

Lawyers for Social Change: Perspectives on Public Interest Law

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I. INTRODUCTION

Writing in the aftermath of the trauma engendered by the fierce struggle between President Franklin D. Roosevelt and the Supreme Court, political scientist Benjamin Twiss complained bitterly:

It is not surprising that lawyers' fame is evanescent Allied with those who are preoccupied with production and profits to the exclusion of standards of consumption and general well-being, lawyers have taken a negative rather than a creative and constructive attitude toward social development. In defending rights of untrammelled enterprise against rules of fair play and in presuming the unconstitutionality of legislative enactments, they have missed their cue to the role of constructive leaders and have been instead dogs in the manger.¹

Whatever its accuracy, this is a withering judgment. But clearly, this judgment cannot be shrugged off as either idiosyncratic or a hoary voice out of a bygone era of hard times. In a more prosperous period, a quarter-century later, Ralph Nader and a host of others expressed similar disillusionment with the legal profession.² Indeed the criticism has been virtually identical: that the profession has single-mindedly pursued the course of economic self-interest, providing its talents to the highest bidder in the marketplace.

Obviously, an occupational group as numerous as the legal profession will provide exceptions to virtually any generalization. As far as iconoclastic, public-spirited lawyers are concerned, Clarence Darrows will arise and stir the imagination in every generation. But the existence of a handful of highly publicized lawyers representing primarily the dissident and downtrodden does not begin to satisfy Twiss' quest for a commitment from

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1. B. TWISS, *LAWYERS AND THE CONSTITUTION* 259 (2d ed. 1962).

2. See, e.g., Halpern & Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 GEO. L.J. 1095 (1971); Nader, *The Role of the Lawyer Today*, 49 MICH. ST. B.J., Nov. 1970, at 17; Nader, *Law Schools and Law Firms*, 3 BEVERLY HILLS B. ASS'N J., Dec. 1969, at 8; Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970). But see Auerbach, *Some Comments on Mr. Nader's Views*, 54 MINN. L. REV. 503 (1970).

commitment to their ideological goals. While the consequence has been dependable broad-based financial support, neither organization's litigation program flourished in the period of exclusive reliance on membership funding. Accordingly, each organization has forged a link between its membership support and subsidization from the legal community in the form of voluntary or cooperating relationships. Moreover, each organization has increasingly tapped the funding source that takes center stage in the next section: the private foundations.

A second concern is structural. With far-flung networks of cooperating attorneys and local affiliates, both organizations can be characterized as highly decentralized. In each case an inbred resistance to excessive bureaucracy compounds the anarchic tendencies. Nevertheless, both organizations, especially the LDF, have maintained a strong sense of identity. The yeast has been provided by an active professional staff, involved in defining priorities, providing expertise and technical assistance, and coordinating related lawsuits.

A third concern is strategic. Each organization has concentrated its limited resources on constitutional test case litigation rather than adopting a service orientation. Many factors have pulled in this direction: most importantly, the commitment to a "national" program, the reliance on volunteer or cooperating attorneys, the ever-present exigency of limited funding, and the dependence on a small core of professional staffers.

It would be hazardous in the extreme to suggest broad-ranging generalizations from this profile of litigation-oriented law reform activity in two well-established national organizations. But we do have the broad outline of two somewhat similar models that have held their own in the rough-and-tumble of a market economy, and we can now proceed to examine a more recent phenomenon that constitutes in many important ways a new departure in law reform activity: the public interest law firm.

III. THE SECOND WAVE: PUBLIC INTEREST LAW

A. *Immediate Antecedents*

The immediate antecedents of the public interest law movement are not difficult to identify. In the second half of the 1960's, virtually every well-established institution was under fire, or at least reexamination, and the administrative system was no exception. The discontent focused, to a considerable extent, on the issue of effective access: how could those with decisionmaking authority be compelled to consider dimensions of a given problem that they ordinarily ignored in making policy?⁵³

The crux of the problem was identified as pluralism, the fashioning

53. It is important to distinguish between "standing" (obtaining a hearing) and effective access

of governmental policy out of the demands of competing interest groups. Growing discontent led to an assault along a surprisingly wide front. In the academic community, the widely read critique of Theodore Lowi in *The End of Liberalism*⁵⁴ is representative. Lowi argued that classical liberalism had been perverted with a concurrent failure of formal government to initiate policy effectively. Laissez-faire liberalism had been replaced by an ideology that advocated the competition of organized interests—unions, cooperatives, trade associations, and so on—for the largess controlled by an ever-expanding network of government agencies. The outcome, Lowi suggested, was cooperative management of large sectors of the economy by an alliance of powerful private interests and their formally designated regulators.

