The Nature of Public Law Duty and Citizen Standing in English Law

by

Thomas A. Leary

This thesis is submitted in conformity with the requirements for the degree of LLM
Faculty of Law
University of Toronto

© Copyright by Thomas A. Leary 2011
The Nature of Public Law Duty and Citizen Standing in English Law

Thomas A. Leary

LLM

Faculty of Law
University of Toronto

2011

Abstract

This thesis explores the often overlooked nature of public law duty and its relationship with the doctrine of standing in English law. Drawing on English and North American legal tradition and thought, it posits that public law obligations should be reconceived of as fiduciary in nature, vesting correlative enforcement rights in citizens to constrain unlawful exercises of public power. This should correspond to the abolition of standing requirements and recognition of the rights of citizens and interest groups to bring administrative and human rights challenges before the courts. This thesis also aims to achieve some synthesis between liberal normativism and communitarianism by recognizing both the individual and the collective interests at stake in public interest litigation.
Acknowledgments

I owe a great debt of gratitude to Kent Roach, my thesis supervisor, for his time, insight, and encouragement during my research and writing. This thesis owes much to his comments and help, particularly in relation to the North American literature on standing, and his tireless efforts through many proposals, drafts, and meetings. All views (and errors) expressed herein belong to the author.

I would also like to thank Hélène Mayrand, my SJD Advisor, for all her help and advice.

My thanks are also due to the LLM students with whom I had the good fortune of studying, the excellent Toronto Law Faculty staff, the residents and faculty members of Wycliffe College, and Wellspring Church, for making my year in Canada so enjoyable.

Finally, my thanks to Claire, who has had to endure more hours on Skype than I care to admit here, and whom I love very much.

‘Trust in the LORD with all your heart
and lean not on your own understanding;
in all your ways acknowledge him,
and he will make your paths straight’

Proverbs 3: 5-6
For my Parents
Table of Contents

1. Introduction ................................................................................................................1

2. The Relationship Between Public Duty and Standing ............................................2

3. The Relationship Between Theories of Duty, Public Law, and Standing ..........8

   a) Liberal Normativism and Individualist Approaches to Standing ....................9

   b) Communitarianism and the Public Interest .......................................................15

   c) Towards Synthesis ..............................................................................................19

   d) Functionalism and Conceptions of Duty ..........................................................25

4. Problems with Restrictive Conceptions of Duty and Standing ............................31

   a) The Problem of Unprotected Interests ...............................................................31

   b) The Problem of Equality Before the Law ..........................................................35

   c) The Problem of Good Administration ..............................................................36
5. The Nature of Public Law Duty ..............................................................42

a) Concepts of Duty .................................................................................43

b) Types of Duty in Public Law ...............................................................44

c) Imperfect Obligations and Correlativity in Public Law ....................46

6. Public Duty as a Fiduciary Obligation ..................................................53

a) The Theoretical Similitude of Public and Fiduciary Obligation ........54

b) Judicial Conceptions of the Fiduciary Nature of Public Law .............57

c) The Distinction between Public Law and Equity ...............................59

7. The Beneficial Interest and Its Implications for Standing ....................62

a) Questioning the Implications of the Fiduciary Model: Evan Criddle ....63
b) Reasserting the Beneficial Interest ........................................................................67

c) Public Authorities in the Absence of Delegation: The Scope of Public Law ....69

d) The Rights of Citizens in Public Law ......................................................................73

8. Lessons from the Canadian Approach to Standing ...............................................74

a) Standing Pre-Charter ..........................................................................................75

b) Standing Post-Charter and in Administrative Law ..................................................78

c) Sections 24 and 52(1) of the Constitution Act 1982 .................................................82

d) The Benefits of the Canadian Approach ...............................................................83

9. Reform of the English Law of Standing .................................................................84

a) An Inadequate Proposal ......................................................................................84

b) Clarifying the Public Interest ...............................................................................85

c) Reformation or Abolition? ....................................................................................89
10. Conclusion: The Future of Standing .................................................................................94

11. Bibliography .........................................................................................................................96
The Nature of Public Law Duty and Citizen Standing in English Law

1. Introduction

A. J. Harding once wrote that, ‘the concept of a public duty is an important but elusive one. It has been consistently ignored by jurists, avoided by public-law scholars, and rendered marginal for much of its history by the judges.’¹ Steven Winter has written that, ‘current standing law obfuscates the instrumental value of the rule of law in a functioning democratic system.’² These concerns, though seemingly disparate, are intimately related, for one’s conception of public law obligation directly affects one’s perception of the law of standing. A coherent theoretical basis for citizen standing in English law must rest upon a proper understanding of the relationship between conceptions of public law duty and the correlative approaches to standing that these yield.

The approach adopted herein draws upon English and Canadian legal thought to recognize and explore the similarity between public and fiduciary obligations and establish a theoretical basis for broad rights of standing for citizens and interest groups.

This approach seeks to improve upon the vague, and often confused, notions of the public interest that are employed by the current discretionary approaches to standing for these persons and groups, by positing a more specific and detailed understanding of the public interest in lawful government and attempting to synthesize arguments from liberalism and communitarianism. The fiduciary approach to public law obligation thereby seeks to avoid unprincipled judicial discretion by providing practical and coherent guidance for judicial decision making under a new doctrine of standing in English law.

2. **The Relationship Between Legal Duty and Standing in Public Law**

You would be forgiven for thinking that the confluence of an inquiry into the nature of public law duty and an examination of the law of standing is likely to yield confusion rather than understanding. After all, the fact that A owes a legal duty to B need not, and on occasions does not, entitle him to sue for breach of that duty. The rules of evidence, the availability of witnesses, time limits for the action, and the problem of costs may all conspire to prevent a claim. Furthermore, it might be supposed that standing to bring an action in administrative law is entirely divorced from the question of duty, being determined simply by political or adjudicative doctrines that
specify, inter alia, the judicial role of the court.\(^3\) Therefore, whatever our general interest in the nature of public law duty, it can be deemed irrelevant to the question of standing, as affirmed by T. R. S. Allan’s observation that although, ‘every public authority has the duty of observing the law…it hardly follows that every official action or decision is appropriately subject to judicial review.’\(^4\)

It is to such a challenge that four points should be adumbrated. First, defining the nature of duties and rights in public law before examining the question of standing focuses attention on whether and how far such duties should be enforced. Whilst the existence of a public duty need not entail standing, the nature of the duty and any correlative rights that it yields may give normative support to a claim for broader standing. This important aspect of public law has often been overlooked by public lawyers, in stark contrast to their private law counterparts.\(^5\) Indeed, we have already noted A. J. Harding’s criticism of English jurisprudence for consistently ignoring this aspect of public law.\(^6\) For Harding, the nature of public duty means that, ‘the law should enable a public duty to be effectively enforced by individuals.’\(^7\) Whether or not that

---


\(^7\) Ibid., 2.
premise is accepted at the outset of our inquiry, it is reasonable to accept that if a duty is owed to another, there should be some way of enforcing that duty.

Second, consideration of duty allows comparisons to be made between public and private law duty that shed light on the coherence of narrow standing. The relationship between public and fiduciary duty supports broadening standing by likening citizens to beneficiaries of fiduciary obligations. This similitude, although not all its implications, has been averred by Dawn Oliver, who writes that, ‘

duties of what in judicial review are called legality and rationality are imposed by equity in respect of exercises of discretion by trustees and company directors. Here the phrase “arbitrary or capricious” tends to be used rather than “Wednesbury unreasonable”. The concept of ultra vires and the principle of rationality enunciated by Lord Greene in Associated Provincial Picture Houses v. Wednesbury Corporation are very obviously borrowed from and also found in equity – hardly surprising since Lord Greene was an eminent Chancery lawyer.’

Indeed, there are other similarities between equity and public law, including the general beneficial interest of citizens in the lawful exercise of public powers, and it will be argued that this insight can support and underpin Laskin J.’s dictum in Thorson v. Attorney-General of Canada [1975] 1 SCR 138 that, ‘it is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.’


A third reason for examining duty in public law is that the scope of the duty and its relationship with the scope of correlative rights has a direct bearing on the breadth of standing. Even the approach of T. R. S. Allan, who is seemingly more hostile to acknowledging the place of duty in explaining standing, demonstrates this point. Allan does not simply argue that the existence of a public law duty need not entail standing. He adopts a particular theory of rights and duties in public law that precludes such standing. Allan argues that although public law duties might entail a general duty of legality, ‘no one has a general right that public bodies observe the law, because such as assertion of right is meaningless. A citizen naturally expects a public authority conscientiously to perform its duties; but his right is a right to fair treatment in its dealings with him.’

Although Allan rightly accepts that the scope of public duty extends beyond fair dealings with individuals, implicit in his argument are two controversial premises: first, that at least some public duties do not vest correlative rights in citizens, and second, that it can be meaningful to assert a broad concept of duty, but meaningless to assert this same scope for rights. Furthermore, Allan does not specify the nature of this broader duty, to whom it is owed, or in whom it vests enforcement rights, if it is capable of doing so at all. Behind Allan’s arguments against broader standing lie particular and questionable understandings of the nature of public law duty and the rights of citizens. Therefore, the standing debate cuts to the core of our understanding of the nature of public law itself.

---

A fourth reason for considering the nature of public law duty is that if, contra Allan, there is correlativity between duties with rights in public law, this suggests that there ought to be some mechanism whereby citizens can individually and collectively challenge ultra vires decisions by public bodies.

Hohfeld famously categorized rights and duties as correlative legal concepts, citing Lake Shore & M. S. R. Co v. Kurtz\(^\text{11}\), in which the court said that, ‘duty or a legal obligation is that which one ought or ought not to do. ‘Duty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violate’.\(^\text{12}\) However, public lawyers have imperfectly grasped the place of correlativity in public law, nor understood its implications for standing. Nicholas Bamforth is one of the few to have given consideration to the place of Hohfeldian analysis in public law.\(^\text{13}\) He has argued that rights and duties in public law are not truly correlative, but that, ‘judicial review...involves a much less direct and immediate linkage between the litigant’s remedy and the public authority’s wrongdoing: for judicial review protects the individual’s interests only via the intervening agency of the grounds of review which, as we have seen constitute general principles constraining public authorities, as well as being subject to the discretionary denial of remedies.’\(^\text{14}\) However, curiously, Bamforth

---

\(^\text{11}\) Lake Shore & M. S. R. Co v. Kurtz (1894) 10 Ind. App. 60.


\(^\text{14}\) Ibid., 11.
then argued in favour of correlativity in public law in an article written with Paul Craig responding to Mark Elliott’s modified ultra vires model\textsuperscript{15} of judicial review.\textsuperscript{16}

Whilst the limits of the present inquiry preclude detailed examination of that debate, it is striking that Bamforth and Craig argue in favour of the correlativity of duties and rights in public law. In arguing that Elliott is mistaken to suggest that the principles of the rule of law depend on statutory intention for their application, they argue that this position makes it difficult to hold that the rights and duties stemming from the rule of law exist at all, independently of their application. Their reasoning is that, apparently contrary to Bamforth’s previous argument, \textit{‘an obligation which exists will normally be understood to impose a duty and a correlative right. This is the very essence of the idea of an obligation. It is relational in the simple sense that the duty will be imposed on one party, the right on another. This is the way we think of the matter in areas as diverse as contract, tort and public law.’} \textsuperscript{17} If this proposition is true, it does far more that strike a blow for Elliott’s theory of judicial review. In proposing that citizens have rights that are correlative to the duties incumbent upon public bodies to obey the rule of law, Bamforth and Craig give credence to the proposition that citizens ought to be able to enforce these obligations and have the right to do so.\textsuperscript{18}

\textsuperscript{17} Ibid., 774.
\textsuperscript{18} Bamforth’s earlier arguments against correlativity in public law will be dealt with at a later stage.
These reasons demonstrate that there is a strong relationship between the concept of duty and standing in public law. First, an examination of the nature of duties and rights in public law focuses attention on whether and how they ought to be enforced. Second, invoking the concept of duty allows a comparison between public law and equity, which will help to form the basis for a broader concept of standing. Third, those who oppose broader standing, such as Allan, often have an implicit and questionable approach to duty and rights in public law which must be evaluated. Finally, if public duties are obligations that vest correlative rights in citizens, then there are strong prima facie grounds for broadening standing to allow the enforcement of those rights.

Conceptions of standing stem from understandings of public law duty and rights. Therefore, the relationship between theories of duty, political theory, and notions of standing need to be examined to determine and evaluate the divergent understandings of duty and rights within each.

3. The Relationship between Theories of Duty, Political Theory, and Standing

It is important to consider the bearing that political theory has on standing, and which conceptions of duty these adopt. Political theories are, sometimes unwittingly, also theories of rights and duties in public law. Understanding public duty not only illuminates the premises underpinning arguments relating to standing, but also helps build consensus through theoretical synthesis.
a) Liberal Normativism and Individualist Approaches to Standing

Liberal normativism embodies, inter alia, a libertarian predilection for protecting individual rights through the common law and judicial review. Martin Loughlin notes that, ‘the emergence of the liberal variant of normativism is linked to the analysis of rights within the British constitution.’ However, these rights are typically restricted to fundamental interests. Liberal normativists seek to enumerate rational principles of judicial review and seek to protect individual liberty through a form of common law constitutionalism.

T. R. S. Allan, a proponent of such views argues that, ‘the rule of law, as a juristic principle…embodies the liberal and individualistic bias of the common law in favour of the citizen.’ In advocating this substantive understanding of the rule of law, Allan also comments that, ‘the juristic principle of the rule of law, like the ideal from which it derives, is based on the central importance of the individual. It expresses the commitment of the common law to individual freedom and responsibility.’ In other words, it forms, ‘a set of publicly articulated standards of justice and fairness-which

---

23 Ibid., 134.
operates to protect traditional liberties.\textsuperscript{24} Allan’s work is therefore motivated by the Dworkinian distinction between principle and policy\textsuperscript{25}. The rule of law, as a principle of common law constitutionalism, lays down limits for political policy that protect individual freedom, liberty, and equality.\textsuperscript{26} Alan argues that, ‘\textit{matters of right must be distinguished from public policy or public interest.}’\textsuperscript{27} Alan therefore adopts a particularly narrow conception of rights in public law and appears to advocate only a right to negative liberty.

Given Allan’s predilection for this narrow rights-based conception of the nature and purpose of public law, it is unsurprising that he should adopt a narrow approach to standing, for such views also narrow the extent to which public duties can be seen as being owed to the public. Allan simply transposes his theory of common law constitutionalism onto his theory of adjudication and standing. His distinction between policy and principle leads him to argue that the essential basis for justiciability in public law is, ‘\textit{the court’s concern with the rights and interests of the applicant, as opposed to the merits of the relevant action or decision as a matter of public policy.}’\textsuperscript{28} Therefore,

\begin{enumerate}
\item Ibid., 212.
\end{enumerate}
although, ‘every public authority has the duty of observing the law…it hardly follows that every official action or decision is appropriately subject to judicial review.’

