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Thinking About the State: Law Reform and the Crown in Canada

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THINKING ABOUT THE STATE: LAW REFORM AND THE CROWN IN CANADA

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In August 1985, the Law Reform Commission of Canada released a working paper entitled "The Legal Status of the Federal Administration." The working paper calls for a re-examination of the concept of the federal Crown in Canadian law. In this article, Professor Cohen undertakes a critical examination of the focus and methodology of the Commission's work. Professor Cohen commends the Commission for its excursion into the field of law reform and the state, but points out that this working paper represents an incomplete and flawed treatment of the subject. In light of this, Professor Cohen proceeds to describe and evaluate what in his view are the more significant ideas involved in the study of law reform and the state.

I. INTRODUCTION

In August 1985, the Law Reform Commission of Canada released a working paper, ambiguously entitled "The Legal Status of the Federal Administration."[1] The paper purports to lay the foundation for the most radical transformation in Canadian administrative regulation since Diceyian concepts of the Rule of Law were applied to disputes between bureaucrats and individuals during the late nineteenth century. In reality it calls, albeit tentatively, for a re-examination of the concept of the federal Crown in Canadian law and the recognition of a unitary federal administration. At this preliminary stage the Commission suggests the establishment of a special regime of law that would be applied to define the relationship of individuals and the Canadian state.

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[1] Law Reform Commission of Canada, *The Legal Status of the Federal Administration* (Working Paper No. 40) (Ottawa: The Law Reform Commission of Canada, 1985) [hereinafter Working Paper]. The reasons for the current federal interest in the legal status of the federal administration are unremarkable. Certainly reform can be justified on narrow grounds — the patriation of the Constitution and the concomitant need of the state to "formalize its special pre-eminence"; internal inconsistencies in the law; and clarification of the law (at 1-4). These are not, however, the most pressing reasons for activity in this area. Rather, reform is demanded by the dangers to liberty and self-government associated with bureaucratic and majoritarian power, by the inadequacies of the current legal review processes, and by the failure of judges to recognize the benefit-defining and -granting functions of the state.

The working paper will certainly interest common-law lawyers, for it represents an attempt to stand back from the details of Crown liability cases that employ and distort common-law concepts.[2] The traditional contract, tort, trust, restitution, and property concepts that have been developed in common-law superior courts in the context of disputes between individuals, bureaucrats, and the state stand to be transformed, if not replaced, by entitlements and institutions designed specifically to apply to the individual-state relationship. 'Law reform and the state' demands that we describe the outlines and philosophy of a comprehensive theory of state appropriate to its role in Canadian society as we move into the twenty-first century.

Although the Commission does not describe its project as I do, I do not think that anyone will disagree with the magnitude of the questions that we face. To what extent should we retain the concept of Crown in federal law? Should we replace the concept of Crown with the concept of state or federal administration? How does one define those terms? And what ought to be the relationship of the state to individuals? When and how should individuals receive compensation and protection from the state and bureaucrats?[3] In particular, when and how should we as individuals receive compensation when the state or bureaucrats interfere with what we are, have, need, or deserve? What is the appropriate response when there has been inadequate delivery of public and private goods allocated by the state? To what extent should the majority be bound by its prior decisions, and to what extent should bureaucrats be obligated to deliver services defined in part by the majority? The Commission does not directly acknowledge that it plans to look at these questions; it certainly does not answer them in this working paper. There is little doubt, however, that an enquiry into the "legal status of the federal administration" involves precisely those questions and demands answers to them.

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[2] Calls for reform in this area began after the First World War and have accelerated since then. See, for example, H. Laski, "The Responsibility of the State in England" (1919) 32 Harv. L. Rev. 447; H. Laski, "The Sovereignty of the State" in H. Laski, *Studies in the Problem of Sovereignty* (New Haven: Yale University Press, 1917) 1; E. Borchard, "Government Liability in Tort" (1924-25) 34 Yale L.J. 1, 129, 229; (1926-27) 36 Yale L.J. 1, 757, 1039; W. Friedmann, *Law in a Changing Society*, 2d ed. (New York: Columbia University Press, 1972) c.11; P. Craig, "Compensation in Public Law" (1980) 96 L.Q. Rev. 413 at 434-35; P. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983).

[3] The law reform process must focus as much on institutional design and competence as on substantive rules. See A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281; N.K. Komesar, "Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis" (1984) 51 U. Chi. L. Rev. 366; O.M. Fiss, "The Social and Political Foundations of Adjudication" (1982) 6 Law & Hum. Behavior 121. See *Palmer* v. *Nova Scotia Forest Industries* (1983), 2 D.L.R. (4th) 397 at 500.

The Commission should be commended for this bold excursion into territory that has remained beyond the intellectual imagination of most legal academics in Canada.[4] During the past decade there have been several texts,[5] as well as innumerable articles,[6] dealing with the state or the Crown. All of them, with the exception of a study on compensation in the case of regulatory change,[7] treat the state within the conceptual framework of private tort, contract, or property law. In a recent article, Professor J.C. Smith and I attempt to develop a different theory of public entitlement in individual-state relations.[8] We argue that individuals should be entitled to benefits that the state has allocated to them, and we develop a model that can be used to define those benefits. Upon reflection I am not sure that our views are correct, but to the extent that we acknowledge that private law doctrine is an inadequate tool to resolve individual-state conflict, I think we are right.

It is enough to say here that we recognize the impossibility of accepting that the state should always be treated like a private firm, or that common law rules should be applied to bureaucrats for whom the state may or may not be vicariously liable. The state (or community) has no private analogue, and, in developing legal concepts and a public policy of the state, we should not carry with us the conceptual baggage of another era, designed to deal with other problems. The Commission

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[4] There have been no Canadian books or articles written in English that attempt to describe a general *legal* theory of state, and the relationships among individuals, the community, and bureaucrats. At the same time Quebec has produced a number of significant theoretical offerings in this area. See Working Paper, *supra*, note 1 at 89-100.

[5] M. Aronson & H. Whitmore, *Public Torts and Contracts* (Sydney: Law Book Co. Ltd., 1982); P. Hogg, *Liability of the Crown in Australia, New Zealand and the United Kingdom* (Sydney: Law Book Co. Ltd., 1971); J.D.B. Mitchell, *The Contracts of Public Authorities: A Comparative Study* (London: G. Bell and Sons Ltd., 1954); G.E. Robinson, *Public Authorities and Legal Liability* (London: University of London Press, 1925); Law Reform Commission of British Columbia, *Legal Position of the Crown* (Working Paper No. 7) (Vancouver: The Law Reform Commission of B.C., 1972); C. Harlow, *Compensation and Government Torts* (London: Sweet & Maxwell, 1982).

[6] Many of the articles are contained in the bibliography of the Working Paper, *supra*, note 1 at 89-100. Other significant articles in Canada include A.W. Mewett, "The Quasi-Contractual Liability of Governments" (1959) 13 U. Toronto L.J. 56; M. Bridge, "Government Liability, the Tort of Negligence and the House of Lords Decision in *Anns* v. *Merton London Borough Council*" (1978) 24 McGill L.J. 277.