At the same time, Ralph Nader and his associates engaged the forces of pluralism on the battlefield. One Nader Report after another was produced,⁵⁵ cataloguing the alleged inaccessibility, or worse, of administrative agencies: their lack of concern for promoting anything other than the interests whose political clout might threaten the agency's own long-term existence. The first report—on the Federal Trade Commission (FTC)—is typical, and probably received the widest publicity. As far as consumer protection was concerned, the Nader group concluded that the agency was worse than useless. Its annual appropriations were frittered away on empty public relations gestures and on efforts to assist larger business interests police and harass smaller competitors. No one spoke for the consumer, who presumably stood to benefit most from disinterested administrative pursuit of "the public interest."

A few years earlier, the theme of effective access was vigorously stated in two landmark court cases that, with hindsight, clearly converge with the academic and investigative reform efforts discussed above. In *Office of Communication of United Church of Christ v. Federal Communications Commission (Church of Christ I)*,⁵⁶ a church group and individuals prominent in the local community, claiming to represent a substantial segment of the viewing public, challenged the license renewal application of television station WLBT in Jackson, Mississippi. The challenge centered on a variety of programming practices by WLBT that allegedly constituted blatant disregard for the interests of the black community in the viewing

(the good faith consideration of the intervenor's viewpoint). Clearly, formal access (standing) does not guarantee serious consideration by the decisionmaker. On the other hand, effective access does not mean absolute influence over the decider. As used in the Article, effective access will refer only to a situation where the intervenor's views are taken seriously before a final decision is reached.

54. T. LOWI, *THE END OF LIBERALISM* (1969).

55. See, e.g., E. COX, R. FELLMETH & J. SCHULZ, 'THE NADER REPORT' ON THE FEDERAL TRADE COMMISSION (1969); J. ESPOSITO & L. SILVERMAN, *VANISHING AIR* (1970); R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION, THE PUBLIC INTEREST, AND THE ICC* (1970); J. TURNER, *THE CHEMICAL FEAST* (1970).

56. 359 F.2d 994 (D.C. Cir. 1966).

area. The FCC was sufficiently concerned about WLBT's activities to substitute a 1-year probationary renewal for the ordinary 3-year renewal period. But the agency refused both to grant petitioners' motion to intervene and to hold an evidentiary hearing on the issue of renewal.

The District of Columbia Circuit Court of Appeals reversed and remanded, requiring an evidentiary hearing and maintaining that legitimate representatives of the viewing public had standing to intervene. In response to the assertion that the agency can itself adequately represent the public interest, the court said:

We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims, or to mere non-participating appearance at hearings. We cannot fail to note that the long history of complaints against WLBT beginning in 1955 had left the Commission virtually unmoved in the subsequent renewal proceedings

[U]nless the listeners—the broadcast consumers—can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner. By process of elimination those “consumers” willing to shoulder the burdensome and costly processes of intervention in a Commission proceeding are likely to be the only ones “having a sufficient interest” to challenge a renewal application. . . .⁵⁷

In the second case, *Scenic Hudson Preservation Conference v. Federal Power Commission (Scenic Hudson I)*,⁵⁸ conservation and recreational groups, as well as local communities, sought to invalidate a license granted to Consolidated Edison to build a pumped storage electricity generating plant at Storm King Mountain on the Hudson River. The FPC's statutory mandate provided that the agency was to license hydroelectric power plants only if a prospective project was “best adapted to a comprehensive plan for improving or developing a waterway. . . .”⁵⁹ The FPC granted the license over the opponents' arguments that the site should be preserved for historic, conservational, recreational, and aesthetic reasons.⁶⁰ The Second Circuit dismissed the agency's argument that the parties lacked standing because of insubstantial economic interests in the controversy. Moreover, the court held:

[T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.⁶¹

57. *Id.* at 1004-05.

58. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

59. 16 U.S.C. § 803(a) (1974).

60. Consolidated Edison Co., 33 F.P.C. 428, 454 (1965).

61. *Scenic Hudson I*, 354 F.2d at 620.

On remand, the agency was required to conduct a full exploration of alternative sources of electric power and to make a new determination in view of the various economic and noneconomic values identified.

In retrospect, then, the time seemed ripe for attempting to reform the administrative system. Two critical federal courts of appeal had signalled their readiness to reexamine traditional notions of judicial deference to administrative agencies; an indefatigