

The New Public Interest Lawyers*

At a time when our society is badly demoralized and failing to meet the needs of many of its citizens, the traditional modes for public service by lawyers—through working in the government¹ or through combining *pro bono* activities with commercial law firm practice²—have lost much of their effectiveness and allure. Some law students now feel an angry despair, no longer believing it possible to play a positive role within their prospective profession. But others have decided to believe, with the poet, that you don't have to be a Weatherman—either to know which way the wind is blowing, or to be a force for necessary and fundamental change.

A source of intense interest for the present generation of law students is the small number of practitioners outside government or corporate law practice whose prime goal is the promotion of significant social

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Information was gathered through a series of in-depth interviews with numerous lawyers who are engaged in what the authors feel may be loosely termed "public interest law." The Journal expresses sincere thanks to these lawyers, whose names are listed in the Appendix, both for the primary contributions which brought them to our attention, and for their remarkably straightforward and insightful interviews. We are especially grateful to James Lorenz, Jr., Thomas Hecht of the American Bar Foundation, and Gary Bellow, for extensive comments and suggestions on an earlier draft. Professors Thomas I. Emerson, Charles Reich, Quintin Johnstone, and Daniel J. Freed offered us helpful criticism at various stages of the project. We also wish to thank Lloyd Cutler, Charles Horsky, and Victor Kramer of the Washington bar for reading this Comment in draft form and helping us to put the new public interest lawyers in historical and analytic perspective.

1. Perhaps the most widely recognized way for a lawyer to serve the public interest in the past was by working for the federal government. According to Charles Horsky, author of *The Washington Lawyer*, the focus on government service developed in the 1930's. At that time, the various state governments had in large measure been taken over by powerful, moneyed interests. Roosevelt convinced the public that there was a significant opportunity to effect economic, social, and political change through the federal government. Young lawyers flocked to Washington to "save the Union from the states." In the thirties, Horsky reflects, "to join one of the federal administrative agencies was seen as a way of fighting the enemy; now it is more often perceived as just joining the club." Though there are certainly important differences among many of the agencies, critics say that they are at best demoralized and inefficient, and, at worst, the captives of a few powerful special interest groups, much like those which had captured the state governments in Roosevelt's time. In a very recent opinion, the Court of Appeals for District of Columbia Circuit boldly focused the issue: "This appeal presents the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect." *Moss v. Civil Aeronautics Board*, Dkt. No. 23,627 (D.C. Cir. July 9, 1970) (slip opinion).

2. For some observations on the past contributions of the private bar to the cause of social change, and references to current *pro bono* activities of commercial law firms, see pp. 1106-09 and notes 65 & 67 *infra*.

change. The activities of these lawyers, coupled with their sense of commitment and willingness to make personal sacrifices, have led publicists to call them the new "public interest lawyers."³

3. Though we will use the term "public interest lawyer" freely in this Comment, we would like to note that its use raises serious conceptual difficulties. *See generally*, G. SCHUBERT, *THE PUBLIC INTEREST* (1960); Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 *Geo. Wash. L. Rev.* 547 (1970).

The slipperiness of the term is well illustrated by a recent incident involving one of the better known "public interest" lawyers, Ralph Nader. Earlier this year, Lloyd Cutler, a Washington lawyer of considerable professional stature, led a firm team which obtained a consent decree on behalf of automobile companies, settling before trial a government antitrust action which charged the companies with conspiracy to impede the development of pollution control systems. Through Nader's promptings, a number of law students picketed Cutler's firm to draw attention to the settlement, which they felt to be a Justice Department sellout of the public interest. The students felt that the settlement prevented a proper public airing of crucial issues, and noted that the settlement also prevented the possibility of private treble damage actions based on the original judgment, which would have been possible had the government gone to trial and prevailed. In the midst of a press conference, in which a clearly upset Mr. Cutler accused the picketing students of violating legal ethics, he asked an especially difficult question: "Why do you think you have a monopoly on deciding what is in the public interest?"

In an interview, Mr. Cutler said that the negotiations were not "secret," as the students had alleged; that public objections were heard and amendments made; and that the final settlement was unanimously affirmed on appeal. According to Cutler, the government received the relief it had sought, and it was by no means clear to those involved that the government would have prevailed had the case actually been tried. Cutler's press-conference question, then, appears to mean the following: if we agree that the pluralistic political system is a fair one, the public interest can only be defined as the outcome of the political *process* in which various private and group interests compete. Thus any lawyer representing any substantive interest in the process can with equal justification claim to be working towards the "public interest." Assuming that the process operated properly, the pollution case settlement, which was the outcome of the process, must have been "in the public interest."

According to the pluralist theory, better decisions for society, at least over the long run, will be produced where competing interest groups have a chance to use power, reason, and compromise to get what they desire. Critics, however, have repeatedly noted that the political system is not presently functioning in the fashion prescribed by pluralist theory. Of many different criticisms, two are most relevant here. First, as Henry Kariel has emphasized, the leaders of large hierarchical organizations have increasingly been granted governmental recognition as quasi-official representatives and spokesmen for their respective groups. As a result, it has become more difficult for the members of such organizations (labor unions, corporations, professional groups) to influence policy—either directly or through their groups. Additionally the political system retains a distinct bias against unorganized interests, or those in the process of formation. H. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* (1961).

Second, other critics have emphasized that the contemporary social structure encourages groups to organize politically around occupational categories, while inhibiting effective organization on the basis of other considerations. The process therefore ignores concerns which the active legitimate groups fail to define as high priority interests. This is why environmental and consumer interests have until recently been so badly neglected. *See generally* J.K. GALBRAITH, *THE NEW INDUSTRIAL STATE* (1967); G. MCCONNELL, *PRIVATE PROPERTY AND AMERICAN DEMOCRACY* (1966); Connolly, *The Challenge to Pluralist Theory*, in *BIAS OF PLURALISM* (W. Connolly ed. 1969).

