THE FUNCTION OF PURPOSE IN THE LEGAL SYSTEM

by

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Most social practices have some purpose or another to fulfil that justifies their existence. Indeed, we explain many formal and informal rules by reference to their particular raison d'être. The reason for doing something, then, is clearly of major importance in considering the nature of the relevant practice as a whole. If this is true of informal social practices it must also follow for the legal system. The thesis of this essay, therefore, is that law is a purposeful activity and that such purposes have a very significant function within the system of law.

Particular emphasis is placed upon the role that purpose plays in the decision-making process. It is argued to be a part of the law itself as opposed to some extra-legal criterion that may be taken into account. The law is not, in fact, neutral as to goals.

The first chapter constitutes a study of the major theories of law in relation to their respective interpretations of the function of goals in the legal system. The schools of Positivism and Natural Law are examined as representing the polar positions in the debate. Then the intermediate standpoints of the Sociological jurisprudents and other writers are discussed. The basic issue here is whether it is at all possible to attribute an important role to purpose in this field.

In chapter 2 a classification of goals is presented with a discussion of how it was derived and the problems that arose in doing so.

If we are able to use goals in some way in the decision-making process it is necessary to look at various methods by which this can be done. This
task is the subject of the final chapter. The problems involved in using goals and especially the fundamental difficulty of identifying the goals are examined. Some of the theories discussed in the first chapter are re-examined and evaluated.

The possible limits upon the practicality of using purpose in the ways discussed have not yet become clear.

However, it does appear that there is great potential for using purpose in the decision process. It offers a means for resolving many disputes and, frequently, even hard cases may be settled by looking to the purposes of the rules concerned. The exercise of drawing up a classification of goals has proved to be a practical method of assessing the viability of using purpose and a valuable indicator as to the major drawbacks to doing so successfully.
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I. INTRODUCTION

In the majority of theories of law that exist some consideration has usually been given to the role purpose or purposes in the legal system. The difference between those theories lies in the way in which purpose is seen to operate within that system. In most cases purposes are regarded as criteria extraneous to the law which form guidelines or signposts to decision-making, but which are not, themselves, a part of the law. There seems to be scope for examining the role of purpose anew in the light of these theories and especially with reference to its function in the decision-making process. If our laws are formulated and enforced in order to fulfil some goal in society it is logical to presume that that goal plays an important role in the overall system of the law and, moreover, that it is itself a constituent of that system. Thus, if we can obtain a detailed and comprehensive formulation of the major goals prevalent in our legal system it may become clearer as to how we may use them.

It is, therefore, the aim of this essay to examine the function of purpose in the legal system and to attempt a classification of goals that exist in the system. No such classification can be exhaustive and it may be open to debate in relation to the categories of goals adopted. However, attempting the classification will give us some impression of the difficulties inherent in the exercise and of the potential utility of looking at purpose in this way.

In the first chapter the various theories of law are examined in relation to their respective views of the role of purpose in the law. The emphasis
in this part of the essay is upon whether we can attribute at all a significant role to purpose as part of the law. The alternative view is that purpose, however useful it may be in determining judicial decisions, is still an extra-legal consideration. In the "hard cases" that come before the courts the judge is often presented with the alternatives of either fulfilling the ends of certainty in following rigidly the dictates of the rule, or of satisfying a desire for a just result. Purpose, it will be seen, may offer a method of avoiding this dilemma.

In chapter 2 the classification of goals is presented with a discussion of how it was formulated. The problems that arose in drawing up the classification are considered.

The final chapter of the essay takes up from the previous chapter the discussion of the problems involved in using purpose. If it is accepted that goals do play an important part in the law then the next question must relate to exactly how we may use them and what difficulties may face us in doing so. Some of the theories mentioned in the first chapter are re-examined and an attempt is made to discover whether the same indeterminacy that was faced by those theories is resolved by the use of purpose or whether purpose itself is subject to areas of vagueness where a choice between goals is forced upon us. The fundamental problem is thus one of identifying goals with sufficient clarity. There may be a number of difficulties inherent in taking an expanded view of purpose as a part of the law, nevertheless it appears to have considerable potential in explaining how marginal, and even hard cases should be decided.
II. THE ROLE OF PURPOSE IN THE TRADITIONAL THEORIES OF LAW.

In many of the theories of or about law that exist to date varying degrees of significance have been placed upon the role played by goals in the legal system. Essentially though, where goals have been considered by commentators, their relevance has been viewed more in an abstract, theoretical light than in terms of their practical utility. The classification to be proposed in this thesis constitutes a move towards a different perspective regarding the structure of goals in a legal system, and the basic theory behind this concept is to be distinguished from previous approaches that have been taken. However, in order to be able to appreciate this distinction it is important to obtain a clear idea of the positions adopted by writers in this field and of the relationship between them. To this end the present chapter takes the form of a survey of the various theories and discusses each in the context of the perspective that it gives on the relationship between laws (as embodied in rules) and the purposes or goals of those laws.

1. NATURAL LAW AND POSITIVISM

A. THE TRADITIONAL DOCTRINE OF NATURAL LAW

These theories of Natural Law and Positivism represent what may be described as the polar positions in the debate on law. Natural law has its origins in Greek philosophy and, to the Greeks, it was seen as the law governing the universe. However, the Greeks were not interested in natural law embodied in the form of normative rules and so the ambit given to the concept was so wide as to be almost devoid of juristic significance. Under the Stoics natural law as a philosophy gained its ascendancy and great stress was placed on the universality of law and hence the basic equality of all men.
The basis for natural law was seen as being a person's sense of reason, that is, reason would point out to an individual those rules which were necessary for existence in society. Cicero stated that "True law is right reason in accordance with nature"\(^1\). Alternatively, the foundation of natural law is seen as being the commands of God.\(^2\) The obvious problem with this view is that it presupposes the existence of some Divine Being and necessitates a belief in that Being for the concept to have any meaning.

From another viewpoint Thomas Aquinas sought to combine the "theological" interpretation of natural law with the Greek element of reason and propounded a kind of unified theory. Again, this view presupposes a belief in God. Aquinas stated that God created the universe to fulfil some overall plan and this plan Aquinas entitled Eternal law. He amplifies this by saying that there are parts of this plan that would be comprehensible even to a limited intelligence such as that of human beings and, as reasoning beings, we should be able to work out those parts of the plan for ourselves. This Aquinas calls natural law. Further, he sees that there will be parts of God's plan that we shall not be able to grasp unaided and these God must communicate to us via the media of the Scriptures and the teachings of the Church.

This aspect encompasses the traditional Divine law concept of St. Augustine and other theologians. Finally Aquinas envisages a fourth category of law that he calls Human law, (in effect, we regard this as positive law).

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1. Cicero, *De Re Publica*, 211; III 22.
2. St. Augustine, *Celestial City*. 
He acknowledges that the principles of Divine law and natural law are rather vague and that the details must be elaborated. It is the duty of human legislators to do this and although the positive law may vary from time to time and from place to place the differences with the "higher law" should never be too great. It is in this area concerning the nexus between the precepts of natural law and the actuality of positive law that the problems arise. Natural law may be defined in teleological terms, that is, it is the embodiment of certain rules that regulate human conduct that man, as a rational being, can appreciate as being necessary to enable man to attain the particular state or end designated by God or Nature. However, the difficulty is to determine just what are those rules and, in addition, what are the ultimate purposes served by them.

Positive laws vary with time and locality and if, as proponents of natural law argue, the relationship between those laws and natural law is contingent, are we to evaluate positive law according to its degree of conformity with natural law? If this is so it would seem to follow that natural law guarantees absolute goals, that is goals that are valid for all time and, plainly, this cannot be accepted. Normally positive law is merely an approximation of natural law. There are a vast number of rules of positive law that can be enunciated but relatively few principles of natural law can be stated with any degree of certainty. It is not contended that natural law should be as detailed as positive law but it should not be too vague or abstract or it would be impossible to maintain any significant relation between them. The concept of natural law is of small practical use unless we are able to compare the laws of a particular state with natural law goals in order to ascertain their conformity or contradiction.

The fundamental conception of natural law is that it is a transcendent kind of law that is eternal and immutable.
On close reflection on the problem there appear to be very few "rules" of natural law that can truly be said to be of universal application. Differences of culture and locality are plainly going to narrow down the area of laws that are accepted as being of overriding priority. Indeed, it is an important point that priorities of different societies and cultures can and do differ and it is possible that we might find a lack of consensus on what constitutes the fundamental principles of natural law. In fact, it has been suggested \(^4\) that it is inaccurate to talk of fundamental "principles" at all as this involves circularity. For example, the precept "Thou shall not kill" is not valid for all circumstances, though competing values may be recognised. Most societies have at some time condoned or legitimized killing by the institution of capital punishment and similarly, most are prepared to engage in warfare. Possibly, it is preferable to talk in terms of fundamental "areas" of legal concern, that is, areas of human behaviour that must be guided by positive rules for the minimal functioning of society. Many natural law theorists have used the decalogue as a basis for natural law and argue that it possesses the qualities of "certainty, universality and immutability" but, to use the previous example, the simple injunction "Thou shall not kill" can have far reaching consequences. For instance, how are we to deal with such questions as the position of the executioner, the issue of abortion and of euthanasia? Such a principle gives no guidance on the latter and on the formulation of exceptions to the rules that must be accounted for such as the defences of provocation, automatism and self-defence, to name but a few. Of course, it is a good general precept that most societies would endorse but, as a practical rule

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it is little better than a starting point from which to evolve a more complex system of rules. Alternatively, another form of basic principle that has been suggested is the one that states: "What is good is to be done and what is evil is to be avoided". But a definition such as this is open to a very broad manner of interpretation and can involve intricate etymological debate on the meaning of the word "good". As one writer concluded such a principle seems to be tantamount to saying "one ought to do what one ought to do".  

However, this is not to demean the importance of the natural law philosophy. The works of John Locke and Tom Paine and their ideas which were based on natural law became the highest positive law in the United States through their incorporation in the Constitution. Similarly, at the Nuremberg trials of Nazi war criminals the doctrine of natural law played a very significant role. The point that must be emphasised is that because of the inherent vagueness of natural law it is very difficult to deduce a concrete set of goals or purposes that can be referred to in a systematic way. Although the doctrine is, in essence, teleologically oriented we are presented with a serious problem in trying to crystallize the goals.

Considerable problems have also arisen in relation to the doctrine of natural law as a result of a much discussed confusion between law as it "is" and law as it "ought to be". This was briefly mentioned at an earlier stage. Frequently natural law has been regarded as a higher law which invalidates any inconsistent positive law; thus bad law is denied the status of law at all. On the other hand, modern theories tend to view natural law as an

5. G. Goble, The Dilemma of Natural Law, (1971)
ideal to which positive law should conform without its legal validity being affected. A.P. d'Entreves is one writer who takes the latter view. He accepts that to contemporary society natural law appears to involve superimposing a moral content on laws and writes,

"The theory of natural law is the outcome of a very old conviction, which goes back to the sources of our civilization: the conviction that the purpose of law is not only to make men obedient, but to help them to be virtuous" 7.

d'Entreves is concerned to avoid speaking of natural law as a confusion between law and morals. He accepts that the very notion of law implies their close association as does a definition of law as an "ethical minimum". Natural law is a vindication of that minimum but it is not a denial of a distinction between the two fields. 8 Yet, the dividing line between them is almost indistinguishable for d'Entreves and he reaches the conclusion that,

"This point where values and norms coincide, which is the ultimate origin of law and at the same time the beginning of moral life proper, is, I believe, what men for over two thousand years have indicated by the name natural law." 9

It is not the purpose of this study to undertake a discussion of law as it "is" and law as it "ought to be". The material point is that although natural law posits certain goals towards which law should direct itself it is a very problematic task to ascertain precisely what those goals are with any degree of clarity. It is acknowledged that there are some purposes of paramount importance that can be stated as natural law "rules" but the question is; how do we cope with cases where other considerations arise that must be taken care of? Most rules are not absolute for if they were the system would be highly inflexible and static. It seems reasonable

8. ID. at 94,
9. ID. at 122.
to assume that not all goals are of equal value and so there must be some form of ordering of those goals, but natural law does not furnish us with the tools to tackle this task.

There is another criticism that can be levelled at the doctrine of natural law that indicates its inadequacy for our present purpose. Natural law is supposed to possess some kind of "transcendent" validity and yet its doctrines have been used to support many different kinds of rights and regimes. It has been both conservative and revolutionary, equalitarian and elitist, democratic and dictatorial. For example, Thomas Hobbes, in "Leviathan" used natural law to justify a regime of absolute power. John Locke took a more utilitarian view in his "Second Treatise of Civil Government" but seems to give great priority to the protection of property interests. Many examples could be cited but the point to note is that it is difficult to extract many consistent principles from such doctrines.

Alf Ross has attacked natural law on this basis and states that,

"The historical variability of natural law supports the interpretation that metaphysical postulates are merely constructions to buttress emotional attitudes and the fulfillment of certain needs."  

He sees natural law as a convenient way for people to shift the burden of responsibility for their actions by claiming that, as they are simply obeying the commands of God, they are blameless. In the political arena Ross sees natural law as the ideology used by the dominant group in many societies to clothe itself with an aura of legitimacy. This is an

extreme viewpoint which may or may not be valid but, the basis of the argument serves to emphasise once again, the fundamental difficulty of deriving many clear rules form the body of the doctrine of natural law.

B. FULLER AND THE TELEOLOGICAL VIEWPOINT.

At this point some discussion must be included on the work of Lon Fuller. In recent years Fuller has been a notable exponent of a natural law philosophy and has put forward arguments to counter the positivist position. Fuller sees law in teleological terms, that is, as a purposeful activity.

Fuller draws a distinction between two concepts that he refers to as the moralites of duty and aspiration. He sees the legal system as complex system of rules that are designed to maximise man's ability to be purposeful and creative. The morality of duty relates to the things that we are bound to do or refrain from doing in order to ensure the conditions necessary for a rational human existence. The morality of aspiration, on the other hand, represents the ultimate standard of excellence that men seek to achieve. Fuller feels that it is impossible to pinpoint a clear dividing line between law and morality. He believes that for anything that we call a legal system there are certain internal requirements of morality and justice that must be fulfilled. Thus, even the most elementary system must achieve a minimum level of morality and justice. These requirements constitute what Fuller calls an "internal morality" of law and amount to eight prerequisites for a legal system. They are as follows:


14. Ibid at 33
1. The need to generalise.

2. The need to publicise the rules thus formulated.

3. There must be no abuse of retroactive legislation.

4. The rules must be coherent and understandable.

5. Contradictory rules should not be enacted.

6. The rules should not require conduct beyond the power of the affected parties.

7. There should not be frequent changes and alteration of the rules.

8. There should not be incongruence between the rules as announced and the rules as administered.

A failure to comply with one of these does not merely mean that the system is a bad system of law; it results in something that cannot properly be called a legal system at all.

This internal morality is conceived of by Fuller as being largely a morality of aspiration and yet, in many respects, these requirements appear to be procedural in nature and neutral as to content. In South Africa we have an example of a regime that fulfils all of Fuller's eight requirements and yet the laws are inherently evil ones. These criteria are undoubtedly very important goals in a legal system but they are rather different in nature from such concepts as freedom and equality and other values important to society. This is an important practical distinction that we will return to in due course.15

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Puller equates the principles he has described not with some "higher" law, but with the "natural laws of carpentry" that form the basis of the system. Thus, his internal morality purports to be a procedural version of natural law. The external morality of law is found in the specific rules of a system which Fuller sees as a practical reflection of the morality of aspiration.

"... law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained, purposive effort."  

In this passage Fuller is distinguishing his position from the analytical approach of the positivists. But although he regards law in terms of the aims it is directed towards achieving he goes little further in elaborating on that point. It is clear that he understands the nature of the conflicts that arise but he can offer no concrete method of resolving such problems. Much stress is laid upon the importance of giving due regard to teleology but in the sense that it is a yardstick by which to measure the legality of a rule and not a part of the rule itself. This seems simply to be another way of stating the traditional natural law proposition that positive laws are to be judged by some abstract standard of a higher law. Fuller clearly perceives the reality of the situation in seeing law as a purposeful pursuit and he appreciates the causal relation between a goal and the means of attaining it. But, in detaching the goal of a rule from the corpus of that rule he leaves us with the usual problem associated with natural law theories; that of ascertaining the principles in any clear form. He says,

16. Fuller (1964) at 96.
17. ID at 106.
"It is, then, precisely because law is a purposeful enterprise that it displays structural constancies which the legal theorist can discover and treat as uniformities in the factually given". 18

However, just what these "structural constancies" are is not described.

In fact, Fuller then proceeds to talk in terms of "weighing and balancing" the various claims running through the legal system. 19 In terms of exactly what those values and claims are, he has little to say. He refutes the suggestion that "survival" is our base value 20 and believes that the chief objective of human aspiration is to maintain communication with our fellows in order to reach understandings and agreement. As a statement of his central idea of substantive natural law Fuller says that our aim should be to,

"Open up, maintain and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel and desire." 21

Obviously, this is desirable but the question remains of how the law, in fact, manages to do this or attempts to do it. On this point Fuller offers no guidance.

Fuller seems to feel that it is impossible to give his teleology any structural basis and makes an error in assuming that in order to do this it is necessary to assign a uniform particular purpose to each rule. This is not the case. If the goals of a law are seen as a vital part of that law and the goals are then ordered in a hierarchy, it will be seen that the picture is more complex and rich than Fuller would seem to indicate.

18. Id. at 151.
19. Id. at 179.
Fuller sees the problems that will arise when justice demands that a dispensation is made from strict compliance with the rules but has no adequate explanation of how the law can deal with this situation. He states that there is a particular kind of "justice" that allows for exceptions when the rules work hardship in special "hard cases" and thus the law will be "bent" in the interests of fairness. This seems a very arbitrary manner in which to deal with such an important aspect of law and, again, emphasises the inadequacy of natural law in relation to many matters fundamental to any cohesive theory of law.

C. POSITIVISM

At the other end of the spectrum we have positivism which adopts a completely different emphasis to doctrine of natural law.

The positivist school of jurists are concerned with the law as it "is" and seek to avoid the confusion caused by imposing the moral order on the legal one. In this approach the role of goals in law is a very peripheral one as positivists tend to regard considerations of the purposes of laws as inclining towards the inference that law has a necessary moral content. Thus, in the positivist model we are not confronted by the problem arising in natural law theories of trying to extract firm principles upon which to act, for only the means are important, the end is a separate matter. It is important to note that this does not mean that a positivist is indifferent to the content of law and looks on evil and good laws alike - as manifested social authority. What it does mean however, is that the positivist, like the natural lawyer, does not view rule and purpose as being inextricably linked and it is this fact that contributes to the unsatisfactoriness of both viewpoints.

We have seen that natural law is unable to be of much help in resolving legal disputes at a practical level but, to date, the purely analytical approach is not much more constructive. The rules of a system, as considered by the positivists, can furnish guidance in only a limited number of cases.

D. HART'S POSITIVIST MODEL OF LAW

H.L.A. Hart recognises this fact in his classic exposition of the positivist model of law.²³ He talks of a rule in terms of the core and penumbra. Most rules will have a limited core area of meaning, that is, an area where the meaning and ambit of the rule's operation are clear. Hart realises that in most cases there are several conflicting rules that could equally apply and a given case can fall in the penumbra of both. Clearly, as both cannot be applied, the judge is faced with a choice and must place the case within the core area of one rule and exclude it from the sphere of the other. Initially this is a useful model. However, there are some serious problems that it fails to resolve. Fuller highlights one of these in that he points out that Hart's model is too simplistic. It is very difficult to ascribe "core" meaning to individual words. When we look at statutes we interpret them in the light of the overall sense of the rule embodied therein and not on an analysis of the meaning of each word. It is almost impossible to determine where the core ends and the penumbra begins and simply examining the rule itself is not going to clarify this. Surely involvement in debates over definitions of words and then on what comes within the decided definition is quite unproductive for our purposes. It is also unnecessary. Both lawyers and, for example, the medical profession are unable, as yet, to formulate a satisfactory definition of

death and, similarly, of the stage at which life can be said to exist, so it seems that discussion in this field is not particularly illuminating.

Another point to observe about Hart's core/penumbra concept is this. How does the judge decide which rule applies and which does not in any particular instance? It seems that this must be, in the main, a matter of the exercise of judicial discretion. According to Hart's scheme it is a rule of adjudication that directs the judge in reaching his decision.

These rules of adjudication are secondary rules that identify the people who adjudicate and set out the procedure to be followed, 24

"Again these rules, like the other secondary rules, define a group of important legal concepts: in this case the concepts of a judge or court, jurisdiction and judgement." 25

Certainly, the rules of adjudication may do all of this, but they still do not provide a meaningful criteria for accounting for the outcome of a case. This is because the conflict situations that generally arise are goal-conflicts and Hart's construction of primary and secondary rules and the rules of recognition, adjudication and change does not take account of this factor. It seems illogical that judges should be attempting to decide cases according to the rules but, at the same time, ignoring the purposes or goals of those rules. To follow Hart's example, we can say that in the case of a game the rules of that game are directed towards fulfilling a purpose and it would be ridiculous to ignore this fact in interpreting those rules. If the rules are infringed or a dispute arises then the referee will decide in such a way that preserves the idea inherent in the rules of the way that we intend that

24. Hart, (1961) at 94. The system that Hart describes of primary rules which may be termed "duty imposing" and secondary rules which confer powers on people in order that they may be able to regulate their affairs.

25. Id. at 94.
game to be played. For instance, in any physical game there are usually rules against "fouling" one's opponents because, presumably, the purpose of the game is to win without violence and not merely to win at any cost.