[7] The article by J. Quinn & M. Trebilcock, "Compensation, Transition Costs, and Regulatory Change" (1982) 32 U. Toronto L.J. 117, attempts to develop a general theory of compensation that does not require the injured individual to articulate a claim within the traditional common law doctrinal categories. See also L. Kaplow, "An Economic Analysis of Legal Transitions" (1986) 99 Harv. L. Rev. 509.

It should be recognized that many American theorists, in developing ideas about compensation in cases of state takings, have engaged in similar analyses. See J. Sax, "Takings, Private Property and Public Rights" (1971) 81 Yale L.J. 149; F. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 Harv. L. Rev. 1165.

[8] D. Cohen & J.C. Smith, "Entitlement and the Body Politic: Rethinking Negligence in Public Law" (1986) 64 Can. B. Rev. 1.

recognizes this in several contexts. In defining the relationship of individuals and the state the Commission recommends that we recognize the particular way in which the state exercises unilateral power as well as the enormous range of benefits and services provided by the modern state. They recognize that the way in which the state exercises power demands innovative and enlightened responses.

The Commission's work is, however, as yet incomplete, and this suggests that the problem of law reform and the state must be approached carefully in the future. While the work to date is important, it is flawed for several reasons. First, the methodology of the Commission's work, focusing on theoretical and abstract analyses of the state, is extremely circumscribed. Second, the focus of the paper on the 'legalization' of the relationship between the individual and the state may be shortsighted. Third, the paper fails to distinguish adequately between concerns with bureaucracies and concerns with majority tyranny. In this article I describe and evaluate the more significant ideas involved in the study of law reform and the state in light of those concerns.

II. DEFINING THE STATE

The question of law reform and the state, as the Commission conceives it, requires that the interests of the state be balanced with the interests of the individual. Leaving aside for the moment what we mean by the state, and why we focus on individual rights and interests, the balancing metaphor is itself an indication of a failure to articulate the real issues. The balancing metaphor is the classic paradigm of twentieth-century legal thought. While it is a comfortable adjunct to a utilitarian, rationalistic ideology, it reveals little. It assumes an intellectual process in which a neutral observer, applying a metaphysical measuring device independent both of her or himself and of what is being weighed, scientifically determines and calculates the sum of the 'weights' of freedom, dignity, individual privacy, bureaucratic autonomy, class solidarity, majoritarian wishes, efficient program design and implementation — all of which are somehow measureable on the same scale. The metaphor distorts the reform process, which must involve articulating and expressing our views and feelings towards these things, explaining why and how we value them, and designing a social policy that reflects these values.[9]

In undertaking the task of reforming the law of Crown liability and associated concepts, the Commission briefly describes the chaotic

[9] See R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978) at 26. G.E. White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford University Press, 1976).

and confusing historical treatment of the 'Crown' in English and Canadian law. There is no attempt to order the confusion, and the Commission acknowledges that the historical inconsistencies and contradictions in the treatment of the concept of the Crown cannot and need not be rationalized. Judges, legislators, and writers who use the term do not choose their words carefully, nor are they always talking about the same thing. When we use one word to describe the monarch herself, the institution of regal power, the concept of sovereignty, the constitutional head of state, judicial institutions and actors, the cabinet, the executive branch of government, individual ministers, government departments established under legislation, Crown corporations, and individual civil servants, it is not surprising that confusion reigns.

What we must do is think about the state, government, or Crown in a way that recognizes the political reality of Canada at the end of the twentieth century. That, the Commission suggests, requires two major shifts in our legal view of the world. First, the concept of Crown should be relegated to its formal and traditional function as constitutional head of state.[10] Discarding monarchical terminology and limiting the Crown to its purely formal role would reduce terminological confusion, historical biases, and anti-democratic and inegalitarian concepts insofar as they affect individuals in their relationships with bureaucrats and the majority. Second, and much more important, individuals who are injured (or are less well off) as a result of decisions and actions of the majority of citizens acting through their elected representatives, or the decisions and actions of individuals or institutions purportedly carrying out the directions of the majority, should be considered as having *direct* claims against the administration. The Commission suggests that we recognize the legal status of the federal administration, which would replace the archaic and confusing legal status of the Crown. Thus the central point of law reform and the state is conceived to be the need for unification of the federal administration — and the application of a uniform legal system of rights, privileges, and immunities to it. While the implicit transformation of Canadian political structure into a somewhat unusual form of republicanism would eliminate three hundred years of confusion as to what is meant by Crown, it will not remove the need to define what is meant by administration.

The Commission fails, however, to provide us with a meaningful or workable definition of administration. The Commission's functional

[10] At the same time, anyone who studies law reform and the state can quite easily avoid examining the privileges and immunities pertaining directly to the person of the monarch, and the Commission states that it is not concerned with that issue. Working Paper, *supra*, note 1 at 25-26.

concept of "a collection of material and human resources existing to give concrete effect to legislation, manage public services of general concern, and provide assistance benefits"[11] is *part* of the idea. But we are also talking about the responsibility of bureaucracies and individual bureaucrats who act selfishly, individuals and institutions who exercise power under the authority of law but who can be considered independent of the state, and so on. The suggestion of a functional definition of the state seems to me to make sense -one can retain the symbolic virtues of the Crown and its history (if one wants to), while simultaneously ensuring that a public policy of the state reflects our current values as to what the majority can and should do to (or for) individuals and minorities, and what bureaucrats can and should do to (or for) them. Our decisions can incorporate an instrumental rationale if we want to restrain the majority and bureaucracies. Current Crown liability rules can do the same, but are certainly less likely to do so, and do so less openly.

In defining the relationship between individuals and the community, we must understand what we mean by the state or the administration, and our appraisal should not be drawn too narrowly. The state (and it may be prejudging the issue to refer to it as the federal administration) can be conceived of in the narrowest of terms — the Crown — or in the broadest — all individuals and institutions whose activities and welfare are a consequence of legal power. The concept can be extended to individual state employees; individual state contractors; institutions such as hospitals and educational institutions that receive all or part of their funding from public sources; corporations established by the state; corporations owned privately but whose legal existence is the result of state action; corporations owned, controlled, and influenced by state employees; individuals able to exercise power as a result of state action; professional governing bodies; the courts, judges, and prosecutors. Government departments and institutions exercising specific statutory and regulatory powers are only the more obvious elements of the state. We must recognize that power is exercised in an infinite variety of ways — the exercise of extra-legislative executive power by the cabinet, the exercise of power by judges and state-employed 'Crown' attorneys, the exercise of power by individuals and institutions funded from public resources, or controlled or influenced by elected representatives and institutions, and the exercise of power by individuals and institutions who are able to do so only because the state permits them to act collectively in corporations and to own private property. All of these are examples

[11] *Ibid.* at 9.

of the exercise of power that requires the implicit acceptance, if not support, of those who control the machinery of government and force. In this sense, the state is everything, and what we must do is decide when and how we want to recognize public individuals and institutions in a different way than we currently recognize private individuals and institutions. The differences among what we call the Department of Transportation, what we call Air Canada, and what we call Canadian Pacific Airlines are differences of degree. None could exercise power, either externally or internally, without the institutional structure that permits them to do so. The state is that structure and is part of all social organization.[12]

The functional definition suggested by the Commission is only a first step in the development of a theory of state — and an uncertain step at that. The "collection of material and human resources implementing legislation" leaves out an enormous range of individuals and institutions that can be thought of as the state. The idea that we should recognize a functional definition of a 'federal administration' is a nice one, but I think that anyone who seriously engages in law reform in this context will discover some difficult and provocative paradoxes when they further develop their ideas about the state.[13] Nonetheless, the questions must be asked, and I agree that the starting point for meaningful answers

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[12] Thus in one sense the state can be conceived to *be* the structure of society; it is more than the formal institutions of legal power, the bureaucracy, or the aggregation of individuals who are considered part of the community.

