is coming to fruition. This article does not purport to favor a class system where moneyed, titled, or professional business people are given a jury trial while a defendant with a long list of convictions be denied a jury trial. What is troubling is that with a 98% conviction rate, the magistrates' courts are considered fair for any defendant.

Should the Criminal Justice Mode of Trial Bill pass into law, the following scenario could occur. As he is delivering the mail, a postman's path to the door is blocked by a drunken and verbally abusive elderly uncle. Knowing the uncle is not a resident of the home, the postman is wary about giving him the post. However after repeated attempts to walk around the old drunk, the postman being hemmed in by the hedges and called many names by the abusive uncle, is forced to push past the uncle. The uncle stumbles and breaks a hip, then accuses the postman of violence against him. The case is taken up by CPS and under the Mode of Trial Guidelines, the magistrate may feel his sentencing power to be

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84 *Narey Report*, *supra* note 4. Magistrates decide venue in all either way cases. The Narey Report suggested that 18,000 cases would then be heard summarily rather than in Crown Court. *Id.*

85 DAVIES ET. AL., *supra* note 7, at 174 (*citing* the Royal Commission on Criminal Justice 1993: 87-88).

sufficient in the case. While the factors of age of the victim, and a broken hip, suggest a jury trial, the proposed bill gives the magistrate the power to hear the case. The postman would be denied a chance for his peers to judge his actions and forced to take his chance with the highly convicting magistrates' court. A postman with an unblemished record could easily be found guilty when a sober elderly uncle testifies, thus jeopardizing his livelihood for the magistrates' justice. It is beneficial to see what other commentators think of this potential trend.

III. PROS AND CONS OF ELIMINATION OF DEFENDANT'S ELECTION FOR TRIAL IN TEW CASES

The jury system puts a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury. -Mark Twain[86]

There are many voices of assent and derision of the removal of the defendant's right to elect a jury trial. It is the Government and the courts that favor the Criminal Justice Mode of Trial Bill, and the barristers, solicitors and press that take a dim view. It is important to look at the issues from all sides.

A. Pro: The Narey Report & Fundamental Rights

Magistrates' courts are inseparable from the idea of quick and inexpensive justice.[87]

It is not whimsically that the English are looking to rid the defendant of the choice of a trial by jury. Since this idea has had many years of introduction, there have been three reports to consider the effect of this decision.[88] In 1975 the James Committee issued a summary entitled: *The Distribution of Criminal Business Between the Crown Court and Magistrates' Court: Report of the Interdepartmental Committee*.[89] The James Committee cited a need for a professional person of good character to have the option of a jury trial if accused of a crime of dishonesty. In canvassing the opinions of professions in the legal system, solicitors, barristers and defendants found the election of trial critical, while judges, clerks and prosecutors thought there should be no right to a jury trial.[90] The James Committee honed in on the need for a class distinction and argued that clergy, as well as both titled and professional people, deserved a jury trial, while repeat criminals did not deserve such an option.[91]

Getting rid of TEW offenses was suggested by the Royal Commission in 1993 with the caveat that magistrates should consider the defendant's reputation, past record, the gravity of the offense, the complexity of the case, and its likely

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86 MARK TWAIN, ROUGHING IT 309 (Franklin R. Rogers ed., University of California Press 1972).

87 GIBSON, *supra* note 41.

88 *Narey Report*, *supra* note 4, The James Committee.

89 *Id.*

90 *Id.*

91 *Id.*

effect on the defendant.[92] The Runciman Commission favored allowing the defendant and prosecutor who agreed on venue to override a magistrates' decision.[93] This was the first version of the Criminal Justice Mode of Trial Bill.[94] The problem with this method of venue decision is that it could easily lead to class distinctions where a moneyed client would easily be granted a jury trial, but a poorer, repugnant defendant would be stuck with a summary trial, regardless of the facts. The House of Lords struck down the first version of the bill based on these class concerns.

The 1999 Narey Report did not conclude to rid the system of TEW offences but suggested the final election of jury or summary trial be made by a magistrate rather than the defendant.[95] The Narey Report rebutted the theory that reputation is a circumstance necessitating a jury trial by citing a distinguished senior magistrate who said that no defendant in memory had chosen a jury trial for reasons of reputation.[96] Thus the second version of the Criminal Justice Mode of Trial Bill was born and submitted to the House of Commons for approval. No longer was justice to be given based on class.

One of the main arguments against the Criminal Justice, Mode of Trial Bill is that it will denigrate a fundamental right established by the Magna Carta. However, the Home Office is quick to point out that a medieval jury of peers were actually a group of local peers who knew the defendant and not apt to be impartial. This is contrary to today's magistrates that are independent.[97]

The right for the defendant to elect a jury trial rather than a summary only trial came in the middle to late nineteenth century. The Narey Report stated during this time, no prisoner was allowed a copy of the accusations against him and that until 1869, a person could be arrested on mere suspicion, with the burden of proof upon the defendant to show that he or she was an honest person. The report further stated there was no right to criminal appeals until the twentieth century.[98]

When the Criminal Justice Mode of Trial Bill was introduced in November of 1999, the Home Secretary, Mr. Jack Straw, reiterated that the right to a jury trial is not a fundamental right. He stated, ". . .giving defendants a choice of court is not [a key freedom.] It is frankly eccentric, which is why we in England and Wales are almost alone in allowing this arrangement to continue."[99] Mr.

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92 *Id.*, Magistrates to decide venue in all either way cases.

93 *Id.* In Scotland the prosecutor decides on the venue with no right to appeal. Their report stated there was no conflict with this procedure in Scotland. *Id.*

94 *See infra* notes 19 & 20 for the full text of the Criminal Justice Mode of Trial Bill, versions 1 & 2.

95 *Narey Report, supra* note 4, Reclassification.

96 *Id.* The senior magistrate stated that defendants who elect a jury trial are experienced and out to play the system. *Id.*

97 *Id.*

98 *Id.*

99 *Straw On Trial Over Jury Reform,* BBC NEWS (Nov. 19, 1999), *available in* <http://news.bbc.co.uk/hi/english/uk_politics/newsid_527000/527721.stm>.

Straw was making reference to the fact that other European counties operate on an inquisitorial system rather than the jury system.[100]

One issue not to overlook is whether the Criminal Justice Mode of Trial Bill is incompatible with the Convention on Human Rights Act that England adopts on October 2, 2000. While some have argued the two are mutually exclusive,[101] the Human Rights Act merely entitles a person to a fair and public hearing by an independent and impartial tribunal established by the law.[102] There is no fundamental right to a jury trial.

B. Con: Practitioners Objections

> Nothing in our law is more fundamental than the doing of justice. . . It is vital to victims of crime, to defendants, and to the confidence of society in our laws. Lord Alexander of Weedon QC[103]

While the Home Secretary and court officials firmly approve of the Criminal Justice Bill, barristers and solicitors take the opposite stance. Their concerns can be classified into (1) Magistrates should not pick the venue, (2) Magistrates' courts have a higher conviction rate (3) Eliminating the right to election is bad policy.

