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ENTITLEMENT AND THE BODY POLITIC: RETHINKING NEGLIGENCE IN PUBLIC LAW

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In using the law of negligence to extend the liability of public bodies for the recovery of losses associated with negligent or inadvertant state or bureaucratic inaction, the courts have distorted the principles of private law. Tort law is inadequate for the task of formulating the obligations public bodies owe to private individuals, as the state is a fundamentally different kind of body than are actors in the private sector. The authors set out, and argue for, a new principle or ground for defining the duties of the state: a principle of entitlement which rests on the presupposition that, while the state has the right to decide what benefits individuals are to receive, once the state has conferred those benefits upon any group, its members are entitled to that benefit, or to damages in lieu thereof.

Les tribunaux ont altéré les principes du droit privé quand ils se sont servie du droit en matière de négligence pour étendre la responsabilité des organismes publics aux cas de recouvrement de pertes liées à l'inaction, par négligence ou par mégarde, de l'état ou des bureaucrates. Le droit des délits n'est pas adéquat pour formuler les obligations que les organismes publics ont envers les particuliers, l'état étant une entité fondamentalement différente des acteurs du secteur privé. Les auteurs présentent et recommandent un nouveau principe qui permet de définir les devoirs de l'état, principe selon lequel le droit des particuliers repose sur la prémisse que c'est à l'état qu'il appartient de décider des bénéfices dus aux particuliers, mais que, une fois ces bénéfices conférés à un groupe, les membres de ce groupe doivent les recevoir de droit ou être compensé par des dommages et intérêts.

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Introduction

In the days of Crown immunity no action could be brought against the state for liability in tort.[1] An action could, nevertheless, be brought against employees or servants of the Crown personally if they acted unlawfully and in breach of a common law duty of care, or if their actions constituted the elements of one of the nominate torts. In such cases, however, the Crown would not be liable for the torts of its employees, even when committed in the course of their employment. During the past century, a political consensus has gradually developed which has resulted in provincial and federal legislation which has eroded the absolute sovereign immunity of the past, at least to the extent that the state, and other representative institutions, may now be held vicariously liable for the torts of bureaucrats committed in the course of their employment.[2]

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[1] See *National Harbours Board* v. *Langelier et al.* (1968), 2 D.L.R. (3d) 81 (S.C.C.); *The Queen* v. *McFarlane* (1882), 7 S.C.R. 216; *Tobin* v. *The Queen* (1864), 16 C.B. (N.S.) 310, 143 E.R. 1148 (C.P.); *Feather* v. *The Queen* (1865), 6 B. & S. 257, 122 E.R. 1191 (K.B.). Beginning in the late eighteenth century the courts imposed liability on municipal corporations and other incorporated public authorities for physical injury or property damage, arising out of the non-performance or negligent performance of *statutory duties*. The claims were framed in nuisance or negligence. See *Russell* v. *Men of Devon* (1788), 2 T.R. 667, 100 E.R. 359 (K.B.); *McKinnon* v. *Penson* (1853), 8 Exch. 319, 155 E.R. 1369 (Exch.), aff'd (1854), 9 Exch. 609, 156 E.R. 260 (Exch. Ch.); *Young* v. *Davis* (1862), 7 H. & N. 760, 158 E.R. 675 (Exch.), aff'd (1863), 2 H. & C. 197, 159 E.R. 82 (Exch. Ch.); *Gibson* v. *Mayor of Preston* (1870), L.R. 5 Q.B. 218; *Sanitary Commissioners of Gibraltar* v. *Orfila* (1890), 15 App. Cas. 400 (P.C.). See cases cited in M.B. Cairns, The Law of Tort in Local Government (2nd ed., 1969), pp. 139-143.

[2] The federal government and all the provinces (except Québec) have enacted legislation establishing Crown liability in tort and abrogating the procedural requirements of a Petition of Right where one would have been required at common law or by statute. Of these enactments (state liability acts) all but British Columbia's and Canada's fit into one of two formats. The first standard format declares that the Crown will be liable where, but for the Act, it would have been liable under a petition of right, and then states the Crown will be liable in tort as if it were a private person for the torts of its servants in the performance of their duties, for breaches of its duties as an employer, for breaches of its duties attaching to its ownership, occupation, possession or control of property, and for any tort arising under a statute, or a regulation or bylaw properly enacted under a statute. See, Proceedings Against the Crown Act, R.S.A. 1980, c. P-18; The Proceedings Against the Crown Act, R.S.S. 1978, c. P-27; The Proceedings Against the Crown Act, R.S.M. 1970, c. P-140; Proceedings Against the Crown Act, R.S.O. 1980, c. 393; Proceedings Against the Crown Act, R.S.N.S. 1967, c. 239. The second standard format is the same as the first except the Crown is not declared liable for torts under a bylaw. See, Crown Proceedings Act, R.S.P.E.I. 1974, c. C-31; The Proceedings Against the Crown Act, S. Nfld. 1973, No. 59; Proceedings Against the Crown Act, R.S.N.B. 1973, c. P-18.

Only the British Columbia legislation appears to make the Crown fully liable for its torts—both directly and vicariously; Crown Proceedings Act, R.S.B.C. 1979, c. 86. Section 2 of the Act says simply that the Crown is "subject to all those liabilities to which it would be liable if it were a person". See *Gerak* v. *R. in Right of British Columbia* (1985), 59 B.C.L.R. 273, at pp. 284, 299, 300 (B.C.C.A.).

The only province which does not have a state liability act is Quebec. According to Peter Hogg, Constitutional Law of Canada (2nd ed., 1985), p. 228, this is because

Judges applying common law principles have refrained from imposing duties on individual bureaucrats to confer benefits, unless a duty to do so could be said to arise from a specific common law relationship, such as a contract or a trust, which recognized obligations to confer benefits. The difference between causing harm and failing to confer a benefit was categorized in tort law by the distinction between "misfeasance" and "non-feasance". The failure of a bureaucrat to confer a benefit was often classified as non-feasance, and consequently judges would refuse to impose liability in tort.[3] The distinction between misfeasance and non-feasance was a critical element in any tort action brought against a bureaucrat, because misfeasance was the only ground upon which, at this time, an action against a public official could succeed. If the situation was classified as non-feasance then no duty would be said to be owed to the plaintiff.[4] The statutory removal in various specific contexts of sovereign immunity had no effect on this aspect of state liability.

"article 1011 . . . [of the Code of Civil Procedure has] . . .been accepted for many years in Quebec as permitting claims in delict and quasi-delict against the Crown". Furthermore, Quebec abolished the requirement of a fiat in 1965 (S.Q. 1965, c. 80, as amended by S.Q. 1966, c. 21, s. 5); see now R.S.Q. 1977, c. C-25, ss. 94-100.

[3] The misfeasance—non-feasance distinction in the case of public authorities has never been articulated or applied in a consistent and comprehensible manner. See *McClelland* v. *Manchester Corporation*, [1912] 1 K.B. 118 (C.A.); *Cox* v. *Town City Mines* (1969), 4 D.L.R. (3d) 241, 2 N.S.R. (1965-69) 79 (N.S. App. Div.); *Millar and Brown Ltd.* v. *City of Vancouver* (1966), 56 D.L.R. (2d) 190, 55 W.W.R. 59 (B.C.S.C.), rev'd (1967), 59 D.L.R. (2d) 640, 58 W.W.R. 191 (B.C.C.A.). The same inconsistency is apparent in *Dutton* v. *Bognor Regis Urban District Council*, [1972] 1 Q.B. 373, *sub nom.*, *Dutton* v. *Bognor Regis United Building Co. Ltd.*, [1972] 1 All E.R. 462 (C.A.), per Sachs L.J. at pp. 402-403 (Q.B.), 479-480 (All E.R.) and per Stamp L.J. at pp. 415 (Q.B.), 490 (All E.R.); *Pride of Derby, etc.* v. *British Celanese Ltd.*, [1953] 1 Ch. 149, [1953] 1 All E.R. 179 (C.A.); *Sheppard* v. *Glossop Corporation*, [1921] 3 K.B. 132 (C.A.). See P. Hogg, Liability of the Crown (1971), p. 69.

As well, the misfeasance—non-feasance distinction may be based on arguments which have little application when the state is the relevant non-actor. See J.C. Smith, Liability in Negligence (1984), pp. 29-47; M.J. Bowman, S.H. Bailey, Negligence in the Realm of Public Law—A Positive Obligation to Rescue, [1984] Pub. Law 277.

[4] In other cases the issue has been dealt with as one of "public" and "private" duties. While the court would recognize a public duty (i.e. a duty owed to the state) on a particular civil servant, they distinguished this from private law duties of care. See *Anns* v. *Merton London Borough Council*, [1978] A.C. 728, at p. 754, [1977] 2 All E.R. 492, at p. 500 (H.L.), per Lord Wilberforce. See also *Kwong* v. *The Queen in Right of Alberta* (1979), 96 D.L.R. (3d) 214, aff'd [1979] 2 S.C.R. 1010, (1980), 105 D.L.R. (3d) 576, where the Alberta Court of Appeal drew the same distinction between bureaucratic responsibilities to advise Cabinet, and private legal compensatory liability. The confusion between "active negligence" and private duties of care continues. See *Attorney General of Nova Scotia* v. *Aza Abramovitch Associates Ltd.* (1985), 11 D.L.R. (4th) 588, at p. 607 (N.B.C.A.); *Moore* v. *Government of Manitoba* (1981), 127 D.L.R. (3d) 450, at pp. 461-462 (Man. Q.B.). Some authors argue (and are critical of the fact) that *Anns* v. *Merton London Borough Council* has introduced a "public law" classification into the legal system which is "wholly incompatable with the English tradition"; C. Harlow, "Public" and "Private" Law: Definitions Without Distinction (1980), 43 Mod. Law

In more recent common law developments, judges have articulated legal principles culminating in the decisions of the House of Lords in *Anns* v. *Merton London Borough Council*[5] and of the Supreme Court of Canada in *Nielsen* v. *City of Kamloops*.[6] These cases held that public bodies and individual bureaucrats are liable to private individuals for damages suffered as a result of a failure to receive a benefit because of a bureaucrat's negligence. The consequence is that bureaucrats, the state and representative insitutions can now be held directly or/and vicariously liable for non-feasance. Since the courts purported to have derived these

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Rev. 241, at p. 242. She apparently believes that the articulation of compensatory models in the case of the state, distinguishable from those applicable to private enterprise, will necessarily result in the insulation of public authorities from liability; *ibid.*, at p. 246. In some American cases the courts have adopted a similar private/public duty analysis, a so-called 'privity' doctrine requiring a special relationship or special duty to be found between the bureaucrat and victim. See M.S. Shapo, The Duty to Act (1977), pp. 79-83, 108. See also *Chambers-Castanes* v. *King County*, 669 P.2d 451 (Wash. S.C., 1983); *Rogers* v. *City of Toppenish*, 596 P.2d 1096 (Wash. C.A., 1979).

[5] *Supra*, footnote 4. See, *Berardinelli* v. *Ontario Housing Corp.*, [1979] 1 S.C.R. 275, (1979), 90 D.L.R. (3d) 481; *Welbridge Holdings* v. *Winnipeg*, [1971] S.C.R. 957, (1972), 22 D.L.R. (3d) 470; *Rudko & Rudko* v. *R.*, [1984] 1 W.W.R. 741, (1983), 28 Alta. L. R. (2d) 350 (Fed. T.D.); *Canadian Federation of Business et al.* v. *The Queen and Andre Ouellet*, [1974] 2 F.C. 443 (Fed. T.D.); *Barratt* v. *District of North Vancouver* (1978), 89 D.L.R. (3d) 473, 6 B.C.L.R. 319 (B.C.C.A.), aff'd [1980] 2 S.C.R. 418, 114 D.L.R. (3d) 577; *Berryland Canning Co. Ltd.* v. *The Queen* (1974), 44 D.L.R. (3d) 568, [1974] 1 F.C. 91 (Fed. T.D.); *Diversified Holdings Ltd.* v. *The Queen in Right of British Columbia* (1982), 133 D.L.R. (3d) 712, 35 B.C.L.R. 349 (B.C.S.C.), aff'd 143 D.L.R. (3d) 529, 41 B.C.L.R. 29 (B.C.C.A.); *Baird* v. *The Queen in Right of Canada* (1983), 148 D.L.R. (3d) 1, 48 N.R. 276 (Fed. C.A.); *Johnson et al.* v. *Adamson et al.* (1981), 128 D.L.R. (3d) 470, 34 O.R. (2d) 236 (Ont. C.A.); *Toews* v. *MacKenzie et al.* (1980), 108 D.L.R. (3d) 473, [1980] 4 W.W.R. 108 (B.C.C.A.). See also *Taylor* v. *The Queen in Right of Ontario* (1983), 1 D.L.R. (4th) 90, 42 O.R. (2d) 740 (Ont. H.C.), where the court held that a court clerk's failure to note an expiry date on a promissory note was operational and negligent (but it also held that acceptance of the note itself was *ultra vires* the clerk's authority). In *Kwong* v. *The Queen in Right of Alberta*, *supra*, footnote 4, the Alberta Court of Appeal held that a failure to warn that leaving the door of a certain type of furnace open was dangerous was not an operational act but pure non-feasance (the court seems to equate the operational/policy distinction with the misfeasance/non-feasance distinction) and so held the Crown not liable in negligence. The operational/policy distinction stated in *Anns* was also approved in *Thorne Riddell Inc.* v. *Alberta* (1983), 28 Alta. L.R. (2d) 326, at pp. 321, 322 (Alta. Q.B.).

[6] [1984] 2 S.C.R. 2, (1984), 10 D.L.R. (4th) 641, [1984] 5 W.W.R. 1. The city issued stop work orders against the construction of the Hughes' house, but did nothing further to prevent construction or occupancy, despite the fact that construction continued in violation of the order. The elder Mr. Hughes (an alderman in Kamloops) lived in the house for 3 years and then sold it to the plaintiff, who did not discover the faulty foundations (the cause of the stop work order) until almost a year later. The trial court apportioned fault 25% to the city and 75% to the Hughes for losses associated with the defective foundations, and the Court of Appeal affirmed the decision. The appeal to the Supreme Court of Canada was dismissed, McIntyre and Estey JJ. dissenting.

In her judgment for the majority, Wilson J. laid the misfeasance/non-feasance distinction permanently to rest, saying it was irrelevant and applied the test set out in *Anns*,

principles from the common law of negligence, they have since been applied to the private sphere by the House of Lords in *Junior Books* v. *Vietchi Co.*,[7] with the result that individuals and firms in the private sector may now be held liable in tort for a failure to act or to act sufficently.

It is our view that the use of common law principles of negligence to impose obligations to deliver public goods to individuals was ill-considered, and distorts the function of the courts, and the nature of the state. The reasons for our concern can be segregated into three categories. First, the common law concepts do not recognize the concept of the state. The application of common law negligence principles to state activities ignores the special political characteristics of one of the actors; it ignores the institutional competence of the courts; it fails to appreciate the relationship between representative processes and bureaucratic processes; it attempts to apply concepts of "negligence" to bureaucratic activities which cannot be subject to that concept; and it may represent an attempt by the courts to interfere with the design and delivery of public welfare programs. Most important, it fails to appreciate the peculiar role of the state in allocating and distributing wealth, in a variety of forms, to individuals and groups. Second, the application of private common law concepts of right and duty in cases of state activity treats duties owed to the state as equivalent to duties owed to private individuals, and rights of the state as equivalent to rights of individuals. Nothing could be further from the truth. The right of

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with a slight modification. She stated that in order for the courts to impose a private law duty on a public authority, it must be shown that the decision made by the authority was "operational" and not "policy", that there was a sufficiently close relationship between the parties for the authority to contemplate reasonably that its carelessness might cause damage to the person, and that there were no policy considerations which ought to negative or limit the authority's liability. In applying this test, Wilson J. held that the failure of the appellant to take any action at all was "operational" in character in that it could not be "a policy decision taken in the *bona fide* exercise of discretion"; *ibid.*, at pp. 24 (S.C.R.), 673 (D.L.R.), 437 (W.W.R.). Furthermore the statute imposed a duty and not a mere power on the Inspector to enforce the bylaws, and this duty was breached. There were no policy reasons to preclude the appellant being held liable, and so the appeal was dismissed.

In his dissenting judgment, McIntyre J. (Estey J. concurring), approached the case from a different perspective saying that the *Anns* case was inapplicable. Although he agreed that the Building Inspector had a statutory duty to enforce the bylaws, he found that this duty was fulfilled when he reported to Council. The responsibility then fell to the city to decide what action to take and there was no duty at common law by which a municipality is required to enforce its bylaws. He then went on to say that the Council's decision was not reviewable by the courts because it was performing a quasi-judicial function instead of a business function such as that in the *Anns* case.

The *Anns* criterion for liability has been modified to a considerable degree in two recent cases of the House of Lords and Australian High Court. See *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson and Co. Ltd.*, [1985] 1 A.C. 210, [1984] 3 All E.R. 529 (H.L.); *The Council of The Shire of Sutherland* v. *Heyman* (1985), 60 A.L.R. 1 (Aust. H.C.); and see, *infra*, the text commencing at footnote 122.

[7] [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

the state to govern has no equivalent in private law, and we believe that the right to rule carries with it a complementary duty—reflected in the right of individuals to that which the state provides. Third, the application of common law concepts to the state and their concomitant distortion resulting from the first two factors described above, has been associated with the imposition of duties of benificence applied to private firms and individuals. That may or may not be desirable, but in either case it should come only after careful analysis of the ethical and policy implications of such reform, and not as a result of developments in public law.

I. *The State and the Distribution of Public Benefits*

It is our view that the legislatures and courts, in developing rules of public conduct and responsibility premised on private law tort concepts, have failed to consider a wide range of factors which should be recognized in articulating the relationship of the private individual and the state. These factors suggest to us that doctrines and principles (and their underlying policies), which have been created to resolve and order private relations, are inappropriate to a model of "state liability". Accordingly, we here provide a model which recognizes the relationships among individuals, the bureaucracy and representative institutions, and distinguishes rights and duties owed between private individuals and rights and duties between individuals and the state.

First, we should acknowledge that the state (or individuals acting with the authority of the state) should represent the interests of the potential and actual victims of its activities as well as the beneficiaries.[8] While this does not mean that the state as an agent of its constituents must never act contrary to its principals' interests, (since unanimous consent to state action is an impossibility), one can argue that the legal obligations imposed on the state need not mimic the obligations imposed on private firms. Private individuals and private firms (as a representative or amalgam of private interests) can perhaps justify their behaviour as activity which serves their private interests—self-interested behaviour, whether we agree with it or not, is at least understandable in that context. As well, the imposition of legal obligations on private firms may have to be evaluated in light of its impact on the liberty of the individuals in the firm. Conversely, the state's interests must to some degree reflect those of its victims, and where they do not, the state must, unlike the firm, justify sacrificing some of its principals for others. Similarly, restricting the

[8] This view of the state as reflecting the interests of all members of the collectivity is consistent with "common good" and "social contract" theories of the state. The state, if it demands obedience, and subjection of autonomy from its members may be able to legitimate its existence in terms of a reciprocal obligation to afford certain benefits to its citizens. See E. Barker (ed.), Social Contract: Essays by Locke, Hume and Rousseau (1962); R. Dworkin, Taking Rights Seriously (1977), pp. 150-183.

freedom of bureaucrats to act in a self-interested fashion raises different concerns than does restricting the personal freedom and liberty of individuals who constitute private firms.

Second, the application of private tort law to the state ignores the special political status of representative institutions, and the relationships among those institutions and the courts. The political doctrine of parliamentary supremacy, as well as judicial recognition of executive powers in relation to vestigial prerogatives, suggests judicial deference.[9] Absent constitutional authority, judges, as the least representative branch of the state, have not been given the power to declare legislative enactments void, or to prevent members of the executive from fulfilling their legislatively defined responsibilities or prerogative powers.[10] The sovereignty of the state rather than judges, as well as separation of powers doctrine, implicitly entail the concept of some institutional supremacy whether of parliament, the monarchy or the judiciary.[11]

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[9] For further discussion see S.A. de Smith, Constitutional and Administrative Law (1971), pp. 114-117 where he points out that while the courts may determine the scope of a prerogative they will not review the grounds on which it has been exercised. This deference is evidenced in *R.* v. *Allen* (1862), 1 B. & S. 850,121 E.R. 929 (K.B.); *Chandler* v. *D.P.P.*, [1964] A.C. 763, [1962] 3 All E.R. 142 (H.L.); but note the reservation at pp. 809-810 (A.C.), 157-158 (All E.R.).