However, Hart does set out a few precepts that he regards as fundamental aims of human beings. These he terms "the minimum content of natural law". Hart sees the basic aim as that of survival, "even at the cost of hideous misery", and the five truisms that he puts forward are the basic necessities for survival. They may be summarized as follows:

(a) The first is the manifest fact of human vulnerability. Clearly, we need rules restricting the use of violence or we would find ourselves living in a situation akin to the "nastiness and brutishness" of a Hobbesian state of nature.

(b) The approximate equality of human beings necessitates that we have a system which will promote mutual forbearances and balancing of interests in order that no individual can predominate and coerce the others.

(c) The third principle of limited altruism is linked to this. People are by nature egocentric and, therefore, we must have a system of forbearances to maintain this balance.

(d) We are faced by the fact that our resources are limited and so we must act to preserve what we have - in conjunction with the necessity for some system of private property.

Hart also talks of "dynamic" rules by which he means the kind of rules that enable men to create and discharge obligations and that try to ensure a minimum form of confidence in the future conduct of others.

(e) The final category concerns what Hart calls limited understanding and strength of will.

26. Id. at 189
27. Id. at 190
In any system there will be people who attempt to take advantage of the benefits of that system whilst avoiding the obligations and sanctions must be provided to deal with such persons.

Hart calls these truisms the "core of good sense" in the doctrine of natural law and, indeed, this is probably correct but the question remains unanswered as to how these truisms feature in the judgement on a case. Positivism, in disassociating the goal of a law from the rule itself and natural law, in its basic vagueness, fails to explain the mystical input that causes a judge to decide one way or another. However, there are other viewpoints to be evaluated and these will now be examined in terms of their relevance to this problem.

2. THE SOCIOLOGICAL JURISPRUDENTS

What has been called the "law, science and policy" approach to law very largely concerns the work of Myres M. McDougal and Harold D. Lasswell in recent years. But, before embarking on a discussion of their writings some consideration will be given to their progenitors in the field of sociological jurisprudence - most notably Roscoe Pound and Julius Stone.

A. POUND AND STONE

For the sociological jurists the real source of law is not to be found in statutes or reported cases but in the activities of society itself. In making a decision the judge should be integrating the formal rules of the legal system with the reality of what is going on in society; that is, the "living law". Legal rules are seen as the embodiment of social fact although it is possible for law to establish goals that represent an
attempt to bring about a change in the social climate; in the United Kingdom the Race Relations Acts 1965 and 1968\textsuperscript{28} would be an example of legislation of this kind.

Roscoe Pound saw law as a form of social control that should be utilised in society to satisfy just claims and desires and should reflect trends in the social sciences. Pound advocated "social engineering" and placed much emphasis on factual determinations and the creative role of the judiciary. In his view, any approach to law should be functional and purpose-oriented in modern society. Law is concerned with satisfying claims that exist in society, independently of the law, and that are "pressing for recognition and security"; it gives effect to some of these claims, within limits, and Pound puts forward a list of claims that he believes abound in a modern democratic society. However, a problem with this kind of approach is that of determining exactly what are the claims that exist in any given society at any particular time. With modern methods of advertising and propaganda through all forms of media it may be very difficult to assess a genuine interest as distinct from one that has been, as it were, manufactured or imposed from without.

There is a danger of confusing what people actually do want with what any person or persons in power or authority believe that they ought to want. And, in the extreme, such a policy could be analogous to the concept of "forcing" people to be free as was described by Rousseau.

Merely by examining the cases that come into court we do not have a reliable method of ascertaining interests, as only the most complex cases are litigated and the financial costs of litigation may deter many people from going to

\textsuperscript{28} Race Relations Act 1965 C.73.
Race Relations Act 1968 C.71.
court. There is no way of proving that Pounds interests do exist - they are merely postulated and also we are not told how such interests may be evaluated and ordered in terms of their priority. The general idea is that law should be viewed in its wider social context and should effect a balancing of the competing interests within that society.

Broadly, Pound divides his classification of interests into three groups,\textsuperscript{29} individual interests, which are claims or demands looked at from the point of view of the individual; public interests, which are the claims asserted by individuals involved in or regarded from the perspective of political life. Finally, there are social interests, which are claims some of which may be found in the previous groups looked at in terms of social life and from the point of view of the social unit as a whole. These groupings break down into various sub-sets in this way:

\textbf{Individual Interests}

A. Personality  
B. Domestic Relations  
C. Interest of Substance

\textbf{Public Interests}

A. Interests of the state as a juristic person.  
B. Interests of the state as a guardian of social interests.

\textbf{Social Interests}

A. Social interest in the general security.  
B. Social interest in the security of social institutions.  
C. Social interest in general morals.  
D. Social interest in the conservation of social resources.  
E. Social interest in general progress.  
F. Social interest in the individual life.

\textsuperscript{29} VCL. \textsuperscript{III} Pound, Jurisprudence, (St.Paul: West Pub.1959) 25.
Pound goes into great detail in amplifying these classifications. Basically, his aim is to "at all times satisfy as much of the total amount as we can". The legal system should recognise the above interests and should define the limits within which they shall be recognised and authoritatively given effect. Also, it should attempt to secure the interests within the defined limits. Pound maintains that these interests precede the legal order and are not created by the law.

Conflicts are to be resolved by a balancing or weighing of interests and Pound insists that the interests should be weighed on the same plane, that is, if one is expressed as an individual interest then so must the other interest involved. Similarly, with social interests - otherwise there is a risk of pre-judging the issue. Generally, Pound feels that it is preferable to transfer the interests to the social plane in order to compare them in a more generalised form and individual interests should be subsumed under social ones to weigh them as such. The role played by rules in Pound's scheme is limited. They are seen as precepts attaching definite consequences to definite factual situations and are supported by a number of other types of legal institutions such as principles, conceptions, doctrines and standards that give the legal system its richness and complexity.

The problem with Pound's plan is that it seems to lack a certain flexibility as the interests are, to some degree, predetermined by Pound and this fails to take account of the fact that laws should be dynamic. Also, Pound gives little indication of how his interest should be evaluated. In most

30. Id. at 16.
societies there are particular goals, as we noted before, that take precedence (in most cases), over other goals in society and if a conflict arises then effect will normally be given to the rule (or interest) that is most likely to achieve that. Of course, there may be exceptions but these can be dealt with as part of the goal of the rule. Thus, we can achieve flexibility but with certainty, unlike Pound's system which may not guarantee either.

Another very important question that arises in connection with any attempt to define lists of interests is this: we must decide whether it is preferable to draw up a list of interests that are thought to be pressing for recognition in society or whether a more accurate method is to list the interests actually represented and acknowledge by the law. Clearly, it is possible to argue that either method will prove to be misleading and incomplete and, once again, it should be noted that it would be unrealistic to claim that any catalogue is exhaustive. However, it seems that the first method is more open to subjective interpretation than the second. Also, if the object of drawing up any such classification is to try and obtain some idea of the cause/effect relationship between various goals of the system in order to explain judicial decisions in the sense of the input that a judge receives, then it is necessary to have a catalogue of the goals actually postulated in the law. Simply having a list of interests is not of much use alone. There is no point in having a purely abstract list of interests or goals because it is only when such goals come into question in practical disputes that we need to consider them. It is the judge who has to evaluate competing interests or goals and what we want to know is if there are any criteria that should guide his decision.
Julius Stone is a disciple of Pound but one who has developed his own brand of sociological jurisprudence and who has criticised Pound's theories. Stone feels that Pound relied on the use of case law and statutory materials rather than on social investigations strictu sensu. He also appreciates the problem of deciding whether we are interpreting a pre-existing harmony of interests or are attempting to produce a desired harmony of interests. In general, Stone feels that de facto claims arise and are made independently of the existing content of the legal order although they are important as to the subject matter on which the law must operate. All claims which bear on a particular issue must be taken into account in determining what position the law should take.

Stone sees Pound's category of public interests as being redundant in that it reflects the human interests (individual or social) that are really involved. Certainly, this is a valid criticism. If, when it comes to balancing competing claims, those claims have to be reduced to the same category and that is usually the category of social interests, then the distinction made by Pound is of small significance. Stone comments,

"The truth is that all interests, individual and social, are so mutually entangled and interlocked in genesis, operation and consequences, that any single, exclusive basis of classification would obscure and even frustrate many other equally illuminating bases of classification."

In fact, as Stone realises, to distinguish between individual and social goals too is somewhat arbitrary. Society as a whole has a vital interest in protecting the right of the individual to such things as freedom of speech and conversely, it could be said that, in certain circumstances, the individual as part of the society in which he lives has an interest in the general security such that freedom of speech, (in the sense of matters

of state defence, official "secrets") might have to be curtailed.

Stone makes some interesting remarks about the nature of public policy. He believes that when public policy is seen as a ground for legal decision it should be seen as being as much a legal ground as the rule it purports to overthrow. In this area of public policy it is not the judicial task to weigh a policy against an existing rule of law, but one policy against another. This is quite true but could fit as well into a goal matrix as into the "balancing of interests" scheme. Stone feels that when a new case arises where settled rules do not apply, then legal rights or rules are not involved at all:—

"What is rather involved, and on both sides, is a conflict of de facto interests, which the court is required to adjust by creative decision." 32

But it is not usually the case that there are no legal rules in point; what generally occurs is that there are several rules which may lead to quite different results. In such circumstances it is obvious that the conflicting interests have to be adjusted but, again, on the question of how this is to be done we are given little guidance.

So, Stone's list of interests differs from Pound's and is, briefly, as follows:— 33

**Individual Interests**

A. Interests of Personality

B. Interests of Substance

**Social Interests**

The list is very detailed and comprehensive and will be considered more fully at a later stage. However, though this classification is very

32. ID at 187
33. ID Chapter IV.
illuminating and of much interest, it must be pointed out that it was compounded from a sociological perspective rather than a legal one and thus has a different emphasis. This difference is brought out very clearly in the following passage:

"Closely related to the rise of administrative application of law, and to the increasing awareness of the non-mechanical aspect of judicial activity, is the rise of the legal standard, for example of "reasonableness", "fairness", or "adequacy". Standards are devices as typical of the recent "socialization" of law as rules are of the strict law of an emergent political society. While any legal system makes use of both, undeveloped systems of law tended to meet new situations by new rules, whereas today we are increasingly seeking to meet them by applying standards. Behind this changed modern approach lies the increased difficulty of framing exhaustive bodies of norms applicable (as a rule must in its nature be) to carefully enumerated sets of facts. The standard is essentially an individualising device, a mediator between rule and absence of rule. It is a means whereby the search may be free of dictation, and the facts of particular cases given weight, and yet not allowed to lord it over later situations."

Stone obviously sees legal rules in a similar light to the positivists, that is, without reference to any kind of teleology and, consequently, sees rules as only being applicable to such "carefully enumerated sets of facts". Thus he uses the standard as the device whereby the purposes of law in its expanded social context may be given effect without undue restriction in the form of precedents. The interests or claims being asserted in society are viewed as being completely separate and distinct from the legal rules.

B. LASSWELL AND McDOUGAL: A THEORY ABOUT LAW

At this stage the work of Lasswell and McDougal must be introduced into the discussion.

34. Id. at 348.
Their work can be regarded as an extension of the "grand theory" of Pound but they place the emphasis on the process of decision-making. They claim that they are postulating a theory about law rather than a theory of law. Law, they argue is being studied too often as a body of doctrine or rules, divorced from concepts of power and the social processes.

"In few of the historic emphases have the standpoint and purposes of the scholarly observer been clearly distinguished from those of the more active participants in the social processes being subjected to inquiry: much too often, instead of creating theories about law which might facilitate comparisons through time and across community boundaries, scholars have been content to frame their own studies in terms of technical theories of law, mere shadowy and ambiguous fragments of the data under observation." 35

To conceive of law in natural law terms or as a body of rules does not admit of empirical inquiry and tends to ignore the actual operations of legal process. There is little clear focus on the process of authoritative decision-making and the many variables that exert an influence on that process. They see little positive effort made to relate decisions to basic community values or, when discrepancies are noted, to clarify values and adopt a creative attitude in the invention and adaptation of new means. Policy is to be value-oriented since it is only meaningful when seen as a deliberate search for the maximisation of valued goals. Lasswell and McDougal believe that an attempt should be made to clarify basic community policies from sources beyond the rules and that existing rules should be given a contextual interpretation.

To look at law as a system of rules alone, to them, gives a sterile and static idea of the system. They view the ideas of the American Realists

as being the most fruitful approach to date in that they looked beyond systems of rules alone to the factors that actually influence decision. But the Realists' theory too proves inadequate as they failed to develop a comprehensive set of value categories or systematic set of procedures for goal clarification. The initial impression given by Lasswell and McDougal, therefore, is that they are going to produce a fairly detailed list of these "values" as the criteria for appraising decisions. However, as we shall see, this is not the case. They regard their jurisprudence as a "man-centred, universalist and equalitarian perspective", with human dignity postulated as the ultimate goal to be attained.

The values referred to by Lasswell and McDougal seem to be analogous to the interests set out by Pound. It is these values that are an essential part of the social process and that prompt people to resort to the decision-making procedures. They recommend a classification of eight value-institution categories drawn from contemporary social science. These are:

Power: government, law, politics.
Wealth: production, distribution, consumption.
Respect: social class and caste.
Well-being: health, safety, comfort arrangements.
Affection: family, friendship circles, loyalty.
Skill: artistic, vocational, professional training and activity.
Rectitude: churches and related articulators and appliers of standards of responsible conduct.
Enlightenment: mass-media, research.

The social process is characterised as human beings interacting with one another and with resources. This flow of interaction is described in two sets of categories, as seen above, values and institutions.

36. Id. at 388, 19 Florida Law Review at 486.
Under this view law is seen on a global scale – a "larger community context", and one more important feature of this community is a process of effective power that has a very considerable effect on decisions. In addition, within this process of effective power there is a continuous flow of decisions that reflect the value-processes of society. The emphasis is very markedly on international law, however, and in this context the question is posed of what basic goals the citizen of the larger community (and of his own smaller community) would be willing to propose as the fundamental bases of public order. The answer that Lasswell and McDougal suggest is that the greatest trans-national co-operation is found in the aim of promoting human dignity and that the values posited should contribute towards this major goal. It is suggested that these goal-values admit of great flexibility as between different cultures and national communities with differing institutional practices, but this may be as a result of their inherent vagueness rather than their comprehensiveness.

The most significant thing to note about the theory of Lasswell and McDougal is that it does not see law as having an independent existence or identity: it is essentially seen as part of the power process in society. It is, therefore, inevitably linked to politics and power-brokering and involves the lawyer in investigating what Hughes called the "explanation" for decisions rather than the justification. If what we are concerned to discover is how judges operate within the framework of politics and manifested authority then law, in the sense of rules and precedents, is of minimal importance. Indeed, Lasswell and McDougal argue that this is precisely the case. How, then, in practical terms, does their analysis of the system function?
We have already seen that Lasswell and McDougal regard their eight "desired events" as the basic categories of values and they ask whether, for each of these classifications the legal process is achieving a maximum sharing of the particular value. But this puts the nature of the inquiry into highly generalised terms that may be adequate for the purposes of political science but are inappropriate for describing more concrete legal concepts. Furthermore, although Lasswell and McDougal purport to be concerned with values, their categorisation appears, strangely, to be value free. The eight values are not given any kind of ordering and no consideration appears to have been given to the possibility, indeed, inevitability, of a conflict arising between different value categories. Thus, the judge has practically no concrete guidance as to how to determine disputes in accordance with these values. Presumably, he is to make the decision that responds to the demands made by "authority" in the particular situation at hand. But, if this is so, there seems to be little point in having any categorisation of values at all if all that dispute settlement eventually boils down to is something that amounts to judicial hunch. In this context too, judicial hunch would appear to be what the judge intuits is politically a proper decision rather than what is legally correct or just.

In fact, it is questionable whether the theory of Lasswell and McDougal really gives us a system of values at all. Any attempt to discover a fundamental set of postulates valid for all communities must suffer from the same deficiencies as the natural law theories that we noted earlier. It could be argued that the yardstick by which to measure the effectiveness of the eight values is the primary goal of human dignity, but this is open
to a myriad of diverse interpretations and is far too indeterminate a standard to be of much practical use. Conceivably, it could be used to justify apartheid, genocide, Nazism and any number of evil (and, of course, benevolent) regimes or acts.

Lasswell and McDougal claim that their system provides for law to be dynamic and sensitive to the changing needs and demands in society, whereas a system which gives prevalence to rules above all else is not. However, there is a subtle difference between the needs of society as a whole and the claims expressed by those who have the power in a society. This dichotomy is a very real one and places the judge in a dilemma that Lasswell and McDougal do not seem to recognise. This point may be illustrated by taking the example of the U.S.S.R. In that state there is a detailed Constitution that theoretically protects all forms of civil liberties and rights. In reality, however, judgements are made arbitrarily, according to the dictates of a ruling elite rather than according to the law. No doubt, most judges would argue that they are acting to further an awesome catalogue of "values" in Soviet society which may well include some or all of the eight value-institutions of Lasswell and McDougal, but in reality, the judge is merely a facet of the power-broking that goes on in society. All this is consonant with an analysis of political processes but these are not synonymous with legal ones.

C. REISMAN

Michael Reisman has made an interesting statement of this kind of standpoint. Reisman is a follower of the Lasswell/McDougal approach
to law. Reisman denies that a necessary distinction exists between
law and politics. He comments,

"I do not find this distinction realistic, cogent
or useful. The contemporary lawyer, as I see him,
is a specialist in advising, making or appraising
social choices or decisions. He views both the
regular flow of decisions or choices as well as the
entire environment that he calls "legal" as a complex
of policy choices, sustained by effective power in a
community." 38

Thus, he feels that a failure to see the actuality of the relationship
between the two means that it is impossible to obtain a true perspective
on what is actually happening with legal decisions. As an example he
takes the case of the United Kingdom and agreements that it has made with
foreign companies relating to North Sea gas and oil development. He
says that it is impossible to assess possible British conduct without
taking a broader view of things than that afforded by the law or courts.
This is, of course, true in this case. It is in this area of
international affairs that the theory is most effective. In this field
the inter-play of many political economic and social - as well as legal
forces is very important and cannot realistically be ignored. On the
other hand, it is very much more difficult to apply this theory in the
area of domestic legislation. A will or trust is not open to interpretation
from the aspect of power bases and politics as is an international
agreement. If law is, as Reisman states, "...a process of making decisions
in conformity with the expectations of appropriateness of those who are
politically relevant..." 39 then large parts of ordinary, domestic law are

37. Reisman, A Theory About Law From the Policy Perspective,
Lecture Series.

38. Id. at 75.

39. Id. at 81.
virtually inexplicable, at least in this theory's elevated terms. Most of the subject matter of the law is of a fairly mundane, routine nature in which power and politics play little or no part. Indeed, in many areas of law those who are "politically relevant" do not have any great concern in decisions and so a judge could gain small guidance from such sources.

Also, Reisman appears to have a very cynical conception of "lawfulness" itself. He acknowledges that not every exercise of power can be lawful but says that lawful acts, in order to be such, must exhibit a minimum degree of effectiveness and that, in time, effective acts can attain the status of legality. This has the appearance of saying that "might is right" which is a very extreme notion of law. Under the Lasswell/McDougal classification law, government and politics are placed together under the general heading of power. Inevitably, then, law must be regarded as merely another aspect of government rather than as an independent entity. By giving deference to political process in this way some very valuable advantages of law are surrendered. For one thing it would be very difficult to maintain the universality of law if each situation is to be determined in accordance with predominantly political considerations. And, if, as Reisman suggests, power can "legitimise" itself then the Rule of Law would be redundant and the general population could have little confidence in the law as a source of justice or clarity. The very vagueness of this kind of system means that there would be very great uncertainty and unpredictability in the law and any existent values could be manipulated and mutated without much difficulty.
There appears to be a certain contradiction in Reisman's approach. He deprecates the idea of discovering the "man with the guns" that is, the source of effective power and, instead, advocates a system whereby each person undertakes a personal goal clarification and participation in the processes of authority in a community as a means of achieving those goals. This system, he says,

"... demands that all of the institutionalised processes of social choice themselves approximate those policies which contribute to human dignity." 40

As we have seen before, "human dignity" is open to very broad interpretation and some distortion. Also, it is difficult to reconcile the idea of individual goal-selection with, on the other hand, power-broking in the political arena. Reisman states the necessity for goal-clarification or the establishment of preferences but, seemingly, fails to achieve either. He says that the problem should be approached from the standpoint of personal goal-clarification and that an individual should not openly or tacitly accept the goals of a commander, God, or any other entity, as his own and thereby shelving his own responsibility. However, the same criticism can be made here as was made of Pound; namely, of how we are to determine what are truly a person's individual goals as opposed to ones superimposed upon him by various methods of "hidden persuasion" and "subliminal" suggestion.

Reisman criticises "natural goals", as adopted by Aristotle and others as being merely subjective choices but it is possible to apply this same criticism to Reisman himself.

40. ID. at 92.
The major problem with this whole approach is that it largely concerns itself with "observing" processes and the functioning of law in the social framework. This is, of course, a useful way of proceeding but it does have serious limitations. Merely observing any social practice from the outside will tell you certain things about what is going on but it will not tell you very much about the basic rationale behind it. To take the analogy of the game of chess; if a detached observer who knew nothing of the game watched a hundred games of chess he would have a reasonable idea of the kind of moves that are made. However, he would not be able to distinguish between "rules" that are desirable to follow from the point of view of winning the game and rules that it is necessary to follow as a part of the game known as chess. Power processes do not give a system of values and are not a reliable guide as to the goals of the majority of people. By adopting the approach of sociological observation the way is barred to obtaining a satisfactory explanation of ordinary aspects of private law legal procedures on a less grandiose scale. However, this approach does alert us to the significance of policy in law that the predominantly rule-governed view tends to regard as peripheral or within the "penumbral" area of judicial discretion. What it does not tell us is just how this policy notion operates as a factor in deciding particular cases.