The first matter regarding magistrates' choosing the venue derives from the preponderance of magistrates who favor the view of the prosecution in 96% of TEW mode of trial decisions.[104] This could be because the prosecution and magistrates follow the same mode of trial guidelines to reach a decision. Andrew Ashworth, in his evaluative study of the mode of trial decisions, stated another possibility for such a high cohesion among magistrates and prosecutors could be that prosecutors have adapted their argument to the practice of the particular magistrate.[105] This high rate of conformity between magistrates and prosecutors erodes the presumption that a magistrate is an independent arbitrator of fact in a summary trial.

Prosecutors have more subtle ways of deciding mode of trial decisions through charging indictable only offences to get a jury trial or summarily only offense. However, prosecutors have been found guilty of abuse of process when

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100 JACKSON, *supra* note 25, at 56.

101 *See* Frances Gibb & James Landale, *Straw Faces Humiliation on Jury Trial,* THE TIMES (London), Aug. 28, 2000, at 1.

102 European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, at art. 6, para. 1, 213 U.N.T.S. 221, 228.

103 GROVE, *supra* note 26, at vii (*citing* Lord Alexander of Weedon QC).

104 ASHWORTH, *supra* note 40, at 234 (*citing,* Riley and Vennerd, *Triable-Either-Way Cases: Crown Court or Magistrates' Court?,* HORS at 11 (1988)). When the defendant elects a jury trial, there is no hearing to argue venue, the case simply goes to Crown Court for trial. However, when the defendant elects a summary trial and the prosecution wishes for a jury trial, the magistrate must hear all the arguments and decide. The study examined cases where the defendant requested a summary trial and the prosecution favored a jury trial. In 27 of the 29 cases, the magistrate sided with the prosecution. *Id.*

105 ASHWORTH, *supra* note 40, at 235.

they have dropped more serious charges to ensure a defendant is tried summarily.[106] While a summary trial may give a guilty defendant a lesser sentence, the greater injustice is that dropping charges essentially deprives the defendant of the right to elect a jury trial.[107]

The second overarching cry is that the conviction rate in magistrates' court is far higher than in Crown Court.[108] As previously stated, in 1998, 98.3% of the magistrates' court hearings resulted in a conviction and 64% of the Crown Court cases that went to trial resulted in an acquittal.[109] In cases of theft, there is a danger of magistrates becoming hardened to the defense of "I just forgot to pay."[110] There is no question as to why a defendant would wish to have a case heard by a jury rather than summarily.[111]

It is also disconcerting that more minorities choose Crown Court over magistrates' court. This could be related to the fact that the "[percentage] of magistrates' courts sitting with one member from an ethnic minority is lower than the 35% of juries that contain at least one ethnic minority."[112] It should be no surprise that demeanor, dress, speech, and body language are all factors taken into consideration when judging the defendant. Defendants of different cultures may be at a disadvantage in front of white magistrates especially when studies show magistrates pay careful attention to demeanor and believe they could judge the

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106 ASHWORTH, *supra* note 40, at 237-38. In the case of *Ramsgate Justices, ex parte Warren et. al.*, (1981) 72 Cr. App. R. 250, the defendant elected a jury trial until the prosecutor dropped the more serious charges to ensure the case was to be tried summarily. In *Canterbury and St. Augustine's Justices, ex parte Klisiak* (1981) 72 Cr. App. R. 250, the police amended the charge to state that the public damage was £155 instead of the original £414 and therefore warrant a summary trial. Both of these cases were found to be a misuse of prosecutorial power.

107 *Liverpool Stipendiary Magistrate, ex parte Ellison* (1990) R.T.R. 220 (noting that a prosecutor that amends the charge before a mode of trial hearing is within rights and such action is not considered an abuse of power). In the Liverpool case, the court found that changing the charge was appropriate when it is changed according to the facts because there was no bad faith by the prosecutor and no prejudice to the defendant. ASHWORTH, *supra* note 40, at 239.

108 *See* DAVIES, *supra* note 7, at 173; *see also Crown Prosecution Service*, *supra* note 13, at 42.

109 *Id.*

110 *See* Hallett, *supra* note 16; *see also* Roger Ede, *In Defence of a Trial by Jury*, THE TIMES (London), Law Section, Sept. 8, 1998. Ede cites the celebrated 1980 case of Lady Isobel Barnett who committed suicide after being found guilty of taking £0.87 worth of food from a shop as an example as to how important reputation is in the case of petty theft, and why the right to a jury trial cannot be abridged. The Law Society opposes the elimination of a jury trial in cases of theft because in cases of theft, a guilty verdict threatens a person's livelihood or reputation. *Id.*

111 ASHWORTH, *supra* note 40, at 245. As Ashworth asserted, the Commission's retort really missed the main argument. The 1993 Royal Commission that was appointed to study the right to jury trial election was asked to examine the argument that there is a better chance of acquittal in Crown Court than in magistrates' court. However, the Commission simply stated the defendant did not have the right to choose a judge who would give them the most lenient sentence. *Id.*

112 *Id.* at 253 (*citing* ZANDER AND HENDERSON, CROWN COURT STUDY 241 (1993)). Zander and Henderson's study suggested that minorities and women were well represented in juries in comparison to their percentage of the population. E. MCLAUGHLIN AND J. MUNCIE, CONTROLLING CRIME 125 (1996).

character of defendants.[113] A simple matter of cultural diversity can seriously undermine the impartiality of justice.

The third area of attention for opponents of the Criminal Justice bill is that the Governments proposal was not well researched. The 1993 Runciman Commission completely ignored the question of whether magistrates' courts had a higher conviction rate than Crown Courts.[114] The previous time the Government reduced TEW offenses, under the 1988 Parliament Act, driving with a suspended license, taking a car without the owner's consent, common assault and criminal damage less than £2,000, were changed to summary only offences. The affect was a mere 6% decrease in Crown Court cases.[115] If the present bill passes, opponents challenge that by eliminating the defendant's right to elect a trial, justice will be delayed as the mode of trial hearing will become a "mini-trial."[116] However no research has been conducted to summarize the affect of mode of trial decisions on the congestion within Crown Court.[117] Neither has anyone taken the time to study mode of trial decisions and the consequences to the victims of crime. There are frequent delays in Crown Court that can be exasperating to witness victims. Crown Court is also a more intimidating arena for victims because of its formality. If there is a guilty verdict, magistrates' court is far more likely to award victims with compensation.[118] Would one court be better than the other for victims or defendants? Without further research, it remains conjecture.

C. Diplock Trials

The largest single factor in administration of law after all is the personality of the judge. Leon Green[119]

Since we are looking at the benefits and disadvantages between bench trials and jury trials, it would be remise not to examine the case of Northern Ireland, where for certain criminal cases, the jury system was replaced with judge only trials, called Diplock trials. In 1972, Lord Diplock chaired a commission in Northern Ireland, which proposed non-jury courts in emergency trials.[120] The commission found Northern Ireland experienced perverse acquittals and jury in-

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113 DAVIES ET. AL., *supra* note 7, at 199.

114 *See infra* note 108.

115 Ashworth, *supra* note 40, at 249-50 (*citing* CRIMINAL STATISTICS, ENGLAND AND WALES, para. 6.12 (1989)). One reason the Crown Court cases fell by only 6% was that at the same time as the 1988 Criminal Justice Act, the National Mode of Trial Guidelines came out for magistrates as a guidance tool in mode of trial decisions.

116 *See* Hallett, *supra* note 16.

117 ASHWORTH, *supra* note 40, at 250.

118 *Id.* at 252 (*citing* C. HEDDERMAN AND D. MOXON, MAGISTRATES' COURT OR CROWN COURT? MODE OF TRIAL DECISIONS AND SENTENCING 32, HORS 125 (1992)). Crown Court judges seem less willing to issue compensation orders. The Royal Commission did not make a recommendation to this observation.

119 JACKSON & DORAN, *supra* note 25, at xiii.

120 *Id.* at 2.

timidation in cases connected with terrorist crimes and emergency situations.[121] The proposal was immediately adopted, and trials involving firearms, explosives and petrol bombs were funneled to a trial by a single judge, who was selected from a group of professional judges instead of a jury.[122] These trials are called the "Diplock Trials" after the commission chairperson, and require that the judge give a written reason for a conviction. There is an automatic right to appeal against any conviction or sentence, and a judge can recuse himself if he rules a confession is inadmissible in voir dire.[123] The main change to the system of justice in Northern Ireland is simply that there is no jury, otherwise the trial maintains its same formal structure.[124]

Since 1973 when the first Diplock trials began, there have been over 10,000 defendants that have gone through this unique system for English justice. Much research has been done to examine the Diplock system. In a 1987 review of the emergency legislation, it was observed that there were no voices of dissent to the Diplock trials and no wrongful conviction claims.[125] However a survey of cases from 1973-1979 pointed to a decline in the acquittal rate from 50% to 35%.[126] There has also been criticism that the Diplock cases overly rely on confessions.[127] The most comprehensive evaluation of the Diplock trials is John Jackson and Sean Doran's book, *Judge Without Jury*. They evaluated and compared forty-three trials in the Belfast Crown Court, of which seventeen were jury trials and twenty-six were Diplock trials.

In their observations they noted:

> You notice that the absence of the jury transforms a criminal trial by relieving lawyers of the need to explain out loud what is going on. The judge and the four barristers sit in a cluster at the front of the court, almost on the same level,

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121 *Id.* at 16. The most recent act in Jackson & Doran's book was the Northern Ireland (Emergency Provisions) Act 1991 with an automatic need for renewal every five years. This book is a fascinating survey of the Diplock trials and a must read for anyone proposing bench trials to replace jury trials.

122 *Id.* at 20. Offenses of common law that were sent to Diplock trials were murder, manslaughter, riot, kidnapping, false imprisonment, and assault occasioning actual bodily harm. Offenses of statutory law were: wounding with intent, causing grievous bodily harm, robbery, aggravated burglary, arson, and aggravated criminal damage. *Id.*

123 *Id.* at 24.

124 *Id.* at 58. The Diplock trials remain adversarial, unlike the European trials where the judge is the inquisitor. *Id.* at 61.

125 *Id.* at 51. The review by Viscount Colville cited a study by the American Bar Association for this claim. However, the claim was not made. *Id.*

126 *Id.* at 33, *citing*, Boyle, Hardon, & Hillard, *Law and State: The Case of Nothern Ireland*, 98 (1975). The author's of the survey declined to say judges were becoming case hardened, but rather that prosecutors were taking greater care in selecting and preparing cases. In 1991 the acquittal rate for those who plead not guilty and were found not guilty was 43%, in 1992 it was 53% and in 1993 it was 29%. *Id.* at 35 Table 2.2.

127 *Id.* at 91. In Jackson & Doran's sample only four trials had the admissibility of a confession contested. However Diplock trials had fewer expert witnesses and expert evidence than jury trials. *Id.* at 94. Maybe it was the audience, because the barristers who presented the trials all had more than ten years experience and all twenty-two of the Diplock judges are experienced. *Id.* at 95.

> conversing with one another in a low, barely audible monotone, checking oral evidence against prepared documents. Clarity, one of the glories of the English jury system, is sacrificed to bureaucratic formalism.[128]

The lack of formal features enables the trial to be shorter.[129] The judge's role is to act as the jury, but still remain the judge. Therefore in Diplock trials, the judge may stop a trial after the prosecution's case not only if he believes no reasonable jury would convict in the case, but also if "he believes that as the trier of fact he could not possibly see himself convicting in such a case."[130]

Jackson and Doran found the Diplock trials worked[131] because the judges were forced to record the circumstances and justifications for their verdict, the judges were professionally trained and there was an automatic right to appeal. Diplock trials dealt with serious matters using professional judges, whereas magistrates' court were created to handle more trivial matters; to submit defendants of more serious matters in magistrates' court would not give defendants quality justice.[132] If within the English system a crucial evaluation of summary trials has ruled the proposed Criminal Justice (Mode of Trial) Bill guilty of serious injustice, why go forward with such an idea? The answer is money.

IV. BUDGET CONCERNS

When you are the person in the dock, a just result is more important than what is convenient for the system. Roger Ede[133]

The approximate cost of hearing a trial in Crown Court was £3,100 in 1988, whereas a case directed to magistrates' court then cost a mere £295.[134] Crown Court is approximately ten times the cost of magistrates' court. In 1999, 18,391 defendants elected a trial by jury in TEW cases.[135] If all these defendants were referred to magistrates' court rather than Crown Court, the Home Secretary estimates he can save the country £105 million.[136]

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128 *Id.* at 89, *citing*, Laurence Marks, THE OBSERVER, Feb. 26, 1989.

129 *Id.* at 198.

130 *See Id.* at 189, *discussing* Regina v. Hassan and Others, 9 NIJB (1981). This test is also called the Galbraith Test from Regina v Galbraith, 1 WLR 1039 (1981). If no reasonable jury could convict a person after hearing the facts from the prosecution, then the judge may acquit. In Diplock trials there does not need to be a formal request from the defense to apply this test and argument from the prosecution, judge simply applies the test. This is again how the trials are cut shorter in Diplock situations.

131 JACKSON, *supra* note 25, at 304.

132 *Id.* at 6.

133 Ede, *supra* note 110.

134 DAVIES ET. AL., *supra* note 7, at 173.

135 *Crown Prosecution Service*, *supra* note 13, at 41. Magistrates directed cases to be heard by jury trial to Crown Court 44,269 times. We will assume that criterion would not change with the Criminal Justice (Mode of Trial) Bill since magistrates would use the same Mode of Trial Guidelines to send cases to Crown Court as they use now.

