

The Public Interest

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"I think every Member of the House knows what he means by the *public interest* and applies that test to a very wide range of questions that come to him for judgement. But I doubt whether any Member could provide a legal definition of what he means by the public interest, capable of covering changing national conditions and of being applied to all [cases] ... In the last resort, this House is, and must be, the authority which decides whether or not any particular practice is in the public interest."

Harold Wilson (Hansard, HC, 499, cols.2035-7)

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1998

THE PUBLIC INTEREST

“Public, *a.* and *sb.* Late ME. [-(O) Fr. *Public*, *-ique* or L. *publicus*, based on *pubes* adult (see PUBERTY) with crossing from *poplicus*, f. *populus* PEOPLE; see -IC.] Usu. opp. To PRIVATE. **A.** *adj.* **I.** Pertaining to the people of a country or locality. **1.** Of or pertaining to the people as a whole; common, national, popular. **2.** Done or made on behalf of the community as a whole; representing the community ... **3.** That is open to, may be used by, or may or must be shared by, all members of the community ... **4.** Open to general observation; existing, done, or made in public ... **5.** Of, pertaining to, or engaged in the affairs or service of the community. **6.** Of or pertaining to a person in the capacity in which he comes in contact with the community. **7.** Devoted or directed to the devotion of the general welfare; public spirited, patriotic.

II. With extended, international, or universal ref. **a.** Of or pertaining to the nations generally, or to the European, Christian, or civilized nations, regarded as a single community; general; international. **b.** Of, pertaining or common to, the whole human race...

B. *sb.* (the *adj.* used absol. Or ellipt.) **1.** **a.** The nation, the state; the commonwealth; the well-being of the community ... **b.** The community as an aggregate, but not as organized ... **2.** *A* and *pl.* A particular section, group or portion of a community, or of mankind. **3.** *In public:* In a situation, condition, or state open to public view ... **4.** Short for PUBLIC HOUSE.”¹

“Interest, *sb.* [Late ME. Alt. of INTERESS *sb.*, partly by addition of parasitic *t*, partly by assoc. with Ofr. *interest* damage, loss, app. subst. use of L. *interest* it makes a difference, concerns, matters, 3rd. pers. sing. pres. ind. of *interesse* differ, be of importance, f. *inter* INTER- + *esse* be.] **I.** **1.** The relation of being objectively concerned in something, by having a right or title to, a claim upon, or share in. **a.** Legal concern *in* a thing; esp. right or title to property, etc. Also **b.** Right or title to spiritual privileges. **c.** Share. **d.** A pecuniary share or stake in, or claim upon anything. **2.** The relation of being concerned or affected in respect of advantage or detriment **b.** Good, benefit, profit, advantage. **3.** A thing in which one has an interest or concern. **4.** A business, cause, or principle, in which a number of persons are interested; the party interested; a party having a common interest. **5.** = SELF-INTEREST ... **7.** The feeling of one who is concerned or has a personal concern in any thing ... **8.** The fact or quality of mattering; concernment; importance ...”²

¹ From *The Shorter Oxford English Dictionary*, Oxford: Oxford University Press, Vol.2.

² From *The Shorter Oxford English Dictionary*, Oxford: Oxford University Press, Vol.1

Introduction

In this paper we explore what is meant by *the public interest* and how one might go about determining which issues have a public interest bearing. Our exploration does not end in the discovery of any clear and unambiguous definitions or tests. It ends, rather, in the suggestion of an approach to the process of definition and testing which goes at least some way to avoiding many of the conceptual obstacles upon which common (mis)understandings often flounder.

As Beatson has warned, “*public interest* is a hopelessly ambiguous term.”³ It has, as Weisbrod further observed, “been used throughout history to justify everything from democracy to totalitarianism.”⁴

We start off by providing a *theoretical* overview of the nature of interests, both individual and, then, public. We explore the obstacles that are faced in the determination of interests. We go on to explain the problems that are faced in trying to move from the concept of individual interests to that of public interests. We then illustrate the conflict that exists between interests both similarly and differentially defined.

Next, we examine some *practical* difficulties to establishing both the nature and magnitude of public interests. We also provide some illustrations of how these practical problems can be addressed, utilising examples drawn from the medical and legal fields.

Next, we examine problems concerning the breadth of public interest definitions surveyed. We ask, in particular, whether legal cases of certain types (namely judicial review, human rights and high profile cases) are necessarily *public interest* cases. We also investigate the numbers and growth of cases of these types.

Finally, we suggest an approach to definition and testing for the particular context of a *public interest* element to the Legal Aid funding code.

Interests: Establishment and Opposition

An immediate problem in determining what is meant by the public interest is that of establishing the substance of interests themselves. It might be thought this is a relatively simple task. However, there is a fundamental difficulty in establishing

³ Beatson, J. (1998) “What is the ‘Public Interest’, and What is a ‘Public Interest Case’?”, paper presented at the Law Society Public Interest Seminar, 26 March 1998, p.1.

⁴ Weisbrod, B.A. (1978) “Conceptual Perspective on the Public Interest: An Economic Analysis”, in Weisbrod, B.A., Handler, J.F. and Komesar, N.K. (eds.) *Public Interest Law: An Economic and Institutional Analysis*, Los Angeles: University of California Press.

interests, even in relation to individuals⁵ – a difficulty that can be attributed to our limited knowledge, of ourselves, of each other and of the consequences of specific decisions and actions.

We cannot, for example, ascertain what is in the interest of individuals by simple reference to their conduct, as their conduct may or may not be indicative of their interests. We might well be in error if we were to conclude that the interests of a person were served by that person being in a single room for 23 of every 24 hours, if that person were a convict! If we take away manifest coercion of behaviour the problem does not go away. Convictions, dependencies and illnesses aside, people's conduct may still be seriously misleading as to their interests. Nor can we ascertain individual interests by reference to responses to questions relating to them. Individuals' accounts of their interests may differ from the reality of their interests for many reasons. They may *purposefully* present themselves in an inaccurate manner. Alternatively, they may *innocently* present themselves in an inaccurate manner, as a consequence of either internal or external influences. They may simply be ignorant. Even knowledge of an individual's beliefs, therefore, may be far from conclusive. Before scientific knowledge developed to the point where the health effects of smoking became clear, even 'fully informed' smokers would have had no way of accurately determining their *true* interests. As we can never know what we do not know, we have no way of accurately, consistently and reliably ascertaining our interests. In a rapidly changing world induction can be a poor tool indeed.

Of course, it may be that the *true* interests of individuals are not always of concern. *Legitimacy of inference* in relation to interests may suffice in many contexts. Democratic government is not, after all, based upon a scientific evaluation of the *true* interests of the individuals making up a society. It is, rather, based upon their *expressed* interests.

Problems of inference are not, though, the only problems standing in the way of establishing the nature of interests. The distinction between short term and long term interests has so far been ignored. Even were it possible to know the interests of individuals, how might short and long term interests be balanced. Might an expressed preference be sufficient here also. Likewise, the possibility that interests may be of equal or unequal import, *subjectively* or *objectively*, has not yet been raised.

In the context of environmental impact, Malnes has recently explored the distinctions between what he terms *vital* interests and *subsistence* interests. As he explains,

“Interests can be ranked in terms of normative force. What may be called vital needs – the physical prerequisites of survival and

⁵ *Individuals* perhaps being far more amenable to definition than the *public*. The term *individual* is, after all, self-explanatory.

normal biological functioning – stand out by virtue of how much, objectively speaking, their fulfilment matters.”⁶

Subsistence interests, on the other hand, are to a great extent *chosen*. They relate to quality of life, not to *the fact* of life itself. However, as Malnes himself concedes, you will always get people who rank subsistence interests higher than vital interests. As Griffin points out, subsistence interests can encapsulate many seemingly morally heavyweight values, making the sacrifice of vital interests in their pursuit sometimes entirely appropriate.⁷ Adherence to a principled way of life is, after all, not a vital interest as such, and yet countless people have sacrificed vital interests to principles throughout history.

Another distinction suggests itself at this point - that between what Feldman has described as *material* and *ideological* interests.⁸ Ideological interests represent interests in *moral values*. Material interests are concerned with, *inter alia*, property, freedom or welfare interests. Ideological interests are a subset of Malnes’ subsistence interests. Material interests, however, might be vital or subsistence interests.

In the case of the public interest, even greater challenges need to be faced. For example, how are the interests of the individuals *currently* making up the public to be balanced with those of the individuals who will make up the public *in the future*? Given that people are born and people die every second of every day, such a question is not an easy one to answer. Intuitively it might be felt that we should have priority over people not yet in existence, but on what analytical foundations can our intuition be based. Only two credible suggestions present themselves, neither of which is entirely satisfactory.

The first relates to, as Malnes put it, “our ignorance about the remote effects of current policies.”⁹ We can not say how the future will unfold, so we have a lesser responsibility to in relation to future events, and therefore persons. Our current interests are certain, and so our interests concrete. However, many possible futures may unfold, so future interests are necessarily drawn from a multitude of possibilities. The force of future interests is consequently diluted by their contingency. In an age of scientific development, we also feel justified in *expecting* potential problems to be resolved by technological advances. Why need we worry, say, about any slow deterioration of the seal on newly manufactured nuclear waste containers, as future generations have many years to determine a safe way to dispose of the material contained within them or further ensure its containment.

⁶ Malnes, R. (1995) *Valuing the Environment*, Manchester: Manchester University Press, p.34.

⁷ Griffin, J. (1986) *Well-Being: It's Meaning, Measurement and Moral Importance*, Oxford: Clarendon Press

⁸ Feldman, D. (1992) “Public Interest Litigation and Constitutional Theory in Comparative Perspective”, in *Modern Law Review* 55:1, pp.44-72, p.45.

⁹ *Supra*, n.6, p.95.

The second stems from the notion of a *social contract* and concerns the possibility that the interests of future persons are outside of any such contract, as they are not yet parties to it.

Perhaps the greatest challenge in determining what is meant by the public interest, however, is determining what constitutes the *public* element of a public interest. Having established that interests are far from being easily determinable (even in the context of individuals), that they are multifaceted, that they are not all of equal import, and that they exist in relation to past, present and future persons, the problem of how we might distinguish *public* interests from other interests must now be addressed.

From Individual Interests to the Public Interest

As suggested above,¹⁰ an easier task than determining the meaning of the *public* interest is that of determining what is meant by *individual* and *common* interests. We can, after all, simply define individual interests as the interests of single persons. Further, where an interest is shared by a number of persons we can go on to term it a *common* (or *shared*) interest.

It might be thought that we can go on again to a definition of the public interest which comprises interests shared by *all* persons. However, *this* progression is problematic. First, whilst it is undoubtedly true that both individual persons and groups of persons have interests, it is not immediately clear whether there are any interests that could be said to extend to all persons.¹¹ Second, there may be more than one public interest so defined, in which case it becomes necessary to establish a means of resolving conflicts between them.¹² As Weisbrod asked,

“Is there a single concept of public interest that can, at least conceptually, allow us to rank all activities according to their degree of public-interestness; or are there multiple public interests, which would imply the possibility of conflict among them?”¹³

Third, it may be that the public interest is not any form of shared interest, but an interest of a defined public as a *thing in itself*. Any acknowledgement of the existence of a macro-societal structure (i.e. a public) might entail the existence of

¹⁰ *Supra*, n.5.

¹¹ In the context of any *national* scheme which references public interests, the set of persons which makes up the public may need to be limited on a national or other jurisdictional basis. If so, the possibility arises that the interest that is shared within the public will conflict with the interests of *other* publics.

¹² Of course, for the purposes of determining whether a dispute is a dispute with a public interest bearing the difficulty of resolving conflicts between public interests need not be of concern. It is enough to know that public interests are involved.

¹³ *Supra*, n.4, p.22.

public interests that are independent of the interests of the individuals making up that structure. For the sake of clarity, we shall term such public interests *societal* public interests (and distinguish them from *sectional* public interests which are based on the interests of individuals alone). Societal interests may be argued to be of two basic kinds. They may be based *solely* upon the existence and form of a macro-societal structure. We term such an approach the *passive* societal public interest approach, as it entails that the interests are simply macro-properties of the structure. Alternatively, they may be based upon the macro-political forces which *bind* the structure. This is similar to what Beatson has termed the *state* approach to public interest¹⁴ and we term it the *active* societal public interest approach, as it sees public interests determined by a dynamic political body rather than an inert societal structure.¹⁵

Before moving on to examine how societal and sectional public interests might co-exist and conflict it is worth taking a closer look at the nature of societal public interests.

The public interest has often been equated with the interests of the government, either in sense of the structure of government as a whole or in the sense of a particular branch of government. Thus, the executive government is often assumed by the courts to act for the public interest. The courts have historically been most wary of entering into the politics of executive government action. The development of the law relating to judicial review of the royal prerogative and the law relating to national security provide examples.¹⁶ Furthermore, the Crown Proceedings Act 1947 recognises that for the executive government to take advantage of a statute is deemed to be for the public benefit.¹⁷ The notion that Parliament legislates in the public interest is almost universally adhered to within the institutions of government. The Attorney-General, for example, in his role as *guardian of the public interest* is concerned to see that statutes are obeyed. The courts will not question the validity of statutes, at least outside the context of

¹⁴ This is a similar distinction to Beatson's distinction between individual, societal and state approaches to the public interest. See Beatson (1998), *supra*, n.3, p.2.

¹⁵ This is the same distinction as that set out by Cotterrell between horizontal structured *communities* and vertical structured *imperia*. See Cotterrell, R. (1994) "Judicial Review and Legal Theory", in Richardson, G. and Genn, H. (eds.) *Administrative Law and Government Action*, Oxford: Clarendon Press, pp.19-20.

¹⁶ See, for example, *Chandler v DPP* [1964] AC 763, *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, *R v Secretary of State for the Home Department, ex parte Hosenball* [1977] 1 WLR 766, *Zamora, The* [1916] 2 AC 77.

¹⁷ *Crown Proceedings Act 1947*, s.31(1). See, further, *Halsbury's Laws of England*, 4th edition, vol.44(1), paras.1321, 1344, 1345, 1359, 1450, 1451, 1452 and 1454. See, also, vol.9, paras.19 and 939, vol.11(2), para.1493, vol.8(1), paras.434-5. Of course the courts have long recognised that "the interests of [executive] government ... do not exhaust the public interest" (*Glasgow Corporation v Central Land Board* (1956) SC(HL) 1, *per Lord Radcliffe*). Further, the courts have long recognised that executive government action must be kept within certain bounds. See, for example, *Entick v. Carrington* (1765) 19 St. Tr. 1030.

defining the national jurisdiction.¹⁸ Even the new Human Rights Act will not alter the court's constitutional position significantly, although some power to highlight substantive deficiencies of statute law will be available in the future. This though is itself constrained by a quasi-legislative document. It is necessary to travel back many centuries, to the days before the Glorious Revolution, to find the courts interest taken by the notion of extra-governmental public interests.¹⁹ In essence, then, for constitutional purposes, the public interest is the *overriding* public interest expressed by Parliament and acted in accordance with by the executive government.

In a modern democratic nation the benefit of equating the public interest with the interests and determinations of government is that it is thereby afforded the same democratic legitimacy as that of government.

Aggregation of Interests and Conflicts of Interests

Sectional approaches to public interests, as has been seen above, might initially be thought to require their being universally shared by the individuals making up the public. However, as has also been seen, there is no certainty that universally shared interests exist. Further, universally shared interests may not constitute what the individuals *individually* regard as their most important interests. So, a sensible course might be to attempt what Lewin and others have termed the aggregation of individual interests.²⁰

Public interests become, according to this approach, those interests of sufficient magnitude when aggregated, to warrant being termed public. Here can be seen an argument that closely relates to traditional strands of democratic theory. Public interests are those that have sufficient aggregated individual interest. They thereby, as Bell has put it,

“provide some contribution to the fundamental structure of the community as a whole which will provide a reason why the losers ought to conform.”²¹

¹⁸ See, for example, *British Railways Board v Pickin* [1974] AC 765, *Edinburgh and Dalkeith Railway Co. v Wauchope* (1842) 8 Cl. & F. 710, *MacCormick v Lord Advocate* (1953) SC 396, *Gibson v Lord Advocate* (1975) SLT 134, *R v Secretary of State for Transport, ex parte Factortame (no.2)* [1991] 1 AC 603, *R v Secretary of State for Employment, ex parte EOC* [1994] 2 WLR 409.

¹⁹ See, for example, *Dr. Bonham's Case* (1610) 8 Co. Rep. 114, at 118, *per Coke, CJ*.

²⁰ See, for example, Lewin, L. (1991) *Self Interest and Public Interest in Western Politics*, Oxford: Oxford University Press.

²¹ Bell, J. (1993) “Public Interest: Policy or Principle?”, in Brownsword, R. (ed.) *Law and the Public Interest*, proceedings of the 1992 ALSP Conference (Archiv fur rechts und sozialphilosophie) Stuttgart: Franz Steiner.

How, though, as Lewin asks, does one go about aggregating interests. Especially as they may be of potentially different imports at the individual level (both as to and as between individuals). Further, how does one set about determining the relative import of what may be multifarious competing and conflicting interests.

Here can be found an argument between those who suggest that we are faced simply with a need to look at the whole picture and “broaden [our] horizons beyond ... personal preferences”²² and take account of the interests of others in a simple interest calculation, and those, such as Dworkin, who believe that to do so might involve *double counting*.²³ However, this controversy is largely semantic. Clearly, in determining the balance and weight of interests within a defined public, a method of calculation must be used that avoids double counting. The principal forms of elections do not involve double counting, because they are an appropriate mechanism for allowing a broadening of horizons whilst maintaining individual autonomy and singularity of input.

The real problem of aggregating and balancing individual interests is the sheer impossibility of the task of ascertaining what the many individual interests are, how they are best furthered and how they conflict in practical terms. As was explained at the outset, even perfect knowledge of interests gets us little way towards determining how present decisions and actions will affect them in the future.

Just because something is monumentally difficult does not, though, mean that there is no value in attempting it. So, just because the determination of interests and the relationship between decisions, actions and interests is not easy, does not mean that there is no value in embarking upon an investigation which may provide at least some indication of such matters. Although it may well often be true that a little knowledge is far worse than none, who would sensibly adopt a purely arbitrary and random approach to decision making. As Kilner put it, “People make decisions all the time based upon calculations of consequences that are anything but certain.”²⁴

Before exploring some practical approaches to individual and public interest determination, two further and particular forms of conflict should be set out. The first is that between societal and sectional interests. The second is between teleological and deontological approaches to interest determination. The first is ultimately a matter of political choice. The second is ultimately a choice of politics. Having set out these conflicts, we propose to leave them unresolved. This is because, in the first case the matter is purely political, and in the second

²² *Ibid.*, p.14.

²³ Dworkin, R. (1977) *Taking Rights Seriously*, Cambridge, Mass: Harvard University Press. As individuals look after their own interests there is a danger that in extending one's calculations of the interests of the whole to others' interests you double their input into the calculations.

²⁴ Kilner, J.F. (1990) *Who Lives? Who Dies? Ethical Criteria in Patient Selection*, New Haven, Conn: Yale University Press, p.30.

case the conflict can be theoretically ameliorated through a treatment of deontological concerns as a form of consequence. As Diamond has argued, teleological approaches can accommodate intrinsic values.²⁵ *Justness* and other largely deontological concepts can be regarded as consequential attributes of actions. Whilst this does not help to determine how traditionally deontological and teleological interests might be measured as against one another, we face this problem even when looking at just traditionally deontological or teleological interests.

Calculating Public Interest

The above analysis moves us to a point where one could sensibly adopt three practical propositions. The first is that in determining what public interests are, one must first identify (either or both) the sectional and societal interests which exist within a defined public. The second is that to ascertain whether a decision or action has a public interest bearing one must assess its (potential) impact in relation to the identified sectional and societal interests, although not necessarily the balance of this impact. The third is that, in order to determine whether decisions or actions further the public interest one *must* (attempt to) ascertain the balance of the *impact* (or consequences) of those decisions or actions.

So, how would one go about doing all of this. As an illustration we use the case of hemodialysis for kidney failure. Hemodialysis for kidney failure provides an excellent example of an expensive lifesaving treatment. With an expensive lifesaving treatment comes the problem of deciding whether it should be made available at public expense, and if it is, but only on a limited scale, who it should be made available to.²⁶

An international study of the treatment of end-stage renal disease found that *social value* criteria (based upon the impact value of survival of individuals) were widely employed in patient selection.²⁷ How are such social value criteria obtained? Not surprisingly they are largely the product of the beliefs of individual doctors, although in some jurisdictions professional bodies provide clinical guidance. So, it is the largely the medical profession which decides what is in the public interest in this context. Some, such as Basson, believe specialist panel determination of public interest criteria within specialist fields is the most

²⁵ Diamond, C. (1997) "Consequentialism in Modern Moral Philosophy and in 'Modern Moral Philosophy'", in Oldberg, D.S. and Laing, J.A. (eds.) *Human Lives: Critical Essays on Consequentialist Bioethics*, Basingstoke: Macmillan, pp.15 *et seq.* See, also, Anscombe, G.E.M. (1958) "Modern Moral Philosophy", in *Philosophy* 33, 1-19.

²⁶ As Wing has said, "It is no longer possible for doctors to take clinical decisions without taking some account of the resources which those decisions commit." See Wing, A. (1979) "The Impact of Financial Constraint", in Scorer, G. and Wing, A. (eds.) *Decision Making in Medicine: The Practice of Its Ethics*, London: Edward Arnold.

²⁷ Evans, R.W. *et al* (1994) *National Policies for the Treatment of End-Stage Renal Disease*, Seattle: Battelle Human Affairs Research Centers.

appropriate method of public interest determination.²⁸ Specialists, after all, have familiarity with the consequences of decisions within their fields. However, others argue that this can become an overly elitist and undemocratic approach.²⁹ They point to the general ease of determining attitudes, at least to general principles, through broad polls and other survey techniques.

The social value criteria used by doctors in hemodialysis cases are, as might be expected given the culture of the profession, not always purely utilitarian in their character, confirming the practical validity of Diamond's argument as set out above, although some criteria do have a thoroughly utilitarian look to them. Kilner found, in a survey of 450 dialysis and transplant doctors, that the weightings set out in figure 1 were put upon a range of selection criteria.³⁰ The principal criteria used are, although consequentialist in basic form, nevertheless far removed from broad based impact criteria.

Figure 1
Average Weightings in Respect of Patient Selection Criteria
(1-5 Scale, 5 Being Heaviest Weight)

Criterion	Weighting (Average)	Standard Deviation
Medical Benefit	4.2	1.0
Likelihood of Benefit	4.0	1.0
Quality of Benefit	3.8	1.0
Willingness	3.7	1.3
Length of Benefit	3.6	1.0
Psychological Ability	3.2	1.0
Age	2.7	1.1
Special Responsibilities	2.5	1.3
Resources Required	2.2	1.1
Progress of Science	2.0	1.1
Social Value	2.0	1.0
Supportive Environment	2.0	1.0
Ability to Pay	1.8	1.1
Random	1.7	1.1
Favoured Group	1.4	0.8
Sex	1.0	0.3

The main criticism levelled against social value criteria being used in contexts such as this is that they can be unfair. Age criteria either discriminate against those who may yet to have a *full* life or those who may have previously made an enormous contribution to society. Overtly consequentialist social value judgements will tend to penalise those members of disadvantaged groups. However, some social value criteria are almost universally acknowledged as appropriate. After all, medical benefit and likelihood of success are basically

²⁸ Basson, M.D. (1979) "Choosing Among Candidates for Scarce medical Resources", in *The Journal of Medicine and Philosophy* 4, 313.

²⁹ See, for example, Shatin, L. (1966) "Medical Care and the Social Worth of a Man", in *American Journal of Orthopsychiatry* 36, 96.

³⁰ *Supra*, n.24.

social value criteria. They are non-controversial because we all have the same chance of having the same chance. They are targeted, yet arbitrary!

In the context of legal aid, the Legal Aid Commission of New South Wales, in determining whether a case is a *public interest case*, weighs the cost of the case itself against the benefit that will accrue to the community as a whole if it is successfully brought (or in appropriate cases, brought at all). The impact looked to, however, is discriminatory in that it is gauged by reference to only “the financially and socially disadvantaged.”³¹ We would argue that any public interest element of the English Legal Aid funding code must be similarly discriminatory, otherwise the rationale of the Legal Aid scheme may be undermined.

Context is, of course, everything. Public health care may lose public support if it becomes discriminatory. Social services may lose support if they are not sufficiently discriminatory. The safest form of public interest to adhere to in such contexts is perhaps therefore the expressed public interest based upon individual interests. It has, as already noted, immediate democratic legitimacy and it is readily ascertainable. It even allows for a quasi-calculation of the balance of interests.

The availability of hemodialysis for kidney failure can also be used to illustrate the advantages and disadvantages of an approach to public interest based on expressed interests.

Hemodialysis has been available as a treatment in the United States since the 1960s. In 1972 the United States Congress voted to fund the treatment for Medicare patients. The vote was the result of effective lobbying of the nephrology community. It was therefore in accordance with the democratic process, but largely brought about by a specific interest group that had an effective voice (i.e. which could express its interests louder than others). As Kilner observed,

“Curiously, no congressional hearings were held on the matter, and less than thirty minutes of debate took place on the Senate floor. Federal funding apparently presented a way of avoiding uncomfortable life-or-death patient selection decisions ... especially those involving evaluations of the social worth of patients ... As a result, the opportunity to develop carefully considered approaches to medicine’s inevitable patient selection decisions was lost ... Federal funding has made dialysis available to the vast majority of those in need, but the supply of *other* lifesaving treatments continues to be limited.”³²

³¹ Gould, J. (1998) “Models for the Delivery of Public Interest Litigation”, paper presented at the Law Society Public Interest Seminar, 26 March 1998, p.4.

³² *Supra*, n.24, pp.4-5.

A couple of lessons can be drawn from this brief history of hemodialysis treatment in the United States. The first is that the public interest can be manipulated by those with a voice. Although we are not suggesting that in this case the public interest was not best served by the democratically legitimated decision of the Congress, we do suggest that it is not immediately possible to know whether or not it was. The second is that just because a particular course of action may greatly benefit a substantial number of people does not necessarily entail that it is truly in the public interest. Alternative action programmes may promote far greater benefits. One is not always faced with *good* and *bad* options. Sometimes one is faced with a range of *good* options, of which some are better than others (or a range of bad options in which some are worse than others).

We can make the observations at this point that there is a great difference between the aggregate interests of individuals and the usual representation of the aggregate representation of individuals. In the same way, as Griffiths LJ stated in *Lim Laboratories Ltd v Evans*,³³

“There is a world of difference between what is in the public interest and what is of interest to the public.”

Further, there is a great difference between what is in the public interest and what interests professionals who deal with matters of public interest on a daily basis.

As has been noted already, and as is becoming increasingly apparent, to reliably ascertain what is truly in the public interest (whatever definition of the public interest one adopts) one must actually enquire into the matter in an objective and calculating manner. This is true also in the case of ascertaining whether an issue has a public interest bearing.

The Court Challenges Program of Canada, set up in 1994, as Gould has explained, “to provide financial assistance for important court cases that advance language and equality rights guaranteed under the Canadian constitution,”³⁴ has explicitly recognised this need for enquiry. The programme can fund not just formal legal cases, but also research in relation to potential litigation, informal issue resolution procedures, the programme’s own promotion, and, most interestingly in this context, *impact studies*. Funding for impact studies must be applied for separately from other funding. Impact studies do not, therefore, constitute a part of the application process for public interest case funding. However, funding for such studies could readily be incorporated into a general case funding code.

In funding impact studies the Court Challenges Program acknowledges that, whilst it may sometimes be clear that an issue has a public interest bearing, such

³³ [1984] 2 All ER 417, at 435.

³⁴ *Supra*, n.31, p.4.

is not always the case. Whilst just 1% of the programme budget has been spent on impact studies, this still amounts to tens of thousands of dollars, a sum which *could* potentially allow for the retention of staff charged solely with an impact evaluation role.

Common Interest Groups and Private Interest Groups

Having drawn attention to the role of lobbying in creating awareness of public interest matters, it is worth briefly explaining the distinction between different types of common interest group. As Griffith recently observed, “pressure groups have a *common interest* at heart ... and interest groups generally exist to bring pressure to bear.”³⁵ However, there is a clear difference between the various types of groups that have a common interest at heart and it needs to be fully understood. There is a clear difference, for example, between APEX, Greenpeace and the Suffolk Quilters’ Club. One seeks to advance its members, one seeks to advance humanity generally and one is essentially a passive association. It is important that our terminology be precise and reflect these differences, as it could be argued that in some contexts the different types of groups should be treated differently. We adopt Feldman’s distinction between *representative* and *surrogate* common interest groups and add to it *mere* common interest groups to take care of the Suffolk quilters.³⁶

A representative common interest group is one that solely represents the interests of its own members. So, to take a simplified example, a union may seek a wage increase for its members. Its members will benefit, others will not. The benefits may not all be the same, but that is not important. It is the interests of the members alone with which the union is concerned. On the other hand, a surrogate common interest group is one that seeks to advance the interests of those beyond its membership. A mere common interest group is one that does not seek to advance any interests (at least at the potential expense of any others).³⁷

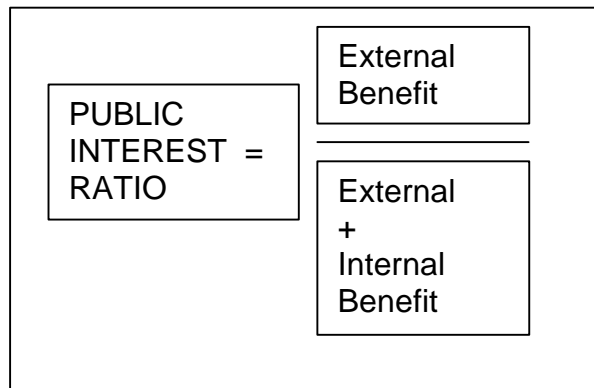
Of course, things are not always as black and white as this. Benefits may *leak out* from representative common interest groups. Some surrogate interest groups may be of little interest to anybody. Some predominately representative groups expressly go about furthering the interests of non-members.

³⁵ Griffith, J. (1997) “Public Interest Litigation and Judicial Review”, in [1997] *Judicial Review* 195.

³⁶ *Supra*, n.8, p.45.

³⁷ It could be argued that the Suffolk quilters are a representative group, as they are advancing their own interests in quilting. However, they are entirely inward looking in this regard. They do not seek to maintain their interests at the potential expense of the interests of others. They are benign as regards non-members. A third classification is therefore, we feel, necessary.

Figure 2
Weisbrod's Public Interest Formula



Faced with this, the public interest formula developed by Weisbrod, set out in figure 2, might be of some use.³⁸ We might allow a certain degree of latitude in our definitions by referencing the public interest ratio that can be derived from the formula. So, instead of classifying a common interest group as representative only if it has a public interest ratio of 1, we might do so if the ratio is smaller than, say, 2. As is clear from the above, the formula is intended to demonstrate “differences in the relative magnitude of any external effects resulting from [different groups’] actions.”³⁹ There are two reasons this may be important. First, in terms of predicting the behaviour of common interest groups. A group with a low public interest ratio is likely, as Weisbrod points out, to act according to “the usual self-interest models.”⁴⁰ Second, and of more immediate concern, in terms of how a group is treated as a matter of public policy. Matters of interest only to groups with low public interest ratios (representative groups) might be deemed less worthy of public support than those of interest to groups with high public interest ratios (surrogate common interest groups).⁴¹

Moving Away From Groups

A problem with the Weisbrod formula, as stated, is that it takes no account of the size of the group concerned. Thus a group with almost as many members as make up the public itself will necessarily score only a very low public interest ratio. Conversely, a group with almost no members might score a very high public interest ratio.

³⁸ *Supra*, n.4, p.21.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ We do not intend here to suggest that cases *brought by* such groups should necessarily ever be considered appropriate for funding. However, we recognise that at least those cases they highlight but do not fund might be deemed appropriate for funding.

It might be thought that the most important determinant in deciding whether something is a matter of public interest is therefore the absolute benefit itself, or perhaps the benefit ascertained by subtracting the internal benefit from the combined internal and external benefit. A problem here, though, might be that the question of who the benefit is realised by is often regarded as important, especially where public funding is involved. It is for this reason, as was noted above, that the Legal Aid Commission of New South Wales focuses its impact calculations upon the financially and socially disadvantaged. It is, after all, those people at whom the New South Wales legal aid system is targeted.

A general problem facing any approach to the public interest based on absolute benefit values is that of differing benefit patterns. To pose the eternal utilitarian question - Is it better that an absolute benefit of 20,000 benefit units be distributed amongst 10 individuals or 1000 individuals?

To answer this question it may be necessary to know *who* the 10 and the 1000 individuals are. This is because the absolute benefit accruing to individuals might be of a lesser concern than the relative benefit accruing to individuals. Thus, it might be preferable that 20 benefit units go to each of 1000 individuals who initially have just 10 than for 2000 benefit units to go to 10 individuals who initially have over 1,000,000. In a practical context, it might be preferable that 100 very poor individuals benefit to the tune of £1,000 than 10 very rich individuals benefit to the tune of £10,000, despite the overall absolute benefit being the same. This would seem to be in keeping with a Rawlsian approach at the least.⁴² Indeed, it might be considered preferable to see the benefit targeted to those with relatively greater need even if the overall absolute benefit were diminished. A Weisbrod type public interest formula, taking into account the relative benefits accruing to different individuals as a consequence of any specific decision or action, could even be developed to meet these concerns.

Types of Public Interest Case

As was noted in an earlier section, an active societal public interest approach is often equated with a governmental interest approach. As was further noted, such an approach is potentially in direct conflict with a sectional public interest approach. An interesting context in which this conflict can manifest itself is in relation to judicial review.

Judicial review cases can be argued to be in the (sectional) public interest on two main grounds. First, they can be argued to keep executive government action within the public interest based boundaries set by Parliament. This is similar to the argument related by Cane in relation to the 'public interest view of administrative law'.⁴³ Parliament determines the "compromise position ... called

⁴² Rawles, J. (1972) *A Theory of Justice*, Cambridge, Mass: Harvard University Press

⁴³ Cane, P. (1992) *An Introduction to Administrative Law*, Oxford: Oxford University Press.

the public interest” in relation to “conflicting community interests” and the courts ensure that executive government action complies with the position adopted.⁴⁴ Second, they can sometimes be argued to independently result in a net aggregate benefit to the public. So, for example, if a case sees a government programme halted, that would otherwise result in expenditure in an inefficient or harmful manner, then it might be said to promote the public interest.

However, it can also be argued that judicial review cases undermine the (active societal) public interest. The argument simply relies upon the fact that the cases are *against* government and concludes that they are therefore against the interests of government (as government). On the other hand, societal public interest approaches are perhaps best formulated in respect of government in the broad sense. If the broad sense is adopted, then it can be argued that the constitutional balance is preserved, the integrity of government is enhanced *and* the interests of individuals protected through judicial review cases.

So, are judicial review cases public interest cases? At one extreme it could be said that they all are, for the reasons just outlined. However, this is similar to saying that *all cases of all descriptions* are public interest cases as they are manifestations of the rule of law and proper access to the courts. This is not, though, a satisfactory position to adopt. The nature of individual cases must, of course, be looked to. The potential impact of cases must be assessed, and this must be in relation to their costs.

It is important at this juncture to note that judicial review is still often depicted as a weapon in the hands of the citizen to be used against the over-mighty powers of central government, and it has performed this role in a number of high profile cases.⁴⁵ However, data from the Public Law Project suggest that it is more often used as a weapon to further limit the autonomy of local government rather than as a constraint on the power of the central state.⁴⁶ It is more akin, in the majority of cases, to a “safety net” for asserting basic rights to fair treatment within the system of administrative decision making where no other appeal mechanism is available.

Further, it is quite common for the individual concerned in a particular case to obtain no *practically* effective remedy. Such cases as these can only be truly important in terms of effecting change in public policy. They can be argued to be of little importance in terms of fairness for particular individuals.

⁴⁴ *Ibid*, p.362.

⁴⁵ See, for example *R v Secretary of State for Foreign Affairs ex parte World Development Movement* [1995] 1 All ER 611 and *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

⁴⁶ Bridges, L., Meszaros, G., Sunkin, M. (1995) *Judicial Review in Perspective*, London: Cavendish, p.193.

It has been argued that judicial review has more of an impact in its educational role than any role centred upon individual remedies. The process of judicial review often acts as a form of deterrent for government bodies or, as Richardson and Sunkin have argued, “provide[s] public authorities with principles and standards to guide their future decision making.”⁴⁷ It is clear that government bodies are acutely aware of the process, as the 1987 publication of *The Judge on Your Shoulder* by the Cabinet Office clearly demonstrated.

Similar arguments to those set out in relation to judicial review cases can be applied to human rights cases. Again, such cases be characterised as involving a conflict between sectional and societal interests. Again, it could be argued that all such cases are public interest cases. They all serve to define the extent of rights that all members of the public share. Surely such rights also constitute shared interests. Again, they can be argued to preserve the integrity of government. However, again it must be recognised that individual cases can sometimes be of little consequence, treading well worn paths of legal discourse and preserving or gaining marginal benefits.⁴⁸ Again, therefore, the potential impact of individual cases must be assessed. As noted above, deontological concerns, such as rights, can be accommodated within a structurally consequentialist methodology.

What of *high profile* cases? What of cases which are of interest to the public? Do they have an inherent public interest bearing? The answer, as was suggested above, is that they do not. It would take an inelastic semantic stretch to equate what the public are interested in with what is in the public interest. The term ‘interest’ is clearly operating differently within the two contexts.