D. HARTZLER

On this question the work of H. Richard Hartzler is of some interest. Hartzler takes justice as his primary concept. 41 He states that if there are obstacles to achieving primary goals then a sense of injustice will result. If there are no such obstacles, all will experience a sense

of justice. Thus, we see that Hartzler does differentiate between types of primary and secondary goals. He sees law as an instrument for creating and regulating regularized interactions in society which may facilitate or block primary and instrumental goal achievement and hence, the achievement of justice. He says,

"The social engineer attempts to use law to provide systems of operational rationality wherein decision techniques, appropriate to circumstances and goals, aid in problem solving." 42

It seems, therefore, that the law and goals are again regarded as being separate entities. Hartzler takes the example of the development of the law relating to consumer protection and manufacturers' liability where, over the past century, rights of consumers have been much increased as an instance where the social engineer has effected a change in ideas in favour of progress as opposed to maintenance of the status quo and stability. This implies that law itself is essentially a static system and that change has to be imposed from without.

Hartzler has drawn up a list of primary and instrumental goals 43 which he integrates with Pound's jural postulates and social interests, but it seems simply to be an elaboration on the eight values of Lasswell and McDougal. As far as decision processes are concerned he has characterised four basic modes: the first is the "formal irrational" method of decision-making where formality itself constitutes the decision process and reason and judgement play no part - "Obedience by recognised officials to the formality of the law makes the decision" 44

42. ID. at 32
43. Hartzler's classification of goals is as follows: see Hartzler (1976) at 56.
44. ID. at 59.
The "formal rational" process is generally what actually goes on, that is, a system that allows for judicial discretion but constrained by rules. The "substantive rational" type of decision-making is teleologically oriented and the rules are the servants of various policies. Judicial discretion, in this category, is fairly elastic in that a judge's decision must aim to fulfill some aspect of social policy and reflect current trends in precedent. This is the equivalent of the Lasswell/McDougal approach. Finally, Hartzler describes the "substantive irrational" process which is typified by the arbitrariness and unpredictability of the whim of an official. He points out that in most "law-government" systems the second or third methods are the usual decision processes but in both instances the input for the exercise of that discretion still remains unexplained. Also, there is no logical reason why the two modes should be mutually exclusive and, as we shall see later, an amalgam of the two may be a more fruitful way of proceeding.

To adopt Hartzler's terminology then, in a typical hard case the judge is faced with the alternative of using the formal rational method, which will probably ensure such objectives as certainty, predictability and clarity in the law, or of acting in a substantive rational manner and exercising his discretion to attain a result that will satisfy the ends of justice. Such an end would be the extension of the ambit of manufacturer product liability. This exemplifies the usual conflict between the (a) and

45. Hartzler cites the cases of Johnson v. Cadillac and MacPherson v. Buick as instances where the court held to the established law and acted in a substantive rational manner respectively. In the latter case the court took notice of contemporary values, interests and other factors and effected a change in the law on manufacturers' liability. Cadillac Motor Car Co. v Johnson, 221F801 (1915). MacPherson v. Buick Motor Co., 217 N.Y. 382, N.E. 1050 (1916) 111.
(b) - type goals but is disjunctive in that it implies that one of those goals must be sacrificed in order to achieve the other. No explanation is offered as to why this should be so and as to how we should decide which goal is to predominate. If law is truly an integrated system this seems somewhat strange. A median formula of the two approaches can avoid this situation. In addition, as Hartzler realises, if we have a situation where some officials decide cases on the basis of one method on some occasions, and others on different occasions predictability and certainty will be virtually impossible. In one case before a court the members of that court too can take different standpoints.

Hartzler sees the whole problem of uncertainty as being vexed even more by the factor of how the rules of a system are used to settle disputes. He concurs with what appears to be the general consensus that rules only apply to a limited number of concrete (core) situations and, therefore, large areas of activity are substantially unregulated. So, he draws on principles, standards and concepts to fill this void. Principles allow for greater human discretion and judgement in decision-making and standards are a form of "authoritative generalisation" even vaguer than rules or principles. The standard of the reasonable man is an example of this. Concepts are the broadest generalisations and permit of the widest exercise of discretion. But this thesis suffers from the same weaknesses as the theories of Dworkin and Hughes. It gives no idea of how these principles, standards and concepts are to be evaluated or ranked. We are not told what to do if a principle urges us to overthrow a rule or if a standard is more important than a concept. Indeed, these theories probably cannot do this because they do not conceive of the purposes of rules being fundamental and operative parts of rules.
3. ALTERNATIVES

We have looked at the two most divergent arguments on law - Natural Law and Positivism, but there are several writers who have offered alternatives to these views.

A. DWORKIN

Ronald Dworkin has made an attack on positivism. He states his position in this way:

"My strategy will be organised around the fact that when lawyers reason or dispute about legal rights and obligations, particularly in those hard cases when our problems with these concepts seem most acute, they make use of standards that do not function as rules, but operate differently as principles, policies and other sorts of standards." 47

It is the introduction of these "principles, policies and other sorts of standards" that mark a departure from the strict positivist position. Dworkin makes a distinction between principles and policies, but this is not of any great significance and Dworkin himself notes that nothing turns on that distinction. The point he emphasises is that rules operate in an "all or nothing" fashion and can only apply in a limited number of cases. The exceptions are part of that rule and should be included in a full statement of that rule. Principles, however, cannot function in this manner and cannot be extended to encompass counter-instances of the principle in an expanded statement.

47. ID. at 34.
48. ID. at 34. Dworkin defines a policy as "...that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community..."
In a particular fact situation Dworkin recognises that several policies can be relevant and can point towards different solutions. A principle argues for one result and may be decisive but in the next case it may be rejected. So, although such principles are a part of the legal system all that is required is that officials take that principle into consideration in reaching a decision. It is not necessary that they should always act upon it. Dworkin feels that this is an aspect of the "logical distinction" between rules and principles. He also adds that principles have another characteristic not shared by rules - a dimension of weight. The judge, then, is required to recognise the various principles involved in a case where the rules have proved to be inadequate and to engage in a process of balancing up the principles according to the relative weight of each in order to arrive at a decision. Dworkin states the matter in this way:

"... one legal rule may be more important than another because it has a greater or more important role in regulating behaviour. But we cannot say that one rule is more important than another within the system of rules, so that when two rules conflict one supersedes the other by virtue of its greater weight. If two rules conflict, one of them cannot be a valid rule. The decision as to which is valid, and which must be abandoned or recast, must be made by appealing to considerations beyond the rules themselves. A legal system might regulate such conflicts by other rules, which prefer the rule enacted by the higher authority, or the rule enacted later, or the more specific rule, or something of that sort. A legal system may also prefer the rule supported by the more important principles. (Our own legal system uses both of these techniques)." 49

To the passage underlined in the above excerpt we could ask the question "Why not?" Dworkin sees a rule merely as a prescription for behaviour

49. He calls a principle, "... a standard to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality". 
of a certain kind but puts the question of why the rule requires that conduct, that is, its purpose, as a completely separate issue. There does not appear to be any good reason for this and Dworkin notes that frequently, it is hard to define the roles played by rules and principles.

In the instance of a "hard case" then, it is a principle that induces a judge to make some change or adaptation of the existing law. Dworkin uses as examples the cases of *Riggs v. Palmer* 50 and *Henningsen v Bloomfield Motors, Inc.* 51 where the courts gave consideration to so-called "principles" in order to achieve results that accorded with the demands of justice. He is thus trying to establish the character of principles as, though not being rules, yet also not being totally within the discretion of a judge. He must consider them, although he need not follow them.

But this fact does not take us much further towards discovering how we may account for judicial "discretion". Certainly, Dworkin is correct in pointing out that positivism stops short of dealing with the hard cases that provide the greatest rest for a theory of law. Judicial discretion is not a mysterious void; on the contrary, it is an area of great creativity but, as we have seen, the problem is to find an explanation for the input that gives us the decisions. If, as Dworkin says, we cannot list principles as they are constantly changing and falling into conflict, and yet, these intangible principles are simultaneously binding we appear to have very muddied and uncertain criteria for justifying decisions. If

50. 115 N.Y. 506, 22 N.E. 188 (1889). Here, the question was whether an heir under a will could benefit though he had murdered the testator.

51. 32 N.J. 358, 161 A.2d 69, (1960). This case related to the way in which an automobile manufacturer could limit his liability in respect of defective products.
there is no structure or clarity to the principles then how is it possible for them to be binding on a judge?

In opposition to Dworkin it will be argued that rules do have a hierarchy and structure and that this can guide a judge in reaching his decision. The definition of a principle offered by Dworkin is clearly tantamount to a statement of a goal of society. In most cases that goal is embodied in a rule and in that case surely it is sensible to regard the goal and the rule as one.

B. HUGHES

Another variation the positivist tradition has been described by Graham Hughes. He has found both the approaches of Professors Fuller and Hart to be unsatisfactory and makes an attempt to remedy the deficiencies that he sees in their theories. Of Fuller he says,

"The principal task of statutory interpretation for Professor Fuller is thus always a search for purpose. How the search is to be conducted and what relationship there is between the concepts of law and policy he does not discuss at any length..." 53.

This reflects the difficulties we have already observed with Fuller's theory. As far as rules are concerned Hughes finds the same kind of problems that Dworkin noted, in that rules only provide guidance in a limited number of clear-cut cases.


Hughes, however, also sees "principles" as an important factor that the positivists fail to take into consideration in their account of judicial decision-making. The essence of his thesis is found in the following passage:

"Principles are vague signals which alert us to general considerations that should be kept in mind in deciding disputes under rules. So we decide under rules but in the light of principles. A maxim is a principle that has been distilled in a traditional, aphoristic form. In marginal cases rules may be applied in the light of principles, but sometimes, when no concrete rule is present and relevant, a case must be decided by a direct application of principle or maxim to the facts without the interposition of a more concrete rule." 54

This is very much like the position taken by Dworkin and, similarly, Hughes attacks the weakness in Professor Hart's theory of core and panumbra.

Hughes realises that most conflicts take place between the goals of consistency and predictability and similar notions, and more aesthetic goals such as those of freedom, equality and the like. He argues that principles serve to illuminate the policy considerations for the judge that he should note in coming to his decision. Again, though, the judge is under no obligation to follow one principle rather than another. Hughes criticises the positivist attempt to differentiate law and policy as being too simplistic. Everything Hughes says is, so far, quite true, but the real problem of how we use these materials (which is really the most important practical question) is not satisfactorily resolved. Hughes undertakes an argument that seeks to make the point that the reason for a judge's decision, in the sense that he may have taken a bribe or be subject to blackmail, is not the same as the justification

54. ID. at 111.
or explanation of that decision, in the sense of the legal ratio that could be expressed in written form. This is perfectly correct but seems to be a different kind of an argument to that on the relationship of law and policy. If a clear, practical link between law and goals can be seen, then the question of the corrupt judge is seen as a vital matter - but not one of a legal character.

Also, Hughes seems to think that a purely prescriptive statement is to be distinguished from a "general rule", in that the former may not be influenced by policy notions.\(^{55}\) This is a confusing argument for even an isolated command such as an order given to a child, "Go to bed by 7 o'clock" provokes the response "Why?", just as much as the laying down of a general rule that the child shall go to bed by 7 every night. Such arguments are not particularly relevant to the central problem and, we would suggest, confuse the issue. In expanding on Fuller's "overly narrow and overly mysterious" perceptions of rules and policy,\(^{56}\) Hughes notes that, frequently, the purposes or policy notions are to be found within the rules itself, or within other rules or within principles, maxims or doctrines. Certainly, this is so but why does Hughes find it necessary to resort to the distinction between rules and principles? Possibly he does so because he feels that some policies or goals are less important or less clear and, therefore, are not encompassed by a rule and must, consequently, be sought in some principle less concrete and binding. But, as we have seen before, society regards certain goals as more important in certain circumstances and, accordingly, if the rule and

\(^{55}\) ID. at 122.

\(^{56}\) ID. at 123.
its goal are one we may discover the ordering given to rules in a way that may help us to resolve even the hard cases. By insisting on qualitatively different rules and principles the former of which are binding and the latter are not, both Hughes and Dworkin render this impossible.

In the writings of both Hughes and Dworkin there is an awareness of the causal relationship between the rule and the behaviour that it seeks to promote, but they do not develop this idea in any great detail. Hughes observes that:

"...we are likewise interested in a rule system primarily because it has a significant effect on behaviour and not merely because it is a collection of prescriptive sounding utterances." 57.

He elaborates on this point in his attack on the approach of the positivists in seeing law solely as a rule edifice. But, disappointingly, stops short of expanding on the practical consequences of his own "policy" approach. Thus, once more we have a disjunctive choice between two sets of goals of different characters and must, apparently, sacrifice one type in order to obtain the other. These sets of goals have been described as the (a) and (b) - type goals.58 Basically, the (a) - type goals represent such objectives as clarity and consistency in the law, while the (b) - type goals are typified by the desirability of obtaining peace, freedom of action, security and other ideals of justice in society. The feeling that we must give up one or the other results from a failure to see both types of goal as an integrated part of the law itself. A solution to this

57. Id. at 126
has been offered that attempts to formulate a theory that is teleological but in a regulated or structural manner. We will come to this later.

C. SUMMARY

After examination of the major theories to date the main factor that emerges is that the "black box" mechanism of judicial discretion is still somewhat mysterious in terms of input. In general, we have the position that rules are regarded as one matter and purpose or goals as another and any immediate nexus between the two is, at least, tenuous. At some stage in any decision-making process some reference must be made to the wider policy considerations by virtue of the causal relationship between law and its aims; the question is, how should this be done? If policy falls to be considered as a feature in a variety of principles, standards and other criteria it is very difficult to discern any structure or ordering to these values. This problem would be lessened if the relationship between rules and their wider practical effect in the social context were acknowledged. Lasswell and McDougal deserve much credit for emphasising that this latter aspect is not a secondary issue to be considered at a separate time, if at all, from the body of rules. Of this approach they say,

"The consequence is a high degree of isolation and abstraction of the identified rules from the community and social processes which must at least condition their prescription, invocation and application, and upon which their application must have its effects."  

The point is well taken. Nevertheless, the objection to the Lasswell/McDougal theory remains - it is fundamentally a socio-political exercise.

59. [Footnote]

rather than a legal one and thus, fails to deal with many of the crucial issues that arise in law.

However, a theory has now been put forward that attempts to deal with the issues discussed above and is the one that forms the basis for this thesis.


A. GENERAL

This theory marks a significant departure from previous theories of or about the nature of law, as although it is teleologically oriented it also sees law as a system of rules. In effect, in adopting aspects of the major theories we have considered in this chapter, the Causal Theory seeks to provide a solution for the deficiencies in those theories. The model of law offered is thus described:

"The model which we offer rests upon a number of assumptions about the nature of legal systems. The first is that law is the kind of rule structure which cannot be viewed in isolation from teleological considerations (indeed, most structures of rules will be found to be of this kind). The second is that some of these teleological factors are incorporated into the very fabric of the law itself in the form of higher-order or deep structure, priority settling rules. The third assumption is that at least some of these higher-order rules are generative in the sense that they allow the legal system itself to produce new rules without external input through the legislative process." 62


As we noted in the discussion of the theories of Dworkin and Hughes, having resort to such things as principles and standards in order to explain the judicial decision, although constituting an advance on the strictly positivist position, still leaves us with a large degree of uncertainty and unpredictability in the law. It is this that is taken up by Smith and Coval.

They argue that Dworkin failed to appreciate the "second-order nature" of the rules that he calls "principles". Thus, principles are regarded as a separate criteria that merely have a weighting effect on a decision. However, Smith and Coval state that a principle can be expanded or extended in the same way as a rule, and can, therefore, act to remove anomalies among the first-order rules. As such it is not an independent entity but is an intrinsic part of a rule. When rules conflict one rule may, at first blush, appear to be as good as another and so the problem is to discover how the rules relate to each other and how we are to decide which rule will prevail. The goals of the rules in question are the source of the answer to this. To date, we have been presented with the alternative of choosing between either a goal or rule-dominated jurisprudence, but there is no compelling reason for having to face this disjunctivism. Smith and Coval make the point that, frequently, there is no conflict between two sets of laws in the sense that a particular case is equally well covered by either. The conflict is actually found at a higher level, that is, in the goals of the laws involved. They say,

"The extent to which conflict exists between first-order rules and is resolvable within the law, is the extent to which such hierarchical matters are integral to the law." 64

63. For their argument on this point, see, Coval and Smith, Some Structural Properties of Legal Decisions (1973) 32(i) Cambridge Law Journal 81.
This hierarchical feature is highly important for the purposes of conflict resolution. If goals can be placed in some kind of hierarchical structure then we have at least some method of evaluating conflicting rules and determining priorities with regard to the facts at hand. In fact, unless such an ordering of goals is implied by the first-order rules, the second-order rules cannot be formulated. This formulation then, is primarily a legal matter and not a sociological one. Obviously, sociology is important in influencing what goals a given society might wish to adopt but their subsequent operation within a legal system is a legal matter. A judge can therefore make use of ordered goals to produce second-order rules in resolving conflicts.

The integrative character of this system is much emphasised by Smith and Coval and has another aspect in what is termed the generative capacity of the law to produce new laws. In this respect it is markedly different from the majority of the other models that we have examined which are predominantly static in nature and generally look to external agencies for innovation and change. Most theories tend to regard rules as being rather barren and one-dimensional and not dynamic and flexible, but;

"The capacity to generate new second-order rules is a formal property of the institution of law itself and not emergent from the discretion of the judge." 65.

Thus, the contention of the sociological jurists that law is not sensitive to the prevalent needs and interests existent in society may be met. The law may take account of changed circumstances and opinions - but it must do so in a rule-like manner. If it does not, we find ourselves in a

65. Id. at 102.
situation where the law is indecisive and unpredictable and the judge becomes embroiled in an intangible procedure of balancing or weighing interests.

This hierarchy of goals is, at its base, highly specific as to the particular goals of particular laws and becomes increasingly more generalised at higher levels. At the highest level the goals will tend to approximate to the moral order and may well parallel those higher ideals that the natural law proponent would select or that would be analogous to the Lasswell/McDougal precept of a public order of human dignity. The relation between the various goals in the structure is a cause and effect one as the lower-level goals are instrumental to achieving the higher ones. Thus, in any given case, if no indicia as to the correct decision are immediately apparent, it will be possible to refer to a higher level of goal orderings. There is no need, therefore, to resort to a search for ill-defined and unstructured principles or policies for these will be incorporated into the goal structure at various levels as are applicable.

B. THE NATURE OF THE GOALS

We now come to a point that was mentioned earlier - that most of the conflicts that arise occur between the kind of goals that include concepts such as consistency, predictability and impartiality, (the (a) - type goals), and those that feature peace, privacy, physical and mental well-being and many more accepted values. Other theories seem to presume that in such a conflict one of the types of goals must be given up. Smith and Coval
argue that no such disjunctive choice exists. A causal relation exists between the (a) and (b) - type goals in that in order to obtain (b), we must have (a). In fact, the two are not mutually exclusive but, on the contrary, are very closely interdependent. The relationship is a teleological one. As a consequence laws must be so formulated that instances where (a) and (b) are incompatible are excluded from their ambit. Most activities are purposeful and so there is a causal link between the performance of an action and some desired result. Similarly, a causal chain exists or may be evoked for any rule to be operative.

Smith and Coval put it in this way,

"Practices have to be built upon what it is possible to achieve in the world. In order to achieve (b) in an (a) - type fashion, e.g., in order to achieve the reduction of violence, (b), by means of a line of action regulated by rule with (a) - type properties, there must be a well-entrenched causal route readily available to form the basis of the rule which will take us to (b) in an (a) - like fashion. Otherwise the rule is literally without effect." 66.

C. THE EXCEPTIONS TO RULES

This system also provides the mechanisms to take care of exceptions to rules, that is, when a breakdown occurs in the causal chain. These exceptions fall under four categories which may be summarised as follows:- 67

1. The situations where the causal connection between the rules and the prescribed behaviour breaks down. Where only a link in the causal chain is missing the law will not hold people responsible and a sanction will be applied where it is possible for the link to be restored. However, in cases where it is


impossible to achieve this the law excuses people. Infants and the mentally ill, for example, are thus not held to be responsible and defences such as those of duress and undue influence are possible. Such doctrines as frustration of contract where events render it impossible to fulfil obligations are covered under this proviso. It is not being denied that certain initial "invoking" acts, (such as promising to do something) took place in a series of events; instead, we acknowledge that somewhere in the causal chain something occurred that rendered the achievement of the desired outcome impossible.

2. Situations where the causal connection between the prescribed conduct and the goal of the rule breaks down: this covers the situation where a person does not do something that he undertook to do because to do so would be pointless as it could not achieve the desired result.

3. Situations where, in given circumstances, the causal link will give you (b), but also something worse than (b). It may happen that the doing of "x", though it will achieve "y" may also, as a side-effect, give us a negative result "z" that was quite unforeseen beforehand. If this effect "z" is detrimental to the attaining of another goal that we hold to be more important to us than "y", then plainly it would be illogical to insist on "y". The law allows for such situations by providing the defence of necessity, thus allowing one rule of the system to be infringed in order to protect a more highly valued goal. What emerges is that when conflicts arise and
we are forced to choose what outcomes are preferred this choice is not "discretionary" or a matter of giving "weight" to criteria but is determined by an agreed ordering of our goals. The basic goals will be fairly stable but those of more equal value will be somewhat fluid and the ordering may fluctuate. This is not a defect but, on the contrary, assures the dynamism of the system and its sensitivity to evolving social needs.

4. Where the point of a rule or practice is no longer a desired goal. Clearly, if we are no longer interested in securing a particular and the rule directed towards that end becomes redundant and obsolete. The causal chain has totally broken down. This problem of the enforcement of archaic or obsolete laws has taxed many writers, but under the Causal Theory may be dealt with quite simply; Coval and Smith say,

"Our view is that a legal system may deal with obsolete laws by simply not enforcing them. This suspension should not be considered a matter of discretion, we believe, but should be regarded as automatic once it is clear that a particular piece of legislation no longer serves a (b) - type goal". 68

In such cases there is no necessity for involvement in debate on whether some provision is or is not a law. Instead,

"we suspend the responsibility for compliance."

Another important aspect of these four exception clauses is that they enable the law to re-write itself in a systematic way, but not in such a manner that it might overlap into unrelated areas where it could have

68. Id. at 144
unanticipated effects. Change must occur without violating the (a) - type goals. This system is much more likely to satisfy the requirements of justice than the ones where a disjunctive position is regarded as an inevitability. The fact that the (a) and (b) - type goals are seen as working in the same direction and not divergently means that we can have certainty plus whatever virtue or value is at stake. Thus, Fuller's concern in relation to evil laws may be set at rest and Lasswell and McDougal's distinction between what may be termed "law" (in the sense of a system of rules), and the "real law" that actually emerges in patterns of decisions is blurred. Instead of decisions being dictated by political superiors in a power-structure, they will be made according to structured criteria furnished from within the law itself. When we are forced to make choices between (a) and (b) - type goals, justice can appear to become a somewhat arbitrary matter as no system of priorities can be established and acted upon in future cases. If there is no stability in a system then the durability and effectiveness of changes is dubious. By the same token, a system that is stable as far as change is concerned may be highly predictable and certain but it will be a barren structure that will lose touch with the social realities.

D. COMMENT

It is primarily this avoidance of disjunctivism that recommends the Smith and Coval theory as being a more satisfactory one than the others that we have examined. Clearly, the full extent to which it can be utilised in determining outcomes of cases cannot yet be assessed. There will always be great problems of determination where competing goals are
of approximately equal value but the suggestion is that the standards are there and it is not a question of weighing or balancing principles or other criteria. What is particularly striking is that Smith and Coval have looked at what is actually involved in normal, everyday activities and practices in terms of cause and effect relationships and how these are constructed and have applied this to the practice of law. Since, in general, most people do "x" in order to achieve "y", it is logical to assume that laws, which are, after all, for the regulation of human conduct and affairs should similarly be purposeful.

The example of promising that is used to illustrate the theory is a very fruitful one. When a person makes a promise he effectively invokes the body of the practice and a causal chain that causes the hearer to react in a certain way and is directed towards achieving a certain goal. However, if events intervene that change the circumstances in the light of which the promise was made or in relation to the carrying out of that promise, then in the social and legal context we do not insist upon performance. If we cannot achieve our original goal there would be no point in doing so - especially if, incidentally, we achieve a negative outcome.

By viewing law as a unity - an integrated structure, we have a more practical tool for analysing decision-making than has yet been devised. Smith and Coval are aware that they may be accused of representing the law as it "ought" to be rather than as it is, but say this in answer,

69. Id. at 116. See discussion on the invocation of a practice and the distinction between the invoking features and the body of the practice.
"The answer is that such practices are all of them prescriptive. They tell us how we ought to proceed in order to achieve certain goals and \textit{ipso facto} they admit of various abuses. The very concept of an "abuse", "error" or "mistake" presupposes a norm or measure as to how the practice ought to have proceeded, and from which there has been a departure. But, unless the distinction between what "ought to be" and "what is", is made, the abuses cannot be either properly explained or prevented." 70

We have seen that goals and their orderings by the law are of crucial importance to this theory as far as its practical applications are concerned. It is the purpose of the rest of this thesis to attempt to classify the hierarchy of goals and to describe the problems inherent in this kind of undertaking. It is worth emphasising that the classification is to be of those goals actually to be served by the law and is not analogous to a list of "interests" or "claims" as described by the sociological jurists. In answer to the objection that this approach ignores the social realities and interests not protected by the law, it is argued that the very nature of the theory does not permit this to happen, it is possible to look beyond the bare bones of the rules \textit{per se}, but in a structurally consistent manner so that the wider ramifications of the case may be seen in the goals that are in conflict. It is difficult to imagine many interests that cannot be taken into account if this pattern is followed. In addition, as we have seen, the law can re-write itself and remain in tune with contemporary feelings and values.

70. \textit{Id.} at 151
III. THE CLASSIFICATION OF GOALS

1. METHOD OF FORMULATION OF THE CLASSIFICATION

At the conclusion of the last chapter we embarked on a preliminary discussion of the theory of Professors Coval and Smith as offering a potential solution to the problems of legal philosophy that emerged throughout the consideration of the relevant theories so far postulated. Central to the Coval and Smith position is the concept of the existence of a matrix of goals. It is this matrix that is the key to the practical utilisation of the Causal Theory of law in solving disputes. Within the matrix goals will be ordered or ranked in ascending order of generality and, at the base of the structure will be seen the highest degree of specificity in the particular provisions of various rules.

Clearly, then, in order to be able to examine the Coval-Smith standpoint in greater detail and in order to be able to test the efficacy of its application, there is a need to formulate some catalogue of goals in a matrix from which basis we can work. In this chapter an attempt will be made to do this. Inevitably, any such posited categorisation will be subject to criticism as being arbitrary, and though this is, to a certain extent, valid the point must be made that the goals are drawn from the guidelines afforded by the law itself.

Before embarking on the classification of goals itself some explanation of how and why the categories listed were selected will be given.

The first task was to decide how to describe or identify the goals derived. Clearly, there are certain objectives within society that are of overriding
importance for the continued existence of that society; these may aptly be termed the "primary" goals. Generally, these primary goals will always take precedence over the other goals of the system. After formulating and refining various lists of possible categories of goals it was possible to distil these possibilities into three major categories from which supplementary sets of primary goals could be evolved. Inevitably, there will be considerable overlap between categories whatever the classification but, in order to minimise confusion as much as possible (yet avoiding an over-simplification of the problem), it was thought best to aim for a fairly concise and comprehensible categorization.

In order to illustrate this it may be useful to examine briefly an earlier formulation of the catalogue of goals as a comparison to the one finally adopted. At one stage four possible major goals presented themselves:

a) The safety and preservation of life.
b) Fundamental freedoms of thought and conscience.
c) The regulation and control of wealth and property
d) Protection of the environment and the quality of life.

However, on reflection, it seemed that the last category could easily be subsumed under the other three.

Categories (a) and (b) contain elements common to both; for example, "liberty" can relate both to physical and mental aspects and would not fit comfortably into either (a) or (b). Thus it seemed preferable to adopt the present classification which can cover all of the above four categories.

1. See Text, INFRA, at 72 - 73.
Obviously, one of the great problems with attempting any classification of this nature is that any choice is necessarily arbitrary. Nevertheless, it is possible to condense the major aims of the law into a relatively small list. The test for the comprehensiveness of such a list comes in determining whether there are laws in existence that cannot be classified under the selected categories. In fact, this did not occur when compiling the list so that it would seem that, currently, the major goals adopted for the legal system are sufficient. The sets of primary goals were obtained by making a systematic breakdown of the laws encompassed in a comprehensive set of statutes, (in this case Halsbury's Laws of England). Having ascertained the nature of the areas with which the law is chiefly concerned it was possible to summarize these and place them under the appropriate major categories. The approach taken throughout is essentially from the legal point of view. The process is not one of observing and noting "interests" being asserted in society as was done by the sociological jurists. Rather it is an analysis of how the major goals, as reflected in the law are ordered and structured by the law. The first major goal heading selected is "liberty" and the first sub-heading under this (communication and the free flow of information), represents the kind of goals that protect not only the fundamental freedoms of conscience but also physical inviolability and freedom of movement in society. In a healthy society there should be very little restriction of the flow and exchange (and availability) of information and discussion of ideas. The law seeks to safeguard and promote this while imposing limitations where necessary as is seen in the more detailed

2. See Text, INFRA at 72 - 73 for the classification of the major goals.
discussion of this category.

Category (b) under this heading relates to the ideal that people should be given the best possible opportunities to develop and fulfil themselves and that those who are less equipped to do so should be given additional assistance and support.

The second major category headed "well-being" is largely self-explanatory, being directed towards physical and mental welfare generally. Finally, the category dealing with material resources may include both property regulation as a whole and protection of the environment and conservation. The distinction between inclusive and exclusive resources is explained in detail further on in this chapter.

Problems arise however, where totally novel fact situations present themselves for a decision by the courts. If there should be no remotely similar fact situations to guide decision it would seem that extra-legal factors such as public opinion must influence decision. In reality, of course, there are usually plenty of precedents available, the question being as to which should be followed. Also, it must be realised that extra-legal factors do have a significant influence upon legal development. For example, the activities of public pressure groups frequently result in a change in the law being effected. But this fact should be distinguished from the manner in which the law operates as a system. In going through the statutes we can obtain a fairly clear idea of the kind of directional changes that are taking place within the law and, in turn, such changes
will have a marked effect on the way that goals are ordered within the matrix. Thus we can observe certain areas of law where the orderings will usually remain stable and others that, taken in conjunction with social trends and needs will be subject to fluctuation and change.

Social and legal goals are not vastly divergent. Indeed, something would be wrong with the system if they were. Any legal system must be flexible and capable of generating new rules in keeping with changing social needs in order to retain its raison d'être. Yet for the purpose of de-mystifying the black-box mechanism of the judicial decision it is seemingly preferable to look to the legal material on which the judge must act in order to ascertain the goals.

The instrumental goals are to be found in the more specific enactments contained in the statutes and can easily be placed under the headings of the primary goals.

The major difficulty in deriving this classification was in reducing the huge bulk of legislation and areas of legal concern into any form of comprehensive list. Classification by subject-matter, for example under torts, contract or equity was found to be clumsy and unsatisfactory as each category could aim to serve a large variety of different purposes. It was more effective to classify according to the individual goals.

Various critics of goal-oriented theories of law have repeatedly stressed the point that it is, in some circumstances impossible to determine the purpose of a rule. This, they say, illustrates the difficulty found in
using goals as part of the law. But it was discovered that, in reality, this was rarely the case. In going through the statutes and building up the goal classification we found no rule where it was impossible to discern a goal of some kind. Frequently, there were problems of deciding under which category to place a goal within the classification, but this is not the same as being unable to find any purpose at all. Rules are generally concerned with protecting specified interests and it is usually apparent as to what constitute the particular interests in a given case. There is often an overlap of goals between rules but rarely a case where no goal at all appears to exist.

Basically, this classification of goals was arrived at as a result of a process of continuous refinement and delimitation from a vast amount of material. The terminology selected to describe the goals is fairly arbitrary and merely serves to summarize the concept of the goals which it embodies. The significant thing to note is that the classification has been approached from within the structure of the law rather than from without it.

2. GOAL CLASSIFICATION

The goal matrix is a highly complex system of rules that are linked to each other in a cause and effect relationship. Professor Smith describes this system in the following manner:

"Every rule may be conceived of as having a purpose or goal. The entire set of rules of which the specific rule is a member of the institution itself to which the rules are related also have ends or purposes. The ends of the specific rule will generally be considered as instrumental in achieving the overall ends of the system of rules of which it forms a part. A cause-effect relationship therefore will be assumed between the content of a specific rule and the ends of the system of rules."

Thus we are given the idea of a hierarchy of goals which may be conceived of as being ordered in sets of goals that serve particular objectives in society. Specific rules and their content are related to these sets of goals in that they are instrumental in ensuring the achievement of the higher goals of society. These higher goals may be described as the primary or intrinsic goals of the system. At this stage, then, the most useful method of giving an overall conception of the structure of the matrix is by presenting the classification adopted for examination.

I. LIBERTY
   A. Communication and free flow of information.
   B. Maximisation (fulfilment) of human resources.

II. WELL-BEING
   A. Physical.
   B. Mental.

III. RESOURCES (MATERIAL)
    A. Shared enjoyment (inclusive).
    B. Restricted enjoyment (exclusive).

The above form the major categories and their sub-categories of the primary goals. We shall see later that these categories can be broken down further into sets of goals.

It is important to note the absence of any one, overriding or major goal in the above. In the analysis in the first chapter of this study we saw that several writers have selected a particular aim or purpose as being a kind of ultimate objective in society or desiderata. For the Lasswell
McDougal school this goal was that of the attainment of and respect for human dignity. According to Hartzler's theory the core concept of the system is the ideal of justice. This he views as being, frequently, a mixture of primary and secondary goals. Thus, if there are obstacles to the achievement of such primary goals there will be a resulting sense of injustice. However, the basic problem with both of these theories is that perceptions of both human dignity and of what constitutes "justice" may and do vary significantly. Such categorisations are extremely imprecise. In fact, they have to be if the intention is that they should provide an ultimate yardstick by which to evaluate the rest of the institutions and aims of the legal system.

But the question arises of whether it is necessary at all to insist on such an absolute principle. Surely this could be subject to the same criticisms that were levelled against the Natural Law theory? That is, that any such "supreme" criterion will be so inherently vague and abstract as to be rendered virtually meaningless. In any event, it is doubtful that there is very much value in trying to establish an ultimate goal as, in reality, there is not much likelihood that we would ever have to have recourse to it for any practical guidance. Even if we did, such a goal would probably be unable to afford any.

In a conflict situation or hard case an examination of the primary goal orderings should be sufficient to indicate the right way to decide a particular case. It is felt that the categories listed speak for themselves and so no transcendent goal has been adopted. An attempt has
been made to make this classification of goals objective, but the introduction of a major aim for the whole legal system must be essentially subjective. There seems to be no reason why such a goal could not equally be analogous to Hart's "more modest" aim simply to survive with our social framework rather than any "more grandiose" alternatives.  

Another factor to be emphasised concerns the nature of the goals in the classification. In Chapter I, when discussing the Causal Theory of law, we noted two qualitatively different categories described as a) and b) - type goals. The goals of the above list are of the b) - type. In other words, they are the kind of goals that are directed towards specific, desired ends in society such as freedom, privacy, physical well-being and other values. On the other hand, the a) - type goals have a rather different emphasis. The a) - type goals impinge on the whole spectrum of b) - type goals in that it is desirable that the law should be clear, precise and predictable. It is between the two sorts of goals that conflict usually arises in hard cases. Thus, the a) - type goals are not represented independently in this particular classification. But it should be remembered, nevertheless, that they are a vital part of the whole structure of law. It could be said that they form a fourth category of primary goals but, for the sake of clarity, they have not been added to the list as presented above.

The next stage in the construction of the matrix is to obtain sets of primary goals under the main categories set out above. These are

postulated as follows:

I  LIBERTY

A. Communication and free flow of information.

i) Freedom of the person.
   ii) Freedom of speech (expression).
   iii) Freedom of assembly and association.
   iv) The right to equal treatment.
   v) The right to privacy.
   vi) Protection of community peace and security.
   vii) Procedural fairness.
   viii) The right of access to information of public concern.

B. Maximisation (fulfilment) of human resources.

   i) The right to education.
   ii) The establishment of facilities for trade, professional and vocational training.
   iii) The right to work.
   iv) Family relations.
   v) Attainment of certain moral objectives.
   vi) The just treatment of those confined or detained by the state.
   vii) The relief of poverty.

II  WELL-BEING

A. Physical.

   i) Safety and the preservation of life.
   ii) Provision of health services.
   iii) Public health controls.

B. Mental.

   i) Immunity of the will from coercion.
   ii) The provision of special and treatment for the mentally ill.
   iii) Certain protection for the feelings and emotions.
   iv) Giving effect to the wishes of individuals.
III RESOURCES (MATERIAL).

A. Shared enjoyment (inclusive).

i) Conservation of rivers, forests, areas of natural beauty and of mineral resources, oil and gas.

ii) The achievement of a distribution of the wealth in society.

iii) Control by the state of certain important industries, (this is linked to (ii) above).

iv) The regulation of the use and control of the seas and outer space.

v) Protection of livestock, agriculture and the fisheries.

vi) The regulation and control of land and its use.

vii) A general interest in broad aims of progress and improvement of the quality of life in society.

B. Restricted enjoyment (exclusive).

i) Protection of private wealth.

ii) Freedom to make agreements and deal with property.

iii) Regulation and promotion of trade and commerce.

Some explanation should be given of the classification of resources adopted in the third category. In regard to the material resources that are available to us in society, we have the alternatives of allowing an exclusive or inclusive use of those resources. This terminology has been used in relation to the larger-scale issues of the domain of the seas and outer-space but is a convenient method to adopt for this classification. When a particular resource, such as oil or natural gas, is one that is of limited duration or supply then there is an absolute need to delimit the exploitation of it in order to ensure that the benefit or advantages accruing from it may be available for the longest possible time.

5. It should be noted that, at this stage, the goals have not been placed in any kind of ordering with regard to importance.

6. For an exposition of the application and use of this terminology see, McDougal, Lasswell, Vlastic, Smith, The Enjoyment and Acquisition of Resources in Outer Space (1963) III (5) U Penn. L.R.I.
Similarly, in the example of areas of great natural beauty, we would wish to preserve these from unwarranted destruction for the future enjoyment of as many people as possible. By contrast, in certain areas of resources we would wish to facilitate and exclusive, restricted use. By this is meant that rights over private property, real and personal, and the freedom to deal with that property should be assured.

A distinction can be made between sharable and non-sharable resources and has been described as follows:-

"By a sharable resource we mean one with respect to which, within a given context, the greatest production and widest distribution of values can be achieved through inclusive use, and by a non-sharable resource one with respect to which this same outcome can best be achieved by use that is exclusive." 7

Another useful distinction has been made between resources that are renewable and the kind that are non-renewable. 8 In the international sphere it is clear that the oceans, air-space and international waterways must be given a high degree of inclusive use and this can be paralleled in the domestic field in many countries. In the United Kingdom, for example, there is an increasing tendency for the Government to inhibit the private use and disposal of land and private control of industry. Inevitably, this is reflected in the aims of the law.

It is a clear goal of the law that, as far as the kind of resources that are vital to a community are concerned, no individual or group of individuals should be allowed to deprive the community of the use of those resources.

7. ID. at 547
8. ID. at 547
The other two categories of primary goals need no more explanation at this stage in terms of the values they seek to protect.

It is probably preferable to keep these categories to the minimum number possible needed to cover all conceivable goals. A great proliferation of classifications might diminish the usefulness of the matrix and result in a greater degree of confusion.

Another fundamental aspect of any system of law must be that of punishment or sanction and this is reflected in the goals of the law. But it cannot be said that such an aim is an independent goal *per se*; the sanction-mechanism is something that forms an adjunct to the various (applicable) rules and is triggered when those rules are contravened. For instance, one of the most important goals of the law is the preservation of life and so murder is plainly contrary to achieving this. Thus, the criminal law imposes a sanction upon those who kill. In other words, the sanction aspect of the law against murder is instrumental to achieving the main goal of preserving life. So, it is preferable to regard this aspect of the law as part of the instrumental goals that we shall discuss later.

The sanction-mechanism of the law is a highly complex one and functions throughout the whole system and not simply via the criminal law. In the law of torts and in the law of contract it is embodied in the concept of compensation and in the forms of damages. It is possible to discern three main objectives for imposing sanctions by agency of the law: deterrence, which merely aims at exacting compliance to law, compensation and retribution.
Sanction is integrated into the goal matrix of the law and functions in relation to rules in the manner described in the Causal Theory that we examined in Chapter I. By this we mean that the sanction is applied unless one of the four exceptions is found to be applicable - that is, where the causal chain has broken down such that we cannot place blame on the agent of an action. It is not the purpose of this paper to examine punishment and sanction in depth; the point to note is that this mechanism is possibly best described as a part of the instrumental goals of law as the most accurate indicator as to how it operates within the system.

Once we have established a list of primary goals of the system we can then take the next step and set out a catalogue of instrumental goals, or rather instrumental rules, the ends of which are directed towards achieving the overall aims of the system.

In this section explanations, where necessary, of the classification adopted will be made as the list is presented.

Primary Goal - LIBERTY

A. Communication and free flow of information.

The goals in this section are chiefly concerned with individual liberties. In England, because of the supremacy of the legislature, there is no entrenched Bill of Rights guaranteeing fundamental "rights" as such. Consequently, the liberties of the individual are largely residual. As one writer put it:

"To define the content of liberty one has merely to subtract from its totality the sum of the legal restraints to which it is subject." 9

At first glance, it would seem that the scope of individual freedom under this definition is somewhat limited, however, as O. Hood Phillips states, the individual does have safeguards to protect his liberties:

"No legal system can allow absolute rights. There must be a balance - a compromise - between the interests of an individual and the interests of other individuals and society as a whole. The difference between liberty and licence is crucial. The strength of English law lies in its provision of adequate remedies for most infringements of legitimate interests, notably habeas corpus, injunction and damages."  

Instrumental Goals

(The primary goal will be restated firstly, followed by the particular goals instrumental to it).

(i) Freedom of the person.

This is well summarized by Dicey as follows:-

"The right to personal liberty as understood in England means in substance a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."  

The "legal justification" for depriving a person of his liberty therefore, must be in terms of other goals of the system that are of greater importance to society in the relevant circumstances and thus may take priority over liberty. So, if we refer to liberty as $b^1$ and any other competing goal as $b^2$, then, usually the ordering will be $b^1 > b^2$. However, if $b^2$ happens to be any of the following list a legal justification for deprivation of

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liberty exists and the ordering becomes \( b^2 \). The major specified
grounds are as follows: in criminal law, unfitness to plead; criminal
conviction, detention in pursuance of a court order, or to bring an
offender before a court, or on reasonable suspicion of having committed
or being about to commit a crime, custody for care and protection,
isolation to prevent the spread of disease, detention of illegal
immigrants, detention for drunkenness, drug addiction or vagrancy.