136 *Straw On Trial Over Jury Reform*, BBC NEWS (Nov. 19, 1999), *available in* <http://news.bbc.co.uk/hi/english/uk_politics/newsid_527000/527721.stm>. Mr. Straw's figures

While Mr. Straw was looking for ways to save money, the Treasurer, Mr. Gordon Brown, was finding ways to spend it. In March, when the budget was announced for the next four years, Mr. Brown promised to increase the Lord Chancellor's budget (the courts) from £3.7 billion to £4.3 billion and the Legal Department from £3.0 billion to £3.3 billion.[137] Mr. Straw's office was set to receive a 6.4% increase over the next three years.[138] It is interesting to note that part of the Home Secretary's expenditure plans in 1999-2000 listed the reduction of crime as very important since it is 50% higher now than in the 1980's.[139] Thus it begs the question that when the Home Office, which governs the legal departments, is receiving such large increases, why this not being passed on to the prosecutors? It is probably best answered that while the Department of Public Prosecutions (DPP) and CPS work with the Home Secretary's Office,[140] they actually are governed by the Lord Chancellor's office. The March budget proposal did not increase the 2000-2001 budget for the Lord Chancellor's office.[141] However the final four-year proposal did increase the Lord Chancellor's budget by £600 million.[142] Unfortunately, the money did not go to the DPP.

While other offices see budget windfalls, the DPP, which CPS falls under, did not make the list. DPP is facing cuts of more than £12 million for a 4% budget cut in the next year.[143] The Bar's feelings were summed up by Chairman

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seem to be calculated from the premise that every defendant that elects a trial by jury has a trial. This discounts that defendants plead guilty before trial. Mr. Straw's figures do not seem to take into account the cost of more cases in magistrates' court.

137 *Total Public Spending 2000-04*, THE TIMES (London), July 19, 2000, at 4m. By all estimates this figure should only go up as the UK export market was up by 6% in 1999 compared with the world trade rate of 5%. The predictions are that the UK market will rise to 7.5% in 2000 and 6.5% in 2001. Strong trade allows the UK budget to give generously. *Budget 2000: British Exports Strong & World I*, THE TIMES (London), (Mar. 22, 2000), *available in* <http://www.the-times.co.uk/news/pages/tim/2000/03/22/timbudbud 01018.html>.

138 *How They Cashed In*, THE TIMES (London), July 19, 2000, at 4m. This increase is on top of the original proposed increased announced in March, when it was announced that the Home Office budget for 1999-2000 was £7.7 billion whereas for 2000-2001 it is £8.1 billion. *Budget 2000: Total Public Spending 2000/2001*, THE TIMES (London), (Mar. 22, 2000) *available in* <http://www.the-times.co.uk/news/pages/tim/2000/03/22/timbudbud 02003.html>.

139 THE GOVERNMENT'S EXPENDITURE PLANS 1999-2000 TO 2001-2002, at 14 (1999).

140 The Annual Report by CPS states that a joint committee of all criminal justice system representatives, Home Secretary's Office, Chancellor's Department and Treasury, have banded together to make a comprehensive spending proposal. *Crown Prosecution Service*, *supra* note 13, at 8.

141 *Budget 2000: Total Public Spending 2000/2001*, THE TIMES (London), Mar. 22, 2000. The £8.7 billion from 1999-2000 is the same amount given in 2000-2001.

142 *Id.* The criminal justice system will receive £245 million but CPS will not see this money. The Lord Chancellor's office has also given £32 million into high tech improvements for Crown Courts. Frances Gibb & Roland Watson, *Lawyers Fear Cuts Will Aid Criminals*, THE TIMES (London), June 5, 2000, at 1.

143 Frances Gibb & Roland Watson, *Lawyers Fear Cuts Will Aid Criminals*, THE TIMES (London), June 5, 2000, at 1. This shortfall comes despite the new preliminary hearings that will take place in Crown Court rather than magistrates' court for the most serious crimes such as rape,

Jonathan Hirst, QC, "[i]f cases are not adequately prepared and prosecuted then this strikes at the heart of the criminal justice system."[144]

The increase in budgets for all departments except CPS does not demonstrate the Labour government's commitment to fighting a war on crime. Nor does the Criminal Justice Mode of Trial Bill seem to save the amount of money that the Home Secretary says he needs.[145] As pointed out in the pros and cons, the defendant does not gain justice by having the summary trial in magistrates' court. Is this small monetary saving worth the effort?

V. CONCLUSION

Sir William Blackstone warned of changing the nature of the jury trial system:

However convenient these may appear at first. . .let it again be remembered that delays and inconvenience in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concern.[146]

Recently the Marquess of Blandford was charged with shoplifting deodorant and sunglasses worth £237 at the trendy Knightsbridge shop of Harvey Nichols. Lord Blandford elected for a jury trial rather than summary trial in magistrates' court. His five day trial cost the taxpayer approximately £40,000, and the jury found him not guilty.[147] Had Lord Blandford been accused of theft after passage of the Criminal Justice Mode of Trial Bill, he would not had the option to choose a jury trial and the magistrates' judge decision would surely have been a summary trial.[148] Despite his standing in the community, his guilt or innocence

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murder and aggravated assaults. This move will reduce delay up to seven weeks that cases usually languish in magistrates' court and supposedly save £15.7 million. Frances Gibb, *Swifter Justice for Worst Crimes*, THE TIMES (London), July 14, 2000, at 7.

144 *See* Gibb & Watson, *supra* note 142, at 1.

145 *Crown Prosecution Service*, *supra* note 13, at 43. One way to look for financing of the Crown Court trials is to require guilty defendants to pay the court costs. While this was done in magistrates' court 53.5% of the time in 1999, Crown Court only did so in 7.3% of its convictions. *Id.*

146 GROVE, *supra* note 26, at 204 (*quoting* Sir William Blackstone).

147 *See* Steve Bird, *Blandford 'Is Honest About His Dishonesty'*, THE TIMES (London), Aug. 10, 2000, at 3; Steve Bird, *Blandford Trial Jury Clears Him of Shoplifting*, THE TIMES (London), Aug. 12, 2000, at 5. This was not Lord Blandford's first court appearance. He had 21 former convictions for possession of drugs, theft and forgery. However, the 44 year-old Lord Blandford told the jury that in the past when he had been charged, he plead guilty right away proving he was honest about his guilt. Since this string of convictions, Lord Blandford has undergone drug treatment and on the day he was accused of shoplifting, he had already spent over £700 in Harvey Nichols on luggage.

148 MODE OF TRIAL GUIDELINES, HMSO 6 (1995). Based on the Mode of Trial Guidelines, the case should be tried summarily unless Lord Blandford needed a higher sentence than magistrates' court could give out, which would be unlikely, and one of the following took place: there was a

would have been tried by three lay magistrates' judges. From the statistics cited earlier, and knowledge of his previous convictions, Lord Blandford probably would have received a guilty verdict from a summary trial. Justice needs to be based on individual facts and not on past history or reputation.

Another recent distressing case was the magistrates' court trial of head teacher (principal) Marjorie Evans. Mrs. Evans was a highly reputable teacher of 35-years experience when she was found guilty by a stipendiary magistrate of assaulting of a ten-year-old unruly schoolboy.[149] Mrs. Evans claimed she used a textbook restraining technique on the boy when he tried to hit her. The only witnesses were the boy and Mrs. Evans, with another teacher stating Mrs. Evans admitted to hitting the boy. Only on appeal to Crown Court did the subsequent judge find the unblemished record of Mrs. Evans more credible than the boy, whose own mother testified that he was difficult to control.[150] However the damage of an initial magistrates' court guilty verdict was done and Mrs. Evans must request reinstatement to her job.[151]

In looking at budgetary concerns and the cost of jury trials, the government has decided there is a price for justice. The Criminal Justice Mode of Trial Bill was first brought up by the Tory government and now introduced into law by the Labour government, both have deemed money more important than juries. Is England going down a slippery slope of near total elimination of the jury system? Only time and money will tell.

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breach of trust by a person in a position of substantial authority, the theft was committed in disguise, the theft was committed by an organized gang, the victim was old of infirm, or the property stolen was valued higher than £10,000. None of these fit the facts in Lord Blandford's case, thus he would have been denied a jury trial whether he wanted one or not. His status as the future 12th Duke of Marlborough would be irrelevant. Mode of Trial Guidelines, HMSO 6 (1995).

149 *See* Steve Bird & David Charter, *Head Cleared of Slapping Unruly Boy*, THE TIMES (London), Sept. 2, 2000, at 1; Steve Bird, *How Did a Child's Lies Destroy My Career?*, THE TIMES (London), Sept. 2, 2000, at 6; Steve Bird, *Boy Branded a Liar Insists He Told the Truth*, THE TIMES (London), Sept. 2, 2000, at 6.

150 *See* Steve Bird & David Charter, *Head Cleared of Slapping Unruly Boy*, THE TIMES (London), Sept. 2, 2000, at 1; Steve Bird, *How Did a Child's Lies Destroy My Career?*, THE TIMES (London), Sept. 2, 2000, at 6; Steve Bird, *Boy Branded a Liar Insists He Told the Truth*, THE TIMES (London), Sept. 2, 2000, at 6. The magistrates' court was not allowed to hear video evidence that the boy gave at the police station stating that he was out to get rid of Mrs. Evans. Crown Court requisitioned the boy and found his testimony to be inconsistent with another boy who claimed to have witnessed the slap. Mrs. Evans has claimed her innocence all along. She had support of her fellow teachers and over 300 parents. After the magistrates' verdict, she was given a suspended three-month jail sentence and fined £2,250 prosecution costs.

151 *See* Steve Bird & David Charter, *Head Cleared of Slapping Unruly Boy*, THE TIMES (London), Sept. 2, 2000, at 1; Steve Bird, *How Did a Child's Lies Destroy My Career?*, THE TIMES (London), Sept. 2, 2000, at 6; Steve Bird, *Boy Branded a Liar Insists He Told the Truth*, THE TIMES (London), Sept. 2, 2000, at 6. Mrs. Evans' ordeal is not over, as it was reported that the police were still investigating her alleged physical and emotional handling of pupils.

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.

A Conversation About Equality*

THE HONOURABLE CLAIRE L'HEUREUX-DUBÉ,
JUSTICE OF THE SUPREME COURT OF CANADA**

I. INTRODUCTION

Equality is a topic very near to my heart. Since I believe that you have to pose the right questions to get good answers, I will explore some of the who's, what's, when's, where's, and why's of equality, although not necessarily in that order. I sincerely hope that these questions will provide a basis for us to ask other questions, both of ourselves and of others. For posing questions, talking to each other, and thinking about what the concept of equality means and should mean will help all of us come to a better understanding of equality, how it applies, and what it means, both in our lives and in the law.

II. WHY IS EQUALITY SO IMPORTANT?

Why are we not prepared to accept that we can be treated with less dignity because of the groups to which we belong or with which we identify? In my opinion, our desire for equality stems from our desire for justice and, put simply, inequality is injustice. It is unjust to treat people as less worthy or less deserving because of inherent personal characteristics, circumstances in which they find themselves, or fundamental choices they have made. It is unjust for those who have historically held advantages and privileges in society to continue those privileges at the expense of others. When there is inequality, oppression is allowed, facilitated, and encouraged. In Canada, where we believe every member of society is a full member, it is contrary to our conception of justice to suggest that people can be treated as less worthy, less deserving, or less equal because of their personal characteristics or identity.

I ask you: if you were given the opportunity to design a model society, not knowing *a priori* who you would be or into what role you would be born, knowing only that the odds were roughly even that you would be born into a position

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of relative empowerment or relative disempowerment, what would your society look like? I put it to you that almost anyone in such a position would design a society that treated each and every individual with dignity, and offered them equal opportunity to realize their goals and expectations. Of course, I am not talking only about you, but about your children, and your children's children. The call to arms of equality seekers today is really an investment in tomorrow.

III. WHERE DO WE LOOK FOR INEQUALITY?

John Stuart Mill, one of the first philosophers to recognize the interrelationship between individual human dignity and the good of the community, observed that the law assumes that existing relationships of domination and subordination are "natural".[1] He argued that the law plays an insidious role when it adopts the status quo and converts a relationship of inequality from a purely physical fact to a legal right.[2] Once inequality is clothed in the legitimising language of rights and law, it receives the sanction of society.[3] Mill asked whether there is ever domination that appears unnatural to those who wield it.[4]

This observation is as true today as it was when he made it. Inequality permeates the social, legal, and political institutions that are central to the workings of our society. A renewed commitment to its eradication requires that we look deep into ourselves and into the reality experienced by those who have not historically dominated "by nature".

While it is interesting to note that the *Canadian Charter of Rights and Freedoms* was proclaimed in force in 1982, thereby constitutionalizing certain human, civil and political rights in Canada, implementation of section 15, which guarantees "equality without discrimination" to all individuals, was delayed until 1985.[5] Equality without discrimination was not a very new or revolutionary concept in 1982 and yet implementation of section 15 was delayed for three years beyond any of the other newly constitutionalized fundamental human rights. In my view, this delay allowed for the profound re-examination of Canada's basic laws and institutions that the recognition of such a right required. I find it a somewhat disturbing indictment of our past that, in 1982, we felt that our laws might be so discriminatory that we would need several years of grace before permitting individuals to challenge them.

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[1] Daniel Proulx, *L'objet des droits constitutionnels à l'égalité* 29 C. de D. 567,570 (1988).
[2] *Id.*
[3] Lorenne Clark, *Liberalism and the Living Tree: Women, Equality and the Charter* 28(2) Alta. L. Rev. 384, 390 (1988), *citing* J.S. Mill, "The Subjugation of Women" in *Essays on Sex Equality* 129-130 (Alice S. Rossi ed., 1970).
[4] *Id.* at 391.
[5] Const. Act 1982, pt. I, § 15 (Canadian Charter of Rights and Freedeoms), Schedule B to the Canada Act, 1982, ch. 11 (U.K.). [hereinafter the Charter]

A few brief comments on some of Canada's historical equality "benchmarks" demonstrates why our drafters' concerns may have been justified. For instance, it was not until 1929 that the British Privy Council, acting as Canada's final court of appeal, finally recognized that women were "persons", and thereby able to be appointed to the Senate.[6] Since that time, slowly but surely, other obstacles to equality have fallen under the relentless pressure of social change. However, many of these moves occurred much later than many people realize. Among the most blatant examples, women could not vote in Québec elections until 1940.[7] Federally, Japanese Canadians could not vote until 1948, and status Indians gained the franchise only in 1960.[8] Thus, even glaring formal inequalities such as these permeated the very foundations of our democracy well into this century.