[10] Thus the courts, recognizing the political philosophy of parliamentary sovereignty, have consistently said that the wisdom, expediency or policy of a statute is not their concern; *Attorney General for Ontario* v. *Attorney General for Canada (References Appeal)*, [1912] A.C. 571, at p. 583 (P.C.); *Anti-Inflation Reference*, [1976] 2 S.C.R. 373, at pp. 424-425, (1976), 68 D.L.R. (3d) 452, at p. 497; and similarly they say that they will not interfere with the proper exercise of statutory powers; *Birkdale District Electric Supply Co.* v. *Corporation of Southport*, [1926] A.C. 355 (H.L.); *Brown* v. *Dagenham U.D.C.*, [1929] 1 K.B. 737 (C.A.); *Barratt* v. *District of North Vancouver*, *supra*, footnote 5. However, the scope of that power will be interpreted strictly; *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 (H.L.); *Pride of Derby* v. *British Celanese*, *supra*, footnote 3. See also *Burmah Oil Co. (Burma) Trading Ltd.* v. *Lord Advocate*, [1965] A.C. 75, at pp. 144, 168, [1964] 2 All E.R. 348, at pp. 382, 398 (H.L.), for statements of the judicially unchallengable nature of the executive's right to exercise its prerogative.

It would appear that the only possible grounds for challenging the use of a prerogative would (apart from definitional issues) be under the Charter of Rights and Freedoms and then only if the Charter is held to apply to the prerogative powers. See *The Queen et al.* v. *Operation Dismantle Inc. et al.* (1983), 3 D.L.R. (4th) 193, (1983), 49 N.R. 363 (F.C.A.), affirmed *Operational Dismantle Inc. et al.* v. *The Queen et al.* (1985), 18 D.L.R. (4th) 481 (S.C.C.).

[11] The same separation of powers thesis justifies judicial deference in tort cases to the executive branch of government in the United States. See *Blessing* v. *United States*, 447 F. Supp. 1160, at p. 1171 (Dist. Ct., 1978); *Payton* v. *United States*, 636 F.2d 132, at p. 143 (C.A. 5th Cir., 1981), rev'd 679 F.2d 475 (C.A. 5th Cir., 1982). In essence decisions as to state liability and immunity should reflect the constitutional structure of government and the explicit as well as implicit separation of powers among the branches of the state; *Nixon* v. *Fitzgerald*, 457 U.S. 731, at pp. 748, 752 (1982). See also *infra*, footnote 117.

Third, the state is often engaged in numerous resource allocation activities over which the courts may be institutionally incompetent to exercise a supervisory jurisdiction.[12] The state is likely to be involved in polycentric disputes in which the determination of any particular factor or issue involves the simultaneous adjustment of numerous other factors and issues, and affects the interests of numerous individual and collective interests. The traditional bilateral dispute-resolution process carried on in courts is ill-suited to deal adequately with legislative and many bureaucratic activities of this sort.

Fourth, the application of traditional negligence law to private firms is carried out under several assumptions, many of which are inappropriate when applied to the state. One is that the firm has as its object either short term economic return to its owners, or long term growth. A second assumption is that the firm operates subject to economic constraints. Those assumptions suggest that, in imposing legal liabililty on the firm, the firm will react by passing costs on to consumers, or back to employees, creditors and shareholders, by adopting accident-reduction techniques, by insurance or by some mix of these possible responses. Conversely, paradigmatic state activities (for example, prosecuting, judging, policing, standard-setting, taxing, licensing, and welfare distributing to name but a few) may not have as their objects private or public wealth maximization, or long term growth. More important, the reaction of the state to legal liability is likely to be quite different from that of private firms. The state enjoys many of the characteristics of a monopoly— it can unilaterally set prices, restrict entry by competitors, and can effectively preclude substi-

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[12] By "institutional competence" we mean the ability, independent of formal political authority, of the judiciary and judicial institutions to resolve state liabilty conflicts so as to further the long-term as well as the short-term interests of affected individuals, institutions and the state. In this context, the question of access to the courts, the effective remedial tools available to the court, the attitude and character of the judges, the evidentiary and procedural constraints and information available to the court, the participation of interested and potentially affected individuals and groups, the ability to review complex scientific and economic data, and the reactive rather than proactive character of curial institutions are all relevant in determining whether the court is an appropriate forum for judicial review. Certainly the courts have not been unaware of the issue. See *Payton* v. *United States*, *ibid.*; *Indian Towing Co. Inc.* v. *United States*, 350 U.S. 61 (1955); *Driscoll* v. *United States* 525 F.2d 136, at p. 138 (C.A. 9th Cir., 1975).

This is not the place to analyze fully the question of institutional competence, although we must admit that, on first impression, we think that the courts are inappropriate to deal with questions of resource allocation by the state. See L. Fuller, Adjudication and the Rule of Law, [1960-61] Proceedings, American Society of International Law 1; A.D. Twerski *et al.*, Shifting Perspectives in Products Liability: From Quality to Process Standards (1980), 55 N.Y.U.L. Rev. 347, at pp. 351-352; A. Chayes, The Role of the Judge in Public Law Litigation (1976), 89 Harv. L. Rev. 1281.

It is interesting to note that Lawrence Tribe believes that institutional competence is not a critical variable in expounding constitutional issues; see L. Tribe, American Constitutional Law (1978), pp. 13, 14.

tute activities. Its ability to "self-insure" and thus to insulate itself from the effect of liability rules and the courts is virtually unlimited.[13] To the extent that private tort law doctrines are premised on deterrent objectives they may be singularly ineffective when applied to the state.[14]

Fifth, the state, unlike private firms, is permitted, indeed its primary purpose even to minimalist theorists is to supply services which are not supplied by private markets. Thus the modern welfare state will often be engaged in correcting market dysfunction, redistributing wealth, and exercising police powers. In all these cases deliberate, advertent, and politically mandated activities are permitted to prejudice the interests of some private citizens, so as to benefit others overall. Decisions by the state to tax private citizens, or to fail to provide wealth through the delivery of public services to private citizens, are the vehicles through which socially

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[13] Questions of state liability must thus be seen as cases which demand an answer to Holmes admonition that "State interference is an evil, where it cannot be shown to be a good. Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise"; O.W. Holmes, The Common Law (1881), p. 86. Our theory of state liability is a theory in which the state does, in fact, represent an insurer of last resort. "The State is, in some ways, an insurer of what is often called social risk, i.e., the risk arising from social activity, which in practice, is carried on by the intervention of the State"; L. Duguit, Traité de droit constitutionnel (3ième éd.), p. 469, as translated in B. Schwartz, French Administrative Law and the Common-Law World (1954), p. 295. There is little doubt that substantial social benefits may be achieved through the loss-spreading associated with state liability; G. Calabresi, The Costs of Accidents (1970), pp. 27, 39-47. See *Payton* v. *U.S.*, *supra*, footnote 11, at p. 144; *Rayonier Inc.* v. *U.S.*, 352 U.S. 315 (1957).

[14] Academic and judicial musing (and one can hardly call it anything else) regarding the instrumental affect of state liability while common, is contradictory. Certainly, some judges are cognizant of the enormous potential impact of liability awards on the behaviour of individual civil servants, and thus may be reluctant to impose liabilty. See *Paul* v. *The King* (1906), 38 S.C.R. 126, at p. 136; *Downs* v. *United States*, 522 F.2d 990, at pp. 997-998 (C.A. 6th Cir., 1975); *Emch* v. *United States*, 630 F.2d 523, at p. 527 (C.A. 7th Cir., 1980).

Other judges do not believe that the imposition of liability will influence executive behaviour. See *Anns* v. *Merton London Borough Council*, *supra*, footnote 4, at pp. 501, 507 (A.C.), 755, 762 (All E.R.). Some academics, however, believe that the bureaucracy will "over" react to judicial awards. See P.S. Atiyah, Accidents, Compensation and the Law (3rd ed., 1980), p. 62. At least one court believes that the threat of liability is a positive factor; *Payton* v. *U.S.*, *supra*, footnote 11.

There has, sadly, been very little empirical investigation of the regulatory impact of judicial compensation awards on either the bureaucracy, or on individual bureaucratic behaviour. Empirical work is critical if one is to design appropriate models of state liability. Three preliminary studies on the impact of judicial damage awards on bureaucratic behaviour which uniformly conclude that damage awards result in minor institutional reform if at all, are: M.J. Jaron, The Threat of Personal Liability Under the Federal Civil Rights Act: Does It Interfere with the Performance of State and Local Government?, [1981] Urban Lawyer 1; Project, Suing the Police in Federal Court (1978), 88 Yale L.J. 781; E.J. Littlejohn, Civil Liability and the Police Officer: The Need for New Deterrents to Police Misconduct (1981), 58 U. Det. J. Urb. Law 365, at p. 428.

accepted state activity takes place. While it is true that such decisions may be subject to constitutional challenge on a variety of grounds, the state must be entitled, at least on some occasions, to inflict deliberate injury on individuals and to allocate benefits to others. Whatever our rules of private tort law might be, they must take into account this aspect of state activity.[15]

Sixth, the assessment of "negligence" against bureaucrats, however one analyzes the concept, is a very different task than determinations of negligence against private firms. It is different because the state is entitled to injure citizens for a variety of motives; it is different because the state does not operate subject to exogenous economic constants like private firms; it is different because the political authority of the courts is limited in the case of state activities; and most important, it is different because of the environment within which bureaucratic activity takes place. Agency behaviour is a result of the legislative history, internal and external interpretations of the legislation and regulations which establish the government department, the public and private agendas of its political actors, the training, history and ambitions of its personnel, its financial resources, and the attitudes and resources of its private constituencies.[16]

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[15] Obviously, the courts recognize this function of the state whenever they enforce the Income Tax Act, the Criminal Code and penal provisions under other acts, and as well when they accept the defence of statutory authority. See *Allen* v. *Gulf Oil Refining Ltd.*, [1981] A.C. 1001, [1981] 1 All E.R. 353 (H.L.); *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430, at p. 455 (H.L.); *Dunne* v. *North Western Gas Board*, [1964] 2 Q.B. 806, [1963] 3 All E.R. 916 (C.A.); *Portage La Prairie* v. *B.C. Pea Growers Ltd.*, [1966] S.C.R. 150, (1966), 54 D.L.R. (2d) 503, 54 W.W.R. 477. Similarly, the refusal of the courts to interfere with the exercise of the war prerogative recognizes this distinct character of state action; *Attorney General* v. *De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508 (H.L.); *Burmah Oil Co. (Burmah) Trading Ltd.* v. *Lord Advocate*, *supra*, footnote 10.

[16] P. Sabatier, Social Movements and Regulatory Agencies: Toward A More Adequate—and Less Pessimistic—Theory of Agency 'Client and Captive' (1975), 6 Policy Sciences 301.

The assumption that the state will simply make decisions that social benefits exceed social costs is naive. The bureaucracy may react to a large number of policy inducements including political payoffs to the agency in future budget allocations, legislative initiatives, public support for and reaction to agency activities, and personal benefits to individual employees. See B.M. Mitnick, The Political Economy of Regulation (1980), pp. 158-168; S. Peltzman, Toward a More General Theory of Regulation (1976), 19 J. of Law and Econ. 211; P.J. Quirk, Industry Influence in Federal Regulatory Agencies (1981). See text *infra*, at footnote 51 and at footnotes 103-106. The development of bureaucratic policy does not seem to us to be capable of evaluation in terms of fault or reasonable care, given the authority of the state to engage in distributive activities. See M. Aranson, H. Whitmore, Public Torts and Contracts (1982), p. 54.

"Reasonableness" of bureaucratic conduct has been articulated as a ground of judicial review in administrative law, and is notoriously vague and incapable of definition. See *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*, [1948] 1 K.B. 223, at p. 230, [1947] 2 All E.R. 680, at p. 683 (C.A.); *City of Vancouver* v.

The influence of these factors on bureaucratic activity is pervasive and applies as much to the junior levels of the bureaucracy as it does to the senior.

Neither judges nor legislators have the information, background or resources to develop negligence standards to be used by or imposed on bureaucrats.[17] Information about the world and the impact of regulation is generated within the bureaucracy over time, and thus the bureaucracy should be perceived as creating and modifying its own standards in light of experience with its programs and their constituencies.[18] In the same way bureaucrats, unlike judges, administer and manage regulatory agendas as well as decide and inform. In some regulatory contexts, each situation which the bureaucracy confronts can be perceived as a unique event— justifying the absence of standards, and explaining idiosyncratic and dynamic decision-making processes which are situation-dependent.[19] If one accepts that model of bureaucracy, it is obviously inappropriate for the courts, when responding to claims by individuals who have been injured as a result of state action or inaction, to determine the issue on the basis of judicial precedent in the context of tort law. Both of these regulatory processes suggest there should be judicial deference to an intellectual process very different from its own. The justification of bureaucratic decision-making on grounds of efficiency, the effect of the decision on other members and classes of society who do not participate in the proceedings, and the achievement of articulated agency objectives should not be re-evaluated according to judicial ideologies,[20] and thus it may not be feasable to demand the development of standards and rules in certain categories of bureaucratic decision-making, especially involving managerial, non-recurring events.

In this article, we argue that these political and bureaucratic realities must be recognized by judges who are called upon to determine the rights of individuals against the state. We believe that in defining rights in this context judges should reflect on their institutional competence, their abil-

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Simpson (1975), 48 D.L.R. (3d) 215, [1975] 1 W.W.R. 207 (B.C.C.A.), rev'd [1977] 1 S.C.R. 71, [1976] 3 W.W.R. 97.

[17] I. Ehrlich, R. Posner, An Economic Analysis of Legal Rulemaking (1974), 3 J. of Leg. Stud. 257, at pp. 267-268. As we point out later, however, our model may provide incentives to senior bureaucrats to issue administrative directives, rules and standards, and to junior bureaucrats to demand and conform to them. See text, *infra*, at footnotes 88, 89. See also K.C. Davis, A New Approach to Delegation (1969), 36 U. Chi. L. Rev. 713, at pp. 725-730, and see commentary on this point in J.H. Ely, Democracy and Distrust, A Theory of Judicial Review (1980), pp. 133-134.

[18] K.C. Davis, 2 Administrative Law Treatise (2nd ed., 1979), pp. 175-176; H. Friendly, The Federal Administrative Agencies (1962), p. 14.

[19] D.J. Gifford, Communication of Legal Standards, Policy Development, and Effective Conduct Regulation (1971), 56 Cornell L. Rev. 409, at pp. 461-66.

[20] See R. Unger, Law in a Modern Society (1976), p. 180.

ity to define bureaucratic negligence, and most importantly, their role in defining and allocating benefits associated with the modern welfare state.

Finally, in determining disputes in this context, judges must recognize that rights against the state are qualitatively different from rights against individuals. As we said above, judges have used the misfeasance/non-feasance analysis to justify or explain a refusal to impose liability in tort on bureaucrats for failures to provide public benefits. This distinction between misfeasance and non-feasance correlates with another important dichotomy; that which exists between obligations to do particular acts, and obligations to refrain from doing, that is to say obligations to not do particular acts. Acts which are done in breach of a duty to not do them generally constitute misfeasance, while actions which are not actually performed constitute non-feasance, whether or not an obligation to do them exists. Thus, if I have a duty to refrain from damaging your property, my act of doing so is misfeasance. If I fail to save your property from harm which someone else is causing, that failure to act would constitute non-feasance. If I had a duty to save your property I would be liable for non-feasance and if I had no duty I would not be so liable.

The acts which people are obligated to refrain from performing are generally acts of non-interference. These traditionally have formed the core of the subject matter of the private law of torts and can be usefully categorized into duties to refrain from interfering with other people's persons, duties of non-interference with other people's property, and duties of non-interference with other people's economic expectations (contractual rights). These duties of non-interference limit agents or actors in what actions they can perform, and generally require that permissible actions be carried out according to a reasonable standard of care.

In contrast to the private sphere where rights to beneficial positive action are contractually created or are correlatives of duties in other ways voluntarily assumed, rights which the individual has to beneficial positive action on the part of the state rest on a different foundation. It is our view that people have a right to whatever benefits the community, acting through the state, directly or indirectly has decided to and actually does disperse to the public. If by inadvertence individuals fail to receive that to which they are entitled, they should have recourse to the law against the state or the relevant public body as a matter of public entitlement.

Rights which individuals have against the state are rights which either everyone has, or would be entitled to under particular conditions, the correlative duties of which lie on the *state* to be carried out by its agents. Since these are entitlements, it is irrelevant whether or not they are duties not to cause harm, or to confer benefits. Thus the distinction between misfeasance and non-feasance, which is critical as between members of the private sector, is irrelevant when the issue concerns entitlements against the state. If members of the public have a right to compen-

sation when they have suffered a loss resulting from the failure of an exercise of a public power, the duty will fall on the state, *not* on an individual bureaucrat, nor directly on the individuals who constitute the state. On this view, the courts should not be imposing duties of care on individual civil servants, nor searching for fictional legislative intentions to create private causes of action, but should be articulating the characteristics and parameters of the entitlement which has been allocated by the state.[21]

Rights against the state, like contractual rights, entail entitlements, while property rights and rights against the person entail rights of non-interference. In regard to the latter two concepts, liability can be direct and/or vicarious. Vicarious liability, however, does not arise in the context of contracts, as it does not matter whether the breach of contract was committed by an employee of one of the parties as an agent, or by the contracting party. In all cases, the contracting party will be directly liable, and the employee or agent not so.[22] Similarly, vicarious liability should not arise in the context of rights against the state, as it should not matter whether the denial of an entitlement was committed by an individual bureaucrat, or by the "state" itself. In all cases the state should be directly liable.

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[21] The intention test has been criticised by numerous writers and recently by the Supreme Court of Canada. See *Queen in Right of Canada* v. *Saskatchewan Wheat Pool* (1983), 143 D.L.R. (3d) 9, [1983] 3 W.W.R. 97 (S.C.C.). Compare Hogg, *op. cit.*, footnote 3, p. 99.

In defining the entitled class and benefits, courts should not fall in the trap of attempting to determine a fictional legislative intention as to whom the representative branch of government "intended to benefit". The definition of the entitled class is certainly influenced by judicial values as to whom *ought* to be benefited, and the uncertainty of the analysis cannot be avoided by simplistic references to legislative intention. The question, as well, depends as much on bureaucratic behaviour as on legislative history and judicial values. There is no escaping that fact, and it is ludicrous to try to define it as a scientific technical inquiry by judges. See text, *infra*, at footnotes 66-68, and Part VI; J.S. Lindgren, Social Theory and Judicial Choice: Damages and Federal Statutes (1979), 28 Buff. Law Rev. 711, at pp. 741-49.

Calabresi and others have pointed out that traditional common law methods of judicial reasoning are inappropriate to an age of statutes; "if statutes are to be made an integral part of the new common law fabric, if statutes are to become ever more common, and if the fundamental role of common law courts is to keep like cases being treated alike, it is no wonder . . . that . . . . the courts almost come to be treated as having the same type of common law authority over statutes as they did over their own old doctrines". See G. Calabresi, A Common Law for the Age of Statutes (1982), p. 86.

[22] The contractual obligation is owed by the principal, and the agent will incur no liability unless he acts without authority. See *Freeman and Lockyer* v. *Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480, [1964] 1 All E.R. 630 (C.A.); *Russelsteel Ltd.* v. *Consolidated Northern Drilling & Exploration Ltd.*, [1981] 4 W.W.R. 113 (Alta. Q.B.); S. Waddams, The Law of Contracts (2nd ed., 1984), pp. 185-186.