However, even when persons are detained they are given certain protections
by the law in the form of a number of rules and presumptions. For
example, persons must be brought before a court without undue delay and
are entitled to bail. They must be presumed innocent until proven
guilty. They must be informed of the charge and must not be subjected
to violence or degrading treatment. Thus, although a person may, justly,
lose his liberty, this deprivation cannot be absolute and he is entitled
to "freedoms" of a certain character. In turn, if a person is wrongfully
detained he has certain remedies that include seeking damages for
malicious prosecution or false imprisonment, applying for a writ of habeas
corpus, appealing the conviction or sentence or, in appropriate cases
seeking an order of certiorari or prohibition.

(ii) **Freedom of speech (expression).**

a) Again, this freedom is residual and the limitations that do
exist are generally in relation to protection of public welfare
and preservation of public order. Basically, it is the freedom

12. For an amplified discussion of these grounds see, S.A. de Smith,
[Constitutional and Administrative Law](London: Butterworths, 1971) 444
to hold any opinions about religion, politics, the government or whatever, without interference. It also protects the free flow of information and communication via the media. Nevertheless, freedom of belief does not encompass an unrestricted freedom of practice in relation to any belief held. It is one thing to believe in a doctrine that may require human sacrifice, but quite another to be able to carry out such a ritual unhindered.

Once again, the ordering of goals can invert in certain circumstances — namely, those involving matters such as treason, sedition, official secrets, defamation, obscene publications, blasphemy, incitement to any criminal offence, provoking a breach of the peace and incitement to racial hatred.

b) Liberty of the Press: In the United Kingdom the freedom of the press to publish material is restricted by the law of defamation which imposes certain conditions. To establish a case of defamation the plaintiff must prove three things;

a) The words must be defamatory,
b) they must refer to the plaintiff, and
c) they must be "maliciously" published.

However, there are certain specialised defences to an action that could be asserted by a publisher. These are,

a) justification (or truth)
b) fair comment, and
c) privilege, (absolute or qualified).  

13. It should be noted that blasphemy, as an offence, is only likely to result in deprivation of a person's freedom of speech where it is likely to cause a breach of the peace.

Apart from such remedies as may be sought by private individuals, a form of regulation of the press is contained in the system of "D" notices. These are confidential letters issued by government departments to newspapers and other publications requesting that material not be published because it would be detrimental to national defence or security.

In this area, the recent case of A.G. v Jonathan Cape Ltd. is of interest. In that case the Attorney General wished to prevent the executors of the late Richard Crossman and the Sunday Times from proceeding with the publication and serialisation of volume I of his Diaries of a Cabinet Minister. The issues involved were basically secrecy of government proceedings and the freedom of the press. Although it has been suggested that the decision favoured the former, one commentator believes that, on the contrary, it "introduces new safeguards for the benefit of the defendants in breach of confidence litigation".

Lord Widgery stated:

"In the present action against the literary executors, the Attorney-General asks for a perpetual injunction to restrain further publication of the Diaries in whole or in part. I am far from convinced that he has made out a case that the public interest requires such a Draconian remedy when due regard is had to other public interests, such as the freedom of speech".

15. (1975) 3 W.L.R. 606., and (1975) 3 All E.R. 484.
17. (1975) 3 W.L.R. at 615.
Symbolically, we may represent the resultant ordering thus,

\[ b_1^1 \]: government secrecy and confidentiality of proceedings.

\[ b_2^2 \]: freedom of the press.

(note: both \( b_1^1 \) and \( b_2^2 \) have public interest aspects.)

After the Crossman case, \( \frac{b_2^2}{b_1^1} \)

(iii) Freedom of assembly and association.

Again, these liberties are residual and consist, in the main, of:

a) Taking part in public meetings, processions and demonstrations; and,

b) Forming and belonging to political parties, trade unions, societies and other organizations.

The freedom to assemble means, in effect, that there is no law forbidding people to assemble provided they keep within the limits imposed by the law. Similarly, there is a liberty to join an association provided that it is not a criminal conspiracy or civil conspiracy and provided that the organization is not constituted to usurp the functions of police or armed forces or for the purpose of using force for political objectives.

Relevant enactments in regard to these goals are, for example, the Public Order Acts and the Emergency Powers Acts.

(iv) The right to equal treatment.

Equality is clearly a highly important goal within a legal system and, in English law, there are a number of statutes directed at achieving equal
treatment of individuals in relevantly similar circumstances. These are:

a) The Sex Discrimination Act 1975,\textsuperscript{18} which established a special Commission to supervise the whole area of equal opportunities. "Discrimination" is defined as being against both sexes and covers such areas as discrimination in relation to jobs, the provision of goods and services and advertising.

b) The Equal Pay Act 1970,\textsuperscript{19} aims to eliminate discrimination on the grounds of sex in remuneration and other terms of employment.

c) The Race Relations Acts 1965 and 1968,\textsuperscript{20} in essence seek to deal with discrimination on the grounds of race, colour, ethnic origin or nationality. As a matter of policy this is unlawful and may operate to restrict certain activities. An incident occurred in England where an individual was ordered to remove a sign, situated on his property and advertising that property for sale but which specified that it would be sold only to white persons.

d) Legislation against genocide.

e) An action exists in tort for deprivation of access to public office.

f) Legislation now exists that aims to equalise the rights of illegitimate children with those of legitimate children.\textsuperscript{21}

\begin{itemize}
\item 18. The Sex Discrimination Act, 1975, C.65.
\item 20. The Race Relations Act, 1965, C.73.
\item The Race Relations Act, 1968, C.71.
\end{itemize}
It is interesting to note that the majority of the instrumental goals served by the legislation above aim to eliminate inequalities based upon biological differences such as sex, colour or incident of birth.

(v) The right of privacy.

As we noted in relation to freedom of the press, there is only a limited right of privacy under English law. Remedies are provided if the case is covered by the torts of defamation, trespass, nuisance or passing off, but not so for the person whose activities attract adverse publicity or whose conversation are "tapped".

a) However, limitations are imposed on the powers of entry and search. Modern statutes give this power to many civil servants, local government officers and officials of public corporations as, for example, inspectors of food and drugs, public health and for the gas and electricity authorities. However, there seems to be little consistency in the type of persons authorised, the nature of the authorising document and kinds of notice that must be given. The statute will usually provide that the official must produce some kind of written authority but these are by no means clearly defined.

Police powers of arrest are largely regulated in the Criminal Law Act 1967.22 There is a feeling that, nowadays, the courts

may give undue weight to the public interest in crime
detection to the detriment of claims of personal privacy.
Also, if an individual chooses not to co-operate with the
police there is a danger to personal liberty if the police
are given too wide powers of coercion.

b) Posts and telecommunications, in order to tap telephone
conversations the relevant authority must obtain a warrant
from the Home Secretary. The circumstances in which they
may do this and for what purposes are unclear. If a
person's proprietary rights are not infringed he has very
little basis for a remedy here. This is probably an area
where the law is seriously deficient in fulfilling the
primary goal of liberty, (in English law at least), and in
this sense, we may find an anomaly in the law. Possibly,
the orderings must change in the future in order to preserve
the integrity of the primary goal.

Likewise, the inviolability of the post can be breached by
a warrant authorising interception of the mail.

c) Protection of physical privacy or integrity. This goal
seeks to protect the individual's right to determine what
happens to his own body and is seen in the requirements that
consents be obtained for surgical operations, blood-tests, 23

23. See, Family Law Reform Act, 1969, C.46, ss. 20(i), 21(i) and 23(i).
s.21(i) requires that a blood-test (in relation to establishing
paternity), shall not be taken without consent. But s.23(i) provides
that where a person refuses a blood sample, "...the court may draw
such inferences, if any, from that fact, as appear proper in the
circumstances."
blood-transfusions and similar matters. The rights to securing abortions and euthanasia are ones that are subject to much controversy today and, consequently, goal orderings in this area will be especially subject to fluctuation.

d) The right to honour and reputation. In this area the law affords a remedy in defamation. A recent development in the law is seen in the Rehabilitation of Offenders Act 1974 which effects an amendment to the law of defamation. This Act provides that after a certain lapse of time, convictions for criminal offences are to be regarded as "spent" and the offender regarded as a "rehabilitated person". It aims to protect offenders who have reformed from subsequent disclosure of their records.

(vi) Protection of community peace and security.

a) The Police Act 1964 regulates police powers and procedures.

b) Provision is usually made for the invocation of certain emergency powers to deal with major crises or disasters.

c) Legislation relating to defence and the armed forces.

d) Official secrets.

e) There is increased emphasis on measures to deal with terrorist activity.

(vii) Procedural fairness.

This category aims at securing an optimum of efficiency in procedural matters, for example, by the use of experts in tribunals and seeks


to ensure fair treatment for the individual.

a) The provision of tribunals enables certain kinds of work to be dealt with more effectively as these have the advantages of affording expert knowledge, cheapness, speed (which can avoid undue hardship to the parties), flexibility (as they are not hampered by the doctrine of binding precedent) and informality.

b) Control of public authorities and officials is effected by a number of measures:

i) The ultra vires rule - this provides that the acts of a competent authority must fall within the powers conferred upon it by the legislature.

ii) Abuse of power - a power that is discretionary is abused or misused if it is exercised for an unauthorised purpose if relevant considerations are disregarded or irrelevant ones taken into account.

iii) The unreasonable use of power is prohibited.

iv) Principles of Natural Justice - whenever government officers act judicially they are expected to observe the principles of natural justice. These principles are chiefly, that a man may not be judge in his own cause and that of audi alteram partem.
v) The prerogative writs - these give the individual remedies for certain injustices he may feel that he has suffered. Certiorari is the most important of these and is an order to an inferior court to remove the record of the proceedings to a higher court for review. This may be done on the grounds of a want or excess of jurisdiction, a denial of natural justice or an error on the face of the record. A writ of prohibition may be given to prevent a court from exceeding its jurisdiction or infringing the rules of natural justice. Finally, mandamus may be issued to compel any person or body of persons to carry out some public duty.


viii) The Parliamentary Commissioner Act has been instituted which sets up an ombudsman who will investigate complaints relating to the failure of government agencies to perform their administrative functions.

B. Maximisation (fulfilment) of human resources.

(i) The right to education.

The law aims to ensure that every person obtains at least a minimum of education and therefore provides for compulsory schooling. 27 Special


27. The Education Act, 1944, 78 Geo. 6. C.31
provision is made for the chronically sick and for disabled persons, including the deaf and blind and autistic children.

(ii) **To facilitate trade, professional and vocational training.**

This is usually done by certain government agencies such as the Employment Services Agency and others.

(iii) **The right to work.**

Today, there is a vast body of legislation covering the field of employment and relating to work conditions, hours, rates of pay and dealing with the membership of trade unions. 28

(iv) **Family relations.**

This is an area that is very much subject to the prevailing social and moral climate and the goals that it seeks to achieve are affected accordingly. Generally, the following categorisations can be made; a) marriage; b) property and capacity; c) matrimonial causes; d) maintenance; e) children.

a) With regard to marriage, the law establishes certain formal requirements for a valid marriage. For example, age limits apply and there are conditions prohibiting marriage between person of a certain relationship. Also, certain tax advantages are offered to married persons. In many respects, however, the law is giving greater recognition and status to common law marriages.

The Employment Protection Act, 1974, C.71.
b) The current trend is towards greater property rights for the wife who does not have a beneficial interest in property. The idea is now developing that, so called "family assets" are to be distinguished from the ordinary law relating to property.

Also, actions for breach of promise have been abolished and provision has been made regarding gifts between engaged persons.\(^29\)

c) Under the Matrimonial Causes Act 1973\(^30\) the criterion for divorce is now that there should be some evidence of the irretrievable breakdown of the marriage.

d) The current emphasis is that maintenance provisions should apply equally to both husband and wife.

e) There is an increasing emphasis on giving consideration to the welfare of the child and on taking into account the feelings of the child.\(^31\) The rights of parents over children are to be equal.\(^32\) Children are always to be subject to special protection by the law and, for instance, their employment is limited and contracts made by children are void or voidable.

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(v) **Moral objectives.**

The goals that fall under this heading are the ones whose ordering is likely to be the most uncertain and fluid. We have seen great debate as to the extent to which law should be used to enforce morality, ranging from Mills' view that there can be no justification for this at all\(^{33}\) to Lord Devlin's idea that a certain moral awareness is necessary to give cohesion to society.\(^{34}\) Clearly, then, it will be very difficult to discern the precise role of laws with moral objectives. Some examples of laws of this nature are those dealing with pornography, prostitution and gambling. In the latter case gaming contracts are void and no action can be maintained on such. An instance of societal values changing and having an impact within the goals of the law is the repeal of the laws against homosexuality. In the Wolfenden Report, in which the questions of homosexuality and prostitution were considered, the Committee made some interesting statements about the purpose of the law as they saw it that are worth reproducing. On the function of the criminal law in this area they say:

"In this field, its function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.

It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined." \(^{35}\)

\(^{33}\) J. S. Mill, *On Liberty* (Everyman's University Library, 1972)


\(^{35}\) Para., 13.
The Committee recommended that homosexual behaviour between consenting adults in private should not be an offence and based this view upon:

"... the importance which society and the law ought to give to individual freedom of choice and action in matters of private morality. Unless a deliberate attempt is to be made by society, acting through the agency of law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business. To say this is not to condone or encourage private immorality." 36

These passages very clearly bring out a situation where the goal orderings may be said to have adjusted within the matrix.

(vi) The treatment of offenders.

Clearly, there will be some effect on those who are imprisoned by the very nature of the constraints placed upon their liberty. The law seeks to minimise the negative effects of imprisonment by controlling prison conditions. Recently, new powers have been conferred upon the courts for dealing with offenders. 37 There is a new emphasis on reparation of the offender and on non-custodial and semi-custodial penalties. Special provision is made for young offenders in the form of borstals and remand centres.

(vii) The relief of poverty.

This is done largely by a series of social security measures that provide for various benefits and subsidies that aim to ensure a minimum standard of living and to alleviate poverty.


Primary Goal - WELL-BEING

A. Physical.

(i) Safety and the preservation of life.

This must clearly be a highly important goal for any legal system and is served in a number of ways.

a) By the criminal law which deals with assaults, batteries, murder, manslaughter, rape and grievous bodily harm.

b) By the law of torts which covers batteries and injuries caused by accidents. Basically, it aims to give the victim some compensation for harm suffered or to prevent the repetition or continuance of such harm. 38

c) The Road Traffic Act 1972 39 deals with traffic offences and requirements for drivers. This legislation aims to make the practice of driving as safe as possible by an insistence upon compulsory third party insurance, safety requirements for vehicles and other measures. At the moment, in England, there is no compulsion to wear seat-belts by law although people are strongly encouraged to do so. 40

38. The victims of the drug thalidomide used the doctrine of negligence to attempt to obtain redress for their resultant disabilities.


40. Note: the case of Froom v. Butcher (1975) 3 W.L.R. 520, on the seat-belt issue. This case will be discussed in more detail in Chapter III. See Discussion P.145 INFRA.
d) People who keep dangerous animals must be liable for them. Animals that are kept for protection must be controlled and must not constitute an undue hazard to people.  

e) Dangerous drugs are controlled and penalties are imposed for their improper use. Restrictions are also imposed on the sale and consumption of alcohol. 

f) In England, abortions are permitted if the existing pregnancy involves a risk to the life of the woman or of injury to the physical or mental health of the woman or of any existing children, or if there is a substantiation risk that, if the child were born, it would be seriously abnormal or handicapped. This is one of the most hotly debated issues in society today with no clear consensus on the question. Consequently, it is an area where the aim of the law is not too clear currently. Analogously, the issue of euthanasia is subject to the same kind of indeterminacy. With modern medical techniques enabling doctors to keep patients "alive" despite grave injuries, pressing issues can now arise over whether a person should be so treated, especially if their prognosis for recovery is hopeless.

In the recent case of Karen Quinlan that arose in the United States, this very question arose. The father of Karen Quinlan applied to have the life-support system that was keeping his daughter alive

disconnected. It was accepted that the girl was technically alive both by legal and medical definition, but she was in an irreversible coma.

The right of privacy in the sense of the "right" to die without interference by state agencies, (physical privacy) was a primary concern in this case and the court felt that, could the girl appreciate her own situation, she would choose to die naturally rather than continue to vegetate for a few months more. The issue is summarized, as follows, by Hughes J. and very clearly brings out the nature of the dilemma faced by the court in this situation.

"The claimed interests of the State in this case are essentially the preservation and sanctity of human life and defence to the right of the physician to administer medical treatment according to his best judgement. In this case the doctors say that removing Karen from the respirator will conflict with their professional judgement. The plaintiff answers that Karen's present treatment serves only a maintenance function; that the respirator cannot cure or improve her condition but at best can only prolong her inevitable slow deterioration and death; and that the interests of the patient, as seen by her surrogate, the guardian, must be evaluated by the court as predominant, even in the face of an option contra by the present attending physicians. Plaintiff's distinction is significant. The nature of Karen's care and the realistic chances of her recovery are quite unlike those of the patients discussed in many of the cases where treatments were ordered. In many of those cases the medical procedure required (usually a transfusion) constituted a minimal bodily invasion and the chances of recovery and return to functioning life were very good. We think that the State's interest contra weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest."

44. IT. Vol II at 305.
They thus concluded that, were Karen able to choose to die, the law should support her choice. In connection with this exercise of right, the court decided there would be no criminal liability for such acceleration of death. Termination of treatment pursuant to a right of privacy is lawful and does not carry liability.

Plainly, the complexity of the issues inherent in questions of this sort are going to make the orderings here very unstable.

g) There is a mass of legislation dealing with safety requirements in all fields of life. A number of statutes deal with safety conditions and standards at factories, offices and shops and on construction and engineering sites. Minimum standards of safety are imposed on manufactured goods. In recent years there has been an introduction of legislation that aims at compelling those involved in the construction of buildings to do their work properly. There has also been an extension in the doctrine of occupier's liability after a recent House of Lords decision.

(ii) The provision of health and welfare services.

This is a clear goal of the law in relation to the general well-being of the community. In England, the health services are state run and provide the whole range of medical services. In addition, various benefits and welfare schemes are available.

45. The Defective Premises Act, 1972. c.35.
(iii) **Public health legislation.**

(Public "health" is used in a broader sense here).

Legislation in this area aims to control pollution, disease, and ensure what may be described as a certain standard of general community health.

a) There are numerous Acts that deal with certain statutory "nuisances", for example, arising from insanitary dwellings, the keeping of animals and unhygienic trade premises.

b) Clean air regulations, noise controls, provision for parks and recreation areas and for basic amenities such as drains, street lighting and such, are contained in a wide range of legislation.

c) Food and drugs are subject to regulations with regard to quality, labelling, marketing and advertising.

B. Mental.

(i) **Immunity of the will form coercion.**

a) It is a clear aim of the law that people should be allowed the free exercise of will in doing or not doing various acts. Thus, in any situation where it appears that a person's free volition has been interfered with, the law tends to regard intent as having been negatived. This is most clearly seen in various defences afforded by the law such as duress and undue influence.

b) Controls are imposed on the kind of interrogation techniques that may be used by the authorities for extracting evidence, confessions or other sorts of information from people.
c) Such techniques as subliminal advertising have been prohibited by the law as these represent what may be described as an invasion of an individual's freedom of choice.

(ii) Care of the mentally ill.
Special care and treatment is provided for the mentally ill. The law does not hold such persons to be responsible for their acts. Legislation provides for special facilities and, when necessary, for compulsory guardianship or admission. 47

(iii) Only a very limited protection is given by the law for injured feelings or mental shock. 48

(iv) In general, the law aims to give effect to the wishes of individuals and will do so unless such would involve, for instance, illegality or would achieve, as a side-effect, some other result that the law seeks to condemn. 49

Primary Goal - ALLOCATION OF RESOURCES

A. Shared enjoyment (inclusive)

(i) Conservation.

of rivers, forests and areas of natural beauty, and of mineral resources, oil and gas.

Clearly, all these resources are subject to waste or despoilation and, therefore, long-term conditions for their conservation must be worked out.

47. The Mental Health Act, 1959, C.72.
49. For example, see Riggs v Palmer 115 N.Y. 506, 22 N.E. 188 (1889)
a) Town and country planning controls protect areas for the recreational benefit of the community. Animals and birds of rare species are given added protection.

b) Detailed controls are placed on the exploitation of oil and gas reserves.

(ii) **Achievement of a distribution of wealth in society.**
This is usually done by the imposition of taxes on individuals and corporations. In England, the major modes of taxation are as follows; of income, capital gains, capital transfers and of corporations. However, the law does recognise certain methods of tax avoidance although it seems there may be a trend towards clamping down on such schemes.

(iii) **State ownership** of certain key industries is a policy that aims at ensuring that a nation has an interest in those industries. It is also a means whereby jobs may be provided by the state for large numbers of people.

(iv) **The regulation and use of the sea and outer-space.**
Generally, agreements have to be made in relation to the use of the seas and air-space, both from the aspect of conservation and of safety.

(v) **Protection of livestock, agriculture and the fisheries.**
Resources of this kind are obviously vital to basic survival and so must be carefully controlled.
a) Agriculture is supported by various subsidies and controls are imposed on farming of all sorts.
b) Livestock is similarly controlled.
c) Special protection is given to animals such as the whale and seals to prevent their indiscriminate slaughter.

(vi) There is a current policy towards an increase in the power of the state to purchase land and control the use of land. Action has been taken to prevent land speculators making excessive profits out of development projects.

(vii) There is a general community interest in progress and research, both in the arts and science. Another aspect of this goal is seen in the policy of allowing favourable tax concessions to charities who seek to relieve some deprived or under-privileged section of society or who undertake research as described above.