We have developed, over the centuries, sophisticated systems of public and private law that define and regulate the relationship among and between individuals and corporations. The struggle worked out in that arena forms part of, and is shaped by, that system of law. We do not yet have a complementary system or law that defines and regulates the relationship of individuals and the state.

Martin Carnoy argues that "it is the State, rather than production, that should and will be the principle focus of class struggle." M. Carnoy, *The State and Political Theory* (Princeton, N.J.: Princeton University Press, 1984) at 9. What the recent deluge of literature on 'Crown liability', 'litigation and the government', 'government liability', and so on reveals is that legal institutions and actors will be part of that struggle.

[13] One of the most difficult paradoxes is to understand the conceptual, moral, and political problems involved in determining whether and how present governments should be able to determine the liability of *future* governments. The dynamic concept of state, a constant fluid concept (never-ending, yet continually changing), suggests that we must rethink our notions of private obligation, which assume the desirability of permitting our present selves to bind our future selves. As well, our ideas evolved from corporate ownership and transfers of liability and risk in the case of private enterprise. It is not clear why future governments, to the extent that they reflect electoral desires, should necessarily be confronted with irrevocable decisions reached by prior governments reflecting a different majoritarian consensus.

One can see these ideas reflected in specific common law and statutory rules that require actual authority and parliamentary appropriation of funds for contractual payments as prerequisites to legal liability in contract. *Attorney-General for Ceylon* v. *A.D. Silva* (1953), [1953] A.C. 461 (P.C.); *Dunn* v. *Macdonald* (1897), [1897] 1 Q.B. 555 (C.A.); *R.* v *Transworld Shipping Ltd.* (1975), 61 D.L.R. (3d) 304 (F.C.A.); *Financial Administration Act*, R.S.C. 1970, c. F-10, ss 25, 33.

must be a recognition of the modern bureaucratic state.[14] There is no reason to retain outmoded, inegalitarian, status-bound concepts of the Crown and her prerogatives and privileges in designing a theory of state liability for Canada. That would lead us, as the Law Reform Commission suggests, to conclude that we should recognize the executive branch of the state — in effect, recognize a republican form of government at least in the context of disputes in which individuals seek to obtain financial compensation from public resources. The historical and perhaps political necessity of recognizing the Queen as formally superior to democratic institutions should not interfere with public policy analysis.

III. THE METHODOLOGY OF LAW REFORM

The methodology of law reform at this stage of the Commission's work is extraordinarily narrow, and the ideas they develop are necessarily constrained by their perspective and methodology. Discussions with the Commission's staff suggest that additional research involving case studies and empirical analysis of compensation practices are currently under way. Nonetheless, so far the research methodology is characterized by reliance on legal academic sources and a superficial review of cases from common-law provinces and Quebec. It specifically rejects historical analysis — and justifies this decision by a need for "clarification and rationalization" that would be futile if history were to explain the world.[15] It is clear to some of us that the law consists of inconsistencies and that denying them is not the path to either understanding or progress. Moreover, how can one understand the world in a totally abstract, ahistorical context? The Commission attempts to excise a specific political, social, and economic institution from the society that gives it meaning, provides it with resources, and in which it functions and is transformed. Writers like Atiyah, Friedman, Horwitz, and Danzig, with their insightful historical studies of legal evolution and of the relationship of economic history to law,[16] have persuaded many of us that to attempt to study law in an ahistorical context is to ignore many of the forces that have shaped the institution and its relationship with the courts.

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[14] See Recommendation 1 of the Working Paper, *supra*, note 1 at 84, and the discussion at 84-85.

[15] *Ibid.* at 6.

[16] See P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979); L.M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1975); M. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard University Press, 1977); R. Danzig, "*Hadley* v. *Baxendale*: A Study in the Industrialization of the Law" (1975) J. Leg. Stud. 249.

The narrow methodology of law reform is reflected, as well, in the neglect of the considerable American material drawing on economic analysis of law,[17] and theories of bureaucratic organization, decision making, and policy implementation[18] that might have informed the Commission's work. American writers, including Reich, Stewart, and Frug, have written extensively on controlling bureaucratic powers,[19] the development of property rights in government benefits,[20] and the recognition of private rights in cases of state action[21] — precisely the issues presented in thinking about the legal status of the state. Finally, the examination or development of case studies in Canada and elsewhere that might inform us of the reality of state action and of attempts to obtain compensation from the state has not been conducted.

This narrow methodology and an associated reliance on an impressionistic view of the world is best reflected in the Commission's justification of a specific proposal — to abrogate the historical Crown immunities and privileges by allusions to concerns with constraining federal bureaucrats. It speaks of the British model of state liability and compares it with "the French or German solutions, in which much greater progress has been made in subjecting the Administration to the law and judicial control."[22] The Commission does not inform us of the French or German models of state liability, but even those of us who are familiar with these continental regimes have no idea of the data upon which the Commission based its conclusions regarding bureaucratic accountability. A further example of abstraction is the Commission's analysis of the problems associated with government liability in a federal state. Here we read about the "theological mystery" of eleven monarchs and one Queen, and consubstantiation.[23] There is no analysis of the practical

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[17] See M. Spitzer, "An Economic Analysis of Sovereign Immunity in Tort" (1977) 50 S. Cal. L. Rev. 515; L. Blume & D.L. Rubinfeld, "Compensation for Takings: An Economic Analysis" (1984) 72 Cal. L. Rev. 569.

[18] See G.B. Doern & R.W. Phidd, *Canadian Public Policy* (Toronto: Methuen, 1983) at 137-61; H.A. Simon, *Administrative Behaviour*, 3d ed. (New York: The Free Press, 1976); A. Downs, *Inside Bureaucracy* (Boston: Little, Brown and Company, 1967); P. Sabatier & D. Mazmanian, "The Implementation of Public Policy: A Framework of Analysis" (1980) 8 Pol. Stud. J. 538; D. Van Meter & C. Van Horn, "The Policy Implementation Process: A Conceptual Framework" (1975) 6 Admin. & Soc. 445; J. Pressman & A. Wildavsky, *Implementation* (Berkeley: University of California Press, 1973) at 69, 135, 143.

[19] G.E. Frug, "The Ideology of Bureaucracy in American Law" (1984) 97 Harv. L. Rev. 1193.

[20] R. Stewart & C. Sunstein, "Public Programs and Private Rights" (1982) 95 Harv. L. Rev. 1195.

[21] C. Reich, "The New Property" (1964) 73 Yale L.J. 733.

[22] Working Paper, *supra*, note 1 at 11.

[23] *Ibid.* at 13.

and political problems created by the existence of eleven democratically elected and accountable legislatures, eleven bureaucracies, and eleven electorates attempting to tax one another and to regulate and interfere with one another's policy objectives and programs.[24] The problems associated with federalism deserve far more sophisticated analysis. The Commission makes no reference to ministries of intergovernmental affairs, federal-provincial conferences of first ministers, or negotiations of federal-provincial agreements.