Because the lawyers we interviewed are representing social groups and interests which are currently underrepresented in the legal and political arenas, they may be said to be acting in the public interest by consciously attempting to correct the bias of the political system. One problem with this approach is that to label a lawyer a "public interest lawyer" because he is "making pluralism operative" suggests that his personal commitment is to the *process* (i.e. is it fair? are all groups and interests being heard?), whereas in fact he may be, and generally is, committed to realizing the substantive interests he represents. From the premise that the public interest is the result of a process in which

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Both the reinvigoration of government agencies and the further development of the *pro bono* potential of private firms will be crucial factors in long range social change. But many observers believe that the new public interest lawyers will be the gadflies and catalysts for a major reallocation of legal resources, which will stimulate the expression of important interests and values in our society and further political, economic, and social equality. What follows is an attempt to describe and analyze some twenty-five in-depth interviews with leaders of this new movement.

Keenly aware of the defects in our society, each of the lawyers we interviewed has made the existential decision to act to bring change. As a group, they have engaged in a *mélange* of activities and have developed a number of strategies to effect the goals they seek; they have tapped a number of different sources of funding for their new operations; they have developed distinctive relationships with clients and

groups contend, it follows that one cannot validly claim to be a "public interest lawyer" by pointing to the merits of the particular causes he pursues. Since there is no societal consensus about values, such a claim is merely an assertion of subjective value preferences, a game which can be played by Lloyd Cutler with as much authority as Ralph Nader.

It is possible to step outside Cutler's premises entirely, and to fault pluralist theory itself. This may be in essence what Nader is doing when he claims to speak out for the public interest in his role as independent professional. For example, it may be argued that the historically produced limitations of the "subdued pluralism" of modern industrial society undermine any faith that decisions made through that process will produce the best results for the whole society. As Herbert Marcuse has argued, critical social analysis may expose "the irrationality of the whole." The competing institutions in modern industrial society, he claims, concur in a common interest to defend and extend their established position, and to solidify the "power of the whole over the individual." The irrationality of the whole—of growing productivity based upon growing destruction, of technological advances used to produce weapons of death or plastic products for a consumer society, of increasing affluence producing pervasive effluence—goes unnoticed and unprotested. H. MARCUSE, *ONE-DIMENSIONAL MAN* xiii (1964). Under such circumstances, we may wish to define the public interest apart from the process of contending groups. Indeed, as Barrington Moore has suggested, the pluralist conception has "become part of what requires explanation." Moore, *The Society Nobody Wants: Beyond Marxism and Liberalism*, in *THE CRITICAL SPIRIT* 418 (1967).

Under this "substantive" (as opposed to process-oriented) approach to defining the public interest, an actor may be able to claim that he represents a group or interest the advancement of which is "in the public interest." Using this approach, Ralph Nader is asserting, from his own research and before the outcome of a long and complex process, where the public interest lies with respect to a given issue. The value choices underlying this claim may be no more subjective than the value preference which supports a faith in the outcome of the pluralist system as it presently operates. For attempts at conceptualization of "the public interest," see Barry, *The Public Interest*, in *THE BIAS OF PLURALISM* (W. Connolly ed. 1969); WOLFF, *THE POVERTY OF LIBERALISM* (1968); MARCUSE, *supra*.

Despite the slipperiness of the term "the public interest," its popularity makes its use inconvenient to avoid. In this Comment, the term "public interest lawyers" will be used to refer to lawyers who represent the underrepresented groups and interests in society; the term "public interest lawyer" is applied as a word of approval, because the authors believe that representation of such clients in the legal-political process will make pluralism work better, or in some instances because we believe that the interests and groups being represented by these lawyers are to be preferred, at least temporarily, over other interests and groups.

have transformed the concept of the "client;" and they have occasionally experimented with different, freer life and working styles. The present career role of each of our interviewees undoubtedly represents a tentative compromise between personal values and societal concerns, risk and security, reality and dreams. Our purpose in writing this Comment is to describe these new career roles and tentatively to evaluate their potential as models for future development.

I. Survey: Clients, Activities, and Social Change

The lawyers to whom we talked are involved in essentially three different pursuits: aiding the poor; representing political and cultural dissidents and new radical movements; furthering substantive but neglected interests common to all classes and races, such as environmental quality and consumer protection. Individual lawyers and law firms often engage in activities which serve more than one of these goals, and of course the categories themselves overlap somewhat. Nevertheless, because many of the operations we will describe do have a primary thrust, these categories will be useful for a survey of the terrain occupied by public interest lawyers. In this section, an attempt will be made to suggest the full range of public interest work by describing the differing activities engaged in and clients and substantive interests represented, as well as the various theories of social change informing specific choices of clients and modes of action. To a surprising extent, it should be noted at the outset, the lawyers we interviewed did not articulate either a "politics" or a theory of what was wrong with American society; and in many cases an individual lawyer's work lacked the programmatic quality such a social theory would produce. But we have at least attempted, with the help of the more theoretically inclined lawyers we interviewed, to suggest the assumptions which underlie the various directions in which public interest lawyers are travelling.

A. *Lawyers for the Poor*

Poverty is both a cause and a consequence of underrepresentation in the legal-political process. The poor need legal services as much as anyone else, and the profession has always recognized, at least in principle, a duty to provide these services without regard for ability to pay. But the poor also need legal services *because they are poor*; the very fact of poverty fiercely intensifies an individual's need for legal representation in almost all facets of his life.⁴