The rights with which Allan is concerned are summarized as, ‘the right to fair treatment’ in the government’s dealings, ‘with him.’ In this, Allan follows Dworkin in viewing the idea of general public rights as erroneous because a right is individualistic and premised on principle not policy, only being realisable against the majority. Allan’s theory therefore appears to demonstrate David Feldman’s observation that in political theory, ‘where the prevailing ethic is individualist, judicial review will be limited to enabling individuals to assert and protect their own (rather than the public’s) interests in dealings with the state. On the other hand, in a civic republican tradition in which citizens are expected or permitted to achieve self-fulfilment by participating in political decision-making, displaying Aristotelian civic virtues, there is good reason to adopt relaxed standing rules for constitutional and public interest litigation, and to develop constitutional theories which will allow citizens to act to secure public interests such as observance of the rule of law and containment of governmental abuse of power.’

Allan’s political theory accepts a broad range of public duties, including the general duty of legality, yet his theory of the meaning and importance of rights limits his understanding of the correlative implications of these duties, resulting in his narrow

30 Ibid., 223.
doctrine of standing. However, acceptance of liberal normativism and individualism need not entail such a narrow approach and there are reasons for even liberal normativists to doubt Allan’s account of duties and rights in public law.

Allan fails to explain who is owed the general duty of legality in public law. If such duties are not owed to the general public, it is not clear to whom they are owed. If the general duty of legality is owed to the public, then powerful justification is required to deny such persons the right to enforce such duties. Allan might argue that public law rights exist to only to protect minority interests, yet this presupposes the unlikely proposition that the majority does not, and cannot, create for itself legal interests. It certainly does not follow from the fact that some public law rights, such as human rights, have a minoritarian character that all public rights conform to this understanding.

Indeed, it is far from clear that judicial review can be reduced to simply the judicial protection of fundamental minority interests, as important a function as this might be. In reply, Allan might reassert the distinction between principle and policy, but the protection of principle by the courts in the face of political policy, need not prevent the courts engaging in judicial review of policy areas in which a legal standard, and therefore a principle, that has been set down for the benefit of all citizens. Hilson and Cram comment that, ‘even in citizen action cases…the courts are still bound by the principles of administrative law.’ It can be argued that legality is itself a principle, at least insofar as it does not conflict with fundamental liberties.

Allan’s approach precludes the judicial enforcement of general public duties, allowing review only of those breaches which touch upon an individual’s fundamental rights. Yet the necessity of protecting fundamental interests should not entail a rejection of the protection of lesser interests through administrative law. Indeed, Allan could have simply argued for the priority of fundamental rights and a hierarchy of public duties, rather than adopting such a narrow conception of rights, duty and standing, one that appears to make the judicial review function of courts exclusively about fundamental rights protection.

Other theories of standing have adopted a version of liberal normativism that accepts broader standing. Chris Hilson and Ian Cram criticize Allan, arguing that relaxed rules of standing can promote, ‘good administration’ and, ‘a culture…which prevents threats to individual liberty from arising in the first place.’\(^{34}\) This means that, ‘broad standing can provide indirect protection of individual liberty and should therefore be acceptable to liberals.’\(^{35}\) Whilst this theory is persuasive and remedies some of the failings in Allan’s position, it too offers an inadequate explanation of duties and rights in public law. The model of duties and rights implicit in Hilson and Cram’s account appears to accept that the only duty owed by the state is to secure individual liberty, which comprises both the negative duty of non-interference, and, unlike Allan’s account, the positive duty of building a system of good administration to guard against risks to


\(^{35}\) Ibid.
individual liberty. According to this theory, these duties generate individual rights, and therefore individual standing.

The theory is persuasive and intuitive, although it would require further empirical studies to demonstrate that good administration, in the sense of lawfulness, actually removes threats to individual liberty. The real problem for this approach is what is lost in an individualistic account of public law duty. Like Allan, it fails to account for those public duties that cannot be explained by reference to the indirect prevention of individual harm. For instance, it is difficult to see the decision not to list a historic building as even potentially indirectly harmful to individual liberty, although it might be contrary to principles of administrative law and the duty to act reasonably, and might touch upon less fundamental individual interests, such as historical, cultural, or environmental concerns. Therefore, Hilson and Cram are forced to go beyond the individualism of liberal normativism and argue that there are exceptional circumstances in which the general public interest outweighs individual claims. Thus they write that, ‘assuming an issue or place can truly be said to be the concern of every citizen in the country, the need for access to the courts should override the value of individual, or local or regional autonomy. On this basis, the failure of Schiemann J to grant locus standi to the Rose Theatre Trust company looks decidedly misconceived.’ Such an amendment is certainly welcome, yet it might have been better to argue that in such cases claimants vindicate their own interest in lawful government, alongside those of the public, thereby

enlarging the understanding of individual rights and not limiting the rights of citizens to circumstances in which every citizen is agreed. There is no prima facie reason why individual rights in public law cannot be conceived of as broader than the right to fundamental liberties and cover broader issues.

Liberal normativism currently only recognizes the public duty not to interfere with the liberty of individuals, and, at most, can only recognize the correlative rights of citizens to negative or positive liberty, both directly and indirectly. Even in its broadest form, it fails to capture the full range of duties in public law, such as those in relation to the listing of sites of historical interest, and the rights that such duties generate. Nevertheless, it does remind us of the priority of fundamental values and minority interests over lesser interests of the general public, and the need to safeguard individual liberty and autonomy.

b) **Communitarianism and the Public Interest**

In contrast to these failings of individualism, communitarian approaches to standing focus on public interests and values, and generalise the exception that Hilson and Cram make to individualistic rationalizations for standing. Yet this can sometimes sit uneasily with the idea of individualistic rights. These approaches tend to see the individual claimant as a representative, not of individual rights, but of public values and
what W. A. Bogart called ‘non-traditional interests’.\textsuperscript{38} As Joanna Miles puts it, ‘this model focuses not on the specific interest of the individual victim in seeing government illegality against him or her checked, but on a broader public interest in lawful government.’\textsuperscript{39} This approach recognizes that citizens represent important principles and values that are of a wider concern than a mere private interest. In this way they come to embody public values, including the value of legality.

Joseph Vining has developed such ideas in his exploration of legal identity.\textsuperscript{40} Vining writes that the shift to this way of thinking is, ‘nothing less than the breakdown of individualism as a basis for legal reasoning.’\textsuperscript{41} In fact, Vining is really acknowledging what he calls ‘the Donne effect’, the idea that “no-man is an island”, but each is constituted by the community and its values.\textsuperscript{42} The law has come to recognize, ‘an entire set of important personal and social values (that) could not be included in the constitutional or common-law protection of liberty or property.’\textsuperscript{43} The interest that a citizen might have in the decision not to list a historic site might be one example of an

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{39} Miles, J., ‘Standing Under the Human Rights Act 1998 and Theories of Public Law Adjudication’ (2000) 59 CLJ 133, 150.
\item \textsuperscript{40} Vining, J., ‘Legal Identity’ (New Haven: Yale University Press, 1978).
\item \textsuperscript{41} Ibid., 2.
\item \textsuperscript{42} Ibid., 32.
\item \textsuperscript{43} Ibid., 28.
\end{itemize}
\end{footnotesize}
interest which, if it were to exist\textsuperscript{44}, would be personal and social, rather than libertarian or proprietary, unless of course that citizen’s estate was affected.

Vining also assimilates the concept of harm to the person with harm to public values. Persons come to embody values in his theory\textsuperscript{45}. Thus he writes, ‘a challenger who is described as “harmed” does represent a public value...protecting the value is justification for a judge’s intervention.’\textsuperscript{46} Vining ultimately argues that, ‘we may have to admit that the question is not whether the plaintiff or defendant “has” a right, but rather whether the challenged action is authorized by law\textsuperscript{47}, and that, ‘the legality of the decision is entirely a question of the values that were or were not taken into account.’\textsuperscript{48}

Although Vining’s theory is important in reminding us that public duties increasingly cover a range of public values, he does not explain how it is that a public interest entails an individual’s right to bring judicial review proceedings, unless the individual has his own right, albeit one that might be shared by all citizens. This distinction is between saying that A owes a duty to B, C, D, and E, collectively, and saying that A owes an identical duty to B, C, D, and E. In both cases, A owes the same duty to B, C, D, and E, yet in the former case, it is not clear why any individual has a

\begin{itemize}
  \item \textsuperscript{44} R v. Secretary of State for the Environment ex. parte Rose Theatre Trust Co. [1990] 1 QB 504 suggests this is not a ‘sufficient interest’.
  \item \textsuperscript{45} For related ideas about claimants representing values and claims in relation to environmental protection see: Stone, C. D., ‘Should Trees Have Standing? – Towards Legal Rights For Natural Objects’ (1972) 45 S. Cal. L. Rev. 450.
  \item \textsuperscript{46} Vining, J., ‘Legal Identity’ (New Haven: Yale University Press, 1978), 171.
  \item \textsuperscript{47} Ibid., 180-1.
  \item \textsuperscript{48} Ibid., 181.
\end{itemize}
right against A. The duty is only owed collectively to the group, and not to any specific individual. It would be strange to allow one of the individuals to represent the others, unless they agreed to this. Therefore, communitarian theories that adopt Vining’s approach seem to support the case for Lord Woolf’s Director of Civil Prosecutions to act in the public interest,\(^49\) rather than individual standing. However, if an equal duty is owed to each individual, then A owes an individual duty to B, C, D, and E as individuals, as well as a collective duty to them all. In those circumstances, the correlation between rights and duties suggests that each should have standing to bring a claim. Therefore, in the latter case, if B sues A to enforce the duty owed to him, he is also representing the claims that C, D, and E would have, if they had decided to bring the claim. He asserts his own rights, as well as representing public values. It is submitted that such a view was taken by Laskin J. in Thorson v. Attorney-General of Canada,\(^50\) in which he stated that citizens have, ‘the right…to constitutional behaviour by Parliament.’\(^51\) What qualifies as constitutional behaviour is a question of value, yet the right to enforce the value belongs to each citizen.

It is important to distinguish between duties owed to the public generally, and duties owed to all citizens equally. Communitarian arguments tend to emphasis the former position and therefore fail to properly justify broader standing for individuals by overlooking the possibility that public duties are owed to citizens, and not simply to the


\(^{51}\) Ibid., 163.
public at large. What communitarianism does highlight is that in either case, persons with standing are representing far more than just their individual interests, and far more can be at stake than the concerns of any one individual.

c) Towards Synthesis

Given the need of recognizing traditional rights, whilst appreciating the scope of duties in public law and the values that can be at stake in adjudication, it is worth formulating a conception of duty that achieves synthesis between individualistic and communitarian strands of political theory. However, some attempts at synthesis have been equally misconceived in their approaches to duty and rights in public law.

Alan Brudner has advocated a synthesized account of constitutional goods that contains ideas of autonomy from both libertarian and the communitarian traditions.\textsuperscript{52} Brudner argues that a pluralistic liberal constitution recognizes not only classical liberty, but also, ‘one’s capacity for self-authorship,…by acknowledging the goodness of already existing social structures – for example, the family, cultures, collegial associations, and the political community – that in turn validate the worth of the self-actuating self.’\textsuperscript{53} Brudner views self-authorship as part of being in a cultural community, or ‘ethos’. Furthermore, this self-authorship represents the ‘ethos’ through individual


\textsuperscript{53} Ibid., 30.
He writes that, ‘cultures come into view in the way they appeared to Herder and Hegel: as structures of mutual recognition wherein individuals submit to an ethos for the sake of the personal worth they receive by virtue of the ethos’s reciprocal deference to individual agency for the sake of its existence and vitality.’ Additionally, for Brudner, cultures also have intrinsic value, ‘quite apart from their value as conditions for leading a self-authored life.’ Within this scheme of intrinsic communitarian value, synthesis with liberalism is found by arguing that, ‘cultures are intrinsically and equally good insofar as they are valued as grounds of individual worth by free agents who are reciprocally valued as vehicles of the culture’s flourishing.’ This balance recognizes both individual rights and other fundamental constitutional goods, such as community. Resultantly, ‘infringements of rights must be justified as necessary to promote a constitutional good.’ This necessarily includes the good of community. Furthermore, it entails, ‘public concern for self-authorship and self-rule, as well as public support for the communities—familial, cultural, professional, and political—within which individuals are socially confirmed as valued ends.’

Whilst Brudner’s synthesis recognizes the good of community in the framework of personal liberty, his conception of duties and rights does not embrace broader citizen

55 Ibid.
56 Ibid., 363.
57 Ibid., 379.
58 Ibid., 426.
59 Ibid.
standing, although it does embrace a form of public-interest group standing. Brudner recognizes the crucial point that standing answers the question: ‘to whom is the duty to account owed?’ Yet, curiously, given his synthesizing theoretical framework, he defends a narrower conception of public value than Vining’s communitarian approach. Instead Brudner supports broad representational standing on the grounds that public-interest groups are, ‘representing an affected interest in the collective and socially responsible’ way. He is reluctant to grant individual citizens the same freedom, arguing that, ‘public authority would dissolve if Law’s agent were called to account to an individual seeking to legislate idiosyncratic ‘value preferences’…Law’s authority is preserved in its submission to challenge by the individual if the plaintiff appears before it clothed with a public interest that mediates, while preserving the difference, between the individual’s particularity and Law. For now the individual seeks to recognize in the law only those interests of his that are shared with many others. Thus, to have locus standi, the individual must have suffered injury to a private ‘right’—that is, to an interest of personality as such; or alternatively to a pecuniary or proprietary interest—that is, to a private interest that is at the same time general. What is anathema to the court is the private individual who, because he claims to appear as an abstract ‘citizen’, actually stands before the court in his isolated singularity, moved by personal opinions and preferred causes no public order could recognize without dissolution.

61 Ibid., 234.
62 Ibid., 233.
Unhappy, this approach assumes that the duty to act in the public interest is not a duty that is owed to individuals. Brudner also appears to suggest that the ‘value preferences’ of individuals rob the law of its authority by advocating opinions that the public order cannot recognize. Yet it cannot be the case that citizens without injury to a private rights, or a pecuniary or proprietary interest, only represent interests so anathematic to public order that they undermine it. Citizens might put forward values and preference that, despite being personal, are also publicly valuable and legally protected. Private rights and pecuniary interests are not the only interests shared by others, nor are the duties correlative to such rights the only duties recognized by public law. Such an argument also runs counter to Brudner’s claim that individual agency acts as a ‘vehicle’ for the community’s ‘lively reproduction’.\textsuperscript{63} If this is true then it would be odd to imply, as Brudner does, that individuals cannot represent collective and socially responsible community interests, as well as their own self-actualizing preferences through the medium of standing in judicial review.