To analyze and decide cases of a failure to convey benefits in the exercise of statutory powers by using private law principles of negligence, is to bring into play issues of misfeasance and non-feasance, questions of fault and standard of care, and vicarious liability, none of which are relevant to issues relating to the direct liability of the state or other public corporate bodies to provide benefits to private individuals. Whether that liability is viewed by judges as arising from a breach of a statutory duty, or from the failure to confer a benefit by the exercise of a public power, makes no difference as to the foundation of liability. The difference lies rather, in how the entitlements are to be defined.[23]

For all these reasons, it is impossible for the principles of the law of negligence to furnish a basis for liability on the part of the state for failure to confer a benefit through the failure to exercise a public power. It is thus not surprising when common law principles were applied by the House of Lords to the failure of a public body to repair a dike in *Eask Suffolk Rivers Catchment Board* v. *Kent*,[24] that no liability was found. This case governed the law relating to public bodies for a good many years.[25] As it became more common for legislation to be drafted in discretionary terms,

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[23] There are, however, two points which we believe must be dealt with immediately. First, we see little merit in the continuation of the requirement now imposed in the case of statutory duties, that the complainant demonstrate that the legislation "bind the Crown". See Hogg, *op. cit.*, footnote 3, pp. 100-102; T.C. Hartley, J.A.G. Griffith, Government and Law (1975), pp. 308-309. Second, we see no reason to analyze the issue in terms of a "negligent" breach of a statutory duty or power. Historically, it appeared that breaches of statutory duties by the state would result in strict liability; C. Harlow, Compensation and Government Torts (1982), pp. 68-70. Recent cases suggest, however, that the courts will demand the negligent breach of statutory duties, applying, incorrectly in our view, principles of private law. See *Baird* v. *The Queen in Right of Canada*, *supra*, footnote 5, at pp. 9 (D.L.R.), 282-283 (N.R.).

[24] [1941] A.C. 74, [1940] 4 All E.R. 527 (H.L.). Earlier cases decided on similar lines include *Wakely* v. *Lackey* (1880), 1 L.R. (N.S.W.) 274; *Sheppard* v. *Glossop Corporation*, *supra*, footnote 3. See D. Foulkes, Administrative Law (5th ed., 1982), pp. 377, 380-382.

The *Kent* v. *East Suffolk Catchment Board* decision is particularly interesting insofar as it contains judgments which reflect both private and public perspectives. Lord Simon analyses the issue of public liability with particular emphasis on the resource allocation decisions of the board. The other judgments, including the dissent by Lord Atkins, adopt a narrow private law misfeasance/nonfeasance perspective focusing on the "no new damages" issue. See W. Friedmann, Law and Social Change in Contemporary Britain (1951), pp. 176-177.

[25] See *Bank View Mills* v. *Nelson Corporation*, [1943] 1 K.B. 337, [1943] 1 All E.R. 299 (C.A.); *Administration of the Territory of Papua and New Guinea* v. *Leahy* (1961), 105 C.L.R. 6 (Aust. H.C.); *Barratt* v. *Corporation of North Vancouver*, *supra*, footnote 5, at pp. 428 (S.C.R.), 584 (D.L.R.). *Cf. Fisher* v. *Ruislip-Northwood U.D.C.*, [1945] K.B. 584, [1945] 2 All E.R. 458 (C.A.).

Early American cases also appeared to exclude liability for a denial of a benefit. See for example, *Moch Co.* v. *Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (N.Y.C.A., 1928).

and for public bodies to be found liable for breaches of statutory duties, the inconsistency entailed when no liability could lie in regard to statutory powers became more and more apparent. Rather than treating public powers and state liability as questions of entitlement, lawyers and judges have been unwilling to break away from the framework of negligence law, preferring to distort those principles to achieve their unarticulated objectives.[26]

In particular the House of Lords in *Anns*, had to redefine the risk principle which underlies the law of negligence so that it would apply to a failure to confer a benefit as well as to the causing of harm through positive action. The result was, and is the application of the *prima facie* duty of care doctrine to the state and other representative institutions. As we explained, the doctrine fails to recognize the distinction between rights against the state and rights against other private individuals. As well, it fails to take into account the politicial sovereignty of the state, the institutional competence of the judicial system, and the benefit granting function of the welfare state. In the end, it furnishes no clear guidelines for deciding questions relating to the liability of the state. Simultaneously, the *prima facie* duty doctrine abolishes the distinction between misfeasance and non-feasance for the law regulating private individuals and firms, thus removing whatever stability of expectation the principles of negligence furnished in the private sphere.

The state may be liable to compensate private individuals in two quite different liability contexts.[27] The first is represented by cases in

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[26] Numerous academics and the House of Lords itself have called for a reconsideration of the current legal model, and the creation of a separate body of law which would provide compensation for losses associated with state action. See *Hoffmann-La Roche* v. *Secretary of State for Trade and Industry*, [1975] A.C. 295, at p. 359, [1974] 2 All E.R. 1128, at p. 1148 (H.L.). We do not agree with Professor Hogg, *op. cit.*, footnote 3, p. 235, that the principles of the common law are flexible enough to apply to peculiarly governmental activity, and that sweeping radical reform is not necessary. The Diceyan view of the rule of law, which he used to justify the equal treatment of a bureaucrat in cases of unauthorized injury, is singularly inappropriate to the articulation of direct state liability for denial of state entitlements which we develop in this paper; see A.V. Dicey, The Law of the Constitution (10th ed., 1959), p. 193; Harlow, *loc. cit.*, footnote 23, p. 13; H.W.R. Wade, Constitutional Fundamentals (1980), p. 663, calling for the application of "ordinary" and common law to the state.

It is our view that the call for a special regime of law applicable to compensation issues and the state has been ignored for too long. See W. Friedmann, Law in a Changing Society (1964), p. 303; P. Craig, Compensation in Public Law (1980), 96 Law Q. Rev. 413, at pp. 434-435.

We should point out that this entitlement perspective is only one of several possible analytical approaches to the issue of state liability, and applies only to a limited subset of state actions.

[27] The issue which we discuss here, is the *direct* liability of the state to compensate a private individual. The various crown liability acts originating in the post-war era were

which independently recognized rights of non-interference are infringed by an individual who is acting as an agent or employee of the state. The paradigm case in this category would be a traffic accident involving a state agent, where liability will usually be imposed, absent a demonstration of statutory authority.[28] The second situation is represented by claims by individuals that they are entitled to certain benefits from the state which they have not received, or that they have been injured as a result of not receiving those benefits.

The facts in *Anns* v. *Merton London Borough Council* furnish a typical example of a situation where this latter kind of claim would be appropriate. A public authority sets up a building inspection system in order to ensure that new construction meets certain minimum standards. A benefit is thereby furnished to the public in that all construction completed after that date should meet the specified standards, and every subsequent purchaser is a recipient of this benefit. In *Anns* the inspector either failed to inspect the foundations of a building eventually purchased by the plaintiff, or negligently approved foundations which failed to meet the standards set by the public body. The plaintiff, therefore, failed to be a recipient of a benefit, which as a member of a class he was to receive and which other persons in this class normally did and would continue to receive. He thus suffered an injury as a result of not receiving a benefit

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commonly framed in terms of vicarious liability in tort, although British Columbia is an exception; *supra*, footnote 2. The issue does not arise in the case of municipal government liability since the municipalities are subject both to direct and vicarious liability risks. See also, *Williams et al.* v. *Corporation of the City of Saint John* (1984), 27 C.C.L.T. 247, at pp. 276, 277, considering Police Act, S.N.B., 1977, P-9.2, s. 17, as amended.

It is our view, however, that the particular liability regime is of central importance. The choice between vicarious and direct liability may have a significant effect on the behaviour of bureaucratic actors. A concern with retaining the independence of bureaucratic judgment suggests that liability in these cases should be direct state liability rather than personal bureaucratic liability; consider, for example, the arguments underlying the traditional immunity of judges and prosecutors. Direct liability has been imposed in several Australian states. See *Thorne* v. *Western Australia*, [1964] W.A.R. 147 (W.A.S.C.); *Introvigne* v. *Commonwealth* (1980), 32 A.L.R. 251 (Aust. H.C.). Hogg, *op. cit.*, footnote 3, pp. 68-72. See also South Australia Crown Proceedings Act 1972-80, s. 10(1)(b). Recent legislative hearings in the United States have considered amendments to the Federal Tort Claims Act providing for the direct liability of the United States government. See H.R. 595, Federal Tort Claims, Hearings before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 98th Cong., April 27, 28, 1983.

[28] We thus distinguish between traditional judicially created common law entitlements which exist independently of the legislatures and bureaucracy and which are *not* the subject of this essay, and entitlements which exist as a result of state action. It is the latter which are the subject of our analysis. Richard Epstein has drawn a similar distinction; R.A. Epstein, Taxation, Regulation, and Confiscation (1982), 20 O.H.L.J. 433, at p. 440.

This approach must be considered "statist" in that we believe that the state determines both entitlements and allotment of harm (or disentitlement) decisions. G. Calabresi,

which he was entitled to receive as a member of the class for whose benefit the public authority actually implemented the scheme and distributed the benefit.

The entitlement model of liability which we have developed applies to these second kinds of claims, unlike the first. The non-receipt of state benefits should not be analyzed in the context of common law negligence doctrines but should be determined through judicial definition of statutory and regulatory benefits to which individuals are entitled. Thus, actions against the police should be analyzed, in some contexts at least, through an analysis of the kind and level of police protection benefits to which the individual is entitled against the state. Actions for inadequate maintenance of highways should be analyzed in terms of the statutory and regulatory framework which define the transportation benefits to which individuals are entitled. And actions against the state to recover economic losses associated with the alleged negligent supervision of trust companies should be analyzed using a similar analytical framework.

These public entitlements are not based on traditional concepts of property nor do they rest on the imposition of duties of care in negligence law. We should not demand reliance on the benefit as a precondition of compensation nor should we require a demonstration of a legitimate or rational expectation of the benefit. The public entitlement which we have described presupposes that individuals have rights to compensation from the state when the state has imperfectly distributed the entitlement, because the state as an institution for manifesting collective ideals and values, has determined that the individuals are to be benefitted. Judges

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A. Melamed, Property Rules, Liability Rules and Inalienability: One View of the Cathedral (1972), 85 Harv. L. Rev. 1089, at p. 1093. At the same time we acknowledge the possibility of a bipartite property entitlement framework. First, we recognize common law property rights and protected interests recognized by the "state as judge" which may reflect self-created and self-defined ownership concepts flowing from labour and exchange, concerns with protecting reliance, or utilitarian rationales; R. Nozick, Anarchy, State, and Utopia (1974), pp. 54-87. These judicially created entitlements *may* be protected from state interference in the same way as they are protected from private interference, although one of us thinks differently. In the case of this category of entitlements, we may protect certain entitlements from interference by other individuals and other groups of individuals *including the group called the state*. On one view, it should not matter if a legally protected interest is interfered with by one, two or a number of others.

Second, we recognize entitlements or rights generated from the state as an institution, which *are* protected from the state. This second category is, however, quite different from the first since it only exists with respect to "all of the others", that is the state. Thus in the case of the first category of entitlements if judges have recognized certain rights as between private individuals and firms it can be argued that they ought to be recognized as well as against the state. In the case of the second category of entitlements, if the court has not recognized certain rights, the victim must demonstrate that right, and find its source in legislation and bureaucratic action. This model recognizes that the state may establish additional rights, and that the source of those rights is the legislation and bureaucratic behaviour, not in judicial rhetoric.

should, in our view, recognize this collective expression of benefits, and should not cling to common law traditions of property or fault-based recovery on negligence grounds. The merit of our approach consists of three elements. First, insofar as our model presumes equal treatment in like circumstances in the allocation of state benefits it raises questions of justice; second, it demands the recognition of public entitlements and the articulation of relevant distinguishing criteria through an examination of the legislative and bureaucratic process through which they are established, defined and allocated; and third it requires judicial deference to the ultimate authority in the legislature and bureaucracy to determine the relevance of the distinguishing criteria, and thus to define state entitlements.

A theory of individual entitlement to state-distributed benefits will produce at least three different kinds of entitlement claims. There may be claims as to the existence of the entitlement— whether it will be provided, and if so at what general level. Thus citizens can claim rights to education, medical care, employment, decent housing, or even a certain general standard of living. Such claims are normally made in the context of the political arena, and have traditionally not been considered to be appropriate for the courts to resolve.[29] A second kind of claim can be made as to the fairness of allocation decisions, once the decision to provide some benefit has been made. Such claims would allege wrongful discrimination in that in the allocation of benefits by the state, relevantly like cases have not been treated alike—persons who are in all relevant respects like the people given certain benefits, have not been included within the class entitled to the benefits. Such claims would include claims of wrongful discrimination in public employment practices, unequal pay for work of equal value in the public sector, different levels or qualities of services given to different localities which reflect racial or ethnic differences, and unfairness in the granting or denial of licencing privileges. Such claims as these also have traditionally been made in the political rather than the judicial arena in Canada. Section 15 of the Canadian Charter of Rights and Freedoms[30] will, no doubt, bring this kind of claim before the courts, and will raise intractable issues as to when cases are alike, and what are to be the criteria of relevant similarity.

Finally, there is the third type of claim which is the subject matter of our article and which we will call questions of marginal entitlement.

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[29] One reason why the courts cannot adequately deal with such claims is that there is no apparent consensus as to what is the appropriate role of the state. Without some kind of answer to this question, courts have no criteria for reviewing governmental decisions. One could, however, argue that almost every theory of the state assumes certain minimal benefits such as police protection, and so that these at least could be enforced by the courts. One still would be faced, however, with problems of how much of the benefit is to be given.

[30] Part I of the Constitution Act, 1982, as enacted by the Canada Act, 1982, c. 11 (U.K.). The Charter was proclaimed in force on April 17, 1982, but, by virtue of s. 32, section 15 came into effect on April 17, 1985.

These are claims which assume a decision as to the provision of a public benefit and its allocation as already made in the legislative and bureaucratic arenas, and constitute demands that that which has been allocated must actually be given, or if it is too late for it to be given, compensation should be given instead. In our model, the legislative branch of government articulates a deliberate distributive judgment, and establishes a class of beneficiaries through legislative action. We will call this the first order decision. The beneficiaries are generally, however, only imperfectly identified. The precise scope of the entitlement, the subject matter of the state benefit, and the identities of the particular beneficiaries are not predetermined. Bureaucrats are permitted to exercise discretion and judgment to delineate the exact entitlements, and to ration them to particular individuals—the second order entitlement decision. Thus the liability of the state in this context should be seen as a judicial articulation of marginal entitlements—the judiciary ascertains the first and second order decisions, and determines whether a particular individual should come within the boundary established by the legislative and bureaucratic institutions.[31]

The issue which we address in this article is whether losses associated with the exercise of public powers should be treated as questions of entitlement, or whether they should be treated as questions to be dealt with in terms of the traditional law of negligence. The law presently imposes liability where a person suffers damage as a result of someone breaching a duty owed to them which has been imposed by a statute. It would appear that the only significant difference between situations where persons have suffered as a result of a failure to receive a benefit where the bureaucracy has a statutory duty to confer it, and cases where persons have failed to receive a benefit where others in like situations are receiving it from a bureaucracy empowered to grant it, is that the latter case involves a delegation of decision-making power to the bureaucracy. If that is so, it can be argued that both kinds of situations should be treated as matters of entitlement. The issue is not one of negligence or the absence of reasonable care, it is one of entitlement to benefits allocated by representative institutions, with the courts engaged in a sophisticated, activist process which involves determining the existence and extent of the private entitlement.[32]

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[31] The thesis which we have developed does not attempt to distinguish among the various kinds of interests this entitlement thesis would protect. We admit, however, that this "interest" analysis clearly deserves further consideration and is currently under investigation by one of the authors. See *Board of Regents* v. *Roth*, 408 U.S. 564, at p. 571 (1972); R.B. Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection (1978), 127 U. Pa. L. Rev. 111.

[32] We do not consider it necessary to reiterate the powerful arguments of Charles Reich on this topic. See C. Reich, The New Property (1964), 73 Yale L.J. 733. Richard Stewart and Cass Sunstein have developed a sophisticated analysis of the individual claimant's legal rights *vis-à-vis* the bureaucracy in which they analyze (1) private rights

It is our view that the direction taken by common law judges and lawyers in recent years has not been well thought out. Lawyers have failed to appreciate fully the implications of attempting to impose unlimited responsibility on the state for foreseeable risks of personal injury, property damage, and economic loss associated with negligent or inadvertant state inaction. They have also failed to appreciate the implications of recognizing only judicially created property rights and refusing to recognize legislatively and bureaucraticly defined entitlements. As well, there has been little judicial or academic recognition that this issue does not nicely fit within our traditional categories of private tort law, or public administrative law.

Now, with *Anns* and its progeny, this has all changed. By giving remedies, for whatever reasons, for the failure of bureaucrats to give the benefits which they have undertaken to give, the courts have recognized rights or entitlements. Their existence is now a fact which has moved beyond the realm of controversy. What remains to be done is to articulate a theory which can justify the benefits as entitlements and to develop a model which will permit judges to determine individual cases. Given that the courts have in fact turned benefits into entitlements, we should forget the history of judicial rationalization which has led us to where we are, and attempt to articulate principles and instrumental goals for doing good things which we are now doing for bad reasons. We should, therefore, throw off the intellectual constraints imposed by the law of negligence and as well, those of the traditional judicial review model of administrative law, in an analysis of the implementation of decisions as to the allocation of benefits by public bodies. We need a new approach, a new theory, a new area of civil obligations of the body politic. The outlines of such a theory will be developed in Part II.

II. *The Right to Receive Benefits*

While we believe that judges ought to recognize property-like rights to public benefits, we must at the same time articulate a method of determining when specific individuals in specific situations should obtain the

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against other private individuals allegedly in violation of statutes, (2) private rights against the state for failure to enforce legislation, (3) private rights against the state to judicial review of unauthorized government controls, as well as (4) a private "new property hearing right" which as an entitlement is closely connected with our thesis; R. Stewart, C. Sunstein, Public Programs and Private Rights (1982), 95 Harv. L. Rev. 1195, at pp. 1207, 1255-1267. However, Stewart and Sunstein's concept of "new property hearing rights" is limited to procedural due process, while our model provides for *compensatory* property-like entitlements. As Stewart and Sunstein explain, the right "protects recipients of certain statutory benefits, . . . from arbitrary or discriminatory decisions by government officials to withhold those benefits"; *ibid.*, at p. 1307. At the same time so called entitlement based "private rights of initiation" where they permit individuals to compel the delivery of state benefits is closely related to our thesis; *ibid.*, at pp. 1271-1272, 1286-1289.

benefit, or compensation for their losses when the benefit has been denied. In these cases we will argue that if individuals are able to demonstrate that they are in like circumstances and under similar conditions as individuals who are receiving a particular benefit, the entitlement or compensation should be allocated to them also, subject to a demonstration by the bureaucracy either that there was no entitlement since its definition was on a non-rule basis as manifested in the bureaucratic behaviour, or alternatively, that through the application of the bureaucrats' relevant criteria, the individuals are not within the entitled class.

Perhaps one can gain some insight into the cases, and begin to develop a coherent theory of state liability, by articulating a conceptual framework drawn from what we refer to as relational analysis. A model which illustrates the relationships among the relevant actors in government liability cases begins with the recognition that state liability involves three institutions or classes of actors. These institutions we classify as distributors[33] (specifically the representative branches of government), providers (agents of the representative branches and specifically, the bureaucracy), and receivers (members of the public, and specifically the potential beneficiaries or victims of distributor and provider decisions, actions and inactions). The distributor is a representative institution whose politically defined function is to originate on a formal basis the kind and level of benefits to be transferred or rationed to the receivers, and perhaps as well to establish the general boundaries of the beneficially entitled class. We refer to this distributive decision as a first order entitlement decision. The provider is a bureaucratic institution through which the benefits are in fact defined and transferred over time. Given the bound-

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[33] In this essay we treat federal, provincial and municipal representative bodies as equivalent. As noted earlier, however, the courts have been reviewing the activities of municipal authorities for a considerable period; *supra*, footnote 1. See also *Mersey Docks and Harbour Board* v. *Gibbs* (1866), L.R. 1 H.L. 93; J.M. Pike, Canadian Municipal Law (1929), pp. 371-376; Cairns, *op. cit.*, footnote 1, pp. 200-215; D.S. Cohen, The Private and Public Law Dimensions of the U.F.F.I. Problem (1983-84), 8 Can. Bus. L.J. 410.

Nonetheless, the courts still state that legislative decisions, even those of municipal governments, are not subject to review. See *Welbridge Holdings Ltd.* v. *Metropolitan Corporation of Greater Winnipeg*, *supra*, footnote 5; *Dunlop* v. *Woollahar Municipal Council*, [1982] A.C. 158, [1981] 1 All E.R. 1202 (P.C.) (cause of action in damages does not arise from *ultra vires* zoning bylaw). Similarly, no liability will be imposed as a result of valid legislative acts. See *Re Apple Meadows Ltd. et al. and Government of Manitoba et al.* (1984), 10 D.L.R. (4th) 67, 32 R.P.R. 220 (Man. Q.B.) (repeal of legislation does not give rise to liability); *St. Ann's Island Shooting & Fishing Club Ltd.* v. *The King*, [1950] S.C.R. 211, [1950] 2 D.L.R. 225 (no estoppel against the crown in the face of an express provision of a statute); *Re Certain Statutes of the Province of Manitoba Relating to Education* (1894), 22 S.C.R. 577. But see cases allowing for implied rights to compensation even in the case of authorized "takings"; see, *e.g.*, *Manitoba Fisheries Ltd.* v. *The Queen*, [1979] 1 S.C.R. 101, (1978), 88 D.L.R. (3d) 462; and *infra*, at footnote 84.

aries on the rationality of distributive institutions,[34] and imperfect information about the future world, the bureaucracy is involved intimately and pervasively in determining the kind and level of benefits actually distributed. We refer to these bureaucratic distributive and allocative decisions as second-order entitlement decisions.[35] As one writer has put it:

> Policy does not exist in any concrete sense until implementors have shaped it and claimed it for their own: the result is a consensus reflecting the initial intent of policy-makers and the independent judgment of implementors.[36]

This consensus model may not be accurate, as other models of bureaucracy point to different techniques which define inferior bureaucratic activity,[37] but the essential truth of the statement is that "policy does not exist in any concrete sense", unless one recognizes the independent judgment of all bureaucratic actors.[38]

Compensation from the state based on state created entitlements can be justified in two situations; first, where the legislative branch of government creates positive mandatory duties on the bureaucracy to act, and the plaintiff alleges that this statutory responsibility has not been fulfilled by the bureaucrat; and second, where the plaintiff alleges that a discretionary decision of the bureaucracy or of a particular bureaucrat has caused injury. In the case of mandatory statutory duties, the courts have had little difficulty in establishing liability. When the distributive institution (the legislative body) acts in such a way as to establish a mandatory duty to benefit an individual or class of individuals, the courts may issue a mandatory injunction to perform that duty,[39] and alternatively provide

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[34] See E. Mackaay, Economics of Information and Law (1982), pp. 125-134; H.A. Simon, Administrative Behavior (3rd ed., 1976); A.D. Hirschmann, C.E. Lindblom, Economic Development, Research and Development, Policy Making: Some Converging Views, in F.E. Emery (ed.), Systems Thinking (1969), p. 351.

[35] These second-order decisions represent serious control problems, since bureaucrats operating at the street level have an extraordinary degree of "discretion regarding the granting of benefits, their size, and their timing"; see M. Tushnet, The Constitution of the Bureaucratic State (1984), 86 West. Virg. Law Rev. 1077, at p. 1078.

[36] R. Elmore, Organizational Models of Social Program Implementation (1978), 27 Public Policy 185, at p. 208. The literature on the necessity of delegating power, and the effect of delegation on the bureaucracy is well known. See A. Downs, Inside Bureaucracy (1967), pp. 132-136; G.E. Frug, The Ideology of Bureaucracy in American Law (1984), 97 Harv. L. Rev. 1277, at pp. 1334-1343.

[37] D.E. Aaronson, C.T. Dienes, M.C. Musheno, Public Policy and Police Discretion (1984), Ch. 11.

[38] We recognize that bureaucratic activity does not conform to any one of several models of bureaucratic decision-making. Regulation can use any one or a mix of a number of policy instruments to achieve its objectives, and even where the same instrument is used, there is no reason to believe that the resulting process necessarily conforms to one model.

[39] The injunctive relief is, however, subject to the existence of statutory authority creating this power in the courts. See Crown Proceedings Act, 1947, s. 21(1); see Hogg,

compensation if the duty is not performed.[40] Liability will be imposed because the victims can demonstrate that they come within the class of persons whom the state intended to benefit.[41]

The much more common case, in which bureaucrats are granted discretionary authority, should be analyzed using the same framework. From this standpoint the entitlement is established in general terms, and the state effectively creates the bureaucracy as an institutional vehicle for defining explicitly the specific benefits on an ongoing basis.[42] In both cases, the state creates the entitlement, in the former in an apparent one stage static process, in the latter in a two stage dynamic process. There is no reason to draw a distinction between the right to an individual's claim to a benefit as between the case where the entitlement is apparently defined expressly by the state through legislation (the case of mandatory statutory duties) or the case where the state defines the benefit over time—where power is delegated to the bureaucracy (the case of statutory powers). In each case the state should be responsible for providing or failing to provide the entitlement.

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op. cit., footnote 3, pp. 22, 23. As well, the plaintiff must (1) satisfy the court that the statute "intended" to give a right to an injunction against a particular bureaucrat for breach of statutory duty— essentially the same test as used in mandamus actions: *De Falco* v. *Crawley Borough Council*, [1980] Q.B. 460, [1980] 1 All E.R. 913 (C.A.); *R.* v. *Secretary of State for War*, [1891] 2 Q.B. 326 (C.A.); *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 (H.L.); *Padfield* v. *Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997, [1968] 1 All E.R. 694 (H.L.); and (2) satisfy the administrative concerns raised by the courts in this context: see *Gravesham Borough Council* v. *British Railways Board*, [1978] Ch. 379, [1978] 3 All E.R. 853 (Ch. D.).

[40] Breaches of statutory duties have in some cases been treated as cases of strict liability in England in the case of statutory authorities. See *Ching* v. *Surrey C.C.*, [1910] 1 K.B. 736 (C.A.); *Morris* v. *Carnarvon C.C.*, [1910] 1 K.B. 840 (C.A.); *Reffell* v. *Surrey C.C.*, [1964] 1 All E.R. 743, [1964] 1 W.L.R. 358 (C.A.). However, as well, in a recent Quebec case, based on Article 1057 of the Civil Code, the Supreme Court of Canada refused to hold the Quebec government strictly liable to compensate a plaintiff who contracted encephalitis as a result of an injection as part of a mass vaccination program; *Lapierre* v. *Attorney-General of Quebec* (1985), 16 D.L.R. (4th) 554. More recent common law cases suggest that the courts will attempt to ascertain "common law" duties, and use the statutory framework as relevant to the determination of the standard of care to be applied; *Queen in Right of Canada* v. *Saskatchewan Wheat Pool*, *supra*, footnote 21; *Baird* v. *The Queen*, *supra*, footnote 5. See P.P. Craig, Administrative Law (1983), pp. 545, 546; P. Cane, Ultra Vires Breach of Statutory Duty, [1981] Public Law 11.

[41] But "intention" is an elusive concept, and does not provide a constructive framework to determine civil rights against the state. *Supra*, footnote 21.

[42] See L.T. Wilkins, Policy Control, Information, Ethics and Discretion, in L.E. Abt, I.R. Stuart (eds.), Social Psychology and Discretionary Law (1979), p. 61; M.J. Saks, A Systems Approach to Discretion in the Legal Process, *ibid.*, p. 77. The bureaucracy is seen as dependent on input and feedback needed to adapt to contemporary events. Discretion is seen as a device which "enhances system adaptation".

The strong dissenting judgment of Lord Atkin in *East Suffolk Rivers Catchment Board* v. *Kent*[43] and the many unsuccessful (until recently) actions which have been brought against public bodies for non-feasance, attest to a widely shared intuition that individuals should be entitled to receive from the state the benefits which have been defined and allocated by joint legislative and bureaucratic actions. That intuition should be accompanied by an acknowledgment that individuals should not be subject to undisciplined bureaucratic power, and that the welfare state is designed to provide benefits to individuals. These benefits are as worthy of protection as are traditional forms of entitlement or property.

III. *The Inadequacy of the Common Law Negligence Principles*

Through the reasoning in the *Anns* line of decisions the courts have reached the conclusion that individuals have or ought to have rights against the state, but the premises which they have used are open to question. The first case to recognize such rights and the first case to depart from the pattern of reasoning laid down in *East Suffolk*,[44] was *Dutton* v. *Bognor Regis Urban District Council*.[45] In *Dutton* a building inspector approved inadequate foundations which did not meet the building code requirements imposed on builders by the defendant municipality. The building was subsequently purchased by the plaintiff who suffered financial loss when the foundations subsided causing cracks in the building and a misalignment of windows and doors. Even though no damage was caused to any other property nor to any person, and even though this kind of subsidence did not pose a risk to persons or property in the future, the court treated it as if it was a case where a builder had built a house which presented a risk of physical harm to persons and property, which an inspector had approved as safe, and then the foreseeable damage actually happened. Lord Denning M.R., for example, cited cases such as *Nelson* v. *Union Wire Rope Co.*,[46] where a negligently inspected and approved lift caused the death of nineteen workmen, and he posed the hypothetical case of a food inspector who negligently approved poisonous food as safe as analogous to the issue of public liability. All the judges in *Dutton* relied heavily on *Clay* v. *A.J. Crump & Sons Ltd.*,[47]

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[43] *Supra*, footnote 24.

[44] *Ibid.* The case is discussed at length in Bowman, Bailey, *loc. cit.*, footnote 3. Other Canadian cases adopting the *East Suffolk* analysis include *Stevens-Willson* v. *Chatham*, [1934] S.C.R. 353, [1934] 3 D.L.R. 1; *Wing* v. *Moncton*, [1940] 2 D.L.R. 740, (1940), 14 M.P.R. 415 (N.B. App. Div.); *Seguin* v. *Town of Hawkesbury*, [1955] 5 D.L.R. 809, [1955] O.R. 956 (Ont. C.A.).

[45] *Supra*, footnote 3. See P. Craig, Negligence in the Exercise of a Statutory Power (1978), 94 Law Q. Rev. 428.

[46] 199 N.E. 2d 769 (Ill. S.C., 1964).

[47] [1964] 1 Q.B. 533, [1963] 3 All E.R. 687 (C.A.).

where an architect, who had negligently approved a wall as being safe, was held liable to people who suffered injuries when the wall collapsed.

The inadequacy of this line of reasoning became apparent in the very next case to come before the English courts on a similar set of facts. In *Anns* v. *Merton London Borough Council*,[48] another case involving inadequate foundations, the evidence failed to disclose whether the foundations had been inspected and approved, or not inspected at all. The House of Lords stated that a duty of care was owed by the inspector on the basis of the foreseeability principle of *Donoghue* v. *Stevenson*.[49] In doing so, however, they extended the principle of *Donoghue* v. *Stevenson*— which justifies the imposition of liability where physical damage or injury to persons or property is caused by the acts of another who ought to have foreseen the risk of injury to the class of persons of which the complainant is a member—and applied it to the decreased value of the manufactured article itself. In addition, the principle was taken to apply equally to non-feasance, or a failure to act, as well as to cases where damage is caused through negligent action. Lord Wilberforce stated his *prima facie* duty doctrine as follows:[50]

> Through the trilogy of cases in this House—*Donoghue* v. *Stevenson* [1932] A.C. 562, *Hedley Bryne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C. 465, and *Dorset Yacht Co. Ltd.* v. *Home Office* [1970] A.C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter—in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . .

The House of Lords, perhaps realizing the implications of treating a representative institution as a private firm, then established a category of activities—which it called "policy decisions"—which would not entail a duty of care. At the same time, operational activities and decisions which are designed to implement the policy decisions, would be reviewable under the common law doctrines stated by the court.

The end result of the applicaation of the *prima facie* duty of care doctrine to individual bureaucrats is that wherever a loss, whether physi-

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[48] *Supra*, footnote 4.

[49] [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.).

[50] *Supra*, footnote 4, at pp. 751 (A.C.), 498 (All E.R.).

cal damage to persons or property, or pure economic loss (including disappointed expectations of gain), is reasonably foreseeable as a result of either acting or failing to act, then *prima facie* there is a legal obligation on the individual bureaucrat to do or avoid doing that which is reasonably necessary to prevent that loss. And the state or representative institution will be vicariously liable for the torts of its employees. Under the *prima facie* duty doctrine there is no problem in imposing a duty in terms of the principle; the problem lies in deciding upon its parameters, and in justifying the imposition of legal liability on the state.

The common law model, focussing as it does on the torts of individual bureaucrats, contains no mechanism for determining the positive obligations of the state towards private individuals and classes. The determination of negligence in many instances of state action is liable to be conceptually intractable, given the nature of state activities. As we explained earlier, given the nature of bureaucratic decision-making, and the authority in the state to redistribute wealth, the concept of negligence may simply deteriorate into judicial rationalization.[51] Moreover, the right of individuals to the benefits which we as a society have determined they "ought to receive" should not depend upon proof of the negligence of a particular civil servant.

The distinction between policy decisions and operational activities only comes into play once the *prima facie* duty is articulated and applied. This distinction, by which the court in *Anns* attempted to limit the scope of the *prima facie* duty doctrine, fails to recognize that all decisions of bureaucrats are both policy decisions (insofar as they establish objectives, standards and criteria to be taken into account by inferior bureaucrats), *and* operational decisions insofar as they are made in the context of achieving and implementing other, prior superior policy decisions.[52] Furthermore, since judges have been given little guidance as to how to distinguish the artificial categories from one another, inconsistency, if not

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[51] See *Biscoe* v. *G.E.R. Co.* (1873), L.R. 16 Eq. 636, at p. 641. See Aaronson, Whitmore, *op. cit.*, footnote 16, p. 36. In *Blessing* v. *United States*, *supra*, footnote 11, at p. 1170, Becker J. noted that in many cases the matter is resolvable only through the analysis of economic efficiency, political pragmatism, and social wisdom. American courts have, like their Canadian counterparts, refused to impose strict liability on the state. See *Laird* v. *Nelms*, 406 U.S. 797 (1972) (no strict liability under the Federal Tort Claims Act, 28 U.S.C. s. 1346(b), for ultrahazardous conduct of the state in testing military planes). But see *Ostash* v. *Sonnenberg* (1968), 67 D.L.R. (2d) 311, 63 W.W.R. 257 (Alta. C.A.). Thus fault concepts may have led the Court of Appeal in *McCrea* v. *City of White Rock* (1975), 56 D.L.R. (3d) 525, [1975] 2 W.W.R. 593 (B.C.C.A.) to fail to question the practice of the municipality to require inspection only on notice.

[52] The policy-operational distinction presumes, naively, that legislatures define and decide on "goals, ends or purposes" which are beyond review, and that they then delegate authority to bureaucratic agencies to implement or achieve those objects. Bureaucrats are thus perceived as value-free technical experts who involve themselves with

confusion, is only to be expected. While it purports to exclude a certain category of decisions from review, the policy/operational test, because the categories do not exist, and because it cannot be given any precise articulation, offers little guidance to the courts.

A further result of dealing with the consequences of a failure of the state to distribute benefits in terms of the dereliction of duty of a particular employee of the state as measured by the law of negligence, (or in terms of the *prima facie* duty doctrine imposing a direct duty in the case of municipal governments and other representative institutions where that is possible), is that the distinction between misfeasance and non-feasance, (that is, acting negligently, and failing to confer a benefit), must be distorted, either by misconceiving the facts as in *Dutton* or by ignoring the distinction altogether as in *Anns*, or in *Schacht* v. *R.*[53] In *Schacht* the Ontario Court of Appeal found a failure of a police officer to put up a warning sign at the scene of an accident to be "non-feasance amounting to misfeasance".[54]

A comparison of the decision of the Supreme Court of Canada in *City of Kamloops* v. *Nielsen et al.*[55] with the decision of the House of

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facts, not values. The technical means of implementing the value based policies are "of course" subject to review as "operational" decisions. Our position is that the "means-end" distinction is simplistic and dangerously naive. The selection of means involves definition and interpretation and thus "judgments about the relative importance of purposes and . . . therefore the implementing tribunal is of necessity also a purpose-selecting or evaluating tribunal"; J. Tussman, Obligation and the Body Politic (1960), pp. 86-90.

The policy-operational distinction reflects the view that regulation is a "rational process" which may be neatly compartmentalized into policy (discretionary and unreviewable) and implementation (reviewable). The whole process is infinitely more complex than that. Compare C. Lindblom, The Science of "Muddling Through" (1959), 19 Pub. Ad. Rev. 79; C.S. Diver, Policymaking Paradigms in Administrative Law (1981), 95 Harv. L. Rev. 393, at pp. 413-421. As Frankfurter J. said in *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), the distinction is finespun and capricious, and incapable of having predictive characteristics. Indeed one court has recognized that virtually all state activity can be considered discretionary and beyond review; *Smith* v. *United States,* 375 F2d 243 (C.A., 5th Cir., 1967).

[53] (1973) 30 D.L.R. (3d) 641, [1973] 1 O.R. 221 (Ont. C.A.), aff'd *O'Rourke et al.* v. *Schacht*, [1976] 1 S.C.R. 53, (1975), 55 D.L.R. (3d) 96; see also *R.* v. *Cote et al.*; *Millette* v. *Kalogeropoulos* (1973), 27 D.L.R. (3d) 676, [1972] 3 O.R. 224 (Ont. C.A.), aff'd [1976] 1 S.C.R. 595, 51 D.L.R. (3d) 244.

[54] See *Schacht* v. *The Queen, ibid.*, per J.A. Schroeder at pp. 651-652 (D.L.R.), 231-232 (O.R.).

The misfeasance/non-feasance distinction is peculiarly problematical in the case of state wrongs in the absence of an entitlement theory; W.P. Keeton, Prosser and Keeton on Torts (5th ed., 1984), pp. 373, 374; *Clemente* v. *United States*, 567 F.2d 1140 (C.A. 1st Cir., 1977); *Williams* v. *California*, 664 P.2d 137 (Cal. S.C., 1983). The issues are fully canvassed in M. Wells, T.A. Eaton, Affirmative Duty and Constitutional Torts (1982), 16 U. Mich. J.L. Ref. 1.

[55] *Supra*, footnote 6.

Lords reveals that the Supreme Court has apparently jettisoned its "limited liability" philosophy expressed in a series of earlier cases, and has adopted an expansive approach to legal responsibility. The limited liability philosophy has been developed over the past two decades by the Supreme Court in *Nunes (J.) Diamonds Ltd.* v. *Dominion Electric Protection Co.*,[56] and in *Rivtow Marine Ltd.* v. *Washington Iron Works*,[57] clearly articulating a narrowly defined area of liability in tort. In *Nunes Diamonds*, the court, by denying liability in tort, refused to allow a privately ordered contract relationship to be altered by an unbargained for representation made "independently" of the contract.[58] Similarly, in *Rivtow* the court refused to impose liability in tort for the cost of repairing negligently designed or constructed equipment on the grounds that the legal responsibility for such risks was appropriate for allocation through contract principles.[59]

Where does all this leave lower courts and the legal profession in Canada? In a conundrum, to say the least. At its simplest level, how do we reconcile the restrictive jurisprudence of *Nunes Diamonds* and *Rivtow* with the jurisprudence of *Schacht* and *Nielson*? By accepting *Anns* as the law of Canada, will the courts necessarily accept the *prima facie* duty doctrine of Lord Wilberforce? The clarification for which the decision of the Supreme Court of Canada in *Nielsen* was eagerly awaited by lawyers is simply not to be found in that judgment. It would appear that the profession must search for it in some future case which will raise these issues, and will be decided by the full court. This further period of ambiguity does, however, furnish the legal profession in its judicial, advocacy, and scholastic roles with time for further analysis and reflection.

It would appear that there are three options open to the Supreme Court of Canada when it chooses to sit as a full court to re-examine these issues. It might reaffirm its traditional conservative "limited liability" approach by reversing its adoption of the principles articulated in *Anns*. Such a choice is highly unlikely as not only would it permanently separate, in this area of law, the common law of Canada from its historical English roots, but it would mean a reversing of the historical trend of widening areas of liability. As well, it would perpetuate the unreasoned historical distinction between statutory duties which are reviewable on

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[56] [1972] S.C.R. 769, (1973) 26 D.L.R. (3d) 699.