The failure of the Commission to undertake any serious case studies of federal-provincial relations, and its reliance on abstractions such as "various embodiments of the same sovereign,"[25] are not helpful. In the end, one wonders why a Law Reform Commission should study such a complex institution relying on cases and articles from legal texts.[26] Law reform that takes this approach is particularly ineffective, at least in part because of its methodology. Perhaps the case studies and empirical research currently under way at the Commission will provide a stronger foundation for future thinking.

IV. DICEY AND THE STATE

The Commission, after arguing for the recognition of the federal administration, then makes a critical error. Perhaps to pacify entrenched conservatives, it draws on nineteenth-century Diceyian concepts of the Rule of Law[27] and the twentieth-century *Charter of Rights and Freedoms*[28]

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[24] There is, admittedly one brief reference to "political" problems, but no one can argue that this is analysis. See *ibid.* at 16.

Later in the Working Paper the Commission raises the problem of federal initiatives being subject to provincial regulatory programs in the context of its analysis of the deficiences of judicial review. Here, the problem of interprovincial relations is reduced to allusions to interpretive rules. Again there is no discussion of inter-governmental relations and the consultative processes that have been developed in this context. *Ibid.* at 55-56. See also *ibid.* at 13-16.

[25] *Ibid.* at 13.

[26] See Consultative Group on Research and Education in Law, *Law and Learning* (Chair: H.W. Arthurs) (Ottawa: Information Division, Social Sciences and Humanities Council of Canada, 1983) at 70; H.W. Arthurs, "Paradoxes of Canadian Legal Education" (1973) 3 Dal. L.J. 639 at 657. Arthurs suggests that law reform agencies could be seen as doing research *on* law, which he defines as research using methodological tools and analytical models derived from non-legal disciplines that are used to evaluate, understand, and criticize law and legal institutions. The Law Reform Commission, at least in this working paper, did not fulfill Arthurs' somewhat optimistic views since virtually all of its research involved studying cases and legal articles and texts.

[27] See A.V. Dicey, *The Law of the Constitution*, 10th ed. (London: MacMillan & Co. Ltd., 1959) at 202.

[28] Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

to justify the argument that, on the basis of formal equality, the administration should be treated like a private firm — at least, the Commission believes that we should take this as our original position for the purposes of its argument. Putting aside the ambiguities of the Rule of Law, or perhaps reflecting those ambiguities, the Commission later recommends the development of a special legal regime applicable to the federal administration. If one believes, as Diceyians would, that the application of particular preferential *rules* to the administration somehow violates the Rule of Law, then certainly the creation of a special system of law and process does so to an even greater degree. I have no quarrel with the suggestion that the federal administration be subject to liability rules and processes different from those applied to private firms, but the justification for such different treatment cannot be a concern with the Rule of Law.

My quarrel is not, however, with the internal inconsistency and tautology of using the Rule of Law in this way. Rather, I cannot accept the Diceyian idea that one should 'legalize' the relationship of individuals and the state. The Commission's error arises from several sources. One is the methodology of the analysis, which I have described earlier. The second is a failure to articulate what Dicey was advocating. The third is the unwillingness of the Commission to examine critically the underlying structure of private law.

It is disturbing that in the modern Canadian state so much of law reform still relies on Dicey and yet fails to discuss what Dicey was advocating. The only possible explanation for Diceyian arguments is that the politics of law reform require comfortable models of legal argument. Anyone familiar with Dicey understands that he was a conservative — he believed that majoritarian values expressed in democratic institutions (which were slowly becoming more democratic during his life) were dangerous to his concepts of security and rights to property. He was terrified of bureaucratic power and recognized the unreality of political accountability as applied to much of the bureaucracy. Finally, he did not believe in the legitimacy of the state as an institution providing goods and services directly to the public — the welfare state, whatever its rationale, could only lead to domination of private interests. These beliefs led Dicey to design a legal model of the state embodying two central characteristics. First, he believed that we ought *not* to recognize the state as the subject of legal analysis. If the state did not exist in law, it would be logically impossible to recognize in it a legal obligation to provide benefits to individuals. Whatever one thinks of the assumptions of law, the logic of this argument is powerful.

Second, Dicey believed, and modern advocates of individual rights confirm,[29] that an effective way to control public bureaucratic power is to make bureaucrats as *individuals* subject to the same system of legal rules as non-bureaucrats. The function of judicial review as Dicey designed it is, at least in part, to frustrate or deny the achievement of the community's objectives in favour of others. That much is obvious, and it is disappointing that the working paper could not articulate it. Dicey's conception of the Rule of Law consisted of several ideas, including one that every person "whatever be his rank or condition" is subject to ordinary law and to the ordinary courts.[30] He specifically excluded from consideration any argument that bureaucrats should be subject to different rules or different institutions. He spoke of administrative law and administrative tribunals in France as "utterly unknown to the law of England, and indeed . . . fundamentally inconsistent with our traditions and customs."[31] Dicey recognized the unreality of theoretical Crown powers[32] and argued that the legal responsibility of bureaucrats, and thus their effective control by judges and courts, resulted from the refusal of the court to recognize that any act could be done by the state[33] and from the personal legal liability of individual bureaucrats.[34] The Commission must have been aware that Dicey was *not* ignorant of Crown immunities, but rather constructed a system that he believed would more effectively constrain bureaucratic conduct *and the community* than would a *droit administrif*.[35]

The point is that Dicey was consumed with 'legality', with the control of 'collectivist' legislation notwithstanding its source in the majoritarian values of even a limited democracy, and with the displacement of bureaucratic values by judicial values. Law reform involving the legal status of the federal government must speak to the debate between those who would control the state by regulating its individual components and those who would recognize the institution of the state and ignore its real actors. It is far too late to return to Dicey and to ignore recent

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[29] Recent legislative hearings in the United States have considered amendments to the *Federal Tort Claims Act* to provide 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. See P. Schuck, *supra*, note 2 at 82-99.

[30] *Supra*, note 27 at 193. See also *ibid.* at 202-3.

[31] *Ibid.* at 203.

[32] *Ibid.* at 9-12.

[33] Dicey used the word 'Crown', *ibid.* at 25.

[34] *Ibid.*

[35] Harry Arthurs makes the same error. H.W. Arthurs, "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

work that has examined the instrumental impact of liability regimes on bureaucratic behaviour.[36]

Finally, a critical perspective on law reform and the state demands that we examine the underlying structure of private law. Legalization of rights against the state, if that is what law reform involves, will perpetuate the application of common law values — focusing on individuals rather than the community, recognizing and giving priority to property and economic rights, attempting to control both bureaucrats *and* the community, refusing to consider legislative history and regulatory purposes, and, as Dicey put it, implementing policy that differs from existing ideas in representative legislation.[37] Contract law,[38] tort law,[39] and many of the other analytical tools used by judges have all been identified with particular ideologies.

It is clear, for example, that applying private law to the state will, in many cases, mean invoking a model of law that draws its legitimating function from notions of corrective justice.[40] Certainly there may be public policy objectives other than, or at least in addition to, corrective justice. Corrective justice, with its orientation to the *status quo*, will justify compensation only where a particular person can be seen to have wrongfully deprived another particular person of certain rights. Furthermore, models of corrective justice often assume relevant actors who are equal in all respects. Law reform need not wed itself to either of these corrective justice ideals, and it seems to me that in deciding on models of state and law we need not adopt perspectives drawn from another time and culture.