Parliament did enact an equality guarantee in the *Canadian Bill of Rights* in 1960.[9] While this was a positive step, no great immediate strides toward substantive equality came about as a result. The *Bill of Rights* was simply a statute like any other. It was interpreted narrowly because it lacked the authority of a constitutional document and it did not apply to provincial laws. In one infamous *Bill of Rights* case, *Bliss v. Attorney General of Canada*, the Supreme Court held that denying benefits on the basis of pregnancy was not sex discrimination, since the distinction was based on the fact that the women were pregnant, rather than the fact that they were women.[10] In another case, *Attorney General v. Lavell*, a law which disqualified native women who married non-natives from receiving certain benefits related to Indian status, but did not similarly disqualify native men, was held not to be discriminatory, since all native women were treated equally with respect to each other.[11] These cases demonstrated that the *Bill of Rights*, as the Supreme Court interpreted it, only guaranteed equality to the extent that people were the same. Women, minorities, and the disabled were fully "equal" within their individual groups, but only to the extent that they were no different from the grouping of white, able-bodied men. For those who were disadvantaged because they were different from what society considered the 'norm', this road to equality was a dead end.

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[6] Edwards v. Canada, [1930] A.C. 124.
[7] Susan Jackel, *Women's Suffrage in* THE CANADIAN ENCYCLOPEDIA: YEAR 2000 EDITION 2535 (McClelland & Stewart Inc., 1999).
[8] John C. Courtney, *Franchise in* THE CANADIAN ENCYCLOPEDIA: YEAR 2000 EDITION 907 (McClelland & Stewart Inc., 1999).
[9] Canadian Bill of Rights, S.C. 1960, c.44 *reprinted in* R.S.C. 1985 (App. III). [hereinafter the Bill of Rights]
[10] Bliss v. Attorney General of Canada, [1979] 1 S.C.R. 183.
[11] Attorney General of Canada v. Lavell, [1974] S.C.R. 1349.

IV. WHAT DOES IT MEAN IN CANADA TO SPEAK OF "EQUALITY" IN THIS DAY AND AGE?

Unlike the American *Bill of Rights*, the *Charter* does not simply assert a right of "equal protection"; it speaks of "equality without discrimination".[12] My first observation about these two documents is that they grew out of two very different historical contexts. In order to understand the equality principle as it applies in Canada, it is necessary to consider the context in which it developed. If American constitutional ideals were born of war and revolution, Canada's grew through evolution. Bit by bit Canada negotiated its way towards independence, from Confederation in 1867, to the recognition of autonomy from Great Britain in 1931, to the patriation of the Constitution and the adoption of the *Charter* in 1982.[13]

The *Charter* was enacted nearly 200 years after the American *Bill of Rights*.[14] Thus, it reflects the developments in human rights law of the latter half of the 20th century, as well as a Canadian vision of liberty and the state, rather than the American civil libertarian vision of the 18th and 19th centuries. Perhaps for this reason, the *Charter* places less emphasis on individual rights and more on collective interests. This is seen in various provisions of the *Charter,* which tend to surprise many Americans. For instance, rights under the *Charter* are subject to an express limitation under section 1, which says that they are guaranteed, "subject . . . to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[15] Secondly, in Canada, diversity is not a debate—it is a constitutionally recognized value. Our constitution recognizes aboriginal treaty rights and minority language education rights, while section 27 of the *Charter* instructs courts to interpret *Charter* rights in a manner consistent with promoting and enhancing Canada's multicultural heritage.[16] Third, property rights are noticeably absent from the *Charter*, primarily due to the fear that the inclusion of property rights in a bill of rights would hamper the power of governments to administer or enact social legislation.

Turning to the *Charter*'s provisions on equality, section 28 states that the "rights and freedoms referred to in the *Charter* are guaranteed equally to male and female persons."[17] Finally, section 15(1), guarantees "equality. . . without discrimination, and in particular without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".[18] Af-

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[12] U.S. CONST., amend. XIV; Canadian Charter of Rights and Freedoms § 15(1).
[13] Const. Act 1982, pt. I, § 15 (Canadian Charter of Rights and Freedoms), Schedule B to the Canada Act, 1982, ch. 11 (U.K.).
[14] *Id.*, U.S. CONST., amend. I-X.
[15] Canadian Charter of Rights and Freedoms § 1.
[16] *Id.* at §§ 23, 25, 27.
[17] Canadian Charter of Rights and Freedoms § 28.
[18] *Id.* at § 15(1).

firmative action is specifically permitted under section 15(2).[19]

As the Canadian courts have interpreted these provisions, equality continues to be a comparative concept. It does not always require that we treat people in the same way. In fact, sometimes it requires that we treat them differently. In my view, the recognition that equality and discrimination are inextricably linked is an important one. It is indicative of a sophisticated understanding of the values that underlie equality. For equality isn't just about being treated the same, and it isn't a mathematical equation waiting to be solved. Rather, it is about equal human dignity, and full membership in society. It is about *promoting* an equal sense of self-worth. It is about treating people with equal concern, equal respect, and equal consideration. These are the values that underlie equality. These are the values that are offended when we discriminate, consciously or not.

In Canada, our present approach to equality, based on the recognition that true equality requires substantive change and accommodation rather than simply formalistic egalitarian treatment, was precipitated by the obviously unfair and inequitable results of equality claims determined under the *Bill of Rights*. When we moved from the *Bill of Rights* to the *Charter*, we made three very important changes. First, we elevated equality rights to a constitutional level. Second, we broadened the measure of equality rights. Third, we broadened the reach of equality rights. All three of these changes constituted essential elements of a trend intended to promote and achieve substantive democracy in Canada, rather than just procedural democracy. With the *Charter*, we have gone from requiring that laws be applied in the same way to everyone, to the stage of requiring that the laws, themselves, treat individuals as substantive equals. This, finally, is the language of substantive equality.[20]

Several Supreme Court cases illustrate particularly well the ways in which a determination of when substantive equality rights have been violated requires an examination of a group§s treatment in the context of Canadian society, and of whether an individual§s fundamental dignity is violated. They show why differential treatment may in some cases lead to substantive equality, just as in other cases, similar treatment may lead to substantive inequality.

Weatherall v. Canada is an example of a case where being treated differently did not lead to substantive inequality.[21] In that case, the male appellant had challenged the fact that male prisoners in penitentiaries were searched and patrolled by female guards, but that female prisoners were supervised only by

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[19] *Id.* at § 15(2).