[57] [1974] S.C.R. 1189, (1974) 40 D.L.R. (3d) 530.

[58] It should be noted that the case has been narrowly applied by lower courts since 1972, although it has been supported by some academics. See B.J. Reiter, Contracts, Torts, Relations and Reliance, in B.J. Reiter, J. Swan (eds.), Studies in Contract Law (1980), p. 266. See also *Sodd Corporation* v. *Tessis* (1977), 79 D.L.R. (3d) 632, 17 O.R. (2d) 158 (Ont. C.A.).

[59] See D. Cohen, Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords (1984), 18 U.B.C. L. Rev. 289.

radically differing principles than are statutory powers. The second alternative is to reaffirm the *prima facie* duty doctrine and the policy/operational distinction of *Anns*. To do this would be to perpetuate the distortion of the traditional private law doctrines of negligence in order to make them fit the situation where the state is being sued by private individuals. Even so distorted, the private law doctrines remain inadequate for the task of judicial review of decisions of the state. The third possibility is to accept the outcome of *Dutton* and *Anns* and their progeny, but to articulate a different set of principles than the *prima facie* duty doctrine on which to justify these outcomes. In the balance of this article we develop a model of judicial entitlement definition which can be used to provide compensation to individuals who are denied benefits by bureaucrats and the state exercising statutory powers. The model is derived more from principles of public than private law.

IV. *Theoretical Justification for a Principle of Entitlement*

Justification for a theory of public entitlements should be made on two quite distinct bases. In this part we develop an analytical justification by demonstrating that the concept of a public entitlement is implicit within the principles which constitute and which are reflected in our existing legal and political processes. In Part V we develop an instrumental justification by presenting arguments to show that use of an entitlement theory of state liability is superior to using a private law, negligence based theory of liability.

All theories of state legitimacy, whether minimalist such as that of Robert Nozick,[60] or liberal social democratic such as that of John Rawls,[61] establish the legitimacy of the state in terms of its right to place limitations on the freedom of action of the individual, either minimally in terms of restraints on behaviour, or more substantially in terms of also requiring from some individuals contributions for the eventual benefit of other individuals or all.

Any justification for the right of the state to limit the autonomy of individuals must be in terms of benefits which the individuals will receive. No other kind of argument will do. This holds as true for Hobbes[62] as it does for Nozick and Rawls. The concept of legitimacy of the exercise of political power by the state entails the right to command and the duty to obey.[63] The right to command on the part of the state, which correlates with the duty to obey on the part of the individual, gives the state a benefit and the individual a burden. The justification for the state's authority to

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[60] Nozick, *op. cit.*, footnote 28.

[61] J. Rawls, A Theory of Justice (1971).

[62] J. Hobbes, Leviathan (1950).

[63] R.P. Wolfe, In Defense of Anarchism (1970).

command is that the individual will receive a benefit which will correlate with a burden on the part of the state. This benefit burden relationship must be in terms of a right and duty relationship—that is, *a right for the individual to receive the state benefits*, and a duty on the state to provide them. Only when the benefits which justify the state are viewed as rights can the power of the state to rule be viewed as a right. Any claim weaker than a claim as of right will not be strong enough to justify or legitimize the power of the state. Hence any theory of state legitimacy must and does state the benefits which justify the state's claims to obedience in terms of rights, thus maintaining a balance or reciprocity with the duties of the individual.

All theories of the legitimacy of the state are thus social contract theories because, like a contract, they entail a reciprocal set of rights and duties.[64] Individuals have duties because they receive rights, and the state has rights because it has assumed duties. The very idea of the state thus entails the idea of entitlements, and so long as the obedience of the individual is viewed as a duty and the individual is held responsible to fulfill it, then the benefits which the state provides must be viewed in terms of entitlements. Each entails the other. If the set of right and duty relations which hold between the individual and the state are reciprocal, that is if they constitute a social contract, each will be entitled to at least some benefits. Even the social contract must, to use the language of private law, have consideration flowing in both directions, and thus to be bound by the social contract an individual must at least have some entitlements. Whether or not only a minimal state can be justified or whether the implementation of some egalitarian sharing is a legitimate function of the state is irrelevant for the purposes of our argument. We need only to justify the existence of benefits as entitlements. We need not concern ourselves at this stage with the definition of those benefits nor with their distribution. For the purposes of our argument, it does not even matter if the state claims more than it is entitled to, whatever that amount might be. It will still follow that the individuals are entitled to any benefit the state purports to give.

Given that the state must justify its claim to the right to rule and the duty of individuals to obey, in terms of the benefits which it gives, those benefits may be for every individual, or they may be beneficial to only some. Let us assume for the moment that some kind of egalitarian state

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[64] One of the earliest forms of this kind of argument is to be found in Plato's Crito. See Euthyphro, Apology; Crito, (Liberal Arts Press ed. 1956), p. 60. If one does not start from the autonomy of the individual the authority of the state can be justified on entirely different kinds of grounds. Since, however, the democratic state assumes the autonomy of the individual only a contractual kind of theory will do for the justification of its authority.

This concept of reciprocity in the exercise of power as a constraint on power is well recognized. See L. Fuller, The Principles of Social Order (1981), pp. 195-197; Nozick, *op. cit.*, footnote 28, pp. 17, 90.

claims first, that citizen A has a duty to pay a greater amount of taxes than could be justified in terms of the benefits which A wants or needs from the state, and second, that the state has a right to collect taxes in excess of that for the benefit of citizen B. Citizen B would then have a right to receive the benefits which justified the collection of taxes from citizen A. B's right to the benefit is, therefore, a necessary condition for the state's right to collect the taxes from A which it justifies in terms of a benefit to be given to B. If the state claims the right in terms of benefits for B, then the state cannot at the same time deny B's entitlement. The state would be acting inconsistently in claiming the right to tax A for B's benefit, and at the same time in denying B's entitlement. The state must always justify whatever level of taxation it maintains in terms of benefits to citizens. The state must, therefore, be prepared to view whatever level of benefits it disperses in terms of that to which individuals or classes of individuals are entitled.

The reason that all of this is not obvious in a framework of legal theory is probably because the doctrine of crown immunity and the refusal to recognize the state as a legal concept has prevented a doctrine of public entitlement from developing within the law. Now, however, since sovereign immunity is of limited relevance in the case of some representative institutions, and is being limited in the case of others, there is no reason why a doctrine of entitlement should not be articulated. Such an articulation will require a synthesis of both political and legal theory.

Under this view of the legitimacy of the state, the legislative and bureaucratic processes by which benefits are granted can be viewed as an entitlement creating process. If the legislature enacts that all persons who have been resident in Canada for ten years or more shall be paid a pension of $300 per month at age sixty-five, then a person who met those requirements should have a good cause of action against the state for that amount whether the reason it was not paid was deliberate or inadvertent bureaucratic action. It should make no difference whether the legislation specifically defines and allocates the entitlement, or empowers the bureaucracy to set the residence and age requirements and the amount of the payment. Equally it should make no difference as to recovery of the amount of an unpaid pension if the bureaucracy was empowered to make the decision as to whether or not a pension would be paid, given that the individual who failed to receive the pension could demonstrate the decision to pay a pension had been made. It should also make no difference to a right of recovery whether it is the benefit itself which is sought through a legal action, or the damages which were suffered as a result of not receiving the benefit.[65] In all cases the analytical foundation of the claim is that the

[65] See N. Henry, Political Obligation and Collective Goods, in J.R. Pennock, J.W. Chapman (eds.), Nomos XII: Political and Legal Obligation (1970), pp. 269-273. In a sense we are arguing for a "property" like right to state benefits in which the only

state directly or indirectly provides a benefit to which the individual is entitled.

The Canadian Charter of Rights and Freedoms adds a further dimension to this issue, as a second analytical argument can now be made in support of an entitlement theory of public benefits. That argument holds that an entitlement theory is implicit in section 15(1), which provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

If it is the case that every individual has a right "to the equal benefit of the law", then it would certainly follow that every individual is entitled to receive the benefits which the state procurs the bureaucracy to provide to the members of the public through the exercise of its legal authority. "Equal benefit of the law" requires consistency in the allocation and distribution of benefits to the public. It is clear from this that every member of the class for which the state provides a benefit is entitled to the benefit, and would thus have a right of compensation if and when a benefit has been denied. Thus section 15 of the Charter can be said to entail the principles of an entitlement theory.

This entitlement analysis pre-supposes the two institutional actors participating in a co-operative entitlement definition process. First, the judge decides whether the victim ought to be compensated, using as a primary criterion that the victim is a "like" case in relation to other cases where the bureaucracy has allocated the entitlement or benefit. Differentiations between the victim and others can only be made on the basis of differences which in the judge's view are relevant. This proposition is simply a specific application of a more general principle that one of us has referred to elsewhere as the principle of formal justice, which entails that relevantly like cases should be treated alike.[66] This norm does not, of course, tell us what are the relevant distinguishing characteristics. In our model, these relevant criteria will be initially articulated by the judge on the basis of the legislative policy, taking into account prior, simultaneous and future bureaucratic behaviour,[67] and of course in light of judicial values. The second stage of this process involves the bureaucracy arguing

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relevant incident of ownership is the legal right to demand the entitlement from the state, and perhaps the "right to security in the thing, in the sense that it is immune from involuntary transfer or expropriation"; A.M. Honoré, Ownership, in A. Guest (ed.), Oxford Essays in Jurisprudence (1961), pp. 119-20. As we pointed out in the Introduction, we do not subscribe to the view that these entitlements are in any way based on reliance, or on an expectation of continued receipt of state benefits, whether the expectation is founded in the victims' perspective, or in the terms of the regulatory program. See T.P. Terrell, "Property", "Due Process", and the Distinction Between Definition and Theory in Legal Analysis (1982), 70 Geo. L.J. 861, at pp. 884-86.

[66] J.C. Smith, Legal Obligation (1976), pp. 88-108.

[67] See text, *infra*, at footnote 84.

and demonstrating that the situation of the victim is *not* alike, given the bureaucratic interpretation of its legislation, the bureaucratic assessment of its own past behavior, the bureaucratic definition of its regulatory objectives and means; or alternatively it may involve the bureaucracy demonstrating that the legislation and program does not demand consistency and conformity to this model of justice. But like the judiciary, the bureaucracy must articulate those rationales. The judges, in creating the entitlement boundary, operate subject to the first and second order decisions. When the victimization is *inadvertent*, the judges would articulate a theory that, absent a distributive rationale for state discrimination, all citizens must be treated equally.

Although not a necessary element in our immediate thesis, it is worth noting that section 15 of the Charter provides a constitutional basis for a theory of entitlement which permits not only actions to be brought in cases of marginal disentitlement, but also contemplates challenges of distributive bureaucratic and legislative decisions as to the identity of the receipients of public benefits on the grounds that equal treatment has not been given in relevantly similar circumstances. Section 24(1) of the Charter may be broad enough to include damages as a remedy where appropriate.[68]

We think that it is obvious that even the limited judicial role in supervising legislative and bureaucratic conduct which the courts now play under *Anns* is about to be radically transformed under section 15. While the section can be seen as establishing an underlying legislative and bureaucratic norm which justifies marginal entitlement analysis as we have described it, it does much more than that. Specifically, it demands, whether in a tort action for unlawful legislative or administrative action, or through a damage action under section 24 of the Charter, that the court review *both* first order legislative decisions, and second order bureaucratic decisions on equal treatment grounds.[69]

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[68] See D. Gibson, Enforcement of the Canadian Charter of Rights and Freedoms (section 24), in W. Tarnopolsky, G. Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary (1982), pp. 489, 502; P. Hogg, Canada Act 1982 Annotated (1982), p. 65; *Collin* v. *Lussier*, [1983] 1 F.C. 218 (F.C.T.D.) (damages awarded under s. 24 for pecuniary loss, psychological damage, deprivation of medical care, and reduction in life expectancy); *R.* v. *Germain* (1984), 53 A.R. (2d) 264, at pp. 275-276 (Alta. Q.B.). However, the fact that s. 24 requires the victim to "apply to a court of competent jurisdiction" has given rise to decisions denying certain remedies on jurisdictional grounds. See *R.* v. *M.* (1982), 70 C.C.C. (2d) 123 (Prov. Ct. Fam. D.); *Lasalle* v. *Disciplinary Tribunal of Le Clerc Institute and Rousseau* (1983), 37 C.R. (3d) 145 (F.C.T.D.); compare *R.* v. *Crossman* (1984), 5 Admin. L.R. 85 (F.C.T.D.).

[69] Thus in cases like *McCrea* v. *City of White Rock*, *supra*, footnote 51, the plaintiff might argue under section 15 of the Charter that the municipal bureaucracy acted unconstitutionally in discriminating between builders who requested inspection and those who did not. The bureaucracy would then have to justify its deliberate distributive action, and if the relevant legislation was pointed to, its distributive impact or intent would be subject to review.

In the United States, benefits which are provided by the government are treated as entitlements providing they can be equated with "liberty" or "property" under the due process clause.[70] In order to bring government benefits under the review of the courts, judges in the United States have gone through tortuous paths of reasoning in order to be able to call a benefit a property or liberty. Such contortions will not be necessary in Canada. Given the broader phrasing in the Canadian Charter, we can conceive of claims in Canada by persons or groups who will seek access to governmentally distributed benefits on the grounds that their exclusion constitutes wrongful discrimination. Given the wording of the Charter it is difficult to see how public bodies will be able to deny that governmental programs to disperse benefits create entitlements to those benefits.

V. *Instrumental Justification for a Theory of Entitlement*

The entitlement model of state liability which we have developed can be justified on explicit instrumental grounds, as well. First, it requires a demonstration that the state has actually allocated entitlements through legislation and bureaucratic programs.[71] One rationale for judicial deference is our view that, as the least representative branch of the state, the

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[70] Constitutional challenges based upon inequality of state treatment, as we envisage it, have been made in the United States, and it seems that "mere negligent" disentitlement based upon unequal treatment is not sufficient to justify the imposition of liability; S.H. Nahmod, Section 1983 and the Background of Tort Liability (1974), 50 Ind. L. Rev. 5; Note, Developments in the Law— Section 1983 and Federalism (1977), 90 Harv. L. Rev. 1133, at pp. 1204-1207. Compare *Huey* v. *Barloga*, 277 F. Supp. 864, at p. 870 (Dist. Ct., 1967); Note, Police Liability for Negligent Failure to Prevent Crime (1980), 94 Harv. L. Rev. 821, at pp. 830-831; *Procunier* v. *Navarette*, 434 U.S. 555, at p. 566 (1978), per Burger C.J. dissenting.

In the model we describe, the role of judges in private law is to defer to the distributive judgments of other institutions, subject to a judicial norm of justice as fairness in the distribution of social costs. See Rawls, *op. cit.*, footnote 61, p. 268.

[71] It seems to us that the requirement that the bureaucracy decide and act after consideration of the alternatives available to them has been recognized by the courts. See *Anns* v. *Merton London Borough Council*, *supra*, footnote 4, per Lord Wilberforce at pp. 755 (A.C.), 501 (All E.R.). The remarks of Wilson J. in *City of Kamloops* v. *Nielsen*, *supra*, footnote 6, reflect a similar concern. See also *Dorschell* v. *City of Cambridge* (1980), 117 D.L.R. (3d) 630, 30 O.R. (2d) 714 (Ont. C.A.); R.E. Shibley, Liability of Public Authorities in Negligence, Special Lectures, L.S.U.C. (1983), p. 263; *King* v. *City of Seattle*, 525 P.2d 228, at pp. 232, 233 (Wash. S.C., 1974).

We should point out that this is not a judicially imposed requirement that the bureaucracy give reasons for its decisions, but rather an acknowledgment that if judicial decisions are based on deference to deliberate distributive judgments of the "legislative-executive" branch of government, we should require evidence of that deliberation. Liability does not follow simply on the grounds that the bureaucracy can offer no reasons, and it would be administrative chaos to require reasons for all discretionary decisions. Rather we would suggest that reasons must be offered when persons consider themselves injured as a result of bureaucratic activity —thus bureaucrats must be prepared to make public the distributive judgments upon which they acted, thus facilitating accountability and informed

courts are politically and institutionally incompetent to review explicit distributional decisions, and thus should defer to the executive and legislative branches in that context. If those institutions have in fact made a distributive decision, then that rationale for deference disappears, and our model should result in the imposition of liability (that is, the distribution of that benefit) unless the bureaucrat had decided to disbenefit an individual or class of individuals. Inadvertence will give rise to liability, and advertence will be considered a valid defence only where the state can demonstrate that a considered distributive judgment was made. The entitlement analysis not only increases the likelihood of pre-accident precautions, it also demands a public acknowledgment of distributive judgments thus facilitating the public debate appropriate in that context.

Second, the analytical framework which we have described demands that the bureaucracy, as well as the judiciary, disclose the relevant distinguishing criteria which they have applied to disentitle the victim. It represents a regulatory tool ensuring that bureaucratic entitlement and disentitlement decisions are made in light of the knowledge that preferential or prejudicial choices may be challenged (legally and extra-legally) by adversely affected individuals and classes. We recognize the inadequacy of simple judicial rules demanding bureaucratic consistency in the definition of entitlements, and thus we are not arguing for bureaucratic explanation and justification based on precedent.[72] We have articulated a co-operative entitlement definition decision-making process in which both judicial and bureaucratic values are brought to bear on the question. The deference is, in our model, to the entitlement decisions and processes of the bureaucracy-legislature. The advantage of the framework is that the bureaucratic norms must be applied and disclosed,[73] but need not be

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public debate. Ideally, the process will have the effect of influencing the bureaucracy and its actors to articulate its objects in its regulatory scheme, identify a range of alternatives open to them and select the appropriate course. That process of distributive justice is what we require to have taken place under our theory of public entitlement. See Craig, *op. cit.*, footnote 40, pp. 233-234.

[72] See H.W. MacLauchlan (1984), 8 Dal. L.J. 435, at pp. 437-441. Consistency, if it is interpreted to mean precedent-based decisions, is both backwards looking and inherently meaningless. The controlling standard(s) of relevance is (are) the determining factor(s).

[73] We assume and hope that judges will, to the extent that they are able, disclose and thus not conceal the conscious reasons for their decisions. The unconscious, as Jerome Frank has written, is likely beyond the knowledge of the decider in the legal context; J. Frank, Courts on Trial, Myth and Reality in American Justice (1949), pp. 146-155.

If judges refuse to play the game, and indeed exercise raw power, there is nothing left to write about—that is law, as some see it, is and will always be simply an instrument or mask of power. We prefer to think that it is something more than that. But see A.C. Hutchinson, P.J. Monahan, Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought (1984), 36 Stan. L. Rev. 199, at p. 206. Nonetheless, the ultimate decision-maker will, under our current legal framework, be the judiciary, and to the extent that facts and rules are indeterminate, we must acknowledge that the deci-

justified. The bureaucracy need only justify an exclusion where there is a *prima facie* case of entitlement.

Third, our analysis requires that the bureaucracy, in making its decisions, has acted as the bureaucracy, since only distributive decisions which are authorized (in some sense) by majoritarian institutions justify judicial deference. Self-interested, private disentitlement decisions by private individuals who happen to be playing the role of bureaucrats can be rejected by the court as unauthorized.[74] This, to put the matter bluntly, is the issue of corruption and the risk of intentional infliction of losses on victims by other individuals acting as bureaucrats. Cases such as *Roncarelli* v. *Duplessis*[75] are significant in that they reveal that the intentional infliction of economic loss or the denial of economic benefits by individuals who use the authority of their positions in the bureaucracy for personal gain, will give rise to liability. Situations of "bad faith", abuse of process, or the tort of intimidation exist,[76] and point out the difficulties which

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sions will be political; M. Tushnet, An Essay on Rights (1984), 62 Texas L. Rev. 1363, at pp. 1371-1382; Unger, *op. cit.*, footnote 20.

To a certain extent, regulation (state action) and the associated distribution of benefits result from the interests of bureaucracies in responding positively to the pressures of special interest groups acting for political, economic, social or personal motives. See R. Litan, W. Nordhaus, Reforming Federal Regulation (1983), pp. 39-42; Mitnick, *op. cit.*, footnote 16. We are not sure that one can do very much about decision-making of this sort, but certainly disclosure of the interest groups and their arguments would introduce an element of debate now sorely lacking.