Indeed, the idea that citizens can represent the interests of others was accepted in R. v. Felixstowe JJ., ex parte Leigh\textsuperscript{64}, which concerned a journalist who wanted to write a report commenting on the reporting of one case given by other newspapers. That case had involved acts of indecency committed in the presence of children and the court had refused to give permission for their names to be published. It was this decision that the claimant now challenged. The Court held that he would not ordinarily have had standing, since he was not himself a court reporter. However, he, or the press

\begin{itemize}
\item \textsuperscript{63} Brudner, A., ‘Constitutional Goods’ (Oxford: OUP, 2007), 362.
\item \textsuperscript{64} R. v. Felixstowe JJ., ex parte Leigh [1987] QB 582.
\end{itemize}
through him, represented the public interest and would be given standing on that basis. Watkins LJ stated that, the claimant was a, ‘publically-spirited citizen’, and the action was, ‘brought either by the applicant himself, or possibly by the press through him, as guardian of the public interest in the maintenance and preservation of open justice…a matter of vital concern in the administration of justice’.65

A similar point was made by Sir Anthony May P., in Hasan v. Secretary of State for Trade and Industry66, in which a Palestinian claimant living near Bethlehem challenged the export of military equipment to Israel. Standing was not questioned in the case, but the judge was prepared to say that the claimant could be seen as, ‘a nominal representative of the public interest…with reference to human rights considerations, not as an individual whose personal rights are likely to be affected by the decision’.67 Whilst these cases do not appear to recognize the individual interests of citizens in the observance of public duties, they do help to rebut Brudner’s argument that individual citizens cannot legitimately represent and enforce public values that are shared by a large proportion of citizens.

There also seems to be an internal tension within Brudner’s suggestion that only representative groups can competently defend community interests, in contrast to individual claimants. Far from achieving a true synthesis between individualism and communitarianism, Brudner appears to simply apply communitarian ideas to public

67 Ibid., [8].
interest representative groups, whilst applying strict normative liberalism to the question of citizen standing. He therefore faces the challenges to both approaches that have been discussed, particularly the inability of libertarianism to explain public duties that go beyond the duties to preserve positive and negative liberty.

A more promising, though less developed, synthesis is found in William Bogart’s language of rights. Bogart commented that, ‘until the right of an individual to bring an action in which she has been affected in no greater degree than others is recognized, suits concerning matters that have a widespread impact will be drastically curtailed.’

Bogart’s concern for matters that have a widespread impact reflects more than just an individualistic concern for the person granted standing, it recognizing the rights of individuals to collective interests. This account implies that public duties are owed simultaneously to both individuals and the public, and vest rights in both individuals and the community. Such an account of public duty can satisfy the libertarian concern for individual rights, and the communitarian desire to protect the interests of the public as a whole, so long as public interest can be conceived of in a way that enhances, rather than undermines, fundamental individual rights.

This kind of synthesis recognizes that both individuals and the public can have coextensive interests in the prevention of ultra vires decisions that go beyond the protection of fundamental liberties and protect the legal interests and values that the community considers sufficiently important to warrant legal restrictions on the exercise of such discretionary powers. This permits a conception of duty, rights and standing in

---

public law that respects both libertarian and communitarian traditions. However, such a conception may still be limited by functionalist theories of democracy which, whilst related to libertarian and communitarian thought, do not explicitly adopt their arguments. In order to clear the ground for this synthesis, these arguments must be critically assessed.

d) Functionalism and Conceptions of Democracy

Functionalist approaches to democracy focus on the role of the courts as institutional actors, and carry their own problems and misconceptions of public law duty. Functionalism tends to take two approaches to limiting standing: one views the courts as lacking competence to resolve polycentric disputes, the other views democracy as political, and sees broader standing as an illegitimate politicization of judicial functions.

In this context, ‘functionalism’ refers simply to approaches that seek to delimit the role and function of the courts in judicial review. As Thio rightly points out, ‘the problem of locus standi in public law is very much intertwined with the concept of the role of the judiciary in the process of government.’ It does not necessarily carry with it the specific definition ascribed by Loughlin that functionalist theories, ‘all try to reorientate public law away from the concern with control and rights and towards function and

---

effectiveness.\textsuperscript{70} This is not the place to assess such approaches, though it is worth noting that all theories of standing must properly grapple with functional efficacy issues.

The first type of functionalism is the view that courts are ill-suited to decide multi-party or public interest litigation. Such views reflect Lon Fuller’s account of, ‘the relative incapacity of adjudication to solve “polycentric” problems.’\textsuperscript{71} Fuller likens decision-making in polycentric cases to interference with a spider’s web, one change to which has multiple and incalculable effects.\textsuperscript{72} These concerns are reflected in some of the arguments made against a liberal approach to standing.

Carol Harlow argues against the efficacy of broadening standing for public interest groups, noting that, ‘Fuller’s notion of polycentricity reflects the more traditional policy/principle divide, to which Ronald Dworkin notably subscribes.’\textsuperscript{73} Harlow argues that standing should be restricted because, ‘courts are not surrogate legislatures. It is not their place to make this type of policy choice nor should they attempt to mimic legislative procedure’.\textsuperscript{74} She concludes that, ‘the policy/principle divide reflected in Fuller’s notion of polycentricity is a necessary protection for the judicial process.’\textsuperscript{75}

\textsuperscript{72} Ibid., 395.
\textsuperscript{74} Harlow, C., ‘Public Law and Popular Justice’ (2002) 65 MLR 1, 10-11.
\textsuperscript{75} Ibid., 12.
The problem with such arguments is that the courts are habitually, and often successfully, concerned with questions of wide-ranging policy. For instance, beyond public law the so-called ‘Caparo test’ for the existence of new duties of care in negligence involves the policy consideration that liability is fair, just and reasonable.\textsuperscript{76} Within public law, adjudication under the Human Rights Act 1998 requires rights to be weighed proportionally against policy needs, and the public interest can sometimes outweigh individual rights. Deciding polycentric issues is a function inherent in the adjudication of qualified rights. Harlow’s insistence that the court only deal with individual interests overlooks the courts’ necessary involvement in adjudicating broader issues of public concern.

The second functionalist argument against more liberal standing is not limited to an argument about the competence of the court. It is also an argument based on the distinction between law and politics. Harlow argues that broader judicial review turns the courts into illegitimate ‘surrogate legislatures’.\textsuperscript{77} She writes that, ‘using the deceptive metaphor of the courtroom as a political surrogate, campaigning groups are gaining entry to the legal process.’\textsuperscript{78} This criticism is even preceded by the extraordinary claim that, ‘representative democracy is weakening before the powerful but illusory vision of a popular, participatory democracy in which focus groups seem more important than Parliament.’\textsuperscript{79} Peter Cane, albeit in more tempered terms, also writes that, ‘the courts

\textsuperscript{76} Caparo Industries plc v. Dickman [1990] 2 AC 605.
\textsuperscript{78} Ibid., 17.
\textsuperscript{79} Ibid., 16.
should not be seen as operating a sort of surrogate political process; but they do have a legitimate role in protecting certain fundamental rights of the public.  

What these arguments overlook is that standing concerns the enforcement of legal duties, not simply political interests. Public law duties are necessarily legal, and not political, duties. Legal enforcement cannot be conceived of as an affront to representative democracy, nor viewed as a political process, nor objected to as some new form of participatory democracy, since it is often these very political processes that designated these duties as legal ones. As Hilson and Cram point out, in adjudication, ‘the courts are still bound by the principles of administrative law. They do not have a free rein in evaluating policy as legislatures do. Of course, some of these principles may themselves come dangerously close to giving the courts free rein, but that suggests a need to develop tighter principles, rather than an argument against broad standing.’ In this way, enforcement seems to enhance, rather than detract from, Parliamentary practice. The enforcement of such duties by individuals or groups is not inherently more political than any other form of legal enforcement. Indeed it might be more effective than the political alternatives and might more directly vindicate the rights of those to whom the duty is owed, by empowering them to challenge the abuse of public power.

Furthermore, since narrow standing can result in the under-enforcement of legal duties, the resultant immunization of illegal behaviour through a denial of standing


involves the courts engaging in precisely the kind of political decision making that is objected to by Cane and Harlow.\textsuperscript{82} Indeed, acquiescence in ultra vires decision-making by public bodies is a more serious from of judicial policy making than judicial review, and turns the courts into the ‘surrogate legislatures’ that Cane and Harlow fear.\textsuperscript{83} In effect, it removes the substance of duties that have been politically accepted, whether arising from statute or common law. Harlow writes of the courts in public interest actions that, \textit{‘it is not their place to make this type of policy choice nor should they attempt to mimic legislative procedures.’}\textsuperscript{84} However, when a court exercises its discretion to deny standing it engages in precisely this form of unwarranted policy decision-making about the merits of the law, and which interests ought to be judicially enforced.

In the recent case of Al-Haq v. Foreign Secretary\textsuperscript{85}, Pill LJ said that, \textit{‘standing should not be treated as a preliminary issue but must be taken in the legal and factual context of the whole.’}\textsuperscript{86} This kind of assessment of the merits of each case might be viewed merely as an unfortunate facet of increased standing. However, even if that is correct, any denial of standing that involves the non-enforcement of a legal obligation necessarily entails a form of judicial policy choice. It is notable that some limits to administrative power are statutory and the failure to enforce such limits fails to give full effect to politically chosen ends. Of course, the choice to make a duty legal does not in


\textsuperscript{83} Ibid.

\textsuperscript{84} Harlow, C., ‘Public Law and Popular Justice’ (2002) 65 MLR 1, 11.


\textsuperscript{86} Ibid., [47].
itself entail more liberal standing. Yet if general public duties are owed to citizens, and if narrow standing results in their unenforceability, then there are grounds for broadening standing.

It is worth mentioning that functionalist approaches that focus on the purpose of standing rules, as opposed to the role of the courts, have tended to support broader standing. For instance, Lord Woolf MR commented that, ‘the purpose of rules as to standing are to protect the courts from being troubled by litigants who have no interest in the litigation and are mere busybodies. They are not designed to prevent litigants who have a meritorious claim form pursuing that claim.’ It is notable that despite his concern that the courts should not operate as a surrogate political process, Cane also argues that standing should not perform the function of merits review and that, ‘standing rules should not be used as a mechanism for restricting the activities of the court to adjudication and for preserving to the administration and the legislature the role of weighing competing interests in society.’ Such arguments would mean that even if functionalist objectors to liberal standing are right about the nature of adjudication, they are mistaken about the function and purpose of rules of standing.

Functionalist objectors to more liberal standing offer no compelling arguments against it. They fail to recognize the distinctive nature of legal obligations, and many of their arguments are self-defeating, since they risk the very results they seek to avoid, namely wide-ranging judicial policy making about which legal duties ought to be

87 Broadmoor Special Hospital Authority v. Robinson [2005] QB 775 (CA).
enforced. Although theoretical approaches in favour of narrow standing have been found wanting, it remains important to explain the practical problems that such narrow approaches to standing can cause, and the benefits of a broader approach.

4. Problems with Restrictive Conceptions of Duty and Standing

A reconsidered approach to standing does not simply respond to the need to discern the true nature of public law duties, and the rights correlative to them. It also responds to the problems caused by narrow, incoherent or insufficiently founded theories of standing that comprise the current judicial interpretation of the ‘sufficient interest’ test in English law.\(^89\) There are four such problems: the problem of unprotected interests, the problem of equality before the law, the problem of good administration, and the problem of coherence.

a) The Problem of Unprotected Interests

Narrow standing can immunize decisions from review, and allow breaches of public law duties to go unchallenged. This is borne out in the judicial reflections of Lord Diplock that, ‘it would...be a grave lacuna in our system of public law if a pressure

\[^{89}\text{Senior Courts Act 1981. s. 31(3). See also Civil Procedure Rules 54.1.}\]
group...or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.  

Although citizens have been granted standing to challenge administrative decisions based on the existence of ‘a serious question’, or a ‘sincere concern for constitutional issues’, the IRC decision remains binding authority that taxpayers with genuine concerns do not necessarily have standing, even if the issues they raise are constitutionally important. Furthermore, whilst standing has been afforded to NGO’s and other groups such as the Child Poverty Action Group, Greenpeace and the Equal Opportunities Commission, these cases have all been heavily influenced by the representational quality of those groups, the existence of individually affected parties in those cases, or specific statutory duties and functions that support standing for such bodies, rather than the recognition of a free-standing right to judicial review for groups and citizens in general. For instance, in ex. parte Greenpeace (No. 2), Otten J. said

---

95 R v. Inspector of Pollution and another ex. parte Greenpeace (No. 2) [1994] 4 All ER 329.
97 These last two elements were present in the EOC case.
98 R v. Inspector of Pollution and another ex. parte Greenpeace (No. 2) [1994] 4 All ER 329.
that, ‘the fact that there are 400,000 supporters in the United Kingdom carries less weight than the fact that 2,500 of them come from Cumbria’, the area what was to be affected by the processing of spent nuclear fuel in that case.

The problem is therefore summarized correctly by the Coalition for Access to Justice for the Environment, which rightly commented in its 2004 report that, ‘although recent case law has been relatively sympathetic to public interest groups and NGOs there is still no clearly established right of standing for such groups. The rules on standing in environmental cases need to be modified to reflect the distinctive role of citizen groups and NGOs in upholding environmental law.’ Whilst standing for groups which represent individually affected members is to be welcomed, this step still leaves important interests unprotected and important duties unenforced.

It might be objected that such interests are unrecognized by the law and ought not to be protected. However, when public duties exist, such as the duty to act reasonably, there are at least prima facie grounds for thinking that such duties entail rights that ought to be enforced. Otherwise, those decisions still insulated from challenge might include decisions of the IRC relating to other tax-payers, decisions not to list historic or archaeological sites, any decision considered on its merits as

99 R v. Inspector of Pollution and another ex. parte Greenpeace (No. 2) [1994] 4 All ER 329, 350.
100 Comprised of The Environmental Law Foundation, Friends of the Earth, Greenpeace, RSPB, and WWF.
weak,\textsuperscript{104} and any decision the challenge to which is viewed by the court as not demonstrating a genuine concern for the public interest.\textsuperscript{105} Schiemann J. also asks if, ‘I negligently run a civil servant down and he subsequently, but before the trial of his running down action, is unlawfully dismissed from his job: can I complain about that unlawful dismissal because its end result is to increase the amount of compensation which I must pay him?’ \textsuperscript{106} This example demonstrates the problems faced by any doctrine of standing that gives preference to the most directly affected person to the exclusion of other interests. All these examples of direct and indirect interests might be excluded under the current rules of standing, since they arguably do not represent a sufficient individual interest, nor would they necessarily be viewed as being motivated by a genuine public concern. Yet all these examples concern important interests and public duties.