[20] *See* Law v. Canada, [1999] 1 S.C.R. 497, 548. For the first use of "substantive equality" in a Supreme Court decision, *see* Symes v. Canada, [1993] 4 S.C.R. 695, 786 (per L'Heureux-Dubé J. dissenting). All Supreme Court of Canada judgments since 1985 are available through the Court's website, http://www.scc-csc.gc.ca/index_e.htm

[21] Weatherall v. Canada, [1993] 2 S.C.R. 872.

members of their own gender.[22] The unanimous judgment of our Court held that the male prisoners had not been discriminated against relative to female prisoners.[23] The Court noted the historical, biological, and sociological differences between men and women, the history of women's disadvantage in society, and the realities of male violence against women.[24] Because of these factors, cross-gender searches do not have the same effects on men as they would have on women.[25] The Court's judgment, which upheld the different treatment of male and female prisoners, demonstrates that equality may sometimes allow or require differential treatment.

On the reverse side of the same coin, *B.C. v. BCGSEU* provides an excellent example of a case where being treated the same led to substantive inequality.[26] Tawney Meiorin was a firefighter who had performed her work satisfactorily for over three years.[27] Her union argued that she was improperly dismissed on the basis of her failure to meet a discriminatory aerobic standard required under a new series of fitness tests adopted by the British Columbia provincial Government.[28]

The Court held that under the B.C. *Human Rights Code*, the minimum fitness standard discriminated against women and could not be justified as a *bona fide* occupational requirement.[29] In other words, a lower standard could still provide sufficient protection to the public, while also having a less discriminatory impact on women. As in many other cases of human rights code violations, courts are recognizing that standards set in relation to a traditionally dominant group, such as male firefighters, must be reviewed from an equality perspective in order to determine whether they are reasonably necessary to the fulfillment of a legitimate work-related purpose.

Eldridge v. British Columbia is another case where similar treatment was held to create substantive inequality.[30] In that case, the appellants, who were deaf, challenged the failure of the British Columbia government to provide sign language interpreters as part of its publicly funded health care system.[31] The Court held that this constituted discrimination, since those who were not hearing impaired did not require interpretation services and they were provided with all

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] British Columbia (Public Service Employee Relations Committee) v. BCGSEU, [1999] 3 S.C.R. 3.
[27] *Id.*
[28] *Id.*
[29] *Id.*, Human Rights Code, R.S.B.C., ch. 210 (1996)(Can.).
[30] Eldridge v. British Columbia, [1997] 3 S.C.R. 624.
[31] *Id.*

the services necessary to receive effective medical care.[32] In contrast, hearing impaired people, who required interpreters in order to receive effective treatment, were required to pay for this service, and therefore, unlike others, did not receive the necessary services to enjoy free medical care.[33] Even though, formally, this constituted identical treatment, substantively, the hearing impaired did not receive equal services from the health care system.[34]

Another example is the case of *Vriend v. Alberta*, which dealt with the failure of the Alberta Individual's Rights Protection Act to provide gays and lesbians with protection against discrimination.[35] Technically, gays and lesbians and heterosexual people were treated the same: none could bring claims under the Alberta human rights legislation based on sexual orientation.[36] However, the fact that only gays and lesbians, not heterosexuals, generally experience discrimination based on sexual orientation meant that the failure to include them in the legislation, even though it formally treated all citizens equally, constituted discrimination.[37]

The Court's decision in *Vriend* shows the importance of looking beyond the Charter for the protection of equality rights, since it applies only to government action.[38] In looking for "WHERE" inequality occurs, we must also turn our attention to the actions of people outside government, to ensure that in relations with others, individuals, companies, and groups conduct themselves in accordance with the principles of equality. Decisions of the Supreme Court and of human rights commissions have reminded us that, for example, when sexual harassment occurs, when there is systemic discrimination within a workplace, or when rules of the workplace have a negative impact on members of certain groups, discrimination has occurred.[39]

Provincial and federal statutory human rights codes remind us that all of our actions must be consistent with the principles of non-discrimination, and that we must constantly be vigilant to ensure that we respect others' equality rights. Because of their importance, our Supreme Court has recognized that human rights codes have taken on a quasi-constitutional status, and for this reason I have advocated a large and liberal evolving interpretation of the protections contained in them. In *Canada (Attorney-General) v. Mossop*, for example, I argued for an expansive interpretation of the prohibition in the *Canadian Human Rights Act*

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Vriend v. Alberta, [1998] 1 S.C.R. 493.
[36] *Id.*
[37] *Id.*
[38] *See* RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.
[39] Janzen v. Platy Enterprises, [1989] 1 S.C.R. 1252; Action Travail des Femmes v. Canadian National Railway, [1987] 1 S.C.R. 1114; O§Malley v. Simpsons-Sears, [1985] 2 S.C.R. 550.

against discrimination based on "family status."[40] Mr. Mossop did not receive bereavement leave to attend the funeral of his male partner's father, although he would have received this leave if his partner had been female.[41] I wrote that respecting the promise of equality contained in the Act required an evolving and expansive definition of family, one that recognized the reality of the diverse types of families that exist in our society. The application of the principles of equality required going beyond traditional definitions of family, to explore what "family" means to different people in our society.

We must constantly be alert to the fact that the scope of the protection set out in these equality provisions may still not be a reality for all.[42] We need to recognize that the need to identify inequality is not present only when allegations of discrimination have been brought under section 15 of the *Charter*, or under human rights codes. Rather, in examining other areas of law, we must be alert to the ways in which the laws' assumptions may not respect the principles of equality. This approach offers us new understandings in family law, in criminal law, and into how the law affects the poor and the elderly. It is changing the way we look at sexual assault, disability, freedom of expression and pornography. The task of rooting out inequality and injustice from our society is now advancing to a higher stage, since, increasingly, we are recognizing that inequality and discrimination stem not from positive intentions on the part of any given individual, but rather from the effects of often innocently-motivated actions. This analysis requires that we understand equality, and make it part of our thinking, rather than treading heavily on it with the well-worn shoes of unquestioned, and often stereotypical, assumptions.

I will mention just two examples where the analysis in other areas of law has required attention to the concept of equality. In *Moge v. Moge,* consideration of the principles of equality, and of the historic disadvantages women faced from marriage breakdown, informed the determination of the appropriate interpretation of the *Divorce Act*s provisions on spousal support.[43] Focusing on equality enabled the Court to look at the perspective and experiences of women, and to ensure that its understanding of spousal support took into account women's needs and realities. In *R. v. Lavallée,* Madame Justice Wilson, writing for the majority of our Court, considered the circumstances of women in relationships with abusive spouses and redefined the criminal law of self-defence in light of the realities

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[40] *Canadian Human Rights Commission v. Mossop,* [1993] 1 S.C.R. 554; Canadian Human Rights Act, S.C. ch.33 (1976-1977) *reprinted in* R.S.C. ch.H6 (1985)(Can.).

[41] *Mossop,* [1993] 1 S.C.R. at 554.