[74] We admit, of course, that it may be difficult to decide that a bureaucrat is not that. The issue has arisen in the past when courts have used this kind of analysis to regulate the behaviour of public firms by treating them as private enterprise.

[75] [1959] S.C.R. 121, 16 D.L.R. (2d) 689; *Central Canada Potash Co. Ltd.* v. *Government of Saskatchewan*, [1979] 1 S.C.R. 42, (1978), 88 D.L.R. (3d) 609; *Gershman* v. *Manitoba Vegetable Producers' Marketing Board* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.) where the court held that the defendant's refusal to grant credit to the plaintiff's employer constituted the tort of intimidation, saying that "it is clear that a citizen who suffers damages as a result of flagrant abuse of public power aimed at him has the right to an award of damages in a civil action in tort". See also S.A. de Smith, Judicial Review of Administrative Action (4th ed., 1980), p. 338; *David* v. *Abdul Cader*, [1963] 3 All E.R. 579, [1963] 1 W.L.R. 834 (P.C.).

Compare *Bosada* v. *Pinos* (1984), 44 O.R. (2d) 789 (Ont. H C.) where it was held that the principle in *Roncarelli* v. *Duplessis* did not apply to malicious prosecution by Crown counsel or to abuse of process by the police.

[76] It is not at all clear what the courts mean when they refer to "abuse of process", or malice, or misfeasance in a public office. In *Roncarelli* v. *Duplessis*, *ibid.*, at pp. 141 (S.C.R.), 706 (D.L.R.), Rand J. defined malice so as to impose liability where a person acts knowing the act is unauthorized. In *Trobridge* v. *Hardy* (1955), 94 C.L.R. 147 (Aust. H.C.), "malice" in a statutory provision immunizing police officers from liability was said to connote ill-will, spite, personal animosity, pique or revenge, whereas in *Smith* v. *East Elloe Rural District Council*, [1956] A.C. 736, [1956] 1 All E.R. 855 (H.L.) the court suggested that "bad faith" must involve deception or corruption.

In this article we define those terms to mean acts of individual bureaucrats intended to injure particular identified individuals where one can infer that the bureaucrat had

occur when agents fail to serve the interests of their principal. The fragmentation of government bureaucracies, the absence of a "real" principal able to monitor the activities of agents, the difficulty of imposing sanctions on self-interested bureaucrats, and the degree of discretion associated with government activity, suggest that the risks of self-dealing on the part of bureaucrats are quite significant.[77]

The treatment by the courts of the self-interested behaviour of bureaucrats is clear. The deliberate infliction of losses, or denial of a benefit whether economic, property or personal, if carried out for the personal benefit of a bureaucrat, should give rise to liability on the part of the bureaucrat,[78] and where entitlements are denied, to direct liability on the state as well.[79] The entitlement is either enjoyed independently of the state, or it is an entitlement established under the regulatory program and in both cases the court is not simply extending liability in response to the existence of foreseeable risks of injury. This articulation of a possible judicial role in defining entitlements may also explain traditional common law and statutory exemptions of individual bureaucrats from liability for acts done in "good faith".[80] The term is notoriously vague, but it has been used to mean acts done in accordance with an objectively justifiable

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actual knowledge that they did not have authority to do so, and for demonstrable private gain which may include psychic sadistic pleasure as well as objective economic gain. It seems that judges generally refer to "malice" without defining the term; see *Takaro Properties Ltd.* v. *Rowling*, [1976] 2 N.Z.L.R. 657, at pp. 662-64 (S.C.).

[77] See K. Kernaghan, The Ethical Conduct of Public Servants, in K.M. Gibbons, D.C. Rowat (eds.), Political Corruption in Canada (1976), p. 158. As Kernaghan and others point out, the courts deal with only the smallest percentage of "corruption" cases which may include conflict of interest cases involving personal pecuniary gain, outside employment opportunities, and graft and bribery, the last of which is dealt with as a criminal offence under the Criminal Code, as well as other statutes. See Immigration Act, 1976, S.C. 1976-77, c. 52, s. 98; Customs Act, R.S.C. 1970, c. C-40, ss. 235, 236. The corruption cases may also include influence peddling, patronage and disclosure of information to private individuals. A.A. Rogow, H.D. Laswell, The Definition of Corruption, in A.J. Heidenheimer (ed.), Political Corruption (1970), p. 54, define the term as "violations of the common interest for special advantage".

[78] An important and revealing exception to the "malice" cases are the absolute judicial and prosecutorial immunities. See *Richman* v. *McMurtry et al.* (1983), 147 D.L.R. (3d) 748, 41 O.R. (2d) 559 (Ont. H.C.); *Bosada* v. *Pinos*, *supra*, footnote 75.

[79] Most decisions do not reflect at any length on the choice between the direct or vicarious liability of the state for the actions of these "rogue" bureaucrats, and the personal liability of the bureaucrat. See also *supra*, footnote 27.

[80] For example, British Columbia has enacted several statutes in which the liability of individual bureaucrats is limited to situations where they have not acted in good faith. See, for example, Trade Practice Act, R.S.B.C. 1979, c. 406, s. 16(1); Coal Mine Regulation Act, R.S.B.C. 1979, c. 52, s. 4(4); Petroleum and Natural Gas Act, R.S.B.C. 1979, c. 323, s. 13(5); Mining Regulation Act, R.S.B.C. 1979, c. 265, s. 5(4). See also the Police Act, R.S.S. 1978, c. P-15, s. 19; The Summary Offences Procedure Act, R.S.S. 1978, c. S-63, s. 7; Liquor Control Act, R.S.A. 1980, c. L-17, s. 77(4); and see *Carr* v. *Forbes et al.* (1980), 7 Sask. R. 123 (Sask. Q.B.); *Morrissette* v. *Salagubas and*

belief that the activity was lawfully authorized.[81] In the context of entitlement models of compensation it would appear that disinterested activity carried out in interpretative conformity with superior guidelines should not give rise to personal liability on the part of bureaucrats, but must give rise to liability on the state. The "disinterested" aspect of this argument supports our view that the welfare of bureaucrats is not included in the legitimate justifications for state action.[82]

Fourth, the judicial task in our model is not disguised as procedural or jurisdictional review.[83] The recovery of compensation is based first, on a *presumptive* requirement that the bureaucracy act in accordance with judicial values and attitudes towards equal treatment, and second, on judicial deference to bureaucratic and legislatively expressed entitlements. It is substantive review— that the bureaucracy define, create, allocate, and remove entitlements in accordance with its own views of the rational implementation of regulatory objectives.

Hosaluk (1984), 32 Sask. R. 25 (Sask. Q.B.); *Lang* v. *Burch and Carlson* (1983), 140 D.L.R. (3d) 325, [1983] 1 W.W.R. 55, (1983), 18 Sask. R. 99 (Sask. C.A.).

These provisions are significant because there is no defence of good faith at common law unless the authority is acting "judicially". See *Hlookoff et al.* v. *City of Vancouver* (1968), 67 D.L.R. (2d) 119, 63 W.W.R. 129 (B.C.S.C.); *Partridge* v. *The General Council of Medical Education and Registration of the United Kingdom* (1890), 25 Q.B.D. 90 (C.A.); *Harris* v. *The Law Society of Alberta*, [1936] S.C.R. 88, [1936] 1 D.L.R. 401. Similarly the courts will only award damages for a "policy" decision if it is not made in good faith: *Anns* v. *Merton London Borough Council*, *supra*, footnote 4; *City of Kamloops* v. *Nielsen*, *supra*, footnote 6 at pp. 25 (S.C.R.), 674 (D.L.R.), 37 (W.W.R.). However, in the usual tort actions brought against typical "bureaucrats" good faith is no defence. Unless the statute authorized the officials' act they will be held personally liable—even if they honestly and reasonably believed they had the authority; Hogg, *op. cit.*, footnote 3, p. 112; *Metropolitan Asylum District* v. *Hill*, *supra* , footnote 10.

[81] See *Roncarelli* v. *Duplessis*, *supra*, footnote 75, at pp. 143 (S.C.R.), 707 (D.L.R.), where Rand J. says "good faith"in this context means "acting with a rational appreciation of [the] intent and purpose" of the Act. In *City of Kamloops* v. *Nielsen*, *supra*, footnote 6, at pp. 22 (S.C.R.), 671 (D.L.R.), 35 (W.W.R.), Wilson J. adopts the reasons of Lambert J.A. of the British Columbia Court of Appeal (31 D.L.R. (3d) 111, at p. 119, [1982] 1 W.W.R. 461, at p. 469) where he said a decision not to act at all could not "be supported by any reasonable policy choice" and so "was not within the limits of a discretion bona fide exercised". See also Hogg, *op. cit.*, footnote 3, pp. 110-111.

[82] But see *supra*, footnote 16. The difficulty with this particular liability rule is that it is often difficult to demonstrate the personal gain to the bureaucrat, and thus the court may find itself imposing liability on the ostensible grounds of negligence, when in fact the situation represents unproved or unprovable corruption. See E.C. Banfield, Corruption as a Feature of Governmental Organization (1975), 18 J. of Law & Econ. 587.

[83] We discuss the issue of *ultra vires* bureaucratic action in Part VI. While our review is "substantive", we do not analyze, here, the arguments in favour of treating state inflicted injuries as negative technological externalities which should be internalized, *ex post*, through the tort system. See E.J. Mishan, The Effects of Externalities on Individual Choice (1981), 1 Int'l Rev. of Law and Econ. 97, at p. 106; J. Quinn, M.J. Trebilcock, Compensation, Transition Costs, and Regulatory Change (1982), 32 U.T.L.J. 117, at pp. 130-135.

Fifth, the entitlement model of state liability need not interfere with dynamic bureaucratic decision-making. The process of legislative-bureaucratic entitlement definition is not necessarily historical, and while not ahistorical may tend towards *ex ante* reasoning processes.[84] The reasons for change or for a particular managerial choice need not be rational only in a historical perspective. Decisions can be rational in a contemporary and instrumental sense, and we do not believe that there should be an onus on the bureaucrat to justify a departure from *past* practice. The consistency of bureaucratic decisions is that they act in accordance with bureaucratic norms, one of which may include an interest in facilitating adaptive choices. As well, the courts' traditional view of *ex post* consistency may be subordinated to bureaucratic views of *ex ante* consistency. Tort law, as well as judicial review as it is traditionally understood, demands conformity to judicial values, and a static view of the world. Our entitlement model involves the judiciary in defining the entitlement and while it introduces judicial values, it does not demand the subordination of the regulatory program to them.

Sixth, our model of liability and our articulation of the process through which entitlements are determined provides more justifiable criteria for imposing liability than does the current model of tort law. The definition of the relationship between the citizen and the state is as much a legislative and bureaucratic task as it is judicial. There is nothing in the history of the courts,[85] in the institutional characteristics of the judicial process,[86] or in the historical articulation of remedies against the state which suggest that it is appropriate for the courts to adopt the view that one is entitled to compensation for all foreseeable injuries suffered as a result of state action or inaction. It seems that entitlements defined by judges at common law (for example, property and contract entitlements as judges define them between private firms) are protected as well against

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[84] It may be that the courts in the United States are beginning to adopt *ex ante* reasoning processes which focus almost exclusively on defining and implementing choices designed to achieve articulated goals. The transformation of law may be too much for us to ask for, given the associated reforms in process and thinking which it entails. Nonetheless, it is theoretically possible to envisage judges taking into account bureaucratic reasoning processes in their decision-making. See B.A. Ackerman, Reconstructing American Law (1984), pp. 72-78.

[85] This follows from an assumption that the courts are the institution which will be involved in determining liability. As we noted earlier, a more wide ranging study currently underway does not make that assumption and considers the appropriateness of the judicial model from a much more critical perspective.

[86] These characteristics include victim initiated action, non-expertise, and adversarial fact-finding among others. See D.L. Horowitz, The Judiciary: Umpire or Empire? (1982), 6 Law and Human Behaviour 129, at p. 134; Chayes, *loc. cit.*, footnote 12; T. Eisenberg, S.C. Yeazell, The Ordinary and the Extraordinary in Institutional Litigation (1980), 93 Harv. L. Rev. 465.

state action.[87] Under traditional tort law, the collective, however, is not permitted to allocate goods which judges will recognize as entitlements. *Put bluntly, judges ensure that one keeps what one has, and yet need not receive what the state determines one ought to receive.* One might like to say that the common law rules reflect a concern that the judiciary not interfere with bureaucratic discretion, but a hundred years of judicial review leads to precisely the opposite conclusion.

Seventh, the application of this articulated entitlement definition process would provide an incentive for superior bureaucrats to create standards and to develop structured policy; and it would provide an incentive for inferior bureaucrats to demand, and then conform to the standards and structure. While bureaucrats can control inferiors through a variety of techniques, including implicit and explicit political power, rules, or professional norms,[88] superior bureaucrats face intractable difficulties in controlling the activities of street level bureaucrats whose activities in fact define the benefits enjoyed and losses suffered by the public.[89]

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[87] History demonstrates that the courts when acting autonomously have protected real property owners, using fictional legislative intention concepts, while denying compensation for contractual expectations and non-consensual interference with economic, personal and group rights. The courts artificially distinguish this "compensation" from damages for wrongful acts; *John Piggott & Sons* v. *R.* (1916), 53 S.C.R. 626, 32 D.L.R. 461. Compare also *B.C. Medical Association et al.* v. *The Queen in Right of B.C., Medical Services Commission and Bolton* (1984), 148 D.L.R. (3d) 718, [1983] 5 W.W.R. 416 (B.C.S.C.), appeal dismissed [1985] 2 W.W.R. 327 (B.C.C.A.); *France Fenwick and Co.* v. *King*, [1927] 1 K.B. 458 (C.A.); *Belfast Corporation* v. *O.D. Cars Ltd.*, [1960] A.C. 490 (H.L.); *Government of Malaysia* v. *Selangor Pilot Association*, [1978] A.C. 337 (P.C.), representing cases of "regulation" and thus non-compensable state action. One can perhaps justify this protection on the ground that ownership of real property was the prerogative of a limited class of persons who exercised political and legal authority. See D. Cohen, The Relationship of Contractual Remedies to Political and Social Status: A Preliminary Enquiry (1982), 32 U.T.L.J. 31. Alternatively, protection of interests in land can be justified on the ground that the courts were unwilling to remain passive in the face of egregious individual sacrifice in favour of majoritarian interests. Thus Rawls argues that the presumptive generality of statutes is premised on protecting individual reliance and reasonable expectations; Rawls, *op. cit.*, footnote 61, p. 238. As well, Lawrence Tribe has argued that "oppressive" and "irregular" bureaucratic behaviour are often associated phenomena, and that the enjoyment of entitlements at the mere will of another is akin to slavery; Tribe, *op. cit.*, footnote 12, p. 475. We are seeking, in demanding the articulation of the policy choices underlying the exercise of state power, to minimize the ability of the state to inflict serious injury by denying state benefits in the case of individuals who are effectively powerless to challenge or influence state activity; Tribe, *ibid.*, pp. 477, 491.

[88] See Tushnet, *loc. cit.*, footnote 35, at pp. 1079, 1095-1096.

[89] The question of flexibility at the "street level", and a concern that "discretion" may lead to arbitrariness, corruption, bias, inconsistency and associated phenomenon is, admittedly, unlikely to be properly "regulated" by tort law. If our concern is with regulation of the bureaucracy, rather than the acknowledgment and vindication of rights (and one of us is of that school), we would be far better off adopting a model which

The structure we describe creates a judicial role which, while it involves deference to the decision making power of bureaucrats,[90] permits judicial interaction in the process of implementation. Thus, our thesis can be justified on grounds of bureaucratic and political accountability. The alternative mechanisms available to ensure that the bureaucracy is operating in accordance with legislative direction involve a critical level of public debate and criticism. In some cases—where those alternate mechanisms are operating effectively—the need for the judiciary to become involved is reduced, as the prophylactic and regulatory roles of the political process will to a large degree reduce the risks of mass victimization. In many cases, this political debate will be absent, and thus we seek its introduction in the interactive process we describe.

Our eighth justification for judicial review rests, in part, on our concern with oppressive state action resulting in individual sacrifice in favour of the majority.[91] While many entitlement and disentitlement decisions (for example, the decision to inspect only on receipt of notice in *McRae* v. *City of White Rock*[92]) are applied to substantial numbers of

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focuses on the ongoing administrative process rather than on its pathology. See E. Bardach, R.A. Kagan, Going By the Book, The Problem of Regulatory Unreasonableness (1982), pp. 152-183; J.B. Weinstein, The Effect of Austerity on Institutional Litigation (1982), 6 Law and Human Behaviour 145, at p. 148; and see also *supra*, footnote 36.

[90] Bureaucrats are often given authority to manage certain sectors of the economy, and thus are apt to exercise their discretion to fulfill statutory objectives in a way which does not necessarily require them to apply historical rules and practices to current situations. They look, at any point in time, prospectively to fulfilling their statutory objectives. Thus in the case of taxing powers, the bureaucracy has been described as exercising "managerial discretion" in adopting policies and dealing with individual taxpayers so as to maximize taxation revenue in light of resources and collection costs; see *R.* v. *I.R.C., Ex parte Preston,* [1984] 3 All E.R. 625, at p. 630, [1984] 3 W.L.R. 945, at p. 951 (C.A.); *I.R.C.* v. *National Federation of Self-Employed and Small Businesses Ltd.*, [1982] A.C. 617, at p. 636, [1981] 2 All E.R. 93, at p. 101 (H.L.).

We recognize that management is not usually the role of Canadian judges, and to require the application of judicial reasoning processes and values to taxation management will not likley serve to fulfill any legitimate social objectives. Yet we also recognize that one must attempt to determine the cases in which the state has defined certain benefits to individuals, which subsequently have not been allocated. The application of the principles described earlier does not demand precedent-based decisions, nor does it refer to procedural fairness.

One of the problems with leaving this area to the judiciary, which these cases reflect, is that the regulatory process will often result in diffused benefits to members of individuals and firms, (*e.g.* taxpayers in general) and highly concentrated costs on others (*e.g.* a particular taxpayer). If all the decision-maker sees are the highly concentrated losers who have the incentive to litigate, the judicial decisions may be consistently biased in one direction. See J.Q. Wilson, The Politics of Regulation, in J.Q. Wilson (ed.), The Politics of Regulation (1980), pp. 357-361. See also *supra*, footnote 5.

[91] Early decisions providing for implied rights to compensation in the case of 'takings' were justified on these grounds. See cases cited *supra*, footnote 86.

[92] *Supra*, footnote 51.

potential victims, the fact remains that in a significant percentage of cases, the disentitlement process will be directed at or will affect one or perhaps a narrowly defined class of individuals. In these cases, the bureaucratic definition of the boundaries of the entitled class will have the effect of victimizing one person in favour of majoritarian interests in situations where representative institutions do not provide adequate accountability.[93] In these cases, we can determine the outcome in either of two ways.

First, in the case of *inadvertent*[94] disentitlement of a particular victim or narrowly defined group of victims, it is relatively straight-forward to decide in favour of compensation since the bureaucrat's own assessments lead to that conclusion.[95] At the same time, inadvertent behaviour associated with injury (as opposed to the non-receipt of benefits) can itself be analyzed in two situations. In the first, the victims can demonstrate that they were within the entitled class, and in this situation, our analysis would suggest that they ought to receive the entitlement, or alternatively be no worse off than if they had not been disentitled.[96] In the second case, they may be able to demonstrate only that they are "outsiders" who have been injured by inadvertent bureaucratic action. Our analysis in this latter case would deny compensation, since the victims are unable to meet the primary criterion for liability against the state—that they were an intended beneficiary of state action.[97]

In the second case—the case of what appears to be *advertent* disentitlement—the issue is somewhat more complex. In some cases the bureaucrat may argue that the benefit was defined with limiting constraints (either constant or variable) and thus what appears to be disentitlement is not.[98] Alternatively, the bureaucrat can justify the decision as a second order entitlement definition not subject to judicial review. The excluded

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[93] See Ely, *op. cit.*, footnote 17.