The undesirability of this immunity from review can also be measured financially. The 2010 Treasury Spending Review estimated baseline plans for Defence spending at £35.4 billion, International Development at £6.4 billion, and Energy and Climate Change at £1.2 billion\textsuperscript{107}. These three heads of expenditure represent 6.74% of total government spending, large parts of which might not be susceptible to judicial review without continuing the trend towards broadening standing. If such decisions are

\textsuperscript{104} Al-Haq v. Foreign Secretary [2009] EWHC 1910.
\textsuperscript{105} R (on the application of Feakins) v. Secretary of State for Environment, Food and Rural Affairs [2003] EWCA Civ 1546.
\textsuperscript{107} HM Treasury Spending Review 2010, Table A.3: Public Sector Current Expenditure, p.79.
insulated from judicial scrutiny by the standard of review, or through deference, no problem arises, for then no legal duty will have been breached and no rights violated. However, if insulation comes from a narrow conception of standing then duties that have been broken might be unenforceable and both individual and collective interests may suffer as a result.

b) The Problem of Equality Before the Law

A further problem of the current law on standing is that it creates an inequality between the enforcement of the legal obligations of citizens and those of the state. The inequality between the enforcement of the legal obligations of citizen and the state is a relatively simply, but important, idea. An inequality of obligation arises not when two people, or institutions, have different duties, but when those duties are not equally enforceable according to their own limits. If every legal obligation of the citizen that is owed to the state, is enforceable by the state and actually enforced so far as is practicably possible, then, in a reciprocal and equal manner, public law duties ought to be enforceable by the public, and, as will be argued, by citizens and public interest groups, rather than simply state officials representing the public interest. This equal enforcement of duties meets Lord Bingham’s concern that, ‘the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation’.108

c) The Problem of Good Administration

Narrow approaches to standing might also harm good administration. In R v. Lancashire County Council, ex parte Huddleston\textsuperscript{109}, Sir John Donaldson MR acknowledged the instrumental value of legality when he said that the development of public law had created, \textit{`a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration.'}\textsuperscript{110}

Increased scrutiny through judicial review, resulting in better compliance with substantive and procedural rules, might encourage more efficient and transparent government. Indeed we have seen that Hilson and Cram make this point when they argue that broadening standing might prevent threats to liberty from arising in the first place.\textsuperscript{111} They argue that, \textit{`judicial review can be a tool for promoting good administrative practices, and further that broad standing ensures the widespread cultivation of such practices….If standards of good administration are promoted through….relaxed rules of standing, a culture is engendered which prevents threats to}

\begin{flushleft}
\textsuperscript{109} R v. Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941.

\textsuperscript{110} Ibid., 945.

\end{flushleft}
individual liberty from arising in the first place.…Broad standing can provide indirect protection of individual liberty and should therefore be acceptable to liberals.'

Although this raises empirical questions, and whilst vexatious litigants can certainly have detrimental effects on both judicial resources and the administration of justice, it is certainly plausible that a culture of accountability might be enhanced when judicial review is not limited only to cases in which there is a traditional victim, or interested party. This was recognized in the early Canadian development of broader standing, by Laskin J.'s reference in Thorson v Attorney-General of Canada\footnote{Thorson v Attorney-General of Canada [1975] 1 SCR 138.} to Lord Mansfield’s approach to the writ of mandamus\footnote{Ibid., 150.} and his comments in Rex v. Barker\footnote{Rex v. Barker (1762), 3 Burr. 1265; 97 E.R. 823.} that the writ, ‘was introduced to prevent disorder from a failure of justice, and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy and where in justice and good government there ought to be one.’

A further reason for the enforcement of legal duties is that it tends to foster legitimacy and trust, which further aid good administration. In R (Jackson) v. Attorney-
General\textsuperscript{117}, Lord Hope rightly commented that, ‘the rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based’.\textsuperscript{118} Allowing public bodies to act illegally undermines the legislative and administrative procedures put in place to limit the exercise of discretionary power. Even if illegality does not prejudice citizens in any material or personal way, it undermines the relationship between citizen and the state, damaging not only trust and confidence, but also legitimacy and allegiance. Furthermore, as Ivan Hare notes, ‘one of the principal justifications for judicial review is that all citizens have an interest in the administration acting lawfully and that the rule of law is damaged if illegality is allowed to occur without challenge.’\textsuperscript{119}

The value of this conception of reputation and the rule of law was captured by Moses LJ in his Court of Appeal decision in R (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems\textsuperscript{120} when he said that, ‘the damage is not merely to the reputation of the SFO and the government but to the reputation and very existence of the rule of law.’\textsuperscript{121} In allowing the decision not to prosecute to fall within the reasonable prosecutorial discretion, the House of Lords failed to recognize the importance of trust and legitimacy in good administration. Narrow

\begin{itemize}
\item \textsuperscript{117} R (Jackson) v. Attorney-General [2006] 1 AC 262.
\item \textsuperscript{118} Ibid., [107].
\item \textsuperscript{120} R (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems [2008] EWCA 714. The decision was reversed by the House of Lords, who held that the decision not to prosecute was within the discretion of the Director of Public Prosecutions at [2008] UKHL 60.
\item \textsuperscript{121} R (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems [2008] EWCA 714, [91].
\end{itemize}
approaches to standing have the same failures, since their effect is to insulate decisions from judicial review.

d) The Problem of Coherence

Although enforcement problems are reason enough to begin a theoretical reassessment of standing, there is also a serious problem in establishing what the standing requirements currently are, and the rationale behind them. The case law is both inconsistent and incoherent, displaying the truth of Stein’s comments that there is ‘no one theoretical construct to support the rules of standing’. Although the World Development Movement case allowed standing based on less restrictive criteria, such as ‘the importance of vindicating the rule of law’, it is not clear what status historical, environmental, and archaeological concerns have. The more restrictive Rose Theatre Trust case has never been overruled and the decision by the court in Al-Haq to deny standing based on the merits of the case threatens to exclude applicants based on a very different test, not on the importance of a claim, but on its

\[\text{122 Stein, L., ‘Locus Standi’ (Sydney: Law Book Company, 1979).}\]
\[\text{123 R v. Secretary of State ex. parte World Development Movement [1995] 1 WLR 386.}\]
\[\text{124 Ibid., 395.}\]
\[\text{125 R v. Secretary of State for the Environment ex. parte Rose Theatre Trust Co. [1990] 1 QB 504.}\]
\[\text{126 Al-Haq v. Foreign Secretary [2009] EWHC 1910.}\]
\[\text{127 Ibid., [47].}\]
viability on the merits. This, ‘fusion of standing and merits’,\textsuperscript{128} might seem attractive to some\textsuperscript{129}, but it hardly makes for a consistent and coherent approach to judicial discretion. Furthermore, judges sometimes grant standing without any proper discussion of these merits, as in the Corner House Research case,\textsuperscript{130} where the House of Lords held that the Director of the Serious Fraud Office had not acted illegally in failing to prosecute BAE after taking into account the threat of Saudi withdrawal of security cooperation if the investigation continued. Indeed, the issue of standing was not discussed in that case despite the fact that Corner House Research and Campaign Against Arms Trade were campaign and research groups without any individually recognized interest in the decision, except a genuine concern about the issue. However, general citizen standing remains unrecognized, since I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd has never been overruled.\textsuperscript{131}

The Court of Appeal has attempted to provide some clarity to this confusion by formulating a more coherent test for standing in R (on the application of Feakins) v. Secretary of State for Environment, Food and Rural Affairs.\textsuperscript{132} There, Dyson LJ said that, ‘if a claimant has no sufficient private interest to support a claim to standing, then

\begin{thebibliography}{}
\bibitem{130} R (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems [2008] UKHL 60.
\bibitem{132} R (on the application of Feakins) v. Secretary of State For Environment, Food and Rural Affairs [2003] EWCA Civ 1546.
\end{thebibliography}
he should not be accorded standing merely because he raises an issue in which there is, objectively speaking, a public interest...If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing." The implication is that a genuine interest in a decision entails standing. However, it has already been demonstrated that the genuine public interest is too vague and unspecific to be applied with consistency and predictability. Furthermore, this case cannot solve the current incoherence in the case law since it is neither Supreme Court authority, nor did it purport to remove the inconsistencies of previous first instance decisions. Additionally, although considering the comments of Dyson LJ in Feakins to be correct, Moore-Bick LJ has advocated what seems to be a broader approach. At first instance he argued that, ‘whatever may be the claimant’s private purpose in commencing and continuing the proceedings...the public has an interest in ensuring that breaches of the law by public bodies are identified and, where appropriate, corrected.’

The case law is not consistent, nor particularly clear. It is uncertain whether the existence of a public interest is enough, whether a genuine interest is always required, what this means, and what the place of merits in assessing standing should be. Joanna Miles is right to argue that the courts have, ‘failed to articulate a coherent theory of

133 R (on the application of Feakins) v. Secretary of State for Environment, Food and Rural Affairs [2003] EWCA Civ 1546, [23].
134 Ibid.
standing to guide their application of the sufficient interest test.\textsuperscript{136} Coherence requires not only clarity, but a proper conception of duty and rights in public law.

The nature of public law duty that will be defended herein not only recognizes the problems of narrow standing and the correlativity between rights and duties in public law, but also provides a conception of public law capable of acceptance by libertarian and communitarian theorists alike and achieves a synthesis between these divergent positions.

\section*{5. The Nature of Public Law Duty}

Before considering the detailed substance of public law obligations, it is important to understand how general concepts of duty apply to the range of public law duties, and the correlative relationship between duties and rights in public law. In this respect, the idea of imperfect obligations will also be examined to understand how it pertains to public law obligation.

a) **Concepts of Duty**

The Hohfeldian correlativity between rights and duties has already been discussed. Yet it is important to appreciate the different conceptions of duty, before determining which best fits our theory and practice of public law.

Joel Feinberg has provided a useful classification of duties that can serve present purposes.\(^\text{137}\) He argues that, *duties of indebtedness, commitment, reparation, need-fulfilment, and reciprocation are necessarily correlated with other people’s in personam rights. Duties of respect and community membership are necessarily correlated with other people’s in rem rights, negative in the case of duties of respect, positive in the case of duties of community membership. Finally, duties of status, duties of obedience, and duties of compelling appropriateness are not necessarily correlated with other people’s rights.*\(^\text{138}\) Of course, in law, duties of indebtedness, commitment, and reparation can sometimes correlate with rights in rem as well as those in personam. Such is the case in trusts or fiduciary obligations. Nevertheless, Feinberg’s classification is helpful in separating out the different types of duties and rights that exist, and their necessary correlation. Feinberg rightly points out that, *it is unquestionably true that when one party owes something to another, the latter has a right to what he is owed.*\(^\text{139}\)


\(^{138}\) Ibid., 142.

\(^{139}\) Ibid., 137.
Duties owed to others take the form of obligations, which necessarily vest rights in those to whom they are owed.

b) **Types of Duty in Public Law**

A useful starting point for discussing how duty in public law fits into this account of duties in general is the grounds of judicial review. Lord Diplock categorized these in the GCHQ case\(^{140}\), saying that they could be conveniently classified, *under three heads…The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds…but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.*\(^{141}\)

‘Illegality’ is simply short for some jurisdictional error, owing to a mistake as to fact or law. ‘Irrationality’ means review for Wednesbury unreasonableness, although it might well now include all forms of substantive review. ‘Procedural impropriety’ covers failures in natural justice, such as requirements of a fair hearing, the rule against bias, duties to give reasons, and decisions based on improper purposes or irrelevant considerations. We can now also add the ground of legitimate expectations. Of course, these grounds tend to overlap and run together, Lord Irvine LC has rightly commented

\(^{140}\) CCSU v. Minister for the Civil Service [1985] AC 374.

\(^{141}\) Ibid., 374.
that the GCHQ categories were, ‘not watertight compartments because the various grounds for judicial review run together’\textsuperscript{142}. For instance, ‘the exercise of a power for an improper purpose may involve taking irrelevant considerations into account, or ignoring relevant considerations; and either may lead to an irrational result. The failure to grant a person affected by a decision a hearing, in breach of principles of procedural fairness, may result in a failure to take into account relevant considerations.’\textsuperscript{143} Nevertheless, the grounds of review give a clear indication of the standards of decision-making that constitute public law duties.

More detailed attempts to classify and explain the different duties in public law have been limited. However, Harding has rightly distinguished duties from powers, categorizing duties as: the duty to determine, the duty to provide, the duty to enforce the law, and other constitutional duties.\textsuperscript{144} In relation to standing, Harding makes a further distinction between ‘public good’ and ‘public service’.\textsuperscript{145} He argues that public duties to provide public goods trigger broad standing, but not in circumstances where only one group is entitled to benefit, and, furthermore, that there should not be general standing to challenge the procedural defects of public bodies in dealing with others.\textsuperscript{146}

Sadly, this distinction between ‘public goods’ and ‘public service’ is misconceived. In cases where one group stands to benefit, there might also be a public

\textsuperscript{142} Boddington v. British Transport Police [1999] 2 AC 143, 152.
\textsuperscript{143} Ibid.
\textsuperscript{145} Ibid., Ch. 6., ‘Standing and Public Duties’, 226.
\textsuperscript{146} Ibid, 225-226.
good at stake. For example, a duty to provide reasonable conditions of housing for the homeless can be both a duty to provide for a limited class of persons, and a general duty to determine issues reasonably that falls within the public interest and qualifies as a public good. That which is owed to the citizens as a public good might be owed to citizens both collectively and individually. The duty to act fairly and reasonably in relation to an individual might constitute a public duty, not to provide housing to all citizens, but to behave in a certain way with respect to individuals actually eligible for the service in question. In other words, the duty of reasonableness in this context actually takes two forms, in one it provides a service to individuals, in the other it vindicates a public good in relation to decision making. In other words, public duties may take the form of what Feinberg called, ‘need-fulfilment’ obligations, owed to specific individuals, and simultaneously those he called, duties of ‘commitment’\textsuperscript{147}, which in public law might be taken as being owed to all citizens.

\begin{itemize}
  \item[c)] Imperfect Obligations and Correlativity in Public Law
\end{itemize}

Of course, some obligations may be unenforceable, or imperfect. George Rainbolt notes various ways in which the distinction between perfect and imperfect obligations is drawn.\textsuperscript{148} Particularly important for present purposes are the distinctions between ‘obligations which imply a right to compel performance vs. obligations which do not’.\textsuperscript{148}

\begin{itemize}
  \item[\textsuperscript{147}] Feinberg, J., ‘Duties, Rights, and Claims’ (1966) American Philosophical Quarterly 137, 142.
\end{itemize}
not imply such a right\textsuperscript{149}…obligations which imply a correlative right vs. obligations which do not imply such a right\textsuperscript{150}…(and) obligations with a legal sanction for non-performance vs. obligations without such a sanction.\textsuperscript{151}

Public law duties, like all other legal duties, are imperfect in the sense that they are contingent upon empirical evidence and compliance with particular time limits for actions. However, it might be suggested that despite their appearance as commitment or need-fulfilment duties, public duties are imperfect in the sense of not being correlative with rights of citizens.

Craig and Bamforth have argued that, ‘an obligation which exists will normally be understood to impose a duty and a correlative right. This is the very essence of the idea of an obligation. It is relational in the simple sense that the duty will be imposed on one party, the right on another. This is the way we think of the matter in areas as diverse as contract, tort and public law.’\textsuperscript{152} However, we have already seen that Bamforth has argued more fully and quite contrary to this relational conception of public law duty, against the correlativeity of rights and duties in public law.\textsuperscript{153}


\textsuperscript{152}Bamforth, N., Craig, P., ‘Constitutional analysis, constitutional principle and judicial review’ (2001) P.L. 763, 774.