For all these reasons — the narrow methodology of the Working Paper, the use of Diceyian arguments, and an acceptance *at this stage* of legalization — it is not surprising that we may overlook the central issue — the design of institutions and processes through which individuals

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[36] Project, "Suing the Police in Federal Court" (1979) 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. L. 365 at 428; G.A. Bermann, "Integrating Governmental and Officer Tort Liability" (1977) 77 Colum. L. Rev. 1175 at 1190-202.

The only explanation for employing Diceyian arguments is that Dicey is familiar to all of us, and has provided the philosophical foundation for much of the Canadian administrative law that has been created by judges. Perhaps they thought that Diceyian allusions would be comfortable to common-law administrative lawyers. In the end, I think that the Diceyian arguments weaken the proposals, which are sufficiently justifiable in their own right.

[37] See A.V. Dicey, *Law and Public Opinion in England* (London: MacMillan and Co. Ltd., 1905).

[38] B. Mensch, "Freedom of Contract as Ideology" (1981) 33 Stan. L. Rev. 753; R. Unger, "The Critical Legal Studies Movement" (1983) 96 Harv. L. Rev. 561.

[39] See R. Abel, "A Critique of American Tort Law" (1981) 8 Brit. J. Law & Soc. 199.

[40] A vocal proponent of this school is R. Epstein, who develops this theory in "A Theory of Strict Liability" (1973) 2 J. Leg. Stud. 151.

will be able to participate effectively in the definition and delivery of the benefits that they claim. Legalization may shift power to a limited degree, but the demoralization and alienation in modern western society is not likely to be overcome simply by allowing the demoralized to sue the state.

V. CONTROLLING BUREAUCRATS AND CONTROLLING MAJORITIES

The third source of confusion in this area of the law and in much of associated law reform is a failure to recognize that studying the relationship of individuals with the state involves studying two very different political processes. The first is the definition of the permissible limits of the exercise of majoritarian power or the exercise of power by coalitions of minorities at the expense of other minorities. On this view, implied rights to compensation when legislatures interfere with private property rights and private wealth should be understood as an attempt by judges to prevent the majority of us from abusing democratic power and from acting "*unjustly* (and perhaps tyranically) toward a minority."[41] This is a central concern in all democracies, and any study of the state in Canada must involve establishing a set of criteria as well as a way of thinking about the intractable problem of democracy and the tyranny of the majority. There is little doubt that the majority, in true democracies, can argue that their collective action is founded on a moral legitimacy to which private firms, individuals, and bureaucrats cannot appeal.

This brings us to the second process defining the relationship of individuals to the state — the definition of the permissible limits of bureaucratic power. Here, we are concerned with the separation of ownership from control and power, which is characterized by the development of bureaucracies. The fragmentation of 'ownership' in democracies, the diffuseness of the interests of the electorate, the complexity of the operations of the state, and the limited capacity of individuals to predict the future and act on the basis of their predictions all lead to bureaucrats who are not accountable to the public. A concern with regulating bureaucratic conduct in these circumstances has been the overriding concern of judges in reviewing administrative action, and this is equally their concern when individuals seek compensation from the state or individual bureaucrats. But bureaucrats, unlike the majority, cannot point to their own interests as explanations for their actions and

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[41] R.A. Dahl, *A Preface to Economic Democracy* (Berkeley: University of California Press, 1985) at 15.

as justifying judicial deference. Any law reform process that fails to express the distinction between these two very dissimilar problems (regulating bureaucrats and regulating majorities) may represent an anti-democratic manifesto.

The problems I have described are revealed in the examination by the Commission of a specific area of state liability — tort liability of the Crown.[42] The alleged purpose of the exercise is to inform us of the details of a special regime of public law applicable to the federal administration. The Commission argues that a special regime would "provide better safeguards for the rights of individuals," but the reason articulated by the Commission — "providing solutions adopted to their particular situations"[43] — is entirely unilluminating. The analysis is little better. The Commission argues that the application of private law to state activities is "less than adequate," but we are not told why. They also argue that a more modern system would be simpler. We are not told, however, how this is just or right or more efficient; we are not told what the Commission means by a simpler system; and we are not given any idea as to how we can achieve this simpler, modern system.

The Commission does suggest that direct state liability would be preferable to vicarious liability — on one view this would "correspond more closely to the nature of administrative activities."[44] There is certainly something to be said in favour of designing liability regimes that can respond effectively to institutional wrongs, but as I explained earlier, it is not obvious that recognizing the state for tort law purposes will be a more effective regulatory device than requiring individual bureaucratic responsibility.[45]

The critical failure is the confusion between the review of distributive judgments of the state representing majority interests and the review of bureaucratic power. If the activity or injury is authorized in some sense, we should at least be concerned with majoritarian values. The Commission lumps together such ideas as "a failure to perform the obligations of the department," "the adoption of an illegal decision," "the fault of incompetence," and "an error in material operations," without defining or discussing them.[46] A brief critique of one quote should be enough to illustrate my concerns. The Commission quotes with approval J. Donzelot, who argues that in many state liability cases an "accident

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[42] Working Paper, *supra*, note 1 at 69-74.

[43] *Ibid.*

[44] *Ibid.* at 70-71.

[45] See H.J. Glasbeek, "Why Corporate Deviance is not Treated as a Crime — The Need to Make 'Profits' a Dirty Word" (1984) 22 Osgoode Hall L.J. 393.

[46] Working Paper, *supra*, note 1 at 70, 71.

is usually . . . the result of the entire work process . . . [and] . . . those involved are thereby concerned . . . in compensating for the resulting injury."[47] There is no analysis of the loss-shifting and loss-spreading abilities of the state. To say that the *bureaucratic* institution is liable to compensate for losses is facile, and certainly the Commission does not believe that the individual bureaucrats should be liable. The Commission, when it goes on to suggest that "sheer negligence" may justify personal liability,[48] makes no attempt or perhaps is unaware of the enormous conceptual, political, and economic complexities in determing bureaucratic negligence.

The Commission apparently ignores the fact that we are also regulating bureaucrats; simply because a bureaucrat is employed by a state institution does not necessarily mean that public resources should be used to compensate individuals whom she or he injures. Liability rules may have very little impact on bureaucracies, and the Commission ignores the considerable literature on bureaucratic deterrence.[49] More significantly, it seems to me that we cannot provide compensation when a department is not doing what it ought to do without a thoughtful analysis of what we mean by 'ought to do' — obtuse references to 'objective' weighing with reference to the normal operations of the department[50] are not particularly insightful. If 'normal' operations involve non-compliance with external or internal standards, will compensation be denied? What if the 'normal' operations are lawful? Will lawfulness automatically insulate the state from liability? What if the losses are due to a Duplessis-like rogue bureaucrat? Dussault is quoted by the Commission in support for the proposition that compensation should be payable for "wrongful and damaging acts by the government."[51] We do not know, however, what *that* means unless we have some understanding what we mean by "wrongful," and "government," and "damaging." Is the non-receipt of state benefits damage? The answer so far has been no.