[94] By "inadvertence", we refer to decisions or omissions which result in private losses in circumstances where the bureaucrat is unable to demonstrate that the "loss" was part of a decision to allocate state benefits. Where judgments are *not* made, or when there is no "balancing of policy factors" then there is no reason to deny compensation on the basis of our thesis. See *Sami* v. *United States*, 617 F.2d 755, at p. 766 (C.A. Dist. Col., 1979); *Harr* v. *United States*, 705 F.2d 500, at p. 505 (C.A. Dist. Col., 1983); *Beins* v. *United States*, 695 F.2d 591, at pp. 600-605 (C.A. Dist. Col., 1982); *Hitchcock* v. *United States* 665 F.2d 354, at p. 363 (C.A. Dist. Col., 1981).

[95] That is, the legislative and bureaucratically defined programs provide for the allocation of the benefit.

[96] We recognize that limitation principles, whether conceptualized as remoteness or causation, must be articulated in this model of liability, and as well that these limitation principles must be consistent with the rationales we develop for liability in the first place.

[97] At the same time, we do not deny a possible right of compensation based upon other state liability principles to which we referred earlier; *supra*, footnote 28.

[98] Both Harrison and Becker, implicitly adopting a "rational expectations" model of compensation, suggest that compensation should not be payable where the benefit is defined with limiting or variable constraints. See R.J. Harrison, The Legal Character of

individual is, according to permitted bureaucratic norms, unlike the others, and thus considerations which might appear to the court to justify a compensation award are excluded.[99] Those arguments, given the distributive and redistributive roles of the state, are unexceptional when the decision affects substantial numbers of the public, but seem to raise difficulties when applied to the case of individual sacrifice. One reason for our concern is our view that it is unlikely that legislative institutions can in any sense be said to have authorized relatively junior bureaucrats to sacrifice the interests of one person, or to disentitle one person, in favour of majoritarian interests. We also recognize that junior bureaucrats may not be subject to the same degree of accountability as elected representatives. Thus in our model individual discrimination will demand additional justification, the court presuming disentitlement unless the bureaucracy can demonstrate its deliberate distributive judgment.[100] As well, we can suppose that in many cases the court will presume that the disentitlement was inadvertent, leading to compensation, unless it can be demonstrated that the bureaucrat acted advertently. Our view is that the risks of private sacrifice and the absence of alternative accountability mechanisms justify judicial review in the case of advertent disentitlement. In the end, however, deliberate, articulated state action should be permitted, absent constitutional grounds for challenge.[101]

Petroleum Licences (1980), 58 Can. Bar Rev. 483; L.C. Becker, Property Rights: Philosophical Foundations (1977); see also Stewart, Sunstein, *loc. cit.*, footnote 32, at pp. 1207, 1259-1260; Quinn, Trebilcock, *loc. cit.*, footnote 83.

[99] This model of judicial decision-making assumes that administrative behaviour traditionally beyond the ambit of judicial consideration, including multi-lateral negotiations, non-binding directives, enforcement priorities, and internal channels of responsibility, are considered by the judiciary. See R.L. Rabin, Administrative Law in Transition: A Discipline in Search of an Organizing Principle, in R.L. Rabin (ed.), Perspectives on the Administrative Process (1979), p. 7. For example, it is common knowledge that legislators may enact "symbolic" legislation, which apparently establishes programs which will guarantee certain benefits to particular groups, and then purposefully refuse to establish or fund the bureaucratic infra-structure necessary to achieve the goals. D.N. Dewees, Evaluation of Policies for Regulating Environmental Pollution, Working Paper No. 4, Regulation Reference, Economic Council of Canada (1980), pp. 22-25; M. Rankin, P. Finkle, The Enforcement of Environmental Law: Taking the Environment Seriously (1983), 17 U.B.C. Law Rev. 35, at pp. 37-40.

This model of state liability will require a reformulation of the traditional corrective justice model of judicial decision-making in order to ensure that the entitlement definition process is not distorted by a perspective which refuses to look beyond the interests and fault of the immediate parties. Compare *Palmer* v. *Nova Scotia Forest Industries* (1983), 2 D.L.R. (4th) 397, at pp. 497-500, 60 N.S.R. (2d) 271, at pp. 348-351 (N.S.S.C.).

[100] In this respect we see the role of judicial review as providing a corrective mechanism for the risks associated with majoritarian based political decisions. We, like John Ely, see the courts as constituting a process in which the interests of those who are sacrificed or not benefited in the political and administrative processes can be articulated. See Ely, *op. cit.*, footnote 17, pp. 73-104; Tribe, *op. cit.*, footnote 12, p. 463.

[101] See *supra*, footnote 70.

Finally, our analysis, by describing a review process rich enough to permit judicial interaction with the bureaucracy in the delivery of state benefits, removes the need for the *prima facie* duty doctrine to be used in this context. The principles of the law of negligence need no longer be distorted by attempting to stretch them to fit situations where they have no real applicability. This will allow the restoration of the distinction between misfeasance and non-feasance which, although irrelevant in the case of the rights of people regarding the benefits distributed by public bodies, may remain a significant factor regarding relationships among private individuals and firms.

In summary, our rationale for state liability is that the decision as to whom should suffer and benefit as a result of collective action is not the exclusive role of the judiciary, bureaucracy or the legislature. Marginal analysis as we have described it, is an attempt by one institution, that is the courts, to implement the distributive decisions of other institutions, rather than to ignore those decisions, or to replace them by its own.

VI. *Transcending Traditional Doctrinal Distinctions Through A Theory of Entitlement*

The entitlement analysis which we have articulated presents a number of subsidiary issues which must be considered and resolved. First, to what extent does our analysis impose strict liability for state action, rather than rest on traditional fault-based liability concepts? Second, what is not the relationship of our analysis to the jurisdictional analysis of liability?[102] Third, what is the role of the policy/operational distinction discussed in *Anns* and in *Nielsen* v. *City of Kamloops*[103] under our model? Fourth, what difference will it make in regard to the nature and range of the benefits to be protected by the courts, if an entitlement theory is used rather than the more traditional common law negligence approach of *Anns*?

Our approach leads to the imposition of legal responsibility to distrib-ute an entitlement once the entitlement decision is made, unless the bureaucrat can demonstrate some reason for the disentitlement decision. If inadvertence is the only explanation, or if no explanation is offered, than the court should allocate the entitlement. The issue of state liability in tort is not necessarily one of negligence or fault-based liability at all. We do not advocate the evaluation of bureaucratic behaviour against an unarticulated "reasonableness" standard. We described at the outset the

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[102] In *Anns* v. *London Borough of Merton*, *supra*, footnote 4, Lord Wilberforce suggests that only *ultra vires* acts are subject to liability.

[103] *Supra*, footnote 6.

futility of such a process. Rather, we propose that the courts engage in a process of entitlement definition, and use the legislative program and conduct of the bureaucracy to assist them in locating the plaintiff within or without the entitlement boundary. The responsibility of the state is strict once it is determined that one has been denied "what one is entitled to".

The "negligent" exercise of bureaucratic discretion is an intractable concept to grapple with, and given an entitlement analysis, it becomes irrelevant. Judges, if they apply negligence principles, may be referring implictly or explicitly to an efficiency norm,[104] but there is no reason to believe that the state, as opposed to private enterprise, operates or ought to operate only according to this norm.[105] Alternatively, even if the bureaucracy has adopted an efficiency norm, it is clear that additional non-allocative criteria are both necessary and politically-mandated aspects of the bureaucratic decision-making process.[106] "Negligence" in judicial parlance is apt to mean "unreasonable" behaviour—behaviour which, according to unarticulated judicial values, ought not to have taken place. What our analysis suggests is the courts should not review, and have no legitimate political role in reviewing, the substance of bureaucratic decision-making. Only if there has been no decision, which may often be the case, or individual sacrifice not in accordance with the bureaucracy's definition of its program, should the courts review. Certainly, unchallenged evidence of "unreasonable" or negligent conduct according to judicial norms may, in some cases, justify an inference of inadvertence as to the injury-

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[104] One might, for example, refer to intra-governmental policy directives demanding socio-economic impact analyses to be carried out prior to the enactment of federal regulations. See Treasury Board Canada, Administrative Policy Manual, Chapter 490, Appendix E, Evaluation Methodologies (1979); G.B. Doern, Rationalizing the Regulatory Decision-Making Process, The Prospects for Reform, Working Paper No. 2, Regulation Reference, Economic Council of Canada (1979), pp. 84-93.

[105] Certainly arguments in favour of distributive goals, or the protection of rights, can be articulated as justifying state action independently of utilitarian rationales. See S. Breyer, Regulation and its Reform (1982), pp. 19-20; M. Sagoff, Economic Theory and Environmental Law (1981), 79 Mich. L. Rev. 1393. And of course bureaucrats and bureaucratic institutions develop their own agendas; *supra*, footnotes 16-18.

Thus, a pervasive problem with "fault" liability in public liability contexts is an inability to articulate a standard against which to assess bureaucratic behaviour. See F. James, The Federal Tort Claims Act and the "Discretionary Function" Exception: The Sluggish Retreat of an Ancient Immunity (1957), 10 U. Fla. L.Rev. 184. See also Cohen, *loc. cit.*, footnote 33; R.C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls (1973), 40 U. Chi. L. Rev. 681, at pp. 693-699. Breyer, *op. cit.*, *supra*, p. 347.

[106] See Treasury Board of Canada, *op. cit.*, footnote 104, sections .2.1 to .2.8. The extent to which these "side displays" are relevant in regulatory decision-making is subject to considerable debate. See T.F. Schrecker, Political Economy of Environmental Hazards, Study Paper, Law Reform Commission of Canada (1984), pp. 53-54; Doern, *op. cit.*, footnote 112, pp. 121-129.

causing activity, but the touchstone of judicial review is disentitlement rather than "fault".[107]

The initial definition of the benefit is determined by the state and the bureaucratic process—the final stage of definition involves the court. This final stage should not involve a redefintion of the entitlement. The court may, however, be confronted with particular cases which, according to judicial norms, appear to be departures from the standard case. Departures may range from no benefit being given at all to some benefit which falls short of the standard case. In either case, when the plaintiff attempts to demonstrate that a case is non-standard, it is easy to see that one might drift into negligence language. One should not have to persuade the court that the state is "negligent", whatever that means. The process of entitlement definition may involve an analysis of the reasons for the peculiar treatment of the victim of state action, but that is not the application of fault or negligence standards.

McCrae v. *The City of White Rock*[108] can be used to illustrate the distinction we wish to make. The standard practice adopted by the municipality in that case was to inspect residential housing construction only after receiving notice from the builder. No notice was given so no second inspection could take place. It would well be argued that the municipality as a representative institution was negligent in not adapting a procedure for checking after a reasonable period to see whether builders who had not given notice had continued construction in breach of the by-laws. This, however, would be to submit legisative/bureaucratic decisions to redefinition through the application of some kind of "reasonableness"

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[107] The courts have, apparently, refused to impose strict liability on the state. See *Virdi and Thompson-Nicola Regional District* v. *Inland Feeders Ltd.* (1982), 129 D.L.R. (3d) 685, at p. 691, [1982] 1 W.W.R. 551, at p. 558 (B.C.C.A.). However, there is limited support for the view that strict liability will be imposed in the case of bureaucratic violations of statutory standards. See *R.* v. *Greenway*, [1982] 1 F.C. 259, 122 D.L.R. (3d) 554 (Fed. C.A.). But see *Gladstone Petroleum Ltd.* v. *Husky Oil (Alberta) Ltd.*, [1982] 6 W.W.R. 577, at pp. 604-610 (Sask. C.A.), leave to appeal to the Supreme Court of Canada denied, 46 N.R. 89. See also *Tate & Lyle Industries Ltd.* v. *Greater London Council*, [1983] 2 A.C. 509, [1983] 1 All E.R. 1159 (H.L.). Compare, *Baird* v. *The Queen in Right of Canada*, *supra*, footnote 5.

Strict liability for disentitlement avoids the administrative costs of "negligence" determinations, and reflects the view that as between the courts and the bureaucracy the latter is in a better position to assess the behaviour it ought to engage in, given that strict liability will be imposed. The shift from negligence to strict liability rules will not necessarily affect a modification of bureaucratic behavior. The bureaucracy can still establish internal controls according to its definition of social welfare, and self-insure against residual risks. The shift from negligence to strict liability merely re-allocates the risks of residual losses, and depending on one's view of the advantages of loss-spreading and of the relative risk-aversion characteristics of the two relevant groups, there may be welfare gains from the re-allocation.

[108] *Supra*, footnote 51.

test, which we advocate should not be done. The standard case should *not* be reviewed, and any alleged "negligence" of a bureaucratic official would simply furnish evidence of a non-standard particular case as measured against the standard.

Another example might illustrate the point. In mountainous areas government departments which have the statutory responsibility for the maintenance of the highways generally maintain crews, who, among many other duties, periodically check steep areas above the highways for loose rock which could fall and cause an accident. A bureaucratic practice of not carrying out such inspections, even though some judges might consider it unreasonable, would be an entitlement decision of the bureaucracy which under our view would not be subject to review by the courts in a case where rocks fell and caused an injury.[109] A situation where crews do carry out this function but allegedly insufficient numbers are maintained to keep the highways safe, and rocks fall causing harm, would also not be subject to review as the amount of resources to be expended for any particular activity usually entails the bureaucratic definition of public entitlements. In both these cases, however, our analysis would demand a judicial definition of the entitlements claimed by victims, in light of their position relevant to others. As well, the bureaucracy would have to demonstrate, rather than merely allege, that the entitlement was defined and distributed in a different manner. In a particular case, however, where a crew is carrying out an inspection of a specific area and they only inspect two thirds of the height above the road, stopping short of a full inspection, a court could find liability on the grounds that the plaintiff had been deprived of a benefit for which an entitlement decision has been made. We should not, however, mislead the reader by simplistic examples. The process of determining what are entitlements and what are not, in light of the legislative and bureaucratic programs is, as we have described it, an extraordinarily complex task.

In matters of public safety, as a further example, how much police protection is to be provided, and where it is to be allocated, is a situation where the bureaucracy defines what benefits are to be received by whom, and consequently cannot be subjected to review by the courts. Where, on the other hand, as in *Schacht* v. *R.*,[110] a police officer is already at the scene of an accident and fails to put up sufficient warning devices to prevent a further accident, his behaviour deprived the plaintiff of a benefit to which we determine individuals are entitled, and consequently state liability will lie. Again, the critical stage in the process is to be able to define the level and character of state benefits. Currently, the application of private law concepts in state liability contexts effectively precludes the

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[109] *Just* v. *British Columbia* (1985), C.C.L.T. 49, 65 B.C.L.R. (B.C.S.C.).

[110] *Supra*, footnote 53.

review process from engaging in the exercise. Our model is concerned with precisely that entitlement definition process.

The second aspect of judicial review which our analysis has ignored so far is the requirement of unlawfulness. As one of us has described in an earlier article, liability in tort which is imposed on individual bureaucrats will not be imposed for bureaucratic acts unless the victim persuades the court to declare that they are unlawful—that is, where the bureaucrat is not able to point to a superior bureaucrat, and through the superior to a legislative body, as having established "a law" which permits the activity.[111]

Certainly, the traditional view has been that *intra vires* acts will not give rise to liability in tort on the part of individual bureaucrats. Conversely, the question whether particular bureaucrats acted within their discretion under the relevant legislation does not arise under our model of liability. In the case of inadvertent losses, the state will be liable since it cannot point to a decision to disentitle the plaintiff—and thus one can *conclude* that the victimization was not authorized. In the case of advertent losses, the state will be liable unless it can demonstrate that it was authorized to deny the entitlement, or alternatively that there was no entitlement under the relevant legislative framework. Judges, in that case, should refuse to award compensation either because there has been an authorized denial of the entitlement, or because the entitlement was never defined.[112]

The idea of jurisdictional error as it has developed in administrative law as a rationalization for judicial review of bureaucratic activity is another form of the *intra vires* argument, and has been recognized as intellectually bankrupt as a valid analytical justification in the context of

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[111] See Cohen, *loc. cit.*, footnote 33.

The jurisdictional question is very often ignored in tort cases. In fact, cases like *Saskatchewan Wheat Pool* v. *Government of Canada*, *supra*, footnote 21, reflect a view that "breach of a statutory duty", which is conceptually related to jurisdictional error analysis, will not justify the imposition of liability on the state (i.e. that "fault" will be the judicial standard), and suggest that compensation from the state will not depend on simple jurisdictional error analysis. See also *Baird* v. *The Queen in Right of Canada*, *supra*, footnote 5; *Thorne Riddell Inc.* v. *The Queen in Right of Alberta*, *supra*, footnote 5. While we cannot agree with the doctrinal analyses of these cases, it is clear that they are inconsistent with the categorization of liability into intra- and extra-jurisdictional categories.

We should point out as well that the concept of strict liability for disentitlements is not inconsistent with cases such as *Saskatchewan Wheat Pool*. The court in determining state liability for denial of entitlements is *not* (as it was in the *Saskatchewan Wheat Pool* case) imposing legal responsibility on private firms in light of non-compliance with legislation. Rather, it is determining whether the victim comes within a class of persons who are entitled under the relevant legislation and bureaucratic program, and that should not depend upon the negligence of the bureaucracy.

[112] See *Takaro Properties Ltd.* v. *Rowling*, *supra*, footnote 78.

compensation awards.[113] Admittedly, one can understand the attractiveness of the argument that "authorized" acts should not give rise to liability. As a political principle, it can be argued that principles of legislative sovereignty hold that if the state activity is authorized then the courts have *no* political authority to overrule a legislative branch of government.[114] The concept of jurisdiction may also be relevant if one argues that "unauthorized" action is not an act of state but rather an act of an individual. Still another perspective adopted by some courts is that an unauthorized act by a public authority resulting in damages is subject to liability *per se*; tort liability follows since harm is caused in an unlawful manner.[115]

It seems that while some constitutional law purists may continue to demand unlawfulness of the bureaucratic activity as a necessary prerequisite to liability, the truth of the matter is that the concept adds little to our analysis. Unlike traditional theories which impose tort liability on individual bureaucrats and which depend upon a *preceding* judicial determination of jurisdictional error in order to impose that liability, our theory of state liability allows us to *conclude* that if an entitlement has been denied, the state has acted unlawfully. More important, jurisdictional error analysis results in the diversion of legal criticism away from the substance of administrative discretion. The analytical perspective we develop is designed to assure that administrative discretion is used in a manner consistent with the aims of public welfare. The problem is to render the administration responsible to the individual and collective interests it is meant to serve.[116]

Equally artificial, as we and others have demonstrated elsewhere, is the policy/operational distinction, which seems to be the favourite of

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[113] See J.M. Evans *et al.*, Administrative Law, Cases, Text and Materials (2nd ed., 1984), pp. 467-473. See also P.W. Hogg, The Jurisdictional Fact Doctrine in the Supreme Court of Canada; *Bell* v. *Ontario Human Rights Commission* (1971), 9 O.H.L.J. 203, at pp. 210-211, 215-217; J.A. Smillie, Judicial Review of Administrative Action—A Pragmatic Approach (1980), 4 Otago L. Rev. 417; H.W. Arthurs, 'Without the Law', Administrative Justice and Legal Pluralism in Nineteenth Century England (1985), pp. 208-210; *Pearlman* v. *Keepers and Governors of Harrow School*, [1979] Q.B. 56, at p. 70, [1979] 1 All E.R. 365, at p. 372 (C.A.), per Lord Denning M.R.

[114] A possible response to that argument may be that in awarding compensation even in the case of authorized acts, the courts are not interfering with legislative or bureaucratic authority—the legislatures and bureaucracies can undertake activities, and the courts simply order compensation when the activity takes place.

[115] See *McGillivray* v. *Kimber* (1915), 52 S.C.R. 146, 26 D.L.R. 164; *Beaudesert Shire Council* v. *Smith* (1966), 120 C.L.R. 145, at p. 156 (Aust. H.C.). One response to this line of cases was the judicial articulation of a "good faith" exception to personal liability. See *H. Hlookoff* v. *City of Vancouver*, *supra*, footnote 80. The *Beaudesert Shire* case has not been received positively. See *Dunlop* v. *Woollahra Municipal Council*, *supra*, footnote 33.