B. Restricted enjoyment (exclusive).

(i) The use and control of private wealth and resources.

The law acknowledges an individual's right to control over his private property and his right not to be deprived of that property. The concept of ownership is a feature of our system that highlights the sheer complexity and sophistication of that system. In primitive systems of law an individual's "rights" over his property

were only as strong as his ability to maintain possession (in the physical sense) over that property. But, today, "ownership" connotes a whole mass or "bundle" of rights over property and a person need never have seen that property, let alone be in possession of it. Thus, the protection given by the law to ownership is equally developed. By the law of theft\(^5\)\(^1\) sanction is imposed on those who deprive others of their property. In tort, a remedy is given to the person so deprived.

(ii) The freedom to make and enforce agreements.

a) Fundamentally, this goal is served by the law of contract. In the words of Myres McDougal:-

"The generalized task of the "law of contracts" is to establish both a framework within which individuals by their own initiative and agreement can shape and share values and certain limits beyond which volition cannot transgress upon community policies." \(^5\)\(^2\)

The limits fixed by the law are, for example, that contracts that are immoral, discriminatory, or that seek to impinge on the free use of community resources will not be enforced. Also the law will not enforce a contract if to do so would have a negative effect in terms of a more important goal. Contracts for personal services, for instance, will not be subject to specific performance as this would involve an incursion on individual free will. However, damages may be awarded. Also, the law recognises that instances will occur where it is not feasible or possible to fulfil a contractual obligation as a link in the causal chain has broken down. The doctrine of frustration is an instance of this kind, or

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an agreement that subsequently becomes illegal.

b) Sales are a particular kind of contract and although, generally, the policy is to allow an optimum of freedom in this area and the maxim _caveat emptor_ applies, nevertheless, the law does exercise a high degree of supervision over such contracts. Buyers are now given a significant degree of protection from over-burdensome contracts and several pieces of legislation direct courts to take into account such matters as concern the whole nature of the bargain arrived at. In addition, recognition is given to the fact that the details may differ as to various sorts of contracts, such as for insurance, banking and labour.

(iii) To facilitate trade and commerce.

This is clearly linked to (ii) above, but in the broader perspective of the whole spectrum of trade in society. In this category we may include the structure of corporations, taxation and customs and excise and the general conduct of trade. Other important matters that may be mentioned include bankruptcy, insolvency, copyrights and patents.


54. See, The Supply of Goods (Implied Terms) Act, 1973, C.13, s. 55(v). This directs the court to look at such matters as the relative bargaining strength of the parties, the presence or absence of competition. Also, The Consumer Credit Act, 1974, C.39, s.138 - a credit bargain is liable to be re-opened under s.139 if it is extortionate if it requires the debtor to make payments that are grossly exhorbitant or if the agreement otherwise contravenes ordinary principles of fair dealing. The court can look at a number of factors including the interest rates, experience and business capacity of the parties, and the extent to which the borrower was under financial pressure at the time of the bargain.

(iv) **Restrictions upon the use of property.**

Under this heading we must note some of the limitations placed upon the free dealing with private property by the law.

a) In relation to real property stringent requirements are laid down for the regulation of leases and relationships between landlord and tenant.

Legislation sets out the procedures for dealing with land and the relevant requirements.56

b) Various restrictions are placed on the kind of operations that can be carried on on land and a distinction is made between business and residential premises. Any activities must not be dangerous or constitute a nuisance.

3. **COMMENT**

In this section the emphasis has been upon viewing purposes as intrinsic parts of the legal system itself. Once we can appreciate the goals at stake in any issue or case that arises we may have an indicator available as to how we should decide the same in the manner best able to satisfy those goals. The whole edifice of the goal matrix will further give us some idea of which goals are of the greatest importance to our society and to which we should give the greatest priority. The crux of the matter is, therefore, identifying the goals and it is this problem that presents the most serious limitation on using purpose in this way.

For, if we cannot tell just what a given rule or set of rules aim to achieve we cannot tell how to apply that rule in a meaningful way. These questions will be discussed in the final chapter.

But it may be useful to set out a couple of examples of the kind of instances where conflict between rules has recently arisen and where goals can be identified with some certainty.

1. In England there has been a great deal of debate over the problem of groups of individuals squatting on private property even where this property is obviously occupied, although the residents may temporarily be absent. It seems that the law provided a very limited protection for occupiers who found themselves in this novel situation and so we have a clear conflict between private property rights and the rights of the homeless squatters, with regard to whom, it would seem, the state has failed to alleviate hardship.

2. Another issue that arose recently was that concerning the right of members of the Sikh faith not to wear crash-helmets when riding motor-cycles despite provisions in the law to the contrary. The issues here were, (a) - the preservation of life; and (b) - freedom of religion.

Many more examples exist. The important thing to note is that the goals do come from within the law itself. There is thus no logical
necessity for a judge to indulge in any weighing or balancing process of material extraneous to the law. The goal matrix already supplies the relevant criteria.
THE FUNCTION OF PURPOSE

1. INTRODUCTION.

In the first chapter we looked at the various theories where purpose is seen as having a significant role to play. It is proposed in this section to examine exactly how purpose may function in the legal system. This is especially pertinent to the mechanism of the judicial decision, and we shall consider how goals may be of practical use in this field.

However, there are certain important points that should be borne in mind in pursuing this topic of the role played by goals. One of the notable factors that emerged from our earlier discussion was that, according to most theories of law, we are constrained to make a choice in a conflict situation between obtaining the ends of certainty or justice. The question is whether the use of goals can eliminate the necessity for this choice. Essentially, what is being done is to view goals as part of the law, although not as part of the rule, and deriving those goals from the law itself. Yet we may still face the same dilemma in trying to obtain both certainty and justice.

Ideally we should be able to formulate a statement that represents a nexus between goal and the means to achieve it; thus,

"In order to achieve x result, do y."

This is the most desirable method of expressing goals but it does have a drawback. If x is not clear then the whole statement becomes obscure in meaning. Once again we are faced with an area of indeterminacy.
Although it may sometimes be the case that a goal of a rule is vague, in reality, it is not easy to imagine a situation where the purpose of a rule is completely undiscernible. A purpose may have become redundant or anachronistic in a society for a variety of reasons, but this is not the same as a rule having no purpose at all. Rules falling in the former category may, anyway, be dealt with in Exception 4 of the causal theory of Coval and Smith.

In the areas where goals do present a problem of clarity it is preferable that we should accept this difficulty rather than indulge in imputing arguable or "artificial" purposes to a rule. It must be stressed that the goals are to be taken from the law and so we should avoid blurring this fact by introducing extra-legal criteria.

If tackling the problem in the above manner proves unsatisfactory the next best alternative is the introduction of Dworkin's principles, policies and other standards. Yet these, as we shall see, are basically vague and, more significantly, lack the clear identification features that the goal "concept" may furnish. Many of our informal social practices or rules have a certain aspect that has been termed their "invocation feature". Thus, when a certain procedure is followed other consequences may reasonably be anticipated to result. The same is true of legal rules which also, like social rules, may take account of those instances where the usual consequences do not follow for some reason. Indeed, the invoking features and the body of the practice are quite distinct. So the material of the latter is not necessary to the validity of the invoking

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act but is simply something which must follow for that act to have its accustomed result. Having such clear identification features may ensure compatibility of goals in the system and so the maximum achievement of both certainty and justice.

The most important matter in the use of purpose is the degree to which we can state goals of rules clearly and objectively - from within the law.

Even where purpose has been acknowledged to be of importance within the legal system there is considerable argument as to the manner in which it operates. Several attempts have been made to attribute overall purposes to the whole edifice of the law and the legal system. By this is meant that one overriding goal is put forward as forming the rationale behind the system. This may be an aim such as the "human dignity" criterion of Lasswell and McDougal, or in the nature of Hartzler's requirement of justice. However, we have already seen that such "aims" are too abstruse and difficult to define to be of very much constructive use. Gidon Gottleib has suggested another approach and criticises the view of searching for purposes for law as a whole. He shares Dworkin's reservations about the existence of some general goal or function served by the legal system. Both of these writers are sceptical of the perspective taken by Wasserstrom who sees law as having a function in the form of some kind of Utilitarian principle. Indeed, it is very hard to imagine any one goal that a majority of people would choose as an ultimate standard by which to evaluate


judicial decisions. Even if there was consensus on a particular formulation, it is more than likely that the interpretations placed upon that goal would be so diverse as to render any postulated definition almost meaningless.

This is the fundamental reason why no major, overriding goal was selected for the goal matrix discussed in Chapter II.

There are inherent dangers in trying to establish a final goal for, as Dworkin has pointed out, there is an inference that such a goal must be of such value to the general community that it must always overrule any inconsistent goals whatever the circumstances. Plainly, this cannot be so. If it were, the whole legal system could be subject to manipulation or distortion for the sake of some intangible but supreme goal.

In contrast, Gottleib's method is concerned with the purposes of "single rules and enactments". He argues that such purposes do not have to be forward-looking in nature as Dworkin seems to believe.

In trying to focus on the purposive nature of rules and laws and their role in decision-making the term "goal" has been used. Nothing turns on this and the term itself has no special significance, but other writers have evidenced much concern with setting out complex definitions. Dworkin, for example, sees the pivotal point of his whole thesis as resting on

the distinction between principle and policy. We shall consider the importance of his argument later on.

The term "function" has also been fairly frequently applied to various aspects of law. Usually we find it being used in a collective sense in describing the function of the law of torts, or the function of a particular doctrine of law such as that of nemo dat quod non habet, for example. It is essentially a descriptive term and may be used in a number of ways. In one sense function implies the idea of the effectiveness of something in fulfilling the ends for which it was designed. This suggests that there is a difference in application between the terms of function and purpose. In another sense we may look at how something functions by reference to the actual effect on the practice to which it relates. It has been pointed out that this effect need not be the one that was intended and can be negative in nature. In summary it has been said,

"The common denominator of the various meanings of the term "function" is that it always refers to some objective factor which can be empirically observed or logically deduced from given principles." 7

Function, then, seems to refer to the operational realities of the way in which a rule is working, (or not working), and need have little reference


6. Kretzmer, Aims and Functions of the Tort System of Loss Allocation (Osgoode Hall Law School: York University 1974) at 6 - 9, for a discussion of the meaning of the term "Function".

7. Id. at 9.
to the ends or aim that the rule is supposed to be serving. This is the kind of differentiation intimated by Gottleib, although as he concludes, the distinction is of relatively small significance in the context of this discussion.  

2. **PURPOSE AS IT OPERATES IN THE JUDICIAL DECISION**

I. In this section the general aim will be to evaluate the effectiveness of using purpose and goals to ascertain how a judge should reach a decision in a case - particularly in a hard case.

The fundamental problem in this area seems to be how we are to use goals and to what degree it is possible accurately to discern the nature and content of those goals. The positivist view, at one end of the scale, as expounded by Hart sees goals as being extra-legal considerations that come into play in a decision when the area of the penumbra is reached and rules cease to provide guidance for the judge. The judge's discretion is, however, not totally unfettered, but the standards that function to constrain it are vague and essentially indeterminate. Although Dworkin, as we have seen, says that principles operate in decisions as legal criteria and point to a correct decision in each case, these principles do not function in a rule-like manner within the system. Yet they do operate to eliminate discretion. Rolf Sartorius takes a similar area of discretion. The basis of this is that what the judge ought to do in hard cases depends directly upon what he must do in the easy cases.

He says,

"Far from being free at any point to reach an essentially legislative decision among principles external to the law, the judge is in all cases ultimately guided by legal principles which severely limit, if they do not totally eliminate his discretion."  

Sartorius sees law as bodies of rules which have similarities of content or consequences of application that provide certain principles for the guidance of judges over and above the more particular judicial obligations but which have been established in those prior obligations. Since there is a fairly large degree of systematic control in even the hard cases, judicial discretion cannot be regarded as being legislative in nature.

The view adopted in the causal theory attempts to simplify matters by placing principles within the sphere of rules and structure. By doing this it is argued that it will be possible to tell, systematically, when such principles gain recognition in the structure and when they cease to be of importance. It does seem more sensible and practical to view principles as having a basis in the more concrete rules of the system rather than as occupying a somewhat nebulous, ephemeral position outside it. This is important for the generative nature of the system.

3. THE PROBLEM OF IDENTIFYING GOALS

Central to the causal theory is the concept that there is a close correspondence between goals and rules but there are some difficulties involved in trying to ascertain what are these goals in very border-line

cases. We have already seen that a search for an all-encompassing goal for the legal system is largely futile, but the question is whether it is easier or more productive to pin down individual goals or purposes. For example, Graham Hughes does not believe that a rule *per se* can have a purpose. The person who devised the rule may have had some sort of aim in mind but this is to be distinguished from ascribing a purpose to a rule. Hughes stresses his point by reference to a number of rules that were originally intended to fulfil one aim but which currently achieve quite different ends. He comments,

"Examples could be multiplied of cases where particular rules of law or broad legal institutions have suffered a sea of change and serve purposes strikingly opposed to their original functions. It is enough to submit that if we are to find common purposes here, if we are to find in the old history the inarticulate embryo of the later development, this can only be done by describing our purposes in such highly abstract terms that they can have little or no utility as tools for the understanding of the development of law." 10

Joseph Raz has made a similar point. He remarks that it is frequently impossible to ascertain the purpose originally envisaged by the legislator. Consequently, he suggest that it is not the intention of the legislator that is the determining factor, but how the law is viewed by the population and various branches of the legislative and judicial arms of government. 11

There seem to be four main instances where problems may arise in identifying and rationalising the operation of goals:

1. Where the purpose of a rule has become transmuted and is eventually applied to situations markedly different to those contemplated by the original legislator.


2. Where the rule currently serves a purpose that is redundant or useless to society.

3. Where the application of the rule achieves ends that are contrary to other evident goals of rules.

4. Where there are, as Gottleib puts it, "a proliferation of purposes".13

With regard to the first category, there seems to be an implication that each rule should have one, fixed purpose for all times. This assumption is questionable as being unrealistic; there is no real need for this to be so. When a rule is applied to a variety of different situations it may well undergo a purposive change and serve other goals of the system. This may be a positive advantage in a rapidly changing society and can reflect developments that occur in society in the law.

It must be remembered that the purpose of laws are being regarded both individually and in relation to their role in the whole structure of the system of rules. If, therefore, changes have taken place in certain areas of that system they must pervade the system in its entirety. Thus, the goal of one particular rule may have to undergo change or adaptation in order to maintain a degree of consistency and compatibility with the rest of the system.


13. It should be remembered that these issues arise at the fringe areas, where it is hard to see clearly what goal is being served by a rule.
There does not appear to be any real reason why social and economic considerations should not actually influence goals within the law - as long as they are admitted into the legal system in a rule-like manner. This must be so for the rules to function in the way envisaged in the framework of the causal theory.

The next two categories are of a related nature and can be taken together. Ideally, when a rule ceases to serve a relevant purpose in society it should be repealed, but often the legislature does not get around to doing this. In the case where such a rule does persist on the statute books this need not necessarily damage the credibility of the goal matrix as it could be regarded as a rule that has lost its relevance to the rest of the matrix. For instance, an old rule existed in London that all taxi-drivers had to carry a bale of hay in their cabs for the horse, harking back to a less mechanised age. Plainly, this rule no longer has any purpose in society as the very conditions to which it pertained no longer exist. In the causal theory this situation may be covered by Exception 4. Similarly, Exception 3 covers our third category above. If the cause-effect relationship between a rule and its goal break down in these ways the resulting decision represents a modification of the former position. It need not mean that the validity of the matrix is damaged by such changes. Law must be flexible and sensitive to social needs, yet predictable if it is to be a cohesive force in society.

The writer Alvin Toffler has expressed great doubts about the ability of the law to do this for much longer. He feels that laws cannot be written,

enacted and repealed rapidly enough to keep up with the changing patterns of society. A purpose-oriented system could counter this fear by preserving consistency, predictability and security of the system in the (a) - type goals while simultaneously giving flexibility and adaptability in attaining the (b) - type goals.

One of the problems see by Hart in the field of purpose is the "relative indeterminacy of aim" of many of our rules. Gottleib accepts that this is often the case but points out that it is not necessary for a statute to be directed towards all future instances where it may be applicable. This would never be feasible. However, he feels that some purposes are going to be so vague that they will be relatively useless in resolving disputes; in his words,

"..... the determination of the purpose or policy of an enactment often involves the consideration of complex compromises and indeterminate goals which leave the legislator's policy unresolved. Because of their vagueness, these purposes and policies cannot function as effective guides for the application of a rule to particulars. The discretion of a court or other persons applying the enactment is then necessarily augmented." 16

This passage brings out the basic difference between Gottleib's view and that demonstrated in the causal theory. However, it may only be a difference of degree. There are clearly going to be many instances where discretion must be exercised. No rule-governed structure will guide a court in deciding where, for example, a child in custody proceedings will

best be placed. Determining what is best for a child's welfare is discretionary, but deciding, in the first place, that that welfare is more important than a parent's wishes is not. The law specifies that the welfare of the child is to be the paramount consideration.

It is possible to find many areas of law where legislation may serve a proliferation of purposes and in those cases the role of goals becomes more questionable. For example, tax legislation especially falls into this class. The goals served by a particular enactment can vary quite considerably and may be influenced to a very great extent by the political allegiance of the government that passes it. Additionally, the fact that many taxes can legitimately be avoided complicates the issue even more by introducing another perspective on the relevant legislation. Changes that occur in the goal orderings in this case may not inevitably be ones from within the law alone, but may be imposed from outside it by a number of influences such as pressure from political interests, business and other factors.

When such a multiplicity of goals presents itself it seems that a choice is necessitated. It may be that the process by which that choice is made is a subjective one in which case we are back in the area of discretion. But, as we have observed before, rules do not generally operate in total isolation from one another, and so there is a foundation for the argument that other rules (and their goals) provide guidance as to how that choice ought to be made. (the (a) - type goals may dictate the proper decision.
In attempting to draw up the classification of goals set out in Chapter II, it was found to be easier to approach the problem from the aspect of discovering the major aims served by the law and then placing the rules under those headings. This contrasts with the other method of classifying the functions of a general area of law, such as contract or tort, the individual rules of which can serve goals of a highly diverse nature. In any event, it should be remembered that a classification of any sort must involve overlap between categories. Also, care must be taken not to over-simplify the task of identifying goals. It is obviously a very complicated one.

As an example of the latter approach described above we may look at a discussion of the aims of the law of tort. Any brief, general definitions are virtually meaningless and are of little value. However, Glanville Williams has formulated a more comprehensive summary of the aims of tort. In brief, he states that there are six purposes for which tort actions are usually brought,

1. To give the plaintiff what the defendant has promised him, or at least to give him damages for not getting what the defendant has promised.

2. To compensate for harm, or to prevent the continuance or repetition of harm.

3. To restore to a person what another has unjustly obtained at his expense.

4. To punish for wrongs and to deter from wrong-doing.

5. To decide the rights of the parties.

6. To decide or alter a person's status.

In all of these situations Glanville Williams points out that there is an intersection with other parts of the law such as contract, the criminal law and aspects of family law. The actual goals involved in specific cases, say, for example, where a patient is injured after a surgeon leaves a swab inside him,\(^\text{18}\) and where a person takes an action in defamation are found throughout the whole spectrum of the matrix and not solely in one area of law. Thus, we see that the law of tort serves a far-ranging collection of purposes in society and this, as Glanville Williams notes,\(^\text{19}\) adds greatly to its complexity. He sees the most important function of tort as being that of compensation, an aim that cannot be detached from its social and economic consequences in society. He also remarks that the law of tort has been utilised to put pressure on the authorities to remedy a wrong suffered by a section of society. He cites the example of the thalidomide victims whose case highlighted the difficulties of obtaining redress for ante-natal injuries. Also, workers who suffered from the disease of asbestosis as a result of handling asbestos at the factory of one manufacturer, sought relief in tort.\(^\text{20}\)

A further aspect of tort in relation to accident compensation that must be noted is that of the contemporary use of insurance as a means of minimising the financial consequences of liability for risks. In the case of a road

\(^{18}\) ID. at 24

\(^{19}\) ID. at 26

\(^{20}\) ID. at 171.
accident it is rarely that the guilty party ever pays personally the compensation to the victim of his negligence. So, the sanction or deterrent aspect here is considerably diluted. The sanction, if any, is imposed by the criminal law in the form of fines, licence endorsements or loss of driving licence. In effect, insurance tends to lift the burden of liability, financially at least, from the negligent party.

The aim is to compensate victims for injuries suffered - even where no fault can be shown.  

Merely by looking at this aspect of law therefore, it is apparent that there are many difficulties in allocating firm goals to rules that may embody a whole myriad of policy considerations. But it must be borne in mind that it is not necessary to decide goals in advance of particular cases. What must be done, preferably, is to look at the application of the rule to the relevant fact situation in terms of its real consequences and determine whether the rule is applicable in relation to those effects.

We would not wish to invoke a rule prohibiting assault against a person who had felt compelled to knock someone out in order to prevent them from trying to commit suicide, or who did so to push someone out of the path of an oncoming vehicle. Despite the fact that the definition of an "assault" applied, and the "victim" suffered the injury contemplated in the statute, the purpose of the statute is not relevant to the facts described.

20. In England the Motor Insurers Bureau exists to compensate the victims of accidents where the negligent party was uninsured or where the victim was injured by a "hit-and-run" driver.
The fundamental issue amounts to whether it is, realistically speaking, possible to structure the way goals work in the legal system in such a way that a solution is provided or indicated for even the hard cases. The alternatives to the concept found in the causal theory are represented in the views we have examined in this thesis and may be summarized in the following way:

1. The positivist view that the hard cases are a matter for judicial discretion broadly constrained by certain standards.

2. Principles and policies exist that are of binding force on the judge, that are not extra-legal, and that dictate unique solutions in every case.

3. Purposes and goals provide inference-guidance for many cases, except where the goals are especially unclear.

4. **HOW PURPOSE MAY BE USED IN PRACTICE**

Having noted the problems involved in ascertaining goals our next task is to determine how we can try to use goals in a practical manner.

A. **GOTTLEIB**

Gottleib envisages two ways in which purpose can provide guidance in the application of rules.\(^{21}\) Firstly, when the relevant case is a penumbral one, and secondly where it falls within the core of a particular rule. For an instance of the relevance of purpose in a case falling in the context

\(^{21}\) Gottleib at 108.
of the latter situation Gottleib adopts Fuller's example of the Second World War truck set up as a monument in the park. The question posed there was whether this truck, though clearly a vehicle within the meaning of the "No vehicles" rule, could be allowed to remain and thus not be subject to the application of the rule. Gottleib argues that as the rule was not intended to deal with the erection of monuments, it would be inappropriate to apply it in these circumstances. To do so would be to apply a rule that "accidentally" refers to vehicles but which has no genuine connexion with the actual situation. He says:

"Purpose can thus be used to preclude the application of a rule in situations which seem to fall squarely within its language when such application would lead to results entirely alien to its purpose." 22

Gottleib and Fuller therefore agree that a consideration of purpose is relevant even where the application of a rule, *strictu sensu*, is not in doubt.

In the case of a rule such as the "No vehicles" one, the purposes involved are fairly modest. But more fundamental rules have correspondingly more important goals as their basis. This fact is reflected in the structure of the matrix from the instrumental to the primary goals. Accordingly, Gottleib comments:

"... even such fundamental purposes are then attributable to the rules themselves rather than to the legal system as a whole, just as the purposes of peace and quiet in the park are attributable to the "no vehicles" rule. These are not the purposes of morality but of rules of law. Judges need not refer to moral standards to ascertain the purposes of legal rules and principles however broad and general such legal rules and principles may be. Fundamental rules of law are not experiments in aimless direction. They presuppose congeries of purposes and policies which they are designed to promote." 23.

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22. *ID.* at 109

Gottleib's conception of the role of purpose illustrates one of the notable advantages of viewing law in this manner. By making use of goals it is possible to determine the extent of the ambit of a rule rather more effectively than by embarking on an analysis of the meaning of the words of a statute. If nothing else, our common-sense should tell us that the "no vehicles" rule cannot, realistically, apply to the truck-monument. An analysis of the rule itself does not help us, but by looking at the goal of the rule we may obtain a fairly accurate impression of how we should or should not apply it. However, Gottleib is concerned to bring to our attention a distinction between a purpose of a rule, in the sense of intent evinced by the legislature, and how such purpose guides the application of the rule to particular cases. In effect, he is arguing that in cases where the purpose of a statute is not very clear in relation to a given case, the judge is in a position where he must look to other material or related statutes or any available indicia of policy. He is not required to try and formulate an assessment of how the legislature intended that statute to be applied in the relevant circumstances of the case. The standard that the judge should be applying is not the "forward-looking, state of affairs to be advanced kind", that drew the criticism of Dworkin. The role of purpose, then, is seen as providing guidance to a judge on the application of a rule, (and extent of the applicability of that rule) to the particular, and not as an indicator that a case should be decided in one way to further some future-oriented, and probable less determinate desired end.

Despite this emphasis on the importance of purpose in rules, Gottleib finds considerable difficulty in determining just how purpose and goals may be used for guiding the application of those rules. He feels that it is frequently impossible to obtain a clear impression of the policy behind a rule and, as a consequence of this vagueness, purpose is of limited practical use in situations where this is the case. What we have then, is a theory which holds the role of purpose to be of a fairly specific nature but which effectively leaves us with an area of judicial discretion. Therefore, in hard cases, goals constitute a kind of supplemental that provides the judge with an additional input that will restrict his discretion. Just what these limits are and how they operate on the judge thus becomes unclear. Gottleib states his position in this way:

"The rule limits discretion by directing what must be done in determined circumstances, and the purpose by guiding the application of the rule to the particular in a manner calculated to achieve the rule's end-in-view. Accordingly, generality of rule or vagueness of purpose merely enlarge the discretion of those relying on them for guidance." 25

The problem with this formulation is that although it is stressed that purpose, as a guidance-device limits judicial freedom, and that the judge must decide with reference to such criteria, how he does so is left unspecified. It may be that this is, in fact, as far as we can go in utilising purpose as a mechanism in decision and we shall look at this possibility at a later stage.

B. DWORKIN RE-EXAMINED

We have already seen that Dworkin does not accept that there is any leeway for the exercise of judicial discretion at all. He sees the judge's role as follows:

"He is subject to the overriding principle that good reasons for judicial decision must be public standards rather than private prejudice. And he is subject to principles stipulating how such standards shall be established and what judicial use shall be made of them." 26

We also noted that Dworkin differentiated between principles and policies. In a recent article27 he has expanded on this distinction and has evolved what he calls a "rights thesis" as a basis for judicial decision-making. To Dworkin, law is a system of entitlements in which the judge is never free to engage in creative judicial legislating. He sees the positivists as using discretion in a "strong" sense which means, as we have seen, that a person is never entitled to a correct decision as of right as there are no specific limitations that restrict a judge's discretion.

Dworkin defines policy and principle in the following way:

"Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community.... Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right" 28

Principle and policy are thus the major grounds of political justification and Dworkin's thesis is that the judicial decision in civil cases, and even in the hard cases, should be generated by principle and not policy. He sees a decision made according to policy as a compromise among individual

27. R. Dworkin, Hard Cases
goals and purposes to further the welfare of the community as a whole. But because judges are usually appointed rather than elected, they should not be given this kind of power. Also, judges should not have the power to create new law and impose new legal duties retroactively upon people. A decision made on the basis of principle is supposed to avoid both these problems. An argument of principle, it is contended, does not often rest on assumptions about the nature and intensity of the different demands and concerns distributed throughout the community. If the plaintiff has a right against the defendant, then the defendant must have a corresponding duty, and it is that duty and not some new duty created by the court, that justifies the decision against him. The duty may be inferred even though it is not embodied in prior legislation and so what the court should be doing is enforcing these existing political rights. Institutional history is, therefore, not a constraint upon judgement, but is an ingredient of that judgement. Dworkin describes political rights as creatures of history and morality and so, he argues, the tension between judicial creativity and institutional history is dissipated.

Dworkin contends that decisions cannot be made in isolation without reconciling them with the general theory of principles and policies exhibited in other decisions. In this respect the doctrine of principle insists on consistency from one decision to another, whereas policy allows inconsistency as the various decisions need not be seen as serving the same policy. Great stress is laid upon the distinction between arguments of principle that establish individual rights and arguments of policy that establish a collective goal. This would seem to deny that social goals can encompass protection for individual rights and from the fact of the matrix developed in Chapter II, we do not think that the distinction is or can be made so
clearly. The goals of the law themselves evidence an acknowledgement of individual interests and broader social goals of a more future-oriented nature.

Dworkin further develops the idea of a political aim and sees a political right as an individuated political aim. By this he means that a right must be examined with reference to a particular individual. With regard to a goal, on the other hand, which is a non-individuated political aim, we are required to look at a much wider range of relevant factors. The basic goals that are referred to seem to be essentially Utilitarian in identity and allow for "trade-offs" in order to obtain maximum benefit for the general community; however, rights although they may yield to another principle, can only rarely be subjugated to a goal. The crux of the identification of a right or a goal appears to be the weight that it has in the fundamental political theory. The question that immediately springs to mind then is of how the judge is to assess and classify as rights or goals the mass of "political aims". In a system of the type that exists in the U.S.S.R., for example, it is suggested that this would be quite impossible.

An additional classification of what are called abstract and concrete rights and principles is introduced but this fails to crystallize into a clear, definitive method of identifying rights and goals. An abstract right is defined as a general political aim which is vague as to how it is to be weighed against conflicting aims. A concrete right is a more clearly defined political aim with more precise notions of its relative weight inherent in it. In a hard case the judge's decision must show good reasons for denying or confirming a right. What, in effect, he

29. R. Dworkin, *Hard Cases* at 1068

30. *Id.* at 1068.
must do is to square his decision with the whole enterprise of law and not merely the rules alone. Dworkin visualises each judge as formulating a conception of the law that will be germinal to his whole reasoning process. The judge must treat rights in a consistent manner and must not apply them piecemeal or erratically.

A collective goal may be served in different ways on different occasions, but not so with a right. Yet again Dworkin's distinction seems to be somewhat vague on a practical level. It is difficult to imagine a judge going through a process of setting out what he considers to be the pertinent principles and policies in the manner visualised by Dworkin. Surely, this amounts to little more than a subjective weighing and balancing of competing interests? In addition, it has been noted that it is the judge, ultimately, who decides the "urgency" of a competing goal, and since there is no scale by which he can assess this the decision appears to be fairly subjective. Moreover, another valuable point has also been made. A political aim can be stated in an individuated or non-individuated form. The example of freedom of speech is given but many other goals could equally well be used. We have already seen that Stone made an analogous criticism of Pound's public and individual interests as being mutually subsumable under the same heading, and Dworkin's distinction apparently suffers from the same defect. It will thus be of little value in identifying rights and goals. "Weight" still appears to be the crucial factor.

32. Id. at 1176.
The judge who is going to utilise the rights thesis has to develop a concept of the underlying principles of the relevant precedents of the common law by assigning to each of these precedents some scheme of principle that justifies the decision in favour of that precedent. Much therefore depends on the individual judge's comprehension of those underlying principles. If the gravitational force of a precedent rests on a fairness basis, the judge must discover principles not only for a particular precedent but consistent with all other judicial decisions at that legal -

"His theory is rather a theory about what the statute or the precedent itself requires, and though he will, of course, reflect his own intellectual and philosophical convictions in making that judgement, that is a very different matter from supposing that those convictions have some independent force in his argument just because they are his." 33

Yet however true this may be it is, nevertheless, no easy task to determine where a judge's general political theory reflects what actually exists in society and where it is overly subjective.

Dworkin's theory of mistakes is also somewhat indeterminate. He feels that where a judge can demonstrate, by arguments of political morality, that a principle is unjust, then the argument from fairness that supports the principle is overridden. But if this is so, in a regime that had a general political theory supporting apartheid or suppression of any minority group, a judge could find plenty of justification in precedent and general theory for such principles. If the body of law upheld such oppressive principles it could not be argued that one particular principle was "unjust" because it was inconsistent - for it would not be.

33. R. Dworkin, Hard Cases at 1096.
The main question that arises in relation to Dworkin's thesis is whether it avoids the pitfall he sees in positivism: that of the judge weighing various political aims in a manner external to the law rather than receiving direction from within it. Dworkin attempts to counter this criticism by distinguishing two ways in which an official might rely on his own opinion. In one sense a judge may rely on the mere fact he holds a particular view as, in itself, justification for the decision. This is not a proper exercise of his judgement. But if he relies on his own belief in the sense of relying on the truth or soundness of that belief, then he is not, apparently, guilty of subjectivism. Dworkin argues that a judge must at some stage rely on the substance of his own judgement in order to make any judgement at all. But the judge must defer to the judgement of others even if he believes such to be misguided. Thus, there is no room for a choice between a judge's own political convictions and those he takes to be the convictions of the community at large,

"... his theory identifies a particular conception of community morality as decisive of legal issues; that conception holds that community morality is the political morality presupposed by the laws and institutions of the community. He must, of course, rely on his own judgement as to what the principles of that morality are, but this form of reliance is the second form we distinguished, which at some level is inevitable." 34

But it is equally feasible that a judge's interpretation of the convictions of the community are coloured by his own conception of them.

Dworkin's other point in relation to the creation of duties ex post facto is well taken though. His contention is basically that the right pre-exists the particular case and, once recognised, forms an addition to

34 ID. at 1105.
the body of law as a precedent for the next case in that area. Thus, the guidance for that decision comes from within the law and is not a formulation of the judge that may bear no relation to the general theory of law. It must be justified in some manner that is not based on extra-legal considerations.

To Dworkin, the rights of the individual are of paramount importance and can never be set aside for the rights of the majority. However, the personal rights of the majority may well count as a justification. He gives a test for this:

"Someone has a competing right to protection, which must be weighed against an individual right to act, if that person would be entitled to demand that protection from his government on his own title, as an individual, without regard to whether a majority of his fellow citizens joined in the demand." 35

Dworkin is opposed to a model that involves balancing individual rights against the general community interest, 36 but, in reality, his own test may amount to this kind of process. He believes that the "right" of the majority is not one that should ever be deferred to if individual rights are at stake, except where the protection of that individual right could only be assured at an unwarranted social cost. 37 Dworkin envisages three situations where such cost does outweigh the value of protecting a right. The Government might demonstrate that the values protected by the right feature only peripherally in a border-line case. Or, it might show that if extended protection were to be given to a right in such a case, another equally important, competing right might be undermined.


36. Id. at 218.

37. Id. at 218.
Finally, it could show that the added recognition given to the right would entail a cost to society of such magnitude that the totality of benefit to society by that recognition would not merit the necessary sacrifice. All these criteria entail a reference to purpose and may be compared to the four exceptions of the causal theory. The difference is that in Dworkin's thesis it is less clear just how the "exceptions" will operate and we are left with an impression that it is largely a weighing and balancing process of adjudication.

5. **A SUMMARY OF THE USE OF GOALS.**

Having adopted the view that purpose and goals are a vital element of rules and their applications, it is now necessary to make a synopsis of the various ways in which goals may be used in judicial decision-making.

Three major uses are apparent:

I. Goals may help to determine the extent of a rule.

II. Purpose and goals may operate as "unglamorous aids to decision" that are a facet of the rules themselves.

III. Goals may be used as a test of relevancy in applying precedents.

I. In the first chapter Hart's theory of judicial discretion was briefly discussed. At this point it is appropriate to return to that theory for a more detailed discussion. We saw that Hart describes law as having an

38. *ID.* at 222.
open texture, that is, an area where the precise rules of the system prove indeterminate and where we are confronted with a choice between open alternatives. Hart says that we have to make such a choice because we are unable to take account of all possible eventualities in advance. We are inhibited by our "relative ignorance of fact" and our "relative indeterminacy of aim". By this Hart means that, in legislating, for example, that vehicles are prohibited from the park, we must have in mind a fairly narrow range of application. Beyond that it is impossible to tell in a rule-like manner how that rule should be applied. In other words, a rule cannot fill a multiplicity of purposes. According to Hart:

"When the unenvisaged case does arise, we confront the issues at stake and can then settle the question by choosing between the competing interests in the way which best satisfies us. In doing so we shall have rendered more determinate our initial aim, and shall incidentally have settled a question as to the meaning for the purposes of this rule, of a general word."

Thus, purpose is useful as an aid to a judge in deciding cases that fall in the penumbral area of rules. However, in the positivist view, it cannot be used to preclude a rule where that rule clearly applies but where it may lead to an anomalous or unforeseen result. Hart believes that his theory avoids the sterility and rigidity that a formalist approach would give us. Formalism guarantees absolute certainty and predictability by virtue of the fact that it insists on a rule having the same meaning in every case. But the "pay-off" for this is that other important goals in society must be ignored.

41. ID. at 126.
Gottleib's approach as we have seen, represents an extension on the positivist position. In the latter, if a particular fact situation is unambiguously covered by a rule then that rule must be applied regardless of consequences. To illustrate this we can examine the case of Herbert Kitson. Here, the appellant was convicted of driving a vehicle when under the influence of alcohol. Kitson had been asleep in the passenger seat of his car and had suddenly awoken to find that the car was rolling downhill and that the hand-brake was not engaged. In order to prevent a serious accident he grabbed the steering wheel and tried to control the car, eventually steering it onto a grass verge. His condition was such that he clearly came within the ambit of the statute and he had been controlling the car at the time. The judge found it impossible to say that Kitson was not driving the car and thus was innocent. In this situation Gottleib would argue that the statute was not intended to apply here as, if its purpose was to preserve life and safety, then that goal was best served by Kitson taking the action that he did in the circumstances. Had he not done so possibly he and others may have been killed or injured. Here is an instance where a consideration of goals would have led to a more sensible and just result.

II. Most of the writers that have been considered agree that purpose is relevant in the judicial decision at some stage - where they differ is on the nature of its operation. The basic difference appears to lie in the mechanics of using purpose, and whether such use should be given any kind of a structural basis. Although Dworkin's exposition of principles and policies adds much to the vacuum left by the positivist

view of judicial discretion, as we have seen, we still face a considerable
difficulty in assessing whether the judge is actually subjectively
weighing the principles involved and whether it is feasible for him to
discern and maintain a distinction between a principle and a policy.

Of penumbral cases Hart has commented as follows,

"In these cases it is clear that the rule-making
authority must exercise a discretion, and there is
no possibility of treating the question raised by
the various cases as if there were one uniquely
correct answer to be found, as distinct from an
answer which is a reasonable compromise between many
conflicting interests." 43

This statement could almost describe Dworkin's concept if it is the
case that the judge's final decision is subjective.

Further to this, Hart has made another criticism of Dworkin's thesis.44
He sees the whole thesis as depending on Dworkin's claim that the
hypotheses formed by a judge as to the existing law direct a uniquely
correct decision for every case. Hart feels that the principles
described by Dworkin are of an excessively general and abstract nature
and that there can be equal gravitational pulls for decisions in
different directions. If this is so an important tenet of Dworkin's
thesis is undermined. The problem seems to be in the fact that the
evaluation of purpose has to be done by the judge, albeit supposedly
objectively, rather than being evidenced in the workings of the law
itself.

Yet in Dworkin's thesis the principles he describes are legal factors and
as such bind the judge. The problem with these principles is that they

44. Hart, Law in the Perspective of Philosophy, 1776 - 1976, (1976)
    N.Y. Univ. Law School Bicentennial Conference.
are characteristically vague. In the alternative we have the view that though purposes may do a great deal to delimit judicial freedom of action, they cannot completely eradicate or oust the area of discretion. Gottleib is a proponent of this view. As he sees it the choice between purposes occurs in relation to the application of rules to specific cases and is necessitated in three situations which we may summarize as follows: firstly, where the case is penumbral; secondly, where application of the rule would be inappropriate with regard to its purposes or those of other rules of the system; and finally, when rules compete recourse should be had to their purposes to determine the outcome.45 He says:

"In such circumstances it is necessary to consider purposes, in the sense that failure to do so would lead to inconsistent results in the application of rules and the disregard of their essential characteristic of purposiveness." 46

However, where it is more difficult to discern what the goals of particular rules are Gottleib states that, in consequence, the scope of discretion is widened as the guidance afforded by purpose is less reliable. At this point, therefore, we enter the kind of area of discretion described by Hart. This is a significant point to note as it is this that distinguishes the causal theory. There, goals function in a much tighter, systematic way and are argued to eliminate the need for resort to discretion even in the hard cases.

Purpose may also be useful in delineating a distinction between rules and commands. Gottleib points out that the concept of an order does not infer that the recipient of the order can look at it in terms of its

45. Gottleib at 113.

46. Id. at 113.
purposes. Only the commander is concerned with those. In the majority of instances this is very likely so, of course, though it should be borne in mind that if someone is given an order to do something and there is a hindrance to carrying it out or doing so would not achieve the object of the order, then purpose becomes relevant. All social practices are purposive to some extent. Nevertheless, the distinction is still a useful one. Gottleib states that in the case of rules goals are relevant at two levels, in relation to legislation and to application to specific cases. In connection with this he makes an interesting point to the effect that when a legislator makes a rule it is proper for him mainly to consider the goal of that rule. But, in applying that rule in the judicial sense the goal of the particular rule at issue must be considered in terms of the results of its application on the whole system of goals.

Thus, we see that Gottleib conceives of goals or purposes interacting in a kind of system, but it appears to be a somewhat loosely knit and unstructured system. With regard to the causal theory, however, structure is one of its primary characteristics in relation to goals. The crux of the matter is whether it is, in reality, possible to do this successfully enough to represent a genuine advance on Gottleib's viewpoint.

III. The final major use of goals that we shall consider is as a test of relevancy. This aspect of goals is closely related to the operation of precedents within the law and forms a very important part of the causal

47. ID. at 112
48. ID. at 116
theory. We have seen that goals are incorporated into the law as higher-order or priority settling rules which allow judges to determine even hard cases in a predictable way. In most cases there will be some precedents available in which some facts are similar to those of the case at hand. When a judge selects which precedent to apply he is, in effect, formulating a new rule. Thus, there is a necessity for a generative rule to enable this to be done. This has been set out in the form of a principle of formal justice in the following way:

"Any judgements made in regard to a particular situation, that a particular person is or is not legally obligated to do a particular act, logically entails that the judgement instances a rule of law such that anyone in a relevantly similar situation is or is not legally obligated to do the same act."

But to apply this rule a criterion of relevancy is needed and the goal matrix can supply this:

"Relevancy is measured in terms of outcome. A fact is relevant in a case if it bears a cause-effect relationship with the situation which has led to the litigation."

A judge, therefore, has to decide which facts of a precedent are relevant to the case at hand and in doing this he must consider whether those facts are relevant to the goals behind the particular law. Many rules furnish their own criteria of relevancy. We noted previously that certain Acts directed towards consumer protection set out factors that should be taken into account.