Although Bamforth does not discount the utility of Hohfeldian theory in public law, he suggests that in public law, rights and duties are not truly correlative. He identifies various uses of ‘rights’ in public law. One is the use of ‘rights’ to denote those interests which trigger standing, in other words those ‘rights’ which trigger an enforcement mechanism by constituting the sufficient interest.\footnote{Bamforth, N., ‘Hohfeldian Rights and Public Law’, Ch. 1, ‘Rights Wrongs and Responsibilities’, Kramer, M. H., ed., (New York: Palgrave, 2001), 10-11.} By contrast, the breach of the ultra vires duty to act lawfully is a breach of a, ‘general public law duty.’\footnote{Ibid., 11.} Thus Bamforth concludes that in contrast to private law, ‘judicial review…involves a much less direct and immediate linkage between the litigant’s remedy and the public authority’s wrongdoing: for judicial review protects the individual’s interests only via the intervening agency of the grounds of review which, as we have seen constitute general principles constraining public authorities, as well as being subject to the discretionary denial of remedies.’\footnote{Ibid.}

Bamforth’s claim is an elliptical one, and not without difficulty. On the one hand, it can be said that his claims are empirically accurate to the extent that public law does not currently recognize that all public authority wrongdoing vests correlative rights in citizens, or in anyone else. However, Bamforth does not adequately justify this status quo, which conflicts with the philosophical understandings of duty that have already been discussed, and the nature of public law duties themselves. This gap between theory and practice can only be explained as error in the law.
Bamforth is also mistaken to think of the grounds of review as having any intervening agency in judicial review. In the case of interference with a recognized ‘right’ that itself entails standing, violation of the right will necessarily be a breach of a ground of review as well. Thus it is difficult to view the grounds of review as having a mediating role between the duty and the right, as Bamforth does, since the right of non-interference is simultaneously the sufficient interest for standing and the ground of review. This leaves no room for the grounds of review to have any mediating role between the duty and the right, since one can conceive of the duty not just as a general one, but as a specific one that relates directly to the harm committed.

Furthermore, if there is a breach of the general duty to act intra vires, but no individual harm that qualifies as a sufficient interest for the purposes of standing, then any lack of correlativeity between this duty and any rights to which it might give rise results not from the intervening agency of grounds of review, but because of the failure to recognize a right to have the general principles of public law observed. If we conceive of public law ‘rights’ as not simply entitlements to sue based on particular interests, but rather as natural correlatives of the general public law duty of legality, then no problem of correlativeity arises. Indeed a proper understanding of public law duty as a legal duty owed to each citizen transforms our understanding of this duty from being merely of a general duty, to being one that is owed to each citizen.

If Bamforth is simply objecting to the discretionary nature of remedies in public law, it suffices to respond that this is irrelevant to the question of whether duties and rights are correlative in public law. Declaratory judgment can vindicate the existence of correlative rights without the granting of any further remedy for breach of that right. In
private law, the level of damages, the grant of specific performance, and the grant of an injunction are all discretionary remedies. Yet that does not mean that the rights which they vindicate are not truly correlative of the duties triggering such remedies. The rights that are correlative to public duties are not rights to particular remedies, but rights to make claims. Rights correlative to duties should always entail claims, although they might not always result in remedies. If nothing else, it is the right to have the law properly decided in one’s favour. Of course, this does not mean that all remedies are equally valuable, or that remedies should not be granted that fully and properly vindicate rights. Rather it properly separates the question of remedies from the question of whether or not rights and duties are correlative in public law.

Bamforth also argues that human rights are not truly correlative.\textsuperscript{157} Giving the example of free speech, he argues that the right is a factor to be weighed in the balance, rather than one which directly produces a duty. Yet his example is of rights to free speech being used in defamation cases. This is methodologically curious, since defamation is a tort, rather than a public law action. It is certainly true that the existence of a human right may only be a factor in such cases. Yet in public law, a human right is not simply a factor to be taken into account, except in so far as restrictions on the right might be necessary under the proportionality test. The human right is breached by any disproportionate action by a public body. The victim certainly has a correlative right stemming from this duty. The balancing exercise determines whether a duty has been breached, not whether a breach of duty yields a correlative right. Bamforth fails to

demonstrate that public duties are not truly correlative, and fails to explain why general public law duties should be treated as what Rainbolt calls, ‘obligations which do not imply such a right’.\textsuperscript{158}

Despite the limits of Bamforth’s argument against correlativeity in public law, the fact that enforcement rights are not presently given by law to all citizens to correct all breaches of public duty forces one to consider whether public law duties are in some manner imperfect, in the absence of any individual harm. Imperfect obligations may be still be legal obligations. For instance, purpose trusts for inanimate ends, such as the upkeep of horses and dogs, graves or monuments, have been considered imperfect trusts, since they lack any cestui que trust to enforce the trust obligations.\textsuperscript{159} However, it is difficult to view public law as operating in this manner.

In Attorney-General ex rel. McWhiter v. Independent Broadcasting Authority,\textsuperscript{160} Lord Denning MR, in a decision later overruled\textsuperscript{161}, held that a member of the public could bring an action if the Attorney-General refused to bring one or acted too slowly, and commented that, ‘we live in an age when Parliament has placed statutory duties on government departments and public authorities – for the benefit of the public – but has provided no remedy for breach of them.’\textsuperscript{162} Rather than evidence that public duties are,
and should be seen as, imperfect, such a comment ought to be viewed as an indictment of public law in refusing to recognize the rights correlative to general public law duties.

Public law jurisprudence gives no explicit support for viewing the duties of public law as imperfect obligations. Indeed, it suggests quite the opposite. In Mutasa v. Attorney-General\textsuperscript{163}, the obligation of the Crown to protect its citizens was held to be an imperfect obligation. However, the reasoning of Boreham J. was not that this duty constituted an unenforceable obligation of public law, but rather that it was only a moral or political duty, and therefore was unenforceable by the one to whom it was owed. He said, ‘the duty here relied upon is not in the proper sense a legal duty, namely one which can be enforced in a court of law or the breach of which would give rise to a cause of action in a court of law.’\textsuperscript{164} It was imperfect because it was not a legal obligation. By contrast, it can hardly be denied that public law obligations are legal duties in the proper sense. Indeed Lord Diplock stated in I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd\textsuperscript{165} that whilst, ‘they (public bodies) are accountable to Parliament for what they do in so far as regards efficiency and policy,…they are responsible to the court of justice for the lawfulness of what they do, and of that the court is the only judge.’\textsuperscript{166} Therefore, it does not seem possible to maintain that public law duties are simply imperfect obligations.

\textsuperscript{164} Ibid., 120.
\textsuperscript{166} Ibid., 644.
Despite the fact that public law duties are not presently treated as vesting legal rights in citizens generally, there is little conceptual justification for treating public duties as imperfect, non-correlative duties. Indeed conceptual arguments suggest quite the opposite. Therefore, public duties should be seen as perfect obligations that vest correlative rights of enforcement in the citizens to whom they are owed. Furthermore, the similarity between public law and fiduciary obligations makes this conclusion intellectually sustainable and compelling.

6. **Public Duty as a Fiduciary Obligation**

In what sense can it be said that general public duties are owed to citizens both collectively and individually, such that failure to abide by those limitations violates rights held by each citizen, quite aside from any particular or individual harm? Certainly we view general public law duties as legally binding obligations, rather than mere standards of public morality. Yet we might still wonder whether this obligation is really owed to citizens so as to correlative vest rights in them? A comparison between the structure and content of fiduciary obligations and public duties sheds light on why citizens should be recognized as having precisely this right, and how, through this, public law standing can achieve a synthesis between the pull of normative individualism and communitarianism.
a) **The Theoretical Similitude of Public and Fiduciary Obligation**

The idea that public bodies act in ways similar to fiduciaries is most clearly demonstrated by the fact that public bodies exercise public power in the public interest, and not for personal or institutional gain. This is not a new idea in political theory, but a foundational truth of public law. Mabry Rogers and Young note that the idea of public bodies as fiduciaries or trustees for the public is formulated as early as John Locke’s political philosophy.  

They write that, ‘to formulate a new theory of constitutional government calling for restrained public authority, Locke... relied upon the concept of a trust to limit governmental power to the exercise of those specific functions delegated to the Government....The Government’s power should be encumbered with a trust to act on behalf of the beneficiaries – all those who had created government by the social contract.’

In a similar way, fiduciary obligations ensure that fiduciary powers are exercised only in the interests of beneficiaries, thereby precluding selfish motives on the part of the fiduciaries. Mason, when writing on equity, noted that, ‘modern administrative law...from its earliest days, has mirrored the way in which equity has regulated the

---


The fiduciary obligation to act fairly, loyalty, and in the beneficial interest, mirrors the requirements of reasonableness, the rule of law, and the public interest in administrative law. P.D. Finn goes so far as to say that, ‘*the most fundamental fiduciary relationship in our society is manifestly that which exists between the community (the people) and the state, its agencies and officials.*’

Evan Fox-Decent has produced a comprehensive account of the fiduciary nature of public law. For Fox-Decent, public power carries with it ‘*public fiduciary duties*’ and as such, everyone subject to state power, ‘*is a beneficiary of an overarching fiduciary obligation that manifests itself as the rule of law.*’ Some of these claims go far beyond the scope of this discussion, but they are worth noting for their acceptance of the basic similitude of fiduciary and public duties.

It is not simply the fact that public authorities, like many fiduciaries, are entrusted with discretionary powers to be exercised in the interests of public beneficiaries, that justifies treating public duty as fiduciary in nature. A central feature of fiduciary relations is not simply entrustment, but a vertical relationship of power, trust, and confidence.

---


171 Fox-Decent, E., ‘The Fiduciary Nature of State Legal Authority’ (2005) 31 Queen’s LJ 259, 261

172 Ibid.
between persons.\textsuperscript{173} Thus, Evan Criddle rightly argues that, ‘the hallmark of fiduciary relations is not delegation per se, but rather the law’s ex post identification of a confidential relation as one founded on trust.’\textsuperscript{174} The crucial point is that a duty is owed to the beneficiaries, whether or not this duty arises by delegation or by some other event or circumstance. Although public duties generally involve an entrustment of power, one need not assent to Edelman’s recent suggestion that all fiduciary duties rest upon entrustment, rather than simply a power relationship.\textsuperscript{175} Even Edelman admits, quoting Lord Millet\textsuperscript{176}, that ‘the quest to define fiduciary relationships “continues without evident sign of success.”’\textsuperscript{177} What is important is that fiduciary duties always vest certain rights in their beneficiaries and always entail duties to act solely in their interest. The other general characteristics of what Edelman calls, ‘circumstances of trust, confidence, power, vulnerability and/or discretion’,\textsuperscript{178} certainly reflect the nature and grounds of judicial review in public law. As Evan J. Criddle puts it, ‘analyzing administrative law from a fiduciary perspective thus illuminates the law’s internal logic and ambitions, and offers glimpses into administrative law’s future.’\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{173} Shepherd, J. C., ‘Towards a Unified Concept of Fiduciary Relationships’ (1981) 97 LQR 51, 76.
  \item \textsuperscript{174} Criddle, E. J., ‘Fiduciary Foundations of Administrative Law’ (2006-7) 54 UCLA L. Rev. 117, 126.
  \item \textsuperscript{175} Edelman, J., ‘When do fiduciary duties arise?’ (2010) 126 LQR 302.
  \item \textsuperscript{177} Edelman, J., ‘When do fiduciary duties arise?’ (2010) 126 LQR 302, 305.
  \item \textsuperscript{178} Ibid., 317.
\end{itemize}
b) Judicial Conceptions of the Fiduciary Nature of Public Law

Far from being a purely theoretical construct, this notion of public law as inherently fiduciary has found its way into the history of judicial review, and its treatment by the courts. As early as 1898, Lord Chief Justice Russell confirmed the non-self-serving role of public bodies when he contrasted public representative bodies, ‘entrusted by Parliament with delegated authority’, with private bodies who do not act only in the public interest.\textsuperscript{180} Furthermore, in R v. Whitaker\textsuperscript{181}, the court accepted that there was a public interest in the enforcement of public law duties. Indeed this was seen as a defining feature of public law obligations. Lawrence J. commented that, ‘a public officer is an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer.’\textsuperscript{182} Such comments are clearly consonant with conceiving of public law in fiduciary terms, and with seeing citizens as having an interest in the proper observance of public obligations. Indeed it is such obligations that form the foundation of public law itself. Public law ensures that public power is exercised within limits that reflect the public interest.

\textsuperscript{180} Kruse v. Johnson [1898] 2 QB 91, 99.
\textsuperscript{181} R v. Whitaker [1914] 3 KB 1283.
\textsuperscript{182} Ibid., 1296.
An important illustration of the relationship between law and equity is the standard of reasonableness laid down in Associated Provincial Picture Houses v. Wednesbury Corporation.\(^{183}\) Earlier we noted Dawn Oliver’s claim that, ‘duties of what in judicial review are called legality and rationality are imposed by equity in respect of exercises of discretion by trustees and company directors. Here the phrase “arbitrary or capricious” tends to be used rather than “Wednesbury unreasonable”. The concept of ultra vires and the principle of rationality enunciated by Lord Greene in Associated Provincial Picture Houses v. Wednesbury Corporation are very obviously borrowed from and also found in equity – hardly surprising since Lord Greene was an eminent Chancery lawyer.’\(^{184}\) Lorne Sossin makes the same point in arguing that, ‘whilst the requirement of acting reasonably in the exercise of a statutory authority was not new, the equitable basis of this requirement had never been so clearly articulated.’\(^{185}\) In Roberts v. Hopwood\(^{186}\), Lord Atkinson also went so far as to say that the council stood, ‘somewhat in the position of trustees or managers of the property of others’\(^{187}\), as regards ratepayers, having to act in their interests and for their benefit.

It has been demonstrated that the legal duty of public bodies is not simply owed to the legislature, but to citizens as beneficiaries. In Reg. v. Commisioner of Police of


\(^{186}\) Roberts v. Hopwood [1925] AC 578.

\(^{187}\) Ibid., [33].
the Metropolis ex parte Blackburn\textsuperscript{188}, Lord Denning MR argued that, ‘the police owe the public a clear duty to enforce the law.’\textsuperscript{189} Edmund Davies LJ concurred that, ‘the law enforcement officers of this country certainly owe a legal duty to the public to perform those functions which are the raison d’etre of their existence.’\textsuperscript{190} Additionally, in I.R.C. v. National Federation of Self-Employed and Small Businesses Ltd\textsuperscript{191}, Lord Scarman, contrary to the arguments put forward for the Revenue that its obligations were owed only to the Crown, analysed their public duty as, ‘a legal duty of fairness…owed by the Revenue to the general body of taxpayers’. Thus, the language and jurisprudence of public law obligations clearly supports the notion that citizens have an interest in the legal exercise of public powers that resembles the beneficial interest and the rights that beneficiaries have vis-à-vis fiduciary obligations.

c) The Distinction between Public Law and Equity

The case for viewing public duty as fiduciary in nature is a compelling one. However, it is also important to distinguish between cases in which public law is viewed as fiduciary in nature, and cases in which trusts or fiduciary obligations are actually imposed by equity on public authorities. Despite the similarity between public law

\textsuperscript{188} Reg. v. Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 QB 118.
\textsuperscript{189} Ibid., 138.
\textsuperscript{190} Ibid., 148-9.
obligations and fiduciary duties, equity and law remain distinctive in jurisdictional and remedial terms.