[42] For a recent decision illustrating this point, see, e.g., M. v. H., [1999] 2 S.C.R. 3 (holding that the opposite-sex definition of "spouse" used for spousal support determination in the province of Ontario's Family Law Act violated sec. 15 of the Charter).

[43] Moge v. Moge, [1992] 3 S.C.R. 813.

of their experiences.[44] These cases, and others like them, show that thinking about equality is more than just analysing discrimination claims or interpreting human rights codes. Rather, its pursuit requires an understanding of the historical disadvantages experienced by members of some groups, an awareness of groups' differences and unique experiences, and a sensitivity to the fact that parts of the law have been designed by and for those with power and privilege. It requires that in the analysis we undertake in every area of law, we consider various perspectives, think about the experiences and realities of disadvantaged groups, and examine the assumptions on which our laws and jurisprudence are based.

V. WHO SHOULD BE CONCERNED ABOUT INEQUALITY?

Many individuals are privileged in numerous ways. Many have never directly experienced discrimination. Nonetheless, inequality is a problem that affects us all. It is short sighted to assume that it is in our interests to preserve the systems and institutions that perpetuate our advantage and the relative disadvantage of others. We now understand that people are interdependent, and the health and dignity of our society depends on the way we treat all of its members. When some lack the opportunities others have, or are treated without dignity, society suffers. When individuals or governments refuse to recognize or respect the differences of others, the cost is the fostering of intolerance in our society. Discrimination imposes costs on us all, not just on those who are its direct victims.

Crime, poverty, unemployment, the fear of walking in the streets of one's own neighbourhood at night, our heavily burdened social programs: few will now dispute that all of these problems have at least some of their roots in inequality. While working to stamp out inequality will not make these problems go away, it is clear that ignoring inequality may very well aggravate them. Given that inequality, discrimination and perceived injustice are highly destabilizing forces in society, anyone who seeks a stable society gains by weakening those forces. We all have something to learn in this regard, particularly those who think of equality only in terms of the costs required to achieve it. As my colleague on the Ontario Court of Appeal, Madame Justice Rosalie Silberman Abella has observed, "We have no business figuring out the cost of justice until we can figure out the cost of injustice".

For these reasons, we cannot be concerned only about inequality and discrimination that affect us directly, but we must be vigilant to inequality affecting others. Working toward a society free from inequality demands that we try to see the world as experienced by others. We must not only recognize the ways in which others are similar to us, but also acknowledge and celebrate others' differences. If we are privileged in certain ways, we must also affirm that others may

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[44] R. v. Lavallée, [1990] 1 S.C.R. 852.

be entitled to differential treatment in order to remedy past or present disadvantages imposed by society.

We must remember that inequality and discrimination are as much attitudes as actions. All of us now have a responsibility to continue to work to bring about changes that will enable the philosophy of non-discrimination to become a reality of substantive equality. The quest for equality does not stop when, for instance, a woman gets a job. It demands pay equity, and a workplace that is sensitive to the social and family demands that women often face. Equally important, it demands that we recognize that not all men measure success purely by virtue of career and financial advancement. New opportunities in the workplace will not bring meaningful change until it becomes socially acceptable to use them. And in striving to achieve such ends we must never be deterred by novel solutions.

VI. HOW DO WE ADVANCE THE CAUSE OF EQUALITY?

Equality is a term that, standing alone, means nothing. It has no universally recognized, inherent or intrinsic content. But rather than simply trying to define the term, I think that it is helpful to conceive of equality as a language like every other: with rules of grammar and syntax, nuances, exceptions, and dialects. After all, a language is more than a form of communication. It is an embodiment of the norms, attitudes, and cultures that are expressed through that language. Learning a language and learning a culture go hand in hand. I believe that all of us are already familiar with the basic vocabulary of equality. On the other hand, I hesitate to say that we are fluent in this language when, in fact, we may only have a working knowledge of it so far. This language is new to us, because equality analysis does not fit easily into traditional legal discourses and concepts. It is not easy to undertake an analysis of the multiple and overlapping manifestations of inequality in our society using traditional legal tests and tools.

But like many immigrants who once came, and continue to come to North America, we have now firmly assumed the obligation of learning a new language, which will help carry us into tomorrow. More importantly, and after much delay, we have finally committed ourselves to learning to speak in terms of meaningful equality.

In our quest to learn the language of equality, we are going through many of the same difficulties encountered by someone trying to learn a new language. We interpret simple sentences very well. However, we lack the experience to deal with more difficult situations. We may improvise by applying approaches found in traditional legal discourse, but experience shows that resorting to those rules is only appropriate when the structures underlying the two languages are substantially the same. Our new task is to revisit our underlying assumptions about people and social structure, to look beyond the four corners of our respective legal and social institutions, and to contemplate change when our examination reveals that the languages are inconsistent. We must try to <u>think</u> in terms of this new language. As any of you who has tried to learn a second language knows, learning to think in that language is probably the most important step to

understanding the language, and this understanding is what is needed in turn to speak it fluently.

We are all students of this language called equality. I should note that this language class is particularly difficult because it is a course in which the students must teach themselves. Fortunately, we are not without direction. Our Rosetta Stone, our key to understanding, lies in our respective past social experiences, in the present realities endured by those less fortunate, and in the future aspirations of one and all. And yet the job does not end here. Implicit in our task of breaking down barriers, learning a new language, and questioning assumptions underlying some of our oldest and most venerable institutions, is our undertaking to rebuild what we take apart.

You will recall that I began my remarks to you by posing the question, "Why equality?". I now conclude by observing that the real question to my mind is no longer "WHY equality?" but rather "WHEN equality?" In my view, moreover, the appropriate answer is "Now!" To permit or perpetuate inequality is to permit or perpetuate injustice. Our public policies, our workplaces, our institutions, and our homes may serve us well, but how do they serve others? Do they enable all people to enjoy full membership in society, and an equal sense of self-worth? Do they accord each human being equal concern, respect and consideration? These are difficult questions, but I put it to you that we owe a duty to ourselves, to others and to the generations to come, to answer these questions, and then to act on the answers until we've lived up to the equality standard.

The urgency of the task of promoting equality means that the guarantees of equality in constitutional and international human rights documents here and around the world are perhaps the most important constitutional or legal instruments we have. These guarantees will, I hope, be at the centre of much of the work of the courts in coming years, not only when appeals based on equality provisions themselves are heard, but also as norms which inform and influence our analysis throughout all areas of law and of life.

Yet as all students know, our understanding of concepts such as equality continues to evolve, and it requires a constant questioning of our work and our assumptions to ensure that our task is being accomplished well. By conversing about equality, by explaining to each other our experiences and understandings, and by listening to others, we can better comprehend the nuances of this evolving concept. Questions about fairness and justice in law and society will never disappear. It is my hope, however, that future generations will converse about these questions fluently, in the language of equality, just as we speak in our native language, or mother tongue: without effort, and in an intuitive and natural way. For when the language of equality becomes our common language, we will truly be able to say that we live in a just society.