However, it is worth taking a quick look at the nature of high profile cases, as many of them might be regarded as being suitable for description as public interest cases.

We reviewed 173 high profile case return forms from Legal Aid Board Area Offices. All the forms were returned during the four month period from May to August 1998. The purpose of the review was to build up an idea of the distribution and nature of cases administratively defined as being high profile. The Legal Aid Board’s *Quality Procedure (QP) No.36* defines a high profile case for this purpose as one “which is, or has the potential for, attracting media attention because of the subject matter of the action or the identity of the parties involved in the action.” They do not include multi-party actions. They do, though, include judicial reviews of key government decisions or public bodies. This does

⁴⁷ Richardson, G., and Sunkin, M. (1996) “Judicial Review: Questions of Impact”, in *Public Law*, pp.79-103.

⁴⁸ Also, the beneficiaries are sometimes groups considered low priority to the ‘general public’. For example, a fair number of UK cases going before the European Court of Human Rights have involved prisoners, whose plight often attracts little sympathy. Of course, it is precisely such groups of people for whom civil rights protection is generally most needed. See, for example, *Silver v United Kingdom* (1986) 10 EHRR 165, *Golder v United Kingdom* (1975) 7 EHRR 524, *Weeks v United Kingdom* (1988) 10 EHRR 293.

not include all judicial review cases, but “would include, say, the first JR of new government legislation or publicly contentious legislation.” Other factors which are important in the classification process are “the potential for ‘opening the floodgates’ [of litigation] – stress at work cases, for example” and the likelihood of cases “breaking new ground”.

Many of the cases reviewed are deemed high profile simply because of their cost. The present guidelines indicate high profile cases include those where the total costs are known to, or are likely to, exceed £50,000. Clearly a case could not be regarded as a public interest case solely because of its cost.⁴⁹ Others of the high profile case classification guidelines, though, such as those relating to *test* and *floodgates* cases seem more promising in this regard.

It is interesting to note that just 22 of the 173 cases were judicial review cases. A brief description of these judicial review cases is presented in figure 5.

There were also 23 personal injury cases and 28 medical negligence cases.⁵⁰ A brief description of these are presented in figures 6 and 7. As can be seen, the great majority of these cases are classed as high profile on costs grounds alone. Whether they would rank as public interest cases under any new legal aid funding code is therefore impossible to determine. It could be said, though, that any link between high profile cases such as these and public interest cases is particularly obscure.

⁴⁹ Although it could be argued that high cost *publicly funded* cases have a public interest bearing, as they involve great public expense. In this context the public interest might demand that public funding be withdrawn unless sufficient balancing interests are served through the case being brought.

⁵⁰ The Government proposes to maintain the availability of Legal Aid in respect of medical negligence cases, but not personal injury cases generally. Legal Aid for other types of personal injury case will remain available only until next year.

Figure 5
Description of Judicial Review Cases Classed as High Profile (n=22)

Legal Aid Granted	Brief Description
Yes	Home Secretary - Stephen Lawrence
Yes	Home Secretary - Stephen Lawrence
Yes	Church in Wales - Sexual Abuse
Yes	Legal Aid Board
Yes	School – Failure To Re-instate After Expulsion
Yes	Prison – Drug Use
Yes	Education
Yes	Immigration- Deportation
Yes	Transport – Cambridge Rickshaw
Yes	Transport – Refusal of Passes to Disabled People
Yes	Prison – Suicide
Yes	KPMG audit
Yes	Crown Prosecution Service
No	Stephen Lawrence
No	General Medical Council – Application by Doctor
No	Mental Health Act – Unlawful Detention (Solicitor)
No	Legal Aid Board
No	Broadcasting Complaints Commission
No	Home Secretary
No	Home Secretary
No	Unknown
No	Unknown

Figure 6
Description of General Personal Injury Cases Classed as High Profile (n=23)

Legal Aid Area	Legal Aid Granted?	Brief Description
2	No	High Cost
2	Yes	High Cost
2	Yes	High Cost (49-75k)
2	Yes	High Cost (pot 75k)
2	Yes	High Cost (60k)
2	Yes	High Cost (300k)
2	Yes	High Cost (50k)
2	Yes	High Cost (pot65k)
2	Yes	High Cost (60k)
2	Yes	High Cost (50k)
5	Yes	High Cost (pot 65k)
6	Yes	High Cost (100k)
7	Yes	High Cost (50k) PVS case
7	Yes	High Cost (60k)
8	Yes	Against Ministry of Defence
11	No	Rape In Care
11	Yes	Against Royal Navy
15	Yes	High Cost
15	Yes	High Cost (100k)
15	Yes	High Cost (50k)
15	Yes	Test Case: Ambulanceman With Post Traumatic Stress Disorder
15	Yes	High cost (50k)

Figure 7
Description of Medical Negligence Cases Classed as High Profile (n=28)

Legal Aid Area	Legal Aid Granted?	Brief Description
1	No	On Behalf of Children of Dead Woman
1	Yes	High Cost
2	Yes	High Cost (75k)
2	Yes	High Cost (200k)measles vaccination
2	Yes	High Cost (pot 50k)
5	Yes	On TV
5	Yes	Media Attention
6	Yes	Media Attention
7	No	Refusal of Heart Transplant for Down's Syndrome Patient (not JR)
7	Yes	High Cost(50k)
7	Yes	High Cost (150k)
7	Yes	High Cost (60k)
7	Yes	High Cost (100k)
7	Yes	High Cost (50k)
8	Yes	Media Attention
10	Yes	Media Attention
11	No	Child
11	No	Media Attention
15	Yes	High Cost
15	Yes	High Cost (55k)
15	Yes	High Cost (100k)
15	Yes	High Cost (50k)
15	Yes	High Cost (100k)
15	Yes	High Cost (75k)
15	Yes	Gulf War (75k)
15	Yes	High Cost (50k)
15	Yes	High Cost (50k)

“Public Interest Law / Public Interest Litigation”

Before concluding matters it is worth very briefly highlighting the common usage of the terms ‘public interest law’ and ‘public interest litigation’. As Griffith has noted, “When we speak of public interest litigation we think primarily of pressure or interest groups initiating proceedings.”⁵¹ This observation neatly summarises the general associations of both terms. Dhavan set out these associations further in *Public Interest Law*.⁵²

“‘Public interest law’ is the product of a near contemporary interlude in recent American history ... In our understanding, [it] is part of the struggle by, and on behalf of, the disadvantaged to use ‘law’ to solve social and economic problems arising out of a differential and unequal distribution of opportunities and entitlements in society.”