In the 1882 case of Kinloch\textsuperscript{192}, Lord Selborne LC commented that in public law the terminology of ‘trusts’ is used in a higher sense than to connote equitable jurisdiction.\textsuperscript{193} It means that in public law, public law duties of trust are owed, rather than equitable obligations. This approach was followed by Megarry V-C in Tito v. Waddell (No. 2).\textsuperscript{194} It is axiomatic that conceiving of public law as having a fiduciary nature does not entail averring equitable jurisdiction or remedies, but rather insisting that public law duties and interests develop in ways comparable with equity, especially in recognizing the right to standing of the beneficiaries of public power, to control the misuse of that power.

This does not, of course, preclude genuine fiduciary duties from arising in the exercise of public power. In Canada, fiduciary duties of a quasi-public, quasi-equitable nature have been found in relation to the proprietary rights of native peoples. In Guerin v. The Queen\textsuperscript{195}, Dickson J. recognized the role of equity within public law when he stated broadly that, ‘where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will

\textsuperscript{192} Kinloch v. Secretary of State for India [1882] 7 App. Cas. 619.

\textsuperscript{193} Ibid., 626.

\textsuperscript{194} Tito v. Waddell (No. 2) [1977] 3 All ER 129. 216-7.

\textsuperscript{195} Guerin v. The Queen [1984] 2 SCR 335.
then supervise the relationship by holding him to the fiduciary’s strict standard of conduct."196 Dickson J. qualified this by noting that fiduciary obligations did not generally arise from the exercise of Crown authority, but arose as the ‘sui generis’ consequence of aboriginal title.197 This finding appears to vest some form of unique proprietary right in native peoples in relation to the use of Crown land and coheres with what Joel Feinberg termed, ‘duties of commitment, reparation, need-fulfilment, and reciprocation’, and, ‘duties of respect and community membership (which) are necessarily correlated with other people’s in rem rights.’198 These unique rights reflect a more communitarian notion of equitable interests, since they are rights of the whole community of aboriginal peoples rather than being public duties that vest rights in both the community as a whole, and specific individuals. However, it might be arguable that public duties in relation to decisions about the use of Crown land, are owed to both the community and to individuals, and indeed owed to the citizenry as a whole, although such rights, unlike aboriginal title, cannot imply any proprietary interest in the land itself. This argument would take a public, and not an equitable, form.

In any case, these kinds of communitarian fiduciary obligations are unique remedial devices for historical injustices, rather than a model for our understanding of public law generally. Dickson J.’s restrictive approach to the recognition of such equitable interests may be justified, but it overlooks the general similarity between fiduciary duties and public law obligations, and cannot be read as a restriction of the

196 Guerin v. The Queen [1984] 2 SCR 335, [97].
197 Ibid., [93], [100].
analogous development of public law on that basis. The equitable nature of public law and the implications that this should have for its development can still be realized through the leitmotif of fiduciary obligations in public law. In this way, judicial review can grow without collapsing into equity, or entailing rights in rem and equitable relief.

The evidence for the similarity between public law duties and fiduciary obligations is compelling. They have a similar structure and content and both are to be exercised only in the interests of others. Therefore, they ought to vest rights in their beneficiaries. However, it remains necessary to explain the rights of beneficiaries across the range of types of fiduciary duties, and which best fits our understanding of public law.

7. The Beneficial Interest and its Implications for Standing

The correlativity between rights and duties, the fiduciary nature of public law duty, and the limitations of an exclusively libertarian, communitarian, or functionalist approach, all indicate the need to broaden standing and vest in individual citizens and public interest groups the right to constrain unlawful behaviour by public bodies. Nevertheless, sensitivity must be had to the different categories of fiduciary duty, and which best fits the theory of practice of public law.
a) **Questioning the Implications of the Fiduciary Model: Evan Criddle**

Not all fiduciary duties operate in the same way, nor necessarily support the same rights of beneficiaries to enforce the fiduciary duty. Evan Criddle, who argues in favour of the fiduciary nature of public law, also advocates a narrow doctrine of standing.\footnote{Criddle, E. J., ‘Fiduciary Foundations of Administrative Law’ (2006-7) 54 UCLA L. Rev. 117, 172-178.} He argues that, *‘the fiduciary model posits standing as an inquiry into the plaintiff’s interest, injury, and ability to represent the beneficiary class’*.\footnote{Ibid., 172.} For him, there is no automatic reason for supposing that the beneficiary has a sufficient interest to enforce the fiduciary duty. For instance, principals may sue agents instead, reducing the need for the beneficiary to become involved, and in the case of charitable trusts, a designated public official represents the inchoate beneficial interest. Furthermore, Criddle notes that, *‘courts generally grant standing liberally to those who can establish a discrete injury arising from a beneficial interest, provided that the prospective litigant establishes that he will adequately represent the interests of his similarly situated co-beneficiaries’*.\footnote{Ibid., 173.} These arguments are serious and need to be carefully evaluated. However, it must be noted at the outset that none of these concerns should necessarily leads to the conclusion that standing be restricted.

First, in the case of public law, if we conceive of the ‘principals’ as being Parliament, then a distinction can be drawn between public law and some fiduciary...
duties, for whilst principals might, on occasion, be in a position to legally enforce a fiduciary duty, Parliament can only politically control the exercise of public duties, unless it is prepared to legislate on the matter. It cannot bring legal proceedings to control the exercise of public powers, and even if it could, government control of Parliament would severely weaken its effectiveness. Furthermore, even if a principal does have residual enforcement rights over a fiduciary obligation, this should not necessarily impede or preclude a claim by the beneficiary.

Second, it would be a mistake to liken public law to charitable trusts. Although the Attorney-General can act as a neutral enforcer of a charitable trust, as a designated public official, he cannot act in the same manner to protect the public interest in lawful government. Indeed, as Harding as written, it is an, ‘illogical and possibly dangerous notion that public duties can only be enforced by the Attorney-General. The office of Attorney-General does not have an illustrious history of enforcing public duties. Attorneys-General are unwilling to act against public bodies and the courts seem unwilling to review their reasons, however poor, for failing to act.’

Additionally, the objects of charitable trusts are conceived of, rightly or wrongly, as purposes, rather than persons. By contrast, public law conceives of public duties as being exercised in the public interest, for persons, rather than abstract purposes. Thus, even when a public duty protects abstract ends, such as the environment, and thus

202 A point also indicated in relation to public official generally by: R. (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems [2008] UKHL 60.

strongly resembles a charitable trust for the preservation of the environment, the two should be conceived of differently. Public bodies exercise powers only in the public interest, giving citizens a stake in the actions of public bodies. In contrast, whilst a wide range of persons might qualify as beneficiaries of a charitable purpose trust, the trust was created by a private individual or group only for the benefit of those who qualify as beneficiaries and not for the public at large, for an abstract end rather than for particular persons.

Finally, whilst Criddle is right to argue that the beneficial interest needs to be demonstrated, no other particular interest is required for a beneficiary to enforce a fiduciary obligation, nor need one beneficiary mark himself out as more interested in a case than any other. In *Boardman v. Phipps*<sup>204</sup>, a constructive trustee was made to account for profits made in the course of his duties, and contrary to the conflict of interest principle, despite the fact that the beneficiaries’ fund actually benefited from these actions. Although this case was not brought by a beneficiary, it certainly demonstrates that fiduciaries can be brought to account for a breach of duty without their being any financial or individual loss on the part of the beneficiary.

Criddle further argues that in the case of a breach of fiduciary duty by a company director, a shareholder must ask the corporation to take action before being able to file his own derivative suit. However, this rule cannot be transferred to the public law context. The reason for limitations upon shareholder actions is that any action by one shareholder will directly affect the legal interests of others, and the nature and legal

---

<sup>204</sup> Boardman v. Phipps [1966] 3 All ER 721.
status of a company means that derivative actions involve suing a director on behalf of the wronged company, and not on behalf of any individual. This rule stems from the 1843 case of Foss v. Harbottle,\textsuperscript{205} in which it was held that the duties owed by directors were owed to the corporation as a whole, rather than to individual shareholders. Thus, the director’s duty is owed to the company rather than the shareholders themselves. This reflects company law, rather than the general law of fiduciary obligation, and cannot serve as a model for public law, nor an argument against broader standing. As has been argued, public duties are owed directly to each citizen as well as the public as a whole. Unlike a corporation, the public as a whole has no legal identity, nor are its members identifiable in a way that allows permission to be sought before bringing a claim, as is the case in company law.

Criddle concludes, proposing reforms for American constitutional law, that, ‘if agencies abuse their discretion in a context where citizens cannot vindicate their interests through the political process, individual citizens’ abstract or generalized interests in agency legality should satisfy the Article III injury-in-fact requirement.’\textsuperscript{206} Yet this argument overlooks the legal nature of the public duty and ignores, rather than stems from, the fiduciary basis for standing and public duty that has been demonstrated, and which Criddle himself acknowledges. This conclusion barely fits Criddle’s own understanding of the fiduciary nature of public law, let alone a full understanding of it.

\begin{flushleft}
\textsuperscript{205} Foss v. Harbottle (1843) 67 ER 189.
\end{flushleft}
Although Criddle rightly warns against the dangers of, ‘opportunism, collusion, and carelessness that haunt administrative law generally’,\textsuperscript{207} and that these might result from affording standing to mere busybodies, he adopts an overly narrow fiduciary understanding of public law obligation that fails to recognize the full implications of the beneficial interest in lawful government and risks stripping from citizens the protection to which they are entitled. The beneficial interest must be reasserted to secure the interests of citizens in the lawful exercise of public power.

b) Reasserting the Beneficial Interest

Having dealt with the problems posed by Criddle, the variants of fiduciary obligation that best fits the core of public law can now be posited. The main variant is the trust, particularly the discretionary trust. It was noted earlier that public law often involves the entrustment of power. The people, through their representatives in Parliament, delegate power to public bodies which is to be exercised only in their interests and in accordance with judicially decided standards. The creation of the power denotes each citizen as a beneficiary of the public duty, whilst its legal nature gives the courts the right to determine standards of review and vests legal rights of enforcement in citizens. The public thus becomes, figuratively speaking, a cestui que trust of public power.

This approach fits the description of trusts given by Roxburgh J. in Re Astor\textsuperscript{208} that, ‘the typical case of a trust is one in which the legal owner of property is constrained by a court of equity so to deal with it as to give effect to the equitable rights of another…. Prima facie, therefore, a trustee would not be expected to be subject to an equitable obligation unless there was somebody who could enforce a correlative equitable right….\textsuperscript{209} In a public law context, this correlative right exists in law rather than equity, and constitutes the public right to lawful government.

In equity, beneficiaries of a trust cannot obtain the whole trust fund without the concurrence of the other beneficiaries.\textsuperscript{210} On the other hand, beneficiaries can still prevent breach of the trust obligation. Public law draws a similar line, through the distinction between law and politics. The public as a whole can act politically to enforce its interests through campaigning and electoral power. However, individuals and groups can also act legally to enforce the legal obligations of public law.

Individual beneficiaries of a discretionary trust cannot generally bring an action for the trust property itself. However, they can control the illegal dissipation or misapplication of the discretion. J. W. Harris notes that what is enforceable by the beneficiary, ‘is the derivative duty not to release the power,\textsuperscript{211} in other words, a generic

\textsuperscript{208} Re Astor [1952] Ch 534.
\textsuperscript{209} Ibid., 541.
\textsuperscript{210} Saunders v Vautier (1841) 1 Cr & Ph 240.
\textsuperscript{211} Harris, J. W., ‘Trust, Power and Duty’ (1971) 87 LQR 31, 52.
duty to hold property for persons or purposes.\textsuperscript{212} Whilst Harris implies that the relational conception of duty is inappropriate to this structure, since such duty is not one to perform an action\textsuperscript{213}, it is submitted that this argument overlooks the fact that an individual can have affirmative rights in respect of negative duties. The duty not to act capriciously and unreasonably, the fiduciary duty of loyalty that precludes acting only in self-interest, and the duty not to give up a power that has been delegated, can all be correlative to the rights of those for whom the trust was created. There is no reason to suppose that they do not fit the correlativity of a relational conception of rights and duties.

In the same way, the duties imposed by the grounds of review on public bodies correlate with the beneficial interest of the citizen in the lawful exercise of public power, which manifests itself in the right to restrain the unlawful exercise of that power.

c) Public Authorities in the Absence of Delegation: The Scope of Public Law

The problem for the trusts-based explanation for the citizen’s right to restrain the unlawful exercise of public power, is that it rests on the delegation of power by Parliament. Yet not all the bodies exercising public powers fit this model. Prerogative powers are regulated by public law, despite the fact that they are technically exercised

\textsuperscript{212} Harris, J. W., ‘Trust, Power and Duty’ (1971) 87 LQR 31, 56.
\textsuperscript{213} Ibid.
on behalf of the Crown. A limited number of non-statutory public bodies also exist that are subjected to public law duties, such as the Panel on Take-overs and Mergers.\footnote{R. v. Panel on Take-overs & Mergers, ex parte Datafin [1987] 1 QB 815.} The basis on which citizens ought to be able to enforce such duties clearly cannot be that they rest of delegated powers like discretionary trusts. Nevertheless, standing in such cases can still be justified by analogy with fiduciary obligations.

In ex parte Datafin\footnote{Ibid.}, Lord Donaldson MR held that the Take-over Panel could be subject to judicial review since, despite its non-statutory basis, it could be said that by, ‘an act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions.’\footnote{Ibid., 835.} In R. v. Disciplinary Committee of the Jockey Club, ex. parte Aga Khan\footnote{R. v. Disciplinary Committee of the Jockey Club, ex. parte Aga Khan [1993] 1 WLR 909, [80].}, Lord Justice Hoffmann explained that Datafin ‘shows that the absence of a formal public source of power, such as statute or prerogative, is not conclusive. Governmental power may be exercised de facto as well as de jure. But the power needs to be identified as governmental in nature.’

This shift from focussing on the source of the power to its nature does not pose fundamental problems for the fiduciary approach to public law. There are three arguments that can be deployed to demonstrate that these bodies and persons also
owe public duties that are analogous to fiduciary obligations that are enforceable by citizens on that basis.

First, whilst the trusts analogy is helpful in explaining the core case of public duties as delegated powers, the real core of fiduciary duties is that they must be exercised only for the benefit of others. There is a distinctively altruistic basis for public power and obligation. As such, these duties vest rights in their beneficiaries to constrain an abuse of power. Indeed, it was noted earlier that a central feature of fiduciary relations is not simply entrustment, but a vertical relationship of power, trust and confidence in regard to others.

Second, the fiduciary relationship between those under public law duties and citizens might arise from an assumption of responsibility by those wielding such powers. In the recent case of YL\textsuperscript{218}, which decided that a private care home was not excising a public function within the meaning of s. 6 of the Human Rights Act 1998 in undertaking care pursuant to a local government contract, Lord Bingham’s dissenting judgment reveals how such duties vest enforcement rights in citizens. Lord Bingham argued that an act was public in nature when it was done in an area of policy in which, ‘the state has assumed responsibility for’ the accomplishment of the task.\textsuperscript{219} If one modifies this approach, one could argue that those subject to public duties should be those who have undertaken to act only in the public interest, at least so far as certain actions are concerned. On this view, the problem of non-delegation is solved by the direct

\textsuperscript{218} YL v Birmingham City Council [2007] UKHL 27.
\textsuperscript{219} Ibid., [66].
undertaking by such persons or bodies to act in the public interest, and acceptance of the fiduciary duty that accompanies the exercise of such power.

Third, those exercising public powers necessarily act under governmental consent, or with a government mandate, even in the absence of a statutory basis or delegation of particular powers. Thus, those subject to public duties are those in the position of an agent vis-à-vis a public authority. These persons or bodies, albeit without express delegation, carry out functions on behalf of public authorities either under contracts, or tacit political consent. These de facto agents may be treated de jure as subject to the obligations of public law. If capable of being viewed as agents, then they become subject to the same limitations that their principal’s delegation of power imposed on them, and hence come under a public “fiduciary” obligation, the beneficiaries of which are the citizens.

Whichever argument one accepts as most compelling, it is clear that those who exercise wide-ranging powers of a public nature must do so in the public interest, and for the benefit of the citizenry, whose interests are protected by the grounds of review. This is true even if the activities are undertaken by commercial entities for economic motivations, since the obligation remains to act primarily in the public interest. These duties are of a fiduciary nature and vest correlative rights in the citizen, which requires broader standing in public law. The fiduciary obligation is not simply a matter of delegated authority; it forms conditions for the exercise of all public powers, and imposes the same duties on public actors, whatever the source of their power. For the same reason, even the worst dictator who seized power in a most unwarranted manner would still be bound by the fiduciary obligations that attach to any exercise of public power, to act in the beneficial interest.
d) The Rights of Citizens in Public Law

It is now possible to summarize the nature of public law duties, and the rights that beneficial citizens should have in public law:

1. Public law duties resemble and operate in a manner akin to fiduciary obligations, especially in the case of discretionary trusts.
2. This fiduciary model remains true even in the absence of a democratic delegation of power.
3. Fiduciary obligations are correlative with the beneficiary’s rights to prevent the abuse or abrogation of fiduciary powers, and to control the exercise of discretionary power.
4. Similarly, the grounds of judicial review prevent the abuse of power in public law.
5. Similarly, citizens should be afforded the legal right to enforce public law duties, both individually and collectively, as the beneficiaries of public powers.

These conclusions flow from the nature of public law duties, and the inability of normative liberalism and functionalist arguments to successfully justify curtailing standing. It accepts that citizens can, at one and the same time, vindicate their individual interest in lawful government, and represent the public’s collective interest in
the shared values of legality and good governance. In this manner, it synthesizes strands of libertarian and communitarian thought to produce the fiduciary model of public law duty.

Public law must give recognition to this conception of duties and rights through its law of standing. This must be reformed to take into account the rights of citizens, both individually and collectively, to enforce the public law duties incumbent upon public bodies. It will be argued that a modified version of the Canadian approach can provide a basis for a broader and more coherent doctrine of standing in English law.

8. Lessons From the Canadian Approach to Standing

Canadian courts tend to adopt a broader and more balanced approach to standing that brings together elements of individualism and communitarianism by enabling individual and group standing on a broader basis than their English counterparts. However, Canadian law is not free from difficulty and has developed in a manner that undermines the fiduciary approach to public duty that has already been described.
a) **Standing Pre-Charter**

The starting point for considering standing in Canadian constitutional law is the aforementioned case of Thorson v. Attorney General of Canada. There, a taxpayer challenged the Appropriation Acts, and the Official Language Act, 1968-69. Laskin J., considered that the most pressing issue was, ‘whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute.’ His answer was that taxpayers were entitled to standing, his reasoning that, ‘it is not the alleged waste of public funds alone that will support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.’ This summation of the law encapsulates a synthesis between individualistic and communitarian concerns and the ideas advocated by a fiduciary approach to public legal duties, through its recognition of the correlative rights of the citizenry to lawful government. However, the simplicity of this test soon developed into a more complicated and limited espousal of this right of the citizenry.

---

221 Ibid., 145.
222 Ibid., 163.
In Nova Scotia (Board of Censors) v. McNeil, the Supreme Court held that a taxpayer had standing to challenge a decision to prohibit exhibition of a controversial film. However, Laskin CJ appeared hesitant to reaffirm his broad rationale for standing in the case, preferring to argue that there should be standing only when there was, ‘no other way, practically speaking, to subject the challenged Act to judicial review.’ He was also more inclined to argue that, ‘there is an arguable case under the terms of the challenged legislation that members of the Nova Scotia public are directly affected in what they may view in a Nova Scotia theatre.’

This retrogressive step was also seen in Minister of Justice (Canada) v. Borowski. There, a prominent crusader against abortion sought a declaration that the Criminal Code permitted procurement of a miscarriage contrary to the right to human life secured by the Canadian Bill of Rights. Although Laskin CJ dissented, the Supreme Court held that there was standing in this case.

Laskin CJ’s dissent seemed to highlight his increasing discomfort with his own broad rationale for standing. He argued that the courts were mainly, ‘dispute-resolving tribunals’, and did not usually deal with, ‘purely hypothetical matters where no concrete legal issues are involved.’ Even if true on the facts of that case, most citizen action or group litigation cases concern concrete issues, and it has already been argued that

---

225 Ibid.
227 Ibid., 579.
courts frequently engage in wide-ranging policy disputes and decisions. However, Laskin CJ continued that the courts did not exist to satisfy, ‘obsessiveness with a perceived injustice in the existing law.’ He therefore recast the right of citizens to standing as, ‘exemptions to the general rule and to the policy.’ The problem with such an approach is that it falls into the trap of assuming that all citizens are busybodies, incapable of raising genuine legal issues, and thus treating their rights as exceptional, rather than normal and genuine, concerns.

The majority did not agree with Laskin CJ, and Martland J. placed great weight on the fact that there was no-one else to challenge the legality of the legislation, and summarizing the test for standing that, ‘to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.’ This three stage test, adopted by this trilogy of cases, imposed new limits on standing and this attempt to build a coherent test also curtailed the scope of standing in public law.

---

228 Minister of Justice (Canada) v. Borowski [1981] 2 SCR 575, 579.
229 Ibid.
b) Standing Post-Charter and in Administrative Law

These cases were all decided before the Constitution Act 1982, which introduced the Canadian Charter of Rights. Following this constitutional change, the Canadian Council of Churches v. Canada[^231^] determined the post-Charter law of standing along similar lines to the trilogy. In that case, the Canadian Council of Churches challenged proposed changes to the Immigration Act 1976, but was denied standing.

Cory J. argued that, ‘the state has been required to intervene in an ever more extensive manner in the affairs of its citizens. The increase of state activism has led to the growth of the concept of public rights. The validity of government intervention must be reviewed by courts. Even before the passage of the Charter this Court had considered and weighed the merits of broadening access to the courts against the need to conserve scarce judicial resources.’[^232^] In determining the balance between these competing interests of public rights and judicial resources, Cory J. considered that the 1982 Act, ‘by its terms the Charter indicates that a generous and liberal approach should be taken to the issue of standing. If that were not done, Charter rights might be unenforced and Charter freedoms shackled. The Constitution Act, 1982 does not of course affect the discretion courts possess to grant standing to public litigants. What it

[^232^]: Ibid., 251.
does is entrench the fundamental right of the public to government in accordance with the law.  

Cory J., also confirmed that this broad approach should also be taken in administrative law since, ‘the question of standing was first reviewed in the post-Charter era in Finlay v. Canada (Minister of Finance), [1986] 2 S.C.R. 607. In that case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for "the limits of statutory authority". Thus, the constitutional and public law tests for standing became assimilated, being discretionary in both instances.

Despite the promise of this rationale for standing, Cory J. confirmed that the balance between judicial resources and the citizen’s right to lawful government would be determined by, ‘limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation. In Finlay, supra, it was specifically recognized that the traditional concerns about widening access to the courts are addressed by the conditions imposed for the exercise of judicial discretion to grant public interest standing set out in the trilogy.”}

\[233\]


\[235\] Ibid., 252; and Finlay v. Canada (Minister of Finance) [1986] 2 S.C.R. 607.
The Supreme Court concluded that, ‘the whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.’\textsuperscript{236} On the facts of the case, they concluded that, ‘it is clear that individual claimants for refugee status, who have every right to challenge the legislation, have in fact done so. There are, therefore, other reasonable methods of bringing the matter before the Court.’\textsuperscript{237} The court also considered that, ‘refugee claimants were bringing forward claims akin to those brought by the Council on a daily basis,’\textsuperscript{238} although these seemed to be administrative appeals rather than specific constitutional challenges.

Whilst it is important to recognize that courts cannot deal with every possible case, and are entitled to take into account judicial resources, the idea that illegality should be allowed to continue so long as there is someone else able to prevent it is unwarranted, and the fact that one problem with narrow standing is the non-enforcement of legal obligations does not mean that so long as one person can enforce the obligation no problem can be said to have occurred. This is to assume that the only rationale for broadening standing is to prevent the insulation of decisions from review and that an alternative enforcement mechanism would be as effective and efficient as the challenge that is being sought in the case at issue. Such is the Canadian approach

\textsuperscript{237} Ibid., 255.
\textsuperscript{238} Ibid., 254.
following the retrenchment from Thorson\textsuperscript{239}, despite the broadening of both public rights and the scope of public duties following the introduction of the Charter.

It must be noted that an equally important reason for broadening standing is to vindicate the increased rights held by each citizen to the lawful exercise of public powers and to restrain the breach of public duties. These rights of citizens are equally held by all and it is not at all clear that they should be restricted merely because someone else might be more directly affected. Indeed, June Ross is right to comment that the case was, ‘restrictive and discouraging to the public interest litigant.’\textsuperscript{240}

In addition, citizens and public interest groups might well be more able to bring claims, and bear litigation costs, than more directly affected individuals. In Canadian Council of Churches v. Canada\textsuperscript{241}, it seems wrong of the court to have reasoned that immigrants were affected by the changes to immigration laws, and thus that someone would always be able to bring a claim. On the facts it appears that despite the large number of administrative appeals on immigration issues, no constitutional challenge to the proposed changes to the Immigration Act 1976 had ever reached the Supreme Court before. Even if they had, it is not clear that such challenges would have been any better or more detailed than one brought by the Canadian Council of Churches, nor that they would have been a lesser burden on judicial resources. Had the Council been granted standing,

\begin{footnotes}
\textsuperscript{240} Ross, J., ‘Canadian Council of Churches v. The Queen: Public Interest Takes a Back Seat’ (1991-2) 3 Const. F. 100, 100.
\end{footnotes}
needless interferences with Charter rights could have been avoided, rather than being cured ex post facto.

c) Sections 24 and 52 (1) of the Constitution Act 1982

Whilst remedies are not directly relevant to our present discussion of standing, it is worth noting the distinction between s. 24 of the Constitution Act 1982, which grants standing as of right for claims to personal remedies to those whose Charter rights are infringed or denied, and s. 52 (1), which allows standing on a discretionary basis to anyone seeking the remedies of a declaration of invalidity, reading in, and reading down legislation. Such remedies mirror those available under s. 3 and s. 4 of the Human Rights Act 1998, and indicate that the case for narrow standing in human rights cases is far from sound.

The most noteworthy aspect of the distinction between s. 24 and s. 52 is that it creates a two-track approach to standing in which directly affected individuals are granted standing as a right, whilst citizen and interest group standing is subjected to judicial discretion in accordance with the problematic standing case law that has already been discussed.
d) **The Benefits of the Canadian Approach**

It has been demonstrated that despite its early promise, Canadian Law has become unnecessarily reluctant to acknowledge the rights of citizens to enforce public law duties. In recognizing this right at all, and laying down a coherent test for standing, Canadian law certainly achieves much that English law can learn from. In addition, the need to balance the rights of citizens with the resources and priorities of the court must be dealt with in a proper and reasonable manner, consonant with the public interest. Canadian law also shows that remedies must be left to judicial discretion, and that victims may well be able to obtain individual remedies which citizens and public interest groups should not be similarly entitled to. Nevertheless, it shows that it is appropriate that citizens and interest groups be able to challenge validity, interpretation, and human rights compatibility of legislative and administrative decisions.

However, it would be a mistake for English law to adopt the third-stage of the discretionary Canadian standing test that rigidly restricts standing unless no other challenge is, or will be, viable. This unnecessarily restricts the rights of citizens to lawful government, and paradoxically means that an increased risk of harm decreases the likelihood that preventative challenges will be permitted. English law needs to strike a different balance between the needs of citizens, and those of courts and public authorities.

It is important to remember these words of Schwartz and Wade: *restrictive rules about standing are in general inimical to a healthy system of administrative law. If a
plaintiff with a good case is turned away merely because he is not sufficiently affected personally, that means that some government agency is left free to violate the law, and that is contrary to the “public interest”.\textsuperscript{242}

9. Reform of the English Law of Standing

Having established that citizens should have rights of enforcement correlative to public law obligations, it is important to set out the reforms of standing that such a conception of public law duty requires.

a) An Inadequate Proposal

The main proposals for the reform of standing in English law have been wholly inadequate. The Law Commission advocated a two-track system of standing that mimics the Canadian approach, whereby those currently entitled to standing by reason of a recognized legal right would always be entitled to bring administrative law proceedings, whilst those representing the public interest would be granted discretionary standing that takes into account a range of factors including: judicial

resources, the need to hear a range of views, the need to avoid vexatious litigation, and the proper role of the courts in judicial review actions.\textsuperscript{243}

Not only does this draw an unwarranted distinction between those rights that have already been recognized by the law, and those that ought to be recognized by a fiduciary understanding of public duty, but also fails to adequately clarify the law. Instead it lays down a list of unspecific factors to be taken into account in the exercise of judicial discretion, without providing the kind of guidance that would enable the courts to solve the problems of incoherence that have already been discussed. As Hilson and Cram note, ‘\textit{were these recommendations to be implemented, the discretion left in the hands of individual High Court judges in the second, residual track, would present us with the same ad hoc, unprincipled approach to standing as we have at present.}\textsuperscript{244}

What is required is to clarify which methods of citizen and group enforcement are in the public interest.

\textbf{b) Clarifying the Public Interest}

It is a basic implication of the right to standing of citizens, in whose interests public law duties must be exercised, that broad public standing for individuals and groups ought to be regarded as prima facie in the public interest. This follows from the


presumption that the standards of legality are themselves designated with the public interest in mind, and the fact that citizens each have an interest in the lawful exercise of public power. However, a number of criticisms and qualifications aim to wholly or partially rebut this prima facie position, and it is necessary to clarify the role of the public interest in defining the scope of standing.

There are dangers to the public interest aside from illegality. When participatory democracy takes on a legal character, democratic and representative government can be weakened by an overly litigious citizenry. As Harlow rightly argues, "the idea of popular democracy is... replete with fallacies and the belief that the populace can participate in every stage of every decision is simply one of them." However, it has already been demonstrated that such concerns ought mainly to be dealt via the scope of judicial review itself and the standards of review employed, rather than the law of standing. It would be inappropriate to use standing to curtail the impact of legal standards and duties that have been laid down because whilst it is axiomatic that litigation is not always the best way to make an issue heard, it can often be useful, efficient, and effective. Where legal standards are laid down in the interests of citizens, the argument against popular democracy cannot be decisive in nullifying the correlative rights that such duties logically entail.

Harlow’s examples of the problems of broadening standing are not decisive arguments against a broad theory of standing. She refers to the Bulger case, in which the Bulger family challenged a prison tariff recommendation for the murderers of their son. This was ruled inadmissible, a decision that Harlow calls, ‘sensible and courageous’, because there would be no way of preventing the defendant’s family, or victim groups from also intervening in similar cases. She also argued that, ‘there is a lack of logic in permitting interventions and widened standing in the Administrative Court or appellate courts, if the powers cannot be invoked in cases designated, purely through the accident of choice of court, as ‘private law’ matters. To cite but a single example, the celebrated ‘Siamese Twins’ case, involving a total re-consideration of the law with regard to surgical interventions which cause death through deliberate choice, arose in the Family Division; it can hardly be argued that no issue of public interest arose.

In reply to Harlow it must be posited that although victims should not have a role in sentencing decisions, this was not directly an issue in the Bulger decision, in which the wider issue of public law legality arose. If there is a problem in hearing from victims and interest groups in relation to sentencing this does not mean that there is a problem in allowing such groups to challenge the public law validity of a tariff recommendation, especially when no other challenger might be forthcoming. If the tariff recommendation was set by taking into account irrelevant considerations, with bias, or was simply unreasonable, there is a powerful public interest in getting such injustices corrected.

---

249 Ibid., 17.
The fact that the victims were pursuing their own interests in attempted to obtain a higher tariff does not automatically disqualify them from representing the public interest in lawful decision making, and the problems of denying victims a role in sentencing can be dealt with through robust standards of judicial review that are not quick to overturn sentencing recommendations and not by narrowing standing requirements.

In relation to the public-private distinction, Harlow appears to be arguing that no sensible line can be so drawn, or at least that any such distinction is often arbitrary. Yet this argument overlooks the distinctive features of the public interest in lawful government. As has been demonstrated, this interest stems from the distinctive nature of public law duty as fiduciary in nature. It is to be exercised only in the public interest, which gives the public a right to enforce public legal duties. Therefore, it is not simply the importance of a matter to the general public that justifies standing, but rather the protection of the beneficial interest that arises from public legal duties that constitutes the public interest. Not everything that is in the broader public interest is enforceable in public law, just as not every promise is enforceable by the law of contract. Both require the creation of legal obligations in order to vest rights of enforcement in others. The public have a public law interest in the enforcement of public law obligations. Therefore,

as Wade argues, there is a, ‘constitutional logic in allowing members of the public to represent the public interest in the public sphere but not outside it.’

c) Reformation or Abolition?

William Fletcher suggests that any single solution to the problem of standing is hopeless, and, ‘to think, or pretend, that a single law of standing can be applied uniformly to all causes of action is to produce confusion, intellectual dishonesty, and chaos.’ However, the distinction between the interests of directly affected persons and those of the general public in the legality of administrative decisions has already been shown to be weak. The current ‘sufficient interest’ test for standing in administrative law, and the ‘victim test’ under the Human Rights Act 1998 s. 7 (1), need to reflect the public interest in the lawful exercise of public power. A useful basis for reform can be found in the isolated judicial decisions granting broader standing that have already been discussed, including: ex parte Smedley, ex parte Rees-Mogg.

251 Wade, W., ‘Note on Gouriet’ (1978) 94 LQR 4, 9.
253 Senior Courts Act 1981. s. 31(3). See also Civil Procedure Rules 54.1.
and ex parte Leigh. Having come to this conclusion, the question becomes whether to broaden standing or abolish it completely?

Hilson and Cram’s model of reform distinguishes between ‘issue’ cases, in which there is no tie to a particular geographical location, and ‘place’ cases, in which an issue is also tied to a particular locality. Hilson and Cram advocate broad public interest standing both in ‘issue’ cases, and in ‘place’ cases that are of public concern, because in such cases, ‘local autonomy ought…to be overridden by…national importance.’ However, where the case, ‘is truly only of local interest, the ability to gain standing through participation in consultation or by way of legitimate expectation is objectionable because it undermines local autonomy.’ As regards consultation and legitimate expectations, Hilson and Cram are probably correct, for these grounds of review are generally not open to all persons in the way that other judicial review actions are. However, one cannot draw the general distinction between ‘issue’ and ‘place’ that they suggest because all cases of illegality by public bodies are necessarily ‘issue’ cases under the fiduciary model of public duty. All citizens have an interest in the enforcement of public law obligations, whatever the geographical impact of those decisions. As such, the reforms averred by Hilson and Cram do not go far enough to vindicate the beneficial rights of the citizenry to lawful government.

258 Ibid., 20.
259 Ibid., 21.
By contrast, Michael Beloff QC has advocated the abolition of all standing requirements.\textsuperscript{260} He argues that the main concern of the courts is which remedy to grant, and that, ‘\textit{since the essential feature of the remedies of public law is that they are discretionary, the issue of standing could usefully be subsumed under the general considerations which inform the courts judgement at this critical stage.}'\textsuperscript{261} The risks of opening the floodgates to meddlesome busybodies can also be limited by time limits for administrative law actions and the costs involved. In any case, one might well wonder who can be considered a ‘busybody’. The person acting in his own self-interest is hardly a busybody, nor the person genuinely representing a public interest. Perhaps the person who is merely litigious and wasteful should be curtailed, but this can be taken care of at the leave stage and need not trouble the law of standing. As Beloff notes, such figures will be relatively rare and, ‘\textit{he is more a phantom figure},’ than a genuine concern.\textsuperscript{262} Indeed, as Hare notes, ‘\textit{it is very difficult to produce a satisfactory method for distinguishing one man’s public-spirited citizen from the next man’s busybody and it can do no credit to the legal system that access to justice should depend upon such a test}.’\textsuperscript{263}

As attractive as this proposal is, Hare still argues that standing should be limited in some circumstances, particularly those in which another applicant might be better

\begin{enumerate}
\item Ibid., 289-90.
\item Ibid., 278.
\end{enumerate}
placed to bring the action. In this, he follows the Canadian approach that has already been criticized, but combines procedural reforms that would allow the court to substitute better placed applicants in a given case, to save the court’s time and the applicant’s costs.264 Such reforms recognize that a balance must be struck between the rights of citizens, and the resources of public authorities and the courts. However, this concern must be dealt with in a narrower and more specific way that does not undermine the fiduciary model of public duty that has been posited herein. He is right that the resources of the applicant, the presence of other likely challengers, the potential impact of the decision of third parties, and whether it is in the public interest that the case be heard are all important factors.265 However, it is important to clarify these points, and situate them appropriately in the system of judicial review to reflect the fiduciary theory of public law.

The resources of the applicant can be taken into account at the leave and costs stages of judicial review and need not be brought into a test for standing. One need not ask if the action is in the public interest, since on the fiduciary model of public obligation there is always a public interest in the lawful exercise of public power. The potential impact of the decision on third parties is also not an appropriate part of the standing test. This can be dealt with at the review stage and at the remedies stage of analysis. The question then becomes whether another challenger will represent the public interest more effectively than the person or group before it. However, it has already

265 Ibid., 317-18.
been shown that courts have not always applied this test in the right way and this concern cannot be allowed to undermine the rights of all citizens to the lawful exercise of public powers. The courts should not accept arguments that a more directly affected individual might be able to bring a case at some point in the future, or assume that a more directly affected individual can bring public law claims in a more effective manner than any one else, let alone a well equipped NGO. The test for standing in public law and human rights cases should therefore be as follows:

1) All citizens, whether individually or collectively, have standing to bring judicial review proceedings and proceedings under the Human Rights Act 1998 whether or not they have a personal, proprietary, or pecuniary interest at stake.

2) This does not prevent the court from joining in the case other applicants as it sees fit.

Not only would these reforms reflect the nature of public law duty, but they would also simplify the law, thus solving the problems caused by the confusing and undesirable state of the English law of standing.
10. **Conclusion: The Future of Public Duty**

These legislative proposals would mark a new chapter in English administrative law, reflecting and improving upon the Canadian law of standing and solving the problems of under enforcement that have been demonstrated herein, creating a more accountable administration. Yet they would also reflect the altruistic purposes of public law, its fiduciary nature, and the correlative rights that this entails for citizens. This conception of public interest not only broadens the libertarian conception of individual interest, but also allows citizens and groups to represent public values, reflecting the best attributes of communitarian political theory.

The potential impact of this understanding of public duty beyond the law of standing is yet to be seen. As Evan J. Criddle notes, ‘analyzing administrative law from a fiduciary perspective…illuminates the law’s internal logic and ambitions, and offers glimpses into administrative law’s future.’ Certainly, it paves the way for more detailed analysis of the nature of public law duty and contributes to making it less elusive and indefinite. The potential of such ideas and their impact on the law of standing is remarkable and compelling. English law needs to respond by adopting Laskin J.’s suggestion that, ‘it is not the alleged waste of public funds alone that will

---

support standing but rather the right of the citizenry to constitutional behaviour by Parliament where the issue in such behaviour is justiciable as a legal question.\textsuperscript{267}

The theory and reforms that have already been outlined herein simply reflect Ivan Hare’s accurate summation that: ‘the logical conclusion…of Lord Diplock’s classic dictum in Fleet Street Casuals “It would…be a grave lacuna in our system of public law if a pressure group…or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped” is the abolition of such technical rules.’

\textsuperscript{267} Thorson v Attorney-General of Canada [1975] 1 SCR 138, 163.
Bibliography

Books and Chapters


Thio, S. M., ‘Locus Standi and Judicial Review’ (Singapore University Press: 1971),


Articles

Allan, T. R. S., ‘Legislative Supremacy and the Rule of Law’ (1985) C.L.J. 111,

Bamforth, N., Craig, P., ‘Constitutional analysis, constitutional principle and judicial review’ (2001) P.L. 763


Cane, P., ‘Standing up for the Public’ (1995) PL 276


Fox-Decent, E., ‘The Fiduciary Nature of State Legal Authority’ (2005) 31 Queen’s LJ 259

Fuller, L., ‘The Forms and Limits of Adjudication’ (1978) 92 Harv. L. Rev. 353


Harris, J. W., ‘Trust, Power and Duty’ (1971) 87 LQR 31


Mabry Rogers, E. & Young, S. B., ‘Public Office as a Public Trust: A Suggestion that Impeachment for High Crimes and Misdemeanors Implies a Fiduciary Standard’ (1975) 63 Geo. L.J. 1025


Oliver, D., ‘Public Law Public law procedures and remedies - do we need them?’ (2002) P.L. 91


Ross, J., ‘Canadian Council of Churches v. The Queen: Public Interest Takes a Back Seat’ (1991-2) 3 Const. F. 100

Schiemann, K., ‘Locus Standi’ (1990) P.L. 342


Wade, W., ‘Note on Gouriet’ (1978) 94 LQR 4


Case law

UK

Al-Haq v. Foreign Secretary [2009] EWHC 1910

Associated Provincial Picture Houses v. Wednesbury Corporation [1947] 1 KB 223


Boardman v. Phipps [1966] 3 All ER 721
Boddington v. British Transport Police [1999] 2 AC 143

Broadmoor Special Hospital Authority v. Robinson [2005] QB 775 (CA)

Caparo Industries plc v. Dickman [1990] 2 AC 605

CCSU v. Minister for the Civil Service [1985] AC 374

Foss v. Harbottle (1843) 67 ER 189


Hasan v. Secretary of State for Trade and Industry [2008] EWCA Civ. 1311


Kinloch v. Secretary of State for India [1882] 7 App. Cas. 619

Kruse v. Johnson [1898] 2 QB 91
Land Securities and Others v. Fladgate Fielder [2009] EWCA Civ 1402


Re Astor [1952] Ch 534

Re Dean [1889] Ch D 552

Re Hooper [1932] 1 Ch 38

Rex v. Barker (1762), 3 Burr. 1265, 97 E.R. 823

Reg. v. Commissioner of Police of the Metropolis ex parte Blackburn [1968] 2 QB 118

R v. Disciplinary Committee of the Jockey Club, ex. parte Aga Khan [1993] 1 WLR 909

R v. Home Secretary and Another ex p Bulger, The Times, 7 March 2001

R (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems [2008] EWCA 714

R (on the application of Corner House Research) v. Director of the Serious Fraud Office and BAE Systems [2008] UKHL 60


R v. Secretary of State for Employment ex. parte Equal Opportunities Commission [1995] 1 AC 1

R (on the application of Feakins) v. Secretary of State for Environment, Food and Rural Affairs [2003] EWCA Civ 1546


R v. Inspector of Pollution and another ex. parte Greenpeace (No. 2) [1994] 4 All ER 329.

R v Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941
R (Jackson) v. Attorney-General [2006] 1 AC 262


R v. Secretary of State for the Environment ex. parte Rose Theatre Trust Co. [1990] 1 QB 504

R v. HM Treasury ex. parte Smedley [1985] 1 QB 657

R v. Whitaker [1914] 3 KB 1283


Roberts v. Hopwood [1925] AC 578

Saunders v Vautier (1841) 1 Cr & Ph 240

Tito v. Waddell (No. 2) [1977] 3 All ER 129
YL v Birmingham City Council [2007] UKHL 27

Canada


Finlay v. Canada (Minister of Finance) [1986] 2 S.C.R. 607

Guerin v. The Queen [1984] 2 SCR 335

Minister of Justice (Canada) v. Borowski [1981] 2 SCR 575

Nova Scotia (Board of Censors) v. McNeil [1976] 2 SCR 265

R v. Ferguson [2008] 1 S.C.R. 96

Thorson v Attorney-General of Canada [1975] 1 SCR 138
USA

Lake Shore & M. S. R. Co v. Kurtz (1894) 10 Ind. App. 60

Statutes and Procedural Rules

UK

Civil Procedure Rule 54.1.

Human Rights Act 1998

Senior Courts Act 1981

Canada

Constitution Act 1982
Other Materials

Coalition for Access to Justice for the Environment Report (July 2004), available at:
http://www.foe.co.uk/resource/briefings/caje_general_briefing.pdf

HM Treasury Spending Review (2010)