[116] See P. Nonet, Administrative Justice (1969), p. 6.

courts in a number of jurisdictions in recent years,[117] including the Supreme Court of Canada in *Nielsen v. City of Kamloops*.[118] The artificial categorization of activities mirrors the jurisdictional error analysis, and is equally unilluminating.[119] The policy/ operational categorization merely expresses a conclusion as to whether something is reviewable by the courts or not. It fails to provide any criteria for reaching the conclusion, and thus Lord Wilberforce in *Anns*, defines a policy decision as "meaning that the decision is one for the authority or body to make, and not for the courts".[120] The distinction in no way informs us what ought to be reviewable and what ought not. Our theory, however, does. Under our approach, the definition of the entitlement, while it necessarily involves the courts, is not subject to judicial review, and therefore the state has a discretion in how it is to be defined. The operation of dispensing the benefits to which people are entitled is subject to review by the courts. If the policy judgments of the state (that is, a function not reviewable by the courts) is

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[117] The policy/operational distinction was recently rearticulated in *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 104 S. Ct. 2755 (1984). The court took the view that the issue is whether the "nature and quality" of the conduct is such that Congress "intended" to shield the state from tort liability. Regulatory behaviour was viewed as coming within the discretionary exemption under the Federal Tort Claims Act, even though it related to a specific individual. See also *Flammia* v. *United States*, 739 F.2d 202, at p. 204, (U.S. C.A., 1984). See also to the same effect as *Varig*, *Smith* v. *United States*, 375 F.2d 243, at p. 246 (U.S. C.A., 1967); *Sami* v. *United States*, *supra*, footnote 94, at p. 796; *Gray* v. *Bell*, *ibid.*, and cases cited therein at p. 513. But see *Payton* v. *United States*, *supra*, footnote 11, at pp. 478-479.

As we suggested earlier, the American courts recognize that the issue as to the application of the discretionary/operational distinction relates to separation of powers and the definition of the role of the courts in reviewing or judging the propriety of the policy-making acts of co-ordinate branches of government. See *Gray* v. *Bell*, *supra*, at p. 511; A. Van Alstyne, Governmental Tort Liability; A Public Policy Prospectus (1963), 10 U.C.L.A.L. Rev. 463; F. James, Tort Liability of Governmental Units and Their Officers (1955), 22 U. Chi. L. Rev. 610; Note, Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government (1971), 56 Iowa L. Rev. 930, at pp. 946-950. As well the rationale for the policy/operational distinction involves the potential impact of judicial review on vigorous decision-making by the state; O.M. Reynolds, The Discretionary Function Exception of the Federal Tort Claims Act (1968), 57 Geo. L.J. 81, at p. 121. Cf. *Owen* v. *City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673 (1980) (threat of governmental liability less likely to influence bureaucratic actors than is threat of personal liability). Finally, the financial impact of the damage award has been seen as a relevant factor, especially in the case of municipal and state liability, and to a lesser degree in the case of federal government liability; B. Schwartz, Public Tort Liability in France (1954), 29 N.Y.U. L. Rev. 1432, at p. 1458. But see *Rayonnier Inc.* v. *United States*, *supra*, footnote 13.

[118] *Supra*, footnote 6.

[119] See Cohen, *loc. cit.*, footnote 33; R.A. Macdonald, Jurisdiction, Illegality and Fault: An Unholy Trinity (1985), 16 R.G.D. 69, at p. 96 *et seq.*; S.M. Makuch, Municipal Immunity from Liability in Negligence, in F.M. Steel, S. Rodgers-Magnet (eds.), Issues in Tort Law (1983), p. 236.

[120] *Supra*, footnote 4, at pp. 754 (A.C.), 500 (All E.R.).

identified with the defining of entitlements, and the operational, which Lord Wilberforce calls "the practical execution of policy decisions",[121] is identified with the delivery of the entitled benefits, then courts might be able to implement the entitlement analysis even within the framework of the doctrinal language of *Anns, given that the alleged "negligence" of public officials is viewed only as evidence of the failure to deliver a benefit to which the plaintiff is entitled.* In the end, however, the use of such language will exacerbate the confusion. Finally, if the courts use the *prima facie* duty doctrine and define state liability in terms of foreseeable risks of loss, liability could extend far beyond the class which could in any sense be said to be entitled to receive a benefit. Others entitled might be excluded because negligence or fault was not present.

The recent decision of the House of Lords in *Governors of the Peabody Donation Fund* v. *Sir Lindsay Parkinson and Co. Ltd.*,[122] would appear to indicate that even the policy/operational distinction is insufficient to define the range of the *prima facie* duty doctrine. Given that the defendant falls under a *prima facie* duty because the requisite foreseeable risk and proximity are present, and given that the court decides to label the bureaucratic acitivity as operational rather than policy, Lord Keith of Kinkel, in *Peabody*, added a further obscure test. He stated that: "in determining whether or not a duty of care of particular scope was incumbent on a defendant it is material to take into consideration whether it is just and reasonable that it should be so".[123] In *Peabody* the plaintiff owner's architects submitted plans for a drainage system for 245 houses that were approved by a senior municipal inspector. Subsequently, a more junior inspector agreed with an employee of the architect to modifications which resulted in the drainage system actually built being inadequate. Neither the plaintiff, the senior architect, nor the senior inspector had knowledge of the modifications, although knowledge was imputed to the Council as a result of another inspector being made aware of them. The drainage system later had to be replaced resulting in substantial reconstruction costs and loss of rent from the premises. The House of Lords dismissed the plaintiff's claim on the grounds that, in its view, the purpose of the empowering legislation was "to avert injury to safety or health", and since a non-resident owner "would not be subject to any possible injury to safety or health",[124] no duty of care would be owed, "notwithstanding that they might reasonably have foreseen that failure to do so [take care] would result in economic loss. . .",[125] to the resident owner. In reaching this conclusion the House of Lords approved of a

[121] *Ibid.*

[122] *Supra*, footnote 6.

[123] *Ibid.*, at pp. 241 (A.C.), 534 (All E.R.).

[124] *Ibid.*, at pp. 242 (A.C.), 535 (All E.R.).

[125] *Ibid.*

recent Court of Appeal decision, *Dennis* v. *Charnwood Borough Council*,[126] where inadequate plans for a foundation were approved and the court found the Council liable to the owner who had commissioned the building and was in residence, and overruled *Acrecrest Ltd.* v. *W.S. Hattrell and Partners*,[127] a case on similar facts where damages were awarded against a Council where the owner who had commissioned the building was not in residence.

The most thorough examination of the *Anns* decision yet made by any court is the judgment of the High Court of Australia in *The Council of the Shire of Sutherland* v. *Heyman*.[128] Each judge of the five person court unambiguously rejected the *Anns* decision, and for different reasons, held on facts which were very similar to those of *Anns* that the municipality was not liable to a subsequent purchaser for economic losses associated with the negligent failure of one or more municipal employees to ensure that the foundations and footings of a building in the process of construction met the appropriate building standards. What is notable about this case is that, like the House of Lords in *Peabody*, the High Court of Australia declined to use the *Anns prima facie* duty doctrine to define the limits on recovery. Rather, they chose to define the range of liability by resorting to an examination of the purpose of the underlying legislation and the application of traditional causation principles.

The more these cases proliferate, the more confusing and meaningless the various outcomes and judicial reasons given appear to be. Why, for example, using Lord Keith's test, is it "just and reasonable" for a plaintiff in occupation to recover but a plaintiff not in occupation to be denied recovery? In the entire *Anns* line of decisions the courts invariably must look at the purpose of the legislation under which the public body is acting. In so doing, they begin to approach the issue of what benefit the plaintiff was entitled to receive. The entitlement issue, however, is soon lost in the preoccupation of the courts with declaring a common law duty of care to justify a finding of liability or no liability, and with the requirement that a particular bureaucrat acted negligently. In addition, the current "negligence model" of liability shifts the focus of the inquiry away from a sophisticated inquiry into the legislative history and program implementation in an effort to define the entitlement. Finally, the nature of the entitlement is distorted by the necessity of the courts viewing the empowering legislation as solely health and safety measures in order to assist them in justifying or denying the imposition of a common law duty of care. The entitlement theory furnishes a foundation for the civil liability of the state, independently of common law principles of negligence.

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[126] [1983] Q.B. 409, [1982] 3 All E.R. 486 (C.A.)

[127] [1983] Q.B. 260, [1983] 1 All E.R. 17 (C.A.). See also *Rimmer* v. *Liverpool City Council*, [1984]1 All E.R. 920, [1984] 2 W.L.R. 426 (C.A.).

[128] *Supra*, footnote 6.

An entitlement analysis would, in cases like *Peabody* and *Sutherland*, operate quite differently from the traditional common law negligence doctrines. First, in these cases the action would be brought directly against the government body, in this case the municipal council; for it is that institution which failed to deliver the benefits under the relevant planning legislation. No individual bureaucrat could be personally responsible for the failure of the state to deliver public benefits. Second, the institution which is reviewing the case—it need not be a court—would examine the political and legislative history of the planning legislation, the purposes for which it was developed, the purported beneficiaries of the legislation and so on. This inquiry would be more than a semantic, interpretative inquiry into legislative meaning. Our theory demands a detailed inquiry into the political, social and economic factors which lay behind the legislative action. Of course, in *Peabody* and *Sutherland*, these detailed inquiries into the legislative and political history of the two Local Government Acts and associated regulations did not take place.

At this stage of the inquiry, complainants would argue that, in light of the legislation, its purpose, effect and implementation and so on, they were being treated differently from other people in their situation. The reviewing body, if it determined that any complainant was in fact being subjected to distinctive treatment, would recognize the entitlement defined through its initial assessment of the legislative and bureaucratic program. The court would design, at this preliminary stage, the necessary award or directions to ensure that the entitlement was provided, or compensation for losses associated with its non-delivery was made. The question of discrimination—or equal treatment—would have required the complainants in the *Peabody* and *Sutherland* cases to present factual evidence and argument relating to the inspection practices and procedures, and resulting housing foundations, which other developers and home owners in like circumstances had and were receiving. Again, in *Peabody* and *Sutherland* we have no information as to that aspect of the entitlement definition. The courts in those cases referred only to vague notions of foreseeability of injury, policy and operational decisions, "just and reasonable" obligations and so on in their attempts to apply common law negligence principles.

Finally, the reviewing institution would re-examine the way in which the legislation was implemented and administered by the relevant bureaucracy over time. That inquiry again is one which would require the reviewers to determine the way in which the regulatory benefits were defined in practice. The bureaucracy in this stage of the review process would be able to argue that, in light of its regulatory program, and its interpretation of its legislative framework, the complainant was unlike others who had received the benefits and thus was not entitled to the benefits of the housing program. Alternatively, the bureaucracy would argue that the benefits were distributed on an individualistic basis, and without regard to overriding standards upon which to base the entitle-

ment. In addition, the bureaucracy could demonstrate that it was engaged in a distributive and redistributive program and that the complainant was deliberately omitted as a beneficiary. If any one of those arguments were successful, the complainant would not be awarded the entitlement or compensation for losses associated with its denial. Again, in *Peabody* and *Sutherland* these questions were not asked, and the courts were forced to resolve the cases on the basis of common law negligence concepts.

Conclusion

Independent of constitutional review under section 15 of the Charter, our model of state liability requires that the state has acted to estabish an entitlement program. As well, under our theory, there is no basis for compensation from the state wherever the state has not acted or has made a deliberate disentitlement decision;[129] that is, legislative and bureaucratic distributive decisions are not subject to judicial review. Liability is imposed and compensation awarded only when the distributive act has been analyzed and determined as creating the entitlement.

The analysis also provides us with a conceptual framework for identifying the marginal entitlement. As we have described the world, the more representative branches of government make the first order entitlement decision in establishing and funding a public program. Obviously, the precise boundaries of the entitlement will be established as a result of a complex series of second order bureaucratic decisions over time. The judicial role in our model is to define the entitlement in the context of an injury to a particular individual or group, given the legislative and bureaucratic first and second order discretionary decisions,[130] and to decide whether the entitlement extends to this particular plaintiff.[131] What we suggest is a co-operative, multi-lateral entitlement allocation process, with the judiciary acting only at the margin, and after the legislative and bureaucratic roles have been fulfilled.[132]

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[129] Our view is that the allocative and distributive activities of the state can be achieved through a number of regulatory instruments ranging from information disclosure, licensing, the establishment of monopolistic state corporations, direct and indirect taxation, to formal expropriation. The instruments are alternative to one another, and thus if distributive judgments are thought to be paramount to judicial redistribution in one, they are paramount in all. See Epstein, *loc. cit.*, footnote 28. As is obvious, there is "a circular and self-defeating quality upon insistence upon explicit compensation"; *ibid.*, at p. 436.

[130] As we explained earlier, the lawfulness of the bureaucratic activity is not a criterion of judicial review under our model of state liability; text *supra*, at footnotes 110-115.

[131] Other commentators who have recently written on this topic have developed this conceptual framework to some degree. See MacDonald, *loc. cit.*, footnote 119; Makuch, *op. cit.*, footnote 119.

[132] The judicial role which we articulate accepts that the statutory text, regulations, history and bureaucratic behaviour which will be interpreted has a meaning which is

The process of defining the entitlement is, however, problematical. We know that there is no "bright-line" to determine liability, and that we are closing the circle in a metaphorical sense only. At the same time, there is an intellectual process which can inform us of the nature of the judicial role. Judges should, if they are engaged in defining entitlements, look to the details of the legislative program, pre-legislative history, and post-legislative bureaucratic activity to inform themselves whether the particular plaintiff was an "intended beneficiary" of the state. We argue that the bureaucracy must be permitted to define the entitlement in light of the legislative program, and judges, in assessing claims to compensation, should enquire initially whether the entitlement is allocated consistently. The judicial role is, however, restricted if a bureaucrat lawfully disentitles an individual or class of individuals of some benefit which would otherwise have been received by them. The judiciary should do little to redraw the entitlement boundary line, given the role which we have defined for them in the context of tort law.[133]

Thus, one can articulate the judicial decision-making process in such cases as consisting of three stages. First, claimants must argue that they come within the entitlement boundary. Arguments supporting this inclusion, in light of the principle discussed earlier, will be based, in part, on the treatment by the bureaucracy of people in like circumstances.[134] Second, the court must analyse the legislative framework and bureaucratic

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determined by judges constrained by training, hierarchy and a community of values. See O.M. Fiss, Objectivity and Interpretation (1982), 34 Stan. L. Rev. 739,at pp. 750-762. Only one of us takes the view that the training, hierarchy and community of judges and judicial institutions is appropriate for this task. The other subscribes to the view that the value system which our judges are likely to bring to bear on the issue will result in preferences to particular individualistic interests which can be justified only on the basis of the exercise of power. See D. Kennedy, Form and Substance in Private Law Adjudication (1976), 89 Harv. L. Rev. 1685, at pp. 1751-1766.

[133] As we demonstrate, however, constitutional review jurisdiction will permit the judiciary to "redraw" the entitlement boundary, so to speak. See text *supra*, at footnotes 65-66.

[134] In several recent "administrative" law cases, judges have suggested that interpersonal fairness or consistency may provide a basis for judicial review, with mandatory injunctive relief being granted to the plaintiff. See *Re Apotex Inc.* and *Attorney General for Ontario et al.*, (1984) 11 D.L.R. (4th) 97, at p. 104 (Ont. H.C.) (strict enforcement of suggested times for compliance and without uniform application caused prejudice to applicant). Similarly, the courts have acknowledged in "tort" cases that if the bureaucracy acts consistently with its own established practice it will not be liable to compensate persons who are injured as a result. See *Funk* v. *Clapp et al.* (1984), 55 B.C.L.R. 336, at p. 344 (B.C.S.C.). The deliberate decision to establish a particular bureaucratic practice will not give rise to liability. At the same time, the departure from self-defined standards is not determinative of liability, the bureaucracy being permitted to justify its behaviour on efficiency grounds, among others; *ibid.*, at p. 347. This "presumption of equality" thus demands justifications or at least explanations of differences of individual sacrifice. See S.I. Benn, Egalitarianism and Equal Consideration of Interests, in J.R. Pennock, J.W. Chapman (eds.), Nomos IX: Equality (1967), pp. 64-65.

program to determine the nature and extent of the entitlement and disentitlement decisions which may have been made in these institutions. And third, the bureaucracy may articulate its explanation and justification of the entitlement or disentitlement. The third stage of analysis allows the bureaucrat to engage in a process of justification and explanation—in legal terminology, to offer a lawful reason for not providing the alleged entitlement. For example, the legislative first order decision may specifically authorize the second order discriminatory denial, regardless of the circumstances in which it took place.[135] Alternatively, the bureaucrat must be permitted *advertently* to define the allocation of entitlements within the legislative framework. Purposeful, advertent, and lawful entitlement definition by the bureaucracy should not give rise to liability on the basis of our theory.

This third stage of the entitlement definition process should not deteriorate into judicial interference with bureaucratic programs. If judges are to be involved in entitlement definition they must defer to bureaucratic norms at this stage—the model demands the judicial implementation of collectively defined benefits. Thus the deliberate decision to establish a particular bureaucratic practice will not give rise to liability. At the same time, the departure from historical self-defined standards is not *determinative* of liability, the bureaucracy being permitted to justify its dynamic behaviour on efficiency grounds among others.[136] One of our concerns in establishing and defining compensation rules is that administrative choice resulting in the allocation of benefits is insufficiently structured and confined in many cases.[137] The tort system is thus seen as confining and checking bureaucratic discretion through its review process, and as requiring structuring of bureaucratic behaviour—that is, justification of decisions by public disclosure of their relation to other decisions, rules, principles or policy statements.[138] The "routine" or "consistent practice" aspect of our thesis does not attempt to delineate

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[135] *Supra*, footnote 98.

[136] As we described the bureaucratic process earlier, the thesis we present does not demand precedent-based or rule-based administration. At the same time, we believe that the "entitlement definition" process we describe will engender the development of standards, criteria-based decision-making, and articulated policy-statements, that is, "internal regulation within the bureaucratic process", a far more effective institution than exogenous rule oriented processes. See Nonet, *op. cit.*, footnote 116, p. 4. The *ex ante* perspective of the bureaucrat, in which decisions can be justified purely on instrumental grounds, and the development of policies which are intended to maximize aggregate welfare, is not consistent only with precedent-based adjudication; *ibid.*, pp. 232-240.

[137] Davis, *op. cit.*, footnote 18, p. 157; K.C. Davis, Discretionary Justice: A Preliminary Inquiry (1969), p. 15.

[138] D.J. Gifford, Discretionary Decision-Making in the Regulatory Agencies: A Conceptual Framework (1983), 57 S. Cal. L. Rev. 101.

the precise form of rationality which structures discretion.[139] We do not believe, as does Kenneth Davis, that the "best" rule consists of precedent adherence practices.[140] The explanation offered by bureaucrats can consist of consistency with past practice or decisions, consistency with factors relevant to discretion, or consistency with new rules, standards or policy positions.

The reality is that courts, under the guise of merely applying the principles of the law of negligence, are in fact reviewing the distribution of private and public benefits by public bodies to individuals and groups and in all probability they will continue to do so. At present the reasons which they give do not, and cannot justify this review, and consequently the courts have been unable to articulate a set of principles which explain the conclusions which they are reaching. It is our belief that through the misconceived distinction between policy decisions and operational decisions, courts may be intuitively reacting to the distinction between the definition of entitlements (policy matters) and the distribution of those entitlements (the operational considerations). Yet as we point out, *all* legislative, bureaucratic and judicial choices involve entitlement definition—and the arbitrary distinction between the process and distribution will only lead to further confusion. What judges must realize is that state liability cases represent a trilateral entitlement definition process. We cannot expect to obtain decisions which accord with justice or reality until the legal justification conforms with and reveals the as yet unarticulated premises which have led judges to reach the conclusions which the cases represent. If section 15 of the Charter results in issues of fairness or justice in the defining of the benefits by administrative and legislative actors being reviewed by the courts as well, then the sooner the courts articulate a theory of entitlement the better.

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[139] One of the problems with traditional judicial review of state action, in addition to information acquisition and retention costs and delay, is that the judges may fail to recognize that bureaucracies may very well operate under conditions of uncertainty, that decisions may be "negotiated", and that state actions may be "tentative" and subject to ongoing modification in light of their effects. See Breyer, *op. cit.*, footnote 113, pp. 117-118, 270-271. Our model, if it is to work, demands that judges are sensitive to these factors.

[140] Davis, *op. cit.*, footnote 18, pp. 189-190.