The Commission argues that 'logically' the imposition of direct liability in 1953 in limited circumstances should culminate in recognizing the direct liability of the administration alone. What is 'logical' about this? The 1953 *Crown Liability Act*[52] *retained* the personal responsibility

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47 *Ibid.* at 71, quoting J. Donzelot, *L'invention du social* (Paris: Fayard, 1984) at 131.

48 Working Paper, *ibid.* at 71.

49 See *supra*, note 36.

50 Working Paper, *supra*, note 1 at 71.

51 *Ibid.* at 71 n.119.

52 R.S.C. 1970, c. C-38.

of bureaucrats. Moreover, law is not only logical, it is functional and normative. If the imposition of direct liability in 1953 failed to establish a more effective regulatory or compensatory tool, or if the 1953 *Act* does not reflect modern ideas about the relationship between individuals and the community, it would be *illogical* to extend its conceptual framework on a more general basis.

The Commission alludes briefly to insurance-based compensation plans that may be appropriate in the state liability context, but again there is no indication that any serious thought has gone into the idea. They argue that no-fault insurance regimes would be more efficient and less onerous as they would require only a "direct link of cause and effect [to be] established between the damage and the activity."[53] Even leaving aside questions of allocative efficiency, it is not clear to me that causation is as simple as that statement supposes it to be. What ought to be the result if a corporation locates an economic enterprise close to a state-owned nuclear power plant and subsequently suffers either economic losses when the nuclear power plant requires extensive periodic planned maintenance or property damage when the plant experiences a foreseeable radiation leak? Should compensation be payable? Who 'caused' the economic loss? Has the firm 'caused' the injury to itself? Has the state 'caused' the economic loss if the firm was compensated *ex ante* through a reduction in its capital investment? In one sense, the reduction in wealth is due to the confluence of two activities that reduces the actual or expected benefits available to either alone. The simplistic causation language conceals and distorts the analysis, which may depend upon an initial determination of rights or economic efficiency.

Nor does the Commission appear to be aware of any of the other issues associated with compensation programs. What are the administrative costs of no-fault liability regimes as compared to other compensation plans? Where is the analysis of moral hazard and the effect of insurance on victim and co-injurer behaviour? Should the source of the insurance payments be general revenues, or specific user fees? Should compensation be payable simply because the state exists, and because individuals need or deserve or have earned a particular level of wealth? Why should the state provide individuals with insurance for risks when private insurance is available? What are the 'social' risks that would be subject to this public compensation scheme? One could not have expected answers to these questions, but surely they ought to have been acknowledged.

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[53] Working Paper, *supra*, note 1 at 53.

Most important, the distinction between concerns with controlling bureaucracies and concerns with controlling majorities is ignored. Representative institutions undertaking deliberate redistributive programs resulting in welfare losses to some are discussed in the same breath as random, unplanned damage associated with state action. The majority, in some sense representing all of us in a democratic state, may decide to take wealth from some of us to benefit others. Of course that deprivation may not be just, and perhaps ought to be unlawful and compensable, but justice in such cases cannot be determined through an inquiry into the regulation of bureaucracies. In cases of majority action we are trying, as Robert Dahl put it, to develop ideas that will permit us to distinguish injustice or tyranny from the right use of the democratic process.[54] Unless we do so, we cannot know when losses associated with state action that redistributes benefits should be compensated. There is, of course, an extensive literature on this question — some policy analysts argue that because there is no net social loss in the case of transfer payments compensation is unnecessary.[55] Others suggest that the state, when it acts so as to reduce the market value of one person's wealth, is simply expressing demand that for one reason or another was not expressed in the market.[56] Changes in taste expressed in the market do not give rise to compensable losses, so why should changes in taste expressed in the political process be treated differently? The Commission ignores all these questions, simply stating that "there is also a measure of social justice in not requiring the victim to bear the burden of an anonymous accident."[57]

The Commission in a sense misses the point entirely. It is not enough to declare social justice, one must think about it. The Commission suggests that in *Manitoba Fisheries Ltd.* v. *The Queen*,[58] a case involving compensation for expropriation of property, the courts in providing compensation on a 'no-fault' basis "are tending to look at the problem of

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[54] Dahl, *supra*, note 41.

[55] W. Bishop, "Economic Loss in Tort" (1981) 2 Oxford J. Leg. Stud. 1. Compare M.J. Rizzo, "The Economic Loss Problem: A Comment on Bishop" (1981) 2 Oxford J. Leg. Stud. 197.

[56] J. Knetsch, *Property Rights and Compensation* (Scarborough: Butterworth, 1983) at 11-12.

[57] Working Paper, *supra*, note 1 at 73.

[58] (1978), [1979] 1 S.C.R. 101; see also *Attorney-General* v. *De Keyser's Royal Hotel, Ltd.* (1920), [1920] A.C. 508 (H.L.).

the Government's tortious liability in a new light."[59] Nonsense. It is an old light, a reflection of judicial values protecting property and economic interests, and an abhorrence of collectivist legislation. If we think that firms ought to be compensated in these cases we must think, as the Commission clearly has not, about democracy, majoritarian tyranny, utilitarianism, and rights to property.

VI. THE LAW OF THE 'FEDERAL ADMINISTRATION'

The Commission, notwithstanding its previous reliance on Dicey in proposing that the administration be subject to the ordinary law,[60] later calls for a radically *anti-Diceyian* reform. In effect, the Commission proposes an administrative law with a "distinctive meaning."[61] This is the first we see of the implicit concept of a *'droit administratif'*, and one can presume that this administrative law is not to be administered in a judicial 'spirit', as Dicey would have it.[62] We are not, however, told precisely what this distinctive meaning is, although the Commission does refer to the existing legal regime as one that "primarily benefits the administration"[63] — a conclusion that would shock most administrative lawyers. One has the sense that the Commission favours the development of a vaguely defined independent system of law applicable to a unitary federal administration. It considers the retarded and incoherent development of public law concepts to be unrealistic in view of the growth of executive power during the postwar era. To be fair, the Commission does not, at this stage of its work, go so far as to advocate a separate system of administrative courts, but that is the overriding impression one has of its ultimate objectives.

The second chapter of the working paper is devoted to developing those ideas — the Commission admits that while it believes change to be necessary, it does not know precisely where to go, and again the analysis is not persuasive. The task of law reform, as of any public policy analysis, must begin with a relatively detailed factual description of the

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[59] Working Paper, *supra*, note 1 at 73. The Working Paper concludes with a suggestion that the determination of compensation in disputes between the individual and the state should not be limited to 'curial' institutions. Brief mention is made of non-adversarial dispute resolution techniques, settlement and mediation processes, and the like. It is, however, somewhat surprising that there is no discussion at this point of relatively more interventionist institutions like ombudspersons and police commissions. And it is startling that the Working Paper fails to consider *the* central issue — the accountability of the new curial or non-curial institutions. The review institution may constitute another arm of the state with an independent ability to injure and deny benefits.

[60] *Ibid.* at 23.

[61] *Ibid.* at 26. These ideas are developed more fully at 34-59.

[62] Dicey, *supra*, note 27 at 30ff.