50. ID. at 177.
51. ID. at 180.
52. See, SUPRA, Footnotes 53 & 54 at P. 94.
It is important to note that goals, in this respect, do not function as something to be weighed or balanced against other indeterminate standards, but as guides to the application of rules. The rule of relevancy does not act as a gravitational force towards "desired outcomes" in the Lasswell/McDougal sense or towards a Utilitarian solution of cases. Its function is to indicate which line of precedents should be followed, in accordance with the goals of the law. The Coval/Smith view basically seeks to challenge the technique so far adopted of applying the precedent in isolation from teleological considerations and then introducing policy factors later to determine the outcome where the position is unclear. Their model, in contrast, aims to establish teleology as an indivisible adjunct of rule and precedent. It is this use of goals that is the most structured and practical to apply. It forms the rationale for the goal matrix that, it must be emphasised, orders goals intrinsically not extrinsically in any Utilitarian or "weighting" sense.

6. EXAMPLES
To conclude this section a fairly detailed examination of two recent, somewhat controversial English cases will be conducted as they provide instances where the role of purpose may be clearly illustrated.

53. Professor Smith states the rule of relevancy as follows: "When a case C1 arises having some facts identical with some facts in Precedent P1 and other facts identical with some facts in Precedent P2 and the application of P1 would lead to different results from those that would follow the application of P2, C1 will fall under the precedent which, if followed, will, when universalized as a rule of law, bring about, because of the presence of similar facts, the most desirable consequences in terms of the teleology of the legal system". Legal Obligation, at 185.
The case of Froom v. Butcher\textsuperscript{54} concerned the issue of whether a plaintiff who has suffered injuries in a road accident as a result of the defendant's negligence should be penalised for contributory negligence because of a failure to wear a seatbelt or a crash-helmet. In the above case the plaintiff suffered injuries that could have been avoided had he been wearing the seat-belt. He said that he believed that he was safer by not wearing the belt. The judge at first instance held that he was not guilty of contributory negligence and awarded him damages. The defendant appealed. In previous decisions in the lower courts there was considerable conflict of opinion amongst the judges about whether damages, in such circumstances, should or should not be reduced.

Lord Denning M.R. briefly surveyed the scope of these previous decisions which covered a diversity of fact-situations. He noted that the relevant legislation is contained in ss. 1(1) and 4 of the Law Reform (Contributory Negligence) Act 1945.\textsuperscript{55} Contributory negligence is a man's lack of care in attending to his own safety. He also noted that the innocent plaintiff is in no way to blame for the accident in the majority of cases and that it may seem wrong to penalise him in this way. However, to Lord Denning, the issue in the seat-belt cases was

\textsuperscript{54} (1975) 3 All. E.R., 520.

\textsuperscript{55} The Law Reform (Contributory Negligence) Act, 1945, C.28, s.1(1) "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage..."

s.4 "'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."
not what caused the accident so much as what caused the damage. In consequence, the plaintiff must bear some of the loss. It is compulsory for vehicles to be fitted with seat-belts\(^56\) and, thus, it would seem that the legislature thought it sensible to use them but this usage is not compulsory:

"Everyone is free to wear it or not, as he pleases. Free in this sense, that if he does not wear it, he is free from any penalty by the magistrates. Free in the sense that everyone is free to run his head against a brick wall, if he pleases. He can do it if he likes without being punished by the law. But it is not a sensible thing to do. If he does it, it is his own fault; and he has only himself to thank for the consequences." \(^57\)

The Highway Code recommends the use of seat-belts and a large body of evidence supports their efficacy. In the judgement at first instance, Nield J. had deferred to the fact that some people honestly and firmly believe the chances of injury are lessened by not wearing the belt.

He did not feel justified in interfering with an individual's freedom of choice in the matter by imposing a penalty. Lord Denning, on the other hand, disagreed:

"In determining responsibility, the law eliminates the personal equation. It takes no notice of the views of the particular individual; or of others like him. It requires everyone to exercise all such precautions as a man of ordinary prudence would observe..." \(^58\)

So, although the negligent driver is chiefly responsible, if the injured person might have avoided injury or suffered less serious injuries by wearing a seat-belt, he must also bear some share of responsibility in the matter. Accordingly, the plaintiff's damages were reduced by twenty-five per cent. But in cases where it can be shown that the injuries would have been as bad in any event, damages should not be reduced.

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\(^{57}\) Per Lord Denning M.R., at 525.

\(^{58}\) Per Lord Denning M.R., at 526.
Thus, exceptions apart (for example, in the case of a pregnant woman), all persons have a duty to take reasonable precautions for their own safety by wearing a belt. The law does not accept the excuse that a person thought it would be dangerous to do so, or that the journey was a "low-risk" one, or that the person was simply forgetful.

On this analysis it is clear that the goal of the preservation of life is to take precedence over the individual's freedom of choice with regard to the wearing of seat-belts. The law is not removing this freedom of choice, however, but is imposing a certain sanction in order to encourage people to take sufficient measures to preserve their own safety.

It may be said that contributory negligence, in relation to motor accidents, is a greater burden to the plaintiff than is negligence to the defendant as the latter rarely pays, (in financial terms at least). Nevertheless, as one commentator has suggested, the tort of negligence serves not only to compensate, but also to "discourage unreasonable behaviour by making (in theory) those who are guilty of it pay for it". Even though carelessness of this sort may only harm the person guilty of it - "... his injury is bound to cause some undesirable social dislocation, and it is therefore a proper object of the law to discourage this sort of carelessness as well."

In this decision we can see that the situations where an exception may

60. ID. at 46.
61. ID. at 46.
arise are fairly limited. In the case of a pregnant woman, for example, Exception 2 of the causal theory would apply; in other words, greater injury is very likely to result from wearing a seat-belt, so it would be unjust to penalise a person suffering injury in this situation.

The other case that we shall discuss is Re D. In this case D, a girl, was born with a condition that resulted in some degree of mental retardation. D was not seriously backward but had some behavioural problems including a tendency to show violence to other children. She was sent to a special school and evidenced signs of improvement. One doctor confirmed that this would continue. D's mother, however, did not accept that any such improvement had taken place or would do so in the future. One Doctor G, who had taken considerable interest in D's case, agreed and he believed that she would be unable to care for herself or any children she might have. But it was accepted that D had sufficient mental capacity to marry in due course. D's mother was gravely concerned that if D were seduced and had a child it would be abnormal or deformed. Dr. G thought this was a possibility. Accordingly, when D reached puberty at the age of ten he agreed to sterilise her without waiting until she was older. Before the operation could be carried out other concerned persons challenged the social and behavioural reasons for performing such an operation and application was made to make D a ward of court in order to delay or prevent the carrying out of the operation. In this case, then, we may summarize the major issues as being:-

1. The right to do what one wishes with one's own body - in this case, the right of a woman to reproduce.

2. The aim of preventing future suffering by reason of the possibility of the birth of deformed children.

3. The concern for the overall welfare of the child.

4. Respecting the wishes of the parent.

The judge in this case stated that:

"The type of operation proposed is one which involves the deprivation of a basic human right, namely the right of a woman to reproduce, and therefore it would, if performed on a woman for non-therapeutic reasons and without her consent, be a violation of such right." 63

Clearly, at the age of ten, the child was not able to give an informed consent. In addition, it was conclusively stated that although parents' wishes will not be superseded lightly, in this situation the welfare of the child must take priority. In D's case there was no adequate medical or social justification for such an operation and it was suggested that, generally, there would only be very rare circumstances where such a step would be permissible. D should have the opportunity to make her own choice later on.

The orderings of goals in this case therefore become quite clear and we have now material that will form a precedent for the next case of this nature, should one arise.

63. Per Heilbron J., at 332.
7. EVALUATION - THE CAUSAL THEORY RE-EXAMINED

From a survey of much of the writing that has been done in the area of judicial reasoning and the use of purpose, something that is striking in relation to posited theories is that simplicity of concepts and precision is most effective in explaining the problems therein. In his article the Model of Rules, Dworkin made a very penetrating analysis of some of the deficiencies of the positivist position. However, in his later writings the same forcefulness and clarity of argument does not appear. The rights thesis, with its complex and elaborate classifications of the various kinds of rights loses its impact as a result of the proliferation of terms and definitions. In the end there is a prevailing impression that, in order to make practical use of the principles described, indeed, even to discern what they are with a sufficient degree of clarity, involves a truly mammoth task. In addition, Dworkin's insistence on the total elimination of an area of discretion is rather doubtful - particularly as he seems to deny that there may be equally powerful reasons for deciding a case in a number of ways leading to different end results. The positivist position may be a more realistic one in this respect. It acknowledges that principles and policies exist for the guidance of the judge but does not attempt to specify the nature or identity of these standards.

One of the ideas contained in the causal theory is that the number of legal concepts used should be kept to a minimum. In presenting rules and goals in a structure that is usable in determining cases this is plainly an advantage. Arguably, there is a possibility of a danger of over-simplification, but this may be paralleled by the considerable difficulties inherent in establishing clear lines of demarcation between "principles, policies and other sorts of standards".
Another crucial feature of the causal theory is its avoidance of disjunctivism in the law. The majority of the other theories tend to assume that we must, at some point, choose between the (a) and (b) - type goals. The causal theory does not accept this as an inevitability and attempts to set out a system by which we can preserve both sorts of goals. The orderings of goals within the matrix provide inferences by which the judge can act to decide outcomes of cases. It has been observed that in some situations it will be very difficult to ascertain what the particular orderings are because the law has not yet crystallized with regard to certain novel developments. Yet, if this is so it is equally true of Dworkin's model and of any other system so far devised. However, the causal theory does offer some guidance on the conditions that may cause the orderings to alter. This is a very important factor. In the words of Coval and Smith:

"Every rule, in implementing its goal or goals, gives priority to that goal over the goals of other rules of law which must be modified, limited or treated as exceptions when the new rule comes into force." 64

This characteristic of rules enables us to see how the "open texture" of those rules may be rendered less indeterminate. In discussing this topic Hart states that in certain areas of human action it is impossible to formulate a rule to cover all conceivable circumstances and hence the standard of "reasonableness" is introduced. It is then the task of the judge to weigh up the claims involved and concretize that variable standard in each case. He cites as a specific example the standard of due care in negligence. Hart derives two objectives of that standard, which are;

a) precautions taken should avert substantial harm; and,
b) the precautions are such that the burden of taking them
does not involve a sacrifice of other important interests.  

But, as he points out, no one can foretell what combinations of facts
may arise and how these will reflect on the precautions taken and the
interests at stake. As Hart says,

"Hence it is that we are unable to consider, before
particular cases arise, precisely what sacrifice or
compromise of interests or values we wish to make
in order to reduce the risk of harm. Again, our
aim of securing people against harm is indeterminate
till we put it in conjunction with, or test it against,
possibilities which only experience will bring before us;
when it does, then we have to face a decision which will,
when made, render our aim pro tanto determinate."  

This succinctly summarizes the position. What the causal theory does
with regard to this problem is to offer the anomaly-solving rules for
resolving the problem posed by a new combination of facts. The crucial
point here is that these mechanisms are rule-like in nature and thus
the decision which renders our aim determinate is not a discretionary one.

The four exceptions described in the theory seem to have the potential
to cover most imaginable situations where the cause-effect relationship
breaks down - without entailing any prior knowledge of the factual
circumstances. It is possible that Exceptions 3 and 4 could be collapsed
under one heading as the kind of situations contemplated by them are fairly
closely related. The process undertaken, then, in judicial reasoning is
essentially different to Hart's concept of judges or officials "striking
a balance between competing interests".  

The causal theory describes

66. ID. at 129
67. ID. at 132
it thus,

"Whether or not the goal of one law is more or less important than the goal or goals of another law is not a matter of discretion. It is not to be determined by balancing or weighing interests. It depends entirely on how the law itself has ordered such goals." 68

This system also represents what amounts to a common-sense resolution of problems that may arise which avoids lengthy and often unhelpful debates about interpretations of statutes. Obviously, there will be limitations on our ability to find and use orderings for many cases, but if we can use goals to solve a number of hard cases it is an approach worth pursuing.

For example, in Chapter II we noted the instance of squatters taking over private residences even where such were occupied by householders who may only have been temporarily absent. The law appeared to be singularly unhelpful on this problem at first glance, but if we look at it from the aspect of the causal theory a fair solution may seem more readily evident.

Let $b^1$ represent - the right to be secure from unwarranted intrusions on property.

$b^2$ - the right to seek shelter in any unoccupied property at the relevant time.

$b^3$ - The right to unrestricted enjoyment of private property.

$b^4$ - the right to adequate housing.

If we place $\frac{b^1}{b^2}$ we will obtain $b^3$ and a large degree of $b^4$.

But, $\frac{b^2}{b^1}$ will give $b^4$ (of a sort), but a significantly reduced degree of $b^3$.

The last formulation would seriously detract from the argument that people would lose a considerable degree of protection for their homes and security. A right to housing becomes meaningless if, in asserting that right, others are effectively deprived of it.

In contrast, the example of the right to picket is one where rights of enjoyment of private property may be subjugated to the goal of facilitating effective collective bargaining. 69

However, the topic of matrimonial property in the field of family law is an example of an area where the goals and orderings are hard to determine. To be specific, one particular problem lies in the issue of whether a spouse who has no registrable interest in property should be allowed to obtain a portion of that property by some reasons of justice or equity. All kinds of nice questions arise as to intentions of the parties and nature of the contributions (if any) made by the parties. The problem came before the courts in a number of cases and eventually the Matrimonial Proceedings and Property Act 1970 was passed. In the case of Wachtel v. Wachtel 70 Lord Denning M.R. expounded his view that sections 2 to 5 of that Act effected a significant change in the substantive law. He felt that it gave the courts power to order transfers of assets and was not merely a codification of the existing law. He said,

"We regard the provisions of ss. 2,3,4 and 5 of the 1970 Act as designed to accord to the courts the widest possible powers in readjusting the financial position of the parties and to afford the courts the necessary machinery to that end..." 71

69. See, Harrison v Carswell, (1975), 75 CLLC 14, 286, at 15, 306., and see, Coval and Smith, The Supreme Court and a New Jurisprudence for Canada, for a discussion of this case, SUPRA, Footnote 69, p.140.

70. (1973) 1 All E.R. 829

Thus, it would seem that traditional property rights can be modified with regard to matrimonial property, or "family assets" in order to do justice in the circumstances of various cases. Yet there are still considerable difficulties in applying the law in this area and it may be that when deciding whether to effect a transfer between spouses the judge is actually relying on his own judgement as to whether such is desirable.

Despite these kinds of difficulties the use of goals and the inference of orderings does offer a new method of looking at hard cases. It supplies a mechanism that we can adopt to analyse cases and judicial reasoning that is interesting, in one sense, simply because it is possible to see how it may be used. The Dworkin model set out in "Hard Cases" is, on the other hand, very hard to utilise as a result of its abstraction. It is possible when viewing law as a unity as described by the causal theory, to pick out and discover where orderings in regard to particular goals have been established consistently. Coval and Smith conclude that,

"... once laws are seen as embodying goals, and once these goals are seen as systematically related by previous legislation and decision, we have available an enormously rich and probably wise bank of fully authorised policy decisions which we cannot overlook." 73

Very few social practices are without any objective and thus, in examining the causal relationship between a rule and its goal we can see how to deal with exceptions to rules, that is, where the intended aim cannot be achieved for some reason. We can, in effect, see how the law operates when "things go wrong" in a practice. Purpose then, may be a more profitable and fertile source for investigation than an overly-zelous concern with the rules of our system alone.

72. A term used by Lord Denning, see Fribrance v. Fribrance (1957) 1 All E.R. 357 at 360; and Wachtel v. Wachtel (1973) 1 All E.R. 829.

73. Coval and Smith, The Supreme Court and a New Jurisprudence for Canada,
CONCLUSION

Purpose and goals have great potential as a means of deciding how cases are to be adjudicated. We have considered a number of theories of and about using goals in this way and the basic difference between them is found in the degree to which their use is structural.

Goals provide a very rich and expansive background against which to rationalise the operation of rules in our system. It would seem illogical to insist that the law is neutral as to goals, for otherwise there would seem to be little point in having a legal system at all if we were not trying to achieve some objectives for society. In addition, by discovering goals in the law - though not necessarily the goal of the whole system of law, we can talk about practices being misused or abused, whereas if the legal system is neutral as to content we cannot do so.

Previous considerations of the role of purpose in the law have tended to take one of two directions. Writers such as Hughes and Dworkin have focussed their attention chiefly on the uses of purpose, whereas the alternative approach adopted by those of the Pound/Stone tradition is concerned with making a classification of the purposes or interest existant in society. But if purpose is to be used in a practical manner in the determination of disputes, or a clearer idea of the extent to which such use is really feasible is to be obtained, then these two fields of enquiry must be merged.

In attempting to draw up a catalogue of what constitute the goals of the legal system we are, in turn, given a more precise impression of how purpose in general actually functions within that system. The primary difficulty that arises in doing this is that there is always a risk that
the classification adopted may be unrealistic or distorted. Thus, we return to the problem that was mentioned earlier of establishing the identity of the goals themselves. Clearly, much of the content and direction of the law will be decided by the predominant political influences in society. But the aims of those in power may not be identical with the goals of the legal system. Indeed, this should not be so in an open society. The legal system should, ideally, be independent of any state agency or government control and should be free to decide disputes in a manner contrary to the wishes of the politically powerful. For instance, the law may act to prohibit excessive government secrecy in the interests of the accessibility of the public to information that concerns them. The question that is most important in relation to our consideration of the role of purpose in law concerns the degree to which it can be utilised to limit the area of judicial discretion in the making of decisions. In this essay we have examined the whole gamut of opinions on this issue and it only remains to give some deliberation to the matter of which theory may provide the best answer to the above question.

At one end of the scale we have the view of Hart that purpose and goals are fundamentally extra-legal factors that come into play when the rules fail to supply clear guidance to a judge. The area of discretion is thus very wide and it is difficult to challenge decisions in hard cases because of the relative indeterminacy of the "guidance" provided by purpose. Although in one sense Dworkin may be said to be, in attitude, at the other end of the spectrum to Hart, the causal theory of Coval and Smith goes even further away from the positivist tradition. Dworkin,

1. See, The Crossman Diaries Case, Supra Footnotes 15 and 16 at 73
as we have seen, denies that there is any room for a judge to exercise discretion as his freedom of action in this respect is completely fettered by a complex array of principles and policies. Yet, these principles are not rule-like in nature or function although they are asserted to be "legal".

In contrast, we have seen that the Coval/Smith position is that such factors are both legal and rule-like in character. It is the latter quality that is paramount to their thesis as it provides the basis for the view of the legal system as a highly structured, closely knit entity that leaves little leeway for judges to resort to the exercise of discretion in deciding cases. It is thought that the positivist view is inadequate to explain the operation of the judicial decision but although Dworkin's thesis is felt to be an advance, it is somewhat disappointing for its inability to be used in a practical way. Dworkin's web of principles and policies and other standards constituted in his theory seems to be too abstract and based upon too many uncertain assumptions about the capacity of judges to formulate the kind of philosophy necessary to use it. However, this criticism may be applicable, in some measure, to the causal theory too. For a judge to use the goal matrix in reaching a decision necessitates that he should have a conception in mind of just what the matrix is in nature. Although it should be possible for a judge to eradicate personal bias from his decision in most cases - especially the clear-cut ones, when confronted by a typical hard case where the goals involved are probably not very clear, it seems optimistic to expect that he will remain totally objective and will look only to the law for guidance. Ironically it is in those circumstances that the law will be least helpful. But this is not to say
that we have immediately regressed to the position of being, once more, in the area of pure discretion. In a great many cases a logical solution does become obvious as a result of looking at the goals involved, (the Kitson case provides a good example). The problems arise when this exercise affords us no help due to a "proliferation of purposes". Possibly, such an extreme situation where an examination of the goals involved is futile will rarely crop up. Yet we cannot ignore the fact that it may do so.

In this respect the theory of Gottleib is especially valuable as offering a viable alternative to the theories of Dworkin and Coval and Smith. Gottleib's theory, as we have seen, is closer to that of Coval and Smith possibly than any other. He gives a very interesting exposition of the way in which purpose functions in the legal system and concludes that the role it plays is a highly important one. Purposes are conceived of as being interstitially linked together within the legal system and as operating upon the decision process in a highly positive way. However, the occasional vagueness of purpose means to Gottleib that it is impossible to eliminate the area of discretion altogether.

What is clear is that only when some sort of goal classification is formulated can we begin genuinely to test a theory of the function of purpose within the law and legal decision. How successful purpose will be in indicating a correct solution to a judge is obviously a matter of degree. Thus, if we have a catalogue of a kind from which to work there is a better chance of arriving at an evaluation on this subject. At least we will be able to assess

2. See, supra Footnote 42 at 126
how far we can go in using purpose and incidentally narrowing or
eliminating discretion as such.

But the goal classification is just the beginning. From embarking on
the task of drawing up a possible goal classification it has been
observed that it is frequently difficult to determine purpose in a
number of cases, or to establish that a purpose is stable. What has
emerged too is that goals do often give us a logical, common-sense
method of analysing even some hard cases that can be applied in judicial
decision-making with the effect of limiting the area of discretion.

A pitfall to be avoided though is that of unconsciously using goals in
what may be termed as an "artificial" manner, that is, by attributing
purposes or aims to rules that appear to suit the relevant case but which
may be over-subjective. Where purposes are vague it is preferable to
recognise the fact. Possibly, however, other goals of the system may
give positive help in determining the goal of the rule in question in
a particular case. This is the value of regarding the structure of goals
as a whole entity.

At this stage, therefore, it is not possible to foresee how far the goal
matrix can go in providing us with sufficient guidance to reduce the ambit
of judicial discretion in toto, and so it is thought that there must be
some reservations held about the ability of purpose to direct us towards a
proper solution in every case. In fact, this would be expecting too much
of purpose which may often be, as Gottleib points out, indeterminate and
woolly. Nevertheless, the potential of using goals in the decision process is very great. What has to be seen is whether the vagueness of purpose leaves open to uncertainty a significant area in the judicial reasoning process that must be discretionary and is not regulated by the operation of rules.
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