‘Public interest litigation’ has often, therefore, been regarded as synonymous with ‘social action litigation’, most famously, perhaps, by Baxi.⁵³

Whilst the American origins of the social action associations have been questioned by Harlow and Rawlings, their usage of both terms is much the same.⁵⁴ As they say, public interest litigation is essentially concerned with “the use of law and legal techniques as an instrument for obtaining wider collective objectives.”⁵⁵ They point to a rapid growth in the ‘public interest law movement’ in the United Kingdom and seem to lament the non-availability of certain US procedural tools in this jurisdiction.⁵⁶

It has, we believe, been useful to set out the common usage of ‘public interest law’ for two main reasons. First, it reminds us that the public interest, even as defined elsewhere in this paper, is perhaps best served by furthering the interests of the disadvantaged - both on philosophical grounds⁵⁷ and arithmetic grounds⁵⁸ - although in the context of legal aid it is likely that such an approach would be implicitly adopted in any event. Second, it warns us that we are entering a highly political and politicised area. As Baxi has commented in relation to social action litigation in India,

⁵¹ *Supra*, n.35, p.199.

⁵² Dhavan, R. (1986) “Whose Law? Whose Interest?”, in Cooper, J. and Dhavan, R. (eds.) *Public Interest Law*, Oxford: Blackwell, p.17.

⁵³ Baxi, U. (1993) “Judicial Discourse: The Dialectics of the Face and the Mask”, in 35 *Journal of the Indian Law Institute*, p.1.

⁵⁴ They regard public interest law and litigation as defined as having a long and noble history in the United Kingdom. See Harlow, C. and Rawlings, R. (1992) *Pressure Through Law*, London: Routledge.

⁵⁵ *Ibid*, p.1.

⁵⁶ e.g. Amicus briefs and class actions.

⁵⁷ See, for example, n.42 above.

⁵⁸ See, for example, p.15 above.

“Constitutional adjudication in social action litigation [can become] a dialogue between judiciary and executive on the nature of public power and its public purposes.”⁵⁹

Although the Indian context is far removed from our own, it is important to remember that constitutional principle would seem to ultimately place many of the issues which form the subject matter of (most definitions of) public interest cases in the hands of Parliament. Caution is necessary when the prospect of their being placed in the hands of the courts arises. Special caution is necessary when they are placed in our own hands!

Conclusion

It has been shown that establishing the substance of true interests, both sectional and societal, is near on an impossible task. However, expressed interests can be reasonably reliably ascertained and can be legitimated with reference to democratic theory. Conceptual difficulties in establishing the public interest have been shown to stem from the distinction and potential conflicts between and within sectional and societal interests. In relation to the latter a further distinction may be drawn between passive and active societal interests. Conceptual and practical difficulties also stem from the problem of aggregation in respect of sectional interests, especially in the light of distinctions between vital and subsistence interests, material and ideological interests, and teleological and deontological concerns.

We have noted that societal interests are often equated with the interests of government, and that these interests can be given a wide (relating to the structure of government as a whole) or narrow (relating to a particular branch of government) reference. We have further noted that the courts historically regard the actions of both the executive (unless *ultra vires*) and legislature as being inherently in the public interest.

In exploring methods of aggregating and conciliating interests we have suggested that difficulty should not prevent earnest endeavour. We have explored a number of methods that have been adopted or suggested and shown that there can exist dangers of double counting. We have explained the nature, advantages and disadvantages of social value criteria. We have provided illustrations of their use. We have demonstrated the seeming need for impact analysis in any determination of whether a matter is in the public interest or has a public interest bearing. We have shown how the Court Challenges Programme of Canada allows for the funding of impact studies to facilitate this analysis.

We have shown that a determination of whether a legal case has a public interest bearing must be based upon an assessment of its potential impact in relation to

⁵⁹ *Supra*, n.58, p.7.

identified sectional and societal interests. Further to this, we have shown that in order to determine whether particular case decision would further the public interest one *must* (attempt to) ascertain the balance of the *impact* (i.e. consequences) of that decision, again in relation to identified sectional and societal interests.

We have explained the distinction between representative, surrogate and mere common interest groups. We have shown how their hard definitions can be softened by utilising a public interest formula. We have also shown, however, that such formulae are not ideologically neutral. We have gone on to suggest that impact analyses are perhaps best focused on relative benefits to individuals rather than absolute benefits. We have also suggested that benefit distribution pattern preferences should link to relative benefits to individuals rather than absolute benefits.⁶⁰ We have provided an example of an approach consistent with this utilised by the Legal Aid Commission of New South Wales, which focuses impact calculations upon the financially and socially disadvantaged.

We have argued that neither judicial review, human rights nor high profile cases are intrinsically public interest cases. We have argued that whilst the two former types of case enhance interests, preserve the integrity of government and maintain the constitutional balance, their public interest bearings must be ascertained in accordance with the same principles as any other type of case, and on a case by case basis. We reviewed 173 recent high profile cases and determined that a good proportion of them were deemed to be so on the basis of their cost, especially those relating to personal injuries. This served to emphasise that what is in the public interest is not the same as what interests the public. We also warned that peripheral sectional interests are sometimes well disguised as public interests.

We have set out the common usage of the terms 'public interest law' and 'public interest litigation' and shown how they are associated with social action litigation. We have argued that this is a useful reminder that, first, the public interest is perhaps best served by furthering the interests of the disadvantaged and, second, decisions relating to the public interest are ultimately constitutionally appropriate for the legislature. Extreme caution should therefore be observed when making public interest decisions or passing them to some other body.

⁶⁰ For the purposes of the analysis we have talked in terms of benefits. Of course, it may be that decisions actually relate to hardships. The principles set out remain unchanged.

“The fact that the notion of public interest is vague does not make it impossible to use. If one were to apply such a principle, our language would be made completely destitute. Take for example the expression ‘a beautiful woman.’ On this point every man considers himself an expert; since the beginning of time men have carried on a lively discussion about which characteristics are of particular importance in judging the beauty of women. Nevertheless, the upshot – at least within each culture – is usually a remarkable degree of agreement about which women should be placed in this category. No one would dream of defining a beautiful woman operationally as one who wins a beauty contest. Nor would anyone wish to deny that beautiful women exist. In fact we can be reasonably certain of which physical attributes are possessed by women who are singled out as beautiful. The same is true of the public interest ... Much of the vagueness disappears when it is put into context.”

Pennock, as explained by Lewin, *supra*, n.20, p.23.