[63] Working Paper, *supra*, note 1 at 27.

phenomenon one is studying. Here, the Commission provides us with an intellectual construct, but there are no case studies, no descriptions of bureaucratic activities and processes, and no analysis of the impact of current or proposed liability regimes. As well, one must identify the normative assumptions that underlie the analysis. Apparently, the Commission believes that the status of the federal administration should enhance the position of individuals in relation to the state.[64]

The ensuing discussion of the conditions favouring individual rights fails to clarify those ideas. We are told that "the question of the rights of individuals has now become a central concern of administrative law."[65] There is, surprisingly, no acknowledgment that most of what we call administrative law, with its focus since the turn of the century on judicial review, has been devoted to controlling the exercise of majoritarian and bureaucratic power in favour of protecting the "rights of individuals." While some of us may now be questioning whether the judicial defence of some rights and the denial of others is correct, the conflict is an ancient one. It may be, as we move towards the twenty-first century, that we should discard our bias in favour of individual rights — or at least include in the concept of rights more than traditional ideas of contract and property.

The Commission apparently believes that we should recognize the need for an arm of the state to act efficiently and to appreciate the "different logic" that justifies the executive branch of the state.[66] Yet the discussion is so abstract as to be virtually meaningless. The idea that the executive branch has specialized functions that differentiate it from the legislative branch is trite. What is required in law reform is an analysis of the ways in which this specialized function operates in reality — policing, delivery of health care, provision of public goods such as parks, national defence and mass immunization programs, establishment of educational institutions, redistribution of wealth and taxation, rate regulation, licensing, and so on.

As well, in designing a regime of public law it may be dangerous to adopt the Commission's implicit views that the bureaucracy is a benign entity simply fulfilling the wishes of its political or command masters. Other views are quite different. In these an activist, independent bureaucracy shapes state policy, and then actively implements that policy to achieve bureaucratically defined objects.[67] The legitimacy of executive

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[64] *Ibid.* at 43-59.

[65] *Ibid.* at 34.

[66] *Ibid.* at 60.

[67] See, for example, R.D. Cairns, *Rationales for Regulation* (Technical Report No. 2) (Ottawa: Economic Council of Canada, 1980) at 14-19.

action in this latter model is quite different from that which can be articulated in the case of passive bureaucracies.

Current law reform analysis, the Law Reform Commission's work being no exception, is apt to turn to the "paramountcy of liberal concepts"[68] for an ideology that favours the rights of individuals and that should drive our conclusions regarding the design of individual-state relations. The *Charter of Rights* is seen as a reflection of liberal, individualistic concepts of freedom of speech and associated political rights, and rights to life, liberty, and security of the person. This focus on controlling state power in favour of individual rights should, according to the Commission, be reflected in our thinking about the legal status of the federal administration. While that proposition would seem straightforward, I have two reservations with such law reform. First, abstract legal theorizing too often fails to appreciate the intensely political nature of the debate that led to the recognition of individual liberties in the *Charter*. For example, the 'curious' omission of property rights in the *Charter* is explained as a reflection of a philosophy that identifies the individual as the supreme value. Philosophy aside, it seems that historical analysis leads to the conclusion that property rights were excluded as a result of the federal government's perceived need for the support of the governments of several provinces, which were concerned with federal encroachment on provincial legislative jurisdiction over property matters,[69] and not as a result of a particular view of the worth of individuals.

Second, it is not clear to me that law reform should necessarily be concerned with the 'legalization' of the relationship of individuals and the state. As I argued earlier, the distribution of collective goods, economic regulation, and policing all require a view of the community as a vehicle for expressing communal values,[70] and perhaps for protecting classes and individuals who are not able for one reason or another to use existing legal and political processes. Legalizing rights that are defined through well-developed democratic political processes is not necessarily a solution, nor is legalizing rights that have not been so defined. I have no quarrel with the thesis that we should be concerned about the welfare

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[68] Working Paper, *supra*, note 1 at 42.

[69] See R. Romanow, J. White & H. Leeson, *Canada . . . Notwithstanding* (Toronto: Carswell, 1983) at 77; A.C. Cairns, "The Politics of Constitutional Renewal in Canada" in K.G. Banting & R. Simeon, eds., *Redesigning the State: The Politics of Constitutional Change* (Toronto: University of Toronto Press, 1985) at 121-27.

[70] Any theory of state liability must do more than protect private rights from state action. The state as the defendant should not be assimilated to the position of private enterprise — at the very least we can begin to understand state action as a reflection of communual values rather than private rights.

of individuals, but I have grave reservations about the prescription for alleviating the disease.

Nonetheless, it is possible to draw on the *Charter*'s equality rights provisions to justify a more general concern with individual welfare, and in this context the Commission argues that the recognition of equality rights reinforces restrictions on autonomous state action. After an extended discussion of equality rights,[71] the Commission concludes that "Dicey clearly meant that. . . individuals and the administration should be subject to the same rules contained in the law."[72] I do not agree. Dicey first argued that we should *not* recognize the administration; and second, that individual bureaucrats who acted unlawfully should be treated like individuals. He further argued that determinations of unlawfulness should be made by judges whose values and attitudes would be opposed in many cases to those of the administration.[73] Dicey may have been right in his implicit assumption that if we want to control institutions we should in some instances ignore the institution, and focus our attention on the individuals who participate in and constitute the organization. Economic sanctions and stigmatization are effective regulatory tools only if the actors react to them.

In any event, after suggesting that individuals and the administration should be subject to the *same* rules, the Commission makes perhaps its most significant proposal — that the administration and the individual should not be subject to equality of treatment. Why? Because the administration is different![74] Some would argue that the dialogue created by Rule of Law analysis is necessary. Here the dialogue results in a tautological conclusion that equality means equal treatment of equals. Law reform submits a conclusory statement that the state is different, thus justifying a special regime of law in light of those differences. We are left to wonder, for the time being, precisely what is so 'special' about the state that would justify those conclusions.

VII. THE STATE IN MODERN CANADIAN SOCIETY

In the end, the enterprise of law reform, an inquiry into state liability, and the definition of individual rights against the state must all address and answer the most difficult question — why should we recognize the state as an institution independent from its constituent actors? The answer is that the state, represented by those individuals who claim to exercise

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[71] Working Paper, *supra*, note 1 at 45-48.

[72] *Ibid.* at 48.

[73] See Arthurs, *supra*, note 35 at 7-14.

[74] Working Paper, *supra*, note 1 at 59-60.

monopolistic legitimate force and who redistribute benefits from the taxation of private funds, has no private analogies. If we are truly concerned with the control of bureaucratic power the inadequate delivery of public benefits, it is impossible to believe that our concerns will be ameliorated if we continue to ignore the state. The Law Reform Commission acknowledges as much in the final section of the working paper, which contains the Commission's most important and provocative ideas.

The Commission argues that the vulnerability of the individual in her or his relationship with the state justifies the creation of a special legal regime defining and regulating bureaucratic power. The Commission observes that the individual "is in a position of dependence and vulnerability,"[75] and is isolated, powerless, and marginalized in a technical, scientifically-managed, -organized, and -controlled society. The traditional authoritarian concept of sovereign immunity, with its associated ideas of subjugation and submission, reinforces the isolation of the individual. These ideas suggest that a concern with enhancing human dignity leads to a model of state liability that would restrict executive authority and insure the delivery of public benefits.

While this idea is attractive, it deserves to be thought about further. First, law reform is misdirected if it does not appreciate the dual nature of state benefits. In some cases the state is providing the infrastructure for capitalist enterprise — rights to property and contract, rights to organize collectively, protection from certain competitive activities, institutions providing information, communications, transportation, and risk-spreading services, and associated private and public goods. In other cases, the state is providing individuals with personal benefits — unemployment benefits, housing, and health care — reflecting the welfare philosophies of the redistributive state and perhaps necessary if the state is to remain legitimate. The latter, and not the former, may be associated with demoralization, domination, surveillance, and dependence. Corporate benefits are certainly *not*, and if a concern with the imbalance of power and the dignity of individuals justifies reforms to adjust the relative power of individuals and the bureaucracy, indiscriminate application of the concept will only exacerbate existing inequalities between the two groups.

Second, law reform must analyze the vulnerability, dependence, and demoralization that the Commission alleges are associated with state action. It may be that these social and personal phenomena are the result of the *state*, rather than the community or other individuals, providing the benefits. They are not necessarily associated with the state *depriving* individuals of entitlements or redefining the benefits. The lack of social

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[75] *Ibid.* at 53.

solidarity, the isolation of the individual from the community, and the disconnection between benefit and dessert may be the source of the discontent. If that is so, then the demoralization will not necessarily be reduced or eliminated by creating legal entitlements to those benefits. It may be true that the dependency and demoralization reflect particular bureaucratic insensitivities and capriciousness, but even then it is not at all certain that legalization is an effective bureaucratic regulatory technique.

Third, law reform must address the way in which individuals do or can participate in the legislative and regulatory definition of these benefits. It seems to me that one way to reduce demoralization and dependency is to establish an institutional framework that will allow individuals and the community to participate effectively in the definition and delivery of the benefits. The Commission does not address this point and yet we cannot know what these benefits are unless we analyze the means used to distribute them. The demoralization that the Commission alleges is a feature of modern society may be as much the product of the attitudes of the bureaucrats and community that provide the benefits, the attitudes of private citizens who believe themselves to be independent of the state, the stigma that is (perhaps deliberately) associated with the receipt of state largesse, and the techniques of distribution that include surveillance, invasions of privacy, and restrictions on liberty. The legalization of these benefits, while it may shift the balance of power to some limited degree, is at the same time too blunt and too specific a tool.

Fourth, law reform that is concerned with the non-receipt of public goods cannot be premised on a belief that all state benefits are equally deserved. Some of us may have other theories of distributive justice, but even if we did not, it is naive to ignore that at least some distributed public benefits are the result of political affiliation, bureaucratic self-aggrandizement, or worse. Simply because public resources are used to benefit others does not necessarily lead to the conclusion that a collective decision to benefit the recipients has been made — it may simply represent a case of one group of individuals (bureaucrats) giving away wealth, originally owned or created by a second group, to a third group. Rather than giving this third group legal power to demand the benefit or compensation for its loss, perhaps we should continue to develop a public policy that ensures bureaucratic financial accountability.

In the end, one should not depend solely on abstract concepts if one is truly concerned with the solution or amelioration of real social problems. The creation of legal rights against the state may shift power, but then only in marginal cases. We may lose sight of the real questions that deal with the quality of social benefits received by individuals and

the process of definition and distribution if we restrict our vision to the formal establishment of legal rights.

Finally, the traditional response to concerns with state power has been judicial review, and as is to be expected, the Law Reform Commission focuses on the deficiences of this remedial process. I suppose that the Commission is arguing that we ought to think about a comprehensive restatement of individual rights in relation to the state since traditional methods of judicial review are inadequate to achieve the Commission's as yet unarticulated objectives. But it can be argued that, if we want to *deny* rights where their acknowledgment would necessitate redistribution of wealth, the current process of judicial review is just what one would expect. The Commission apparently fails to understand both the values and process associated with common law judging. Anyone familiar with the literature on judicial values and reasoning could not believe that "judges have simply recognized the existence and scope of a privilege."[76] Recognition and definition are active processes, and common law judges have for decades attempted to restrict the operations of the state and of individual state representatives. In some cases the judges are attempting to control majorities; in others, they are concerned with bureaucratic power; but in all cases they will protect judicially defined and created property and economic rights. Implied rights to compensation on the expropriation of property rights[77] are simply the most obvious manifestation of judicial values. To argue that common law judges favour the state and bureaucrats in the context of defining their relationship with individuals is unsupportable.

The Commission recognizes that judicial review reflects judicial attitudes and values but concludes that the values reflect deference to the state. What they should be saying -what is more accurate — is that judges are protecting the wrong kinds of interests. Traditionally, a concern with protecting individual private property and economic rights has led judges to restrict the state when it attempts to interfere with the limited classes of private entitlements that judges have considered worthy of protection. Simultaneously, judicial concerns with 'rugged individualism', independence, and self-reliance make it difficult for recipients of state benefits to persuade judges that those benefits (which are needed but perhaps, according to judicial ideologies, not deserved) are similarly worthy of protection. Thus judges *do* defer to the state but only when it or individual bureaucrats interfere with the enjoyment of state largesse — only where recognition of private rights would be to countenance wealth redistribution. Certainly one can say that the judges are wrong in protecting one type of entitlement (property rights and economic

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[76] *Ibid.* at 55.

[77] See *Tener* v. *Queen in Right of British Columbia* (1985), 17 D.L.R. (4th) 1.

expectations) against state action, while refusing to recognize the other, but that is a very different problem inherent in judicial review.

Nonetheless, the Commission identifies the central idea in this context. The state exercises a benefit-granting function that has no private analogue. Tort, property, and contract ideas simply do not provide a conceptual apparatus that permits us to develop a public policy dealing with the delivery of state benefits. Contract law concepts are rigid, demand a specific exchange relationship or perhaps actual reliance, and reflect theories of promise and consent — none of which reflect the reality of the relationship of the state to the individuals to whom it is delivering public services. Tort law concepts, admittedly more flexible, might have been employed to achieve novel outcomes, but judges have not yet indicated that they understand the problems associated with the state delivery of benefits. As well, tort law, in light of its narrow focus on corrective justice and its unwillingness to accept that the non-receipt of expected benefits should be recognized as a wrong, is an unwieldy remedial tool. Similar arguments can be made about trusts, property, restitution, or any other of the familiar categories of common law thought. In all cases we protect existing common law entitlements, but do not recognize collectively defined entitlements with all of the redistribution that recognition would entail. In the end, I suspect that the Commission is right in thinking that a special regime of public law is necessary; but I have serious doubts that their research methodology, analytical framework, and understanding of the judicial and administrative processes will assist them in going any further.

VIII. CONCLUSION

The Commission concludes that the recognition of new safeguards protecting the individual "would be eventually associated with the abandonment of the idea of the Crown as an operative concept in administrative law. If that idea were to disappear in the course of unifying the law applicable to the federal Administration, there is no doubt that entirely new systems could be created."[78] It is not clear to me that the views of the Commission are fully developed — their approach is narrow, and the reasoning in the working paper is so abstract as to be meaningless. Nonetheless, there is considerable merit in an attempt to engender debate and discussion on the topic among the Canadian community. One of the most difficult and politically contentious projects of law reform is the reviewing of bureaucratic and majoritarian judgments and the design of new institutions and processes that recognize the modern Canadian state.

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[78] Working Paper, *supra*, note 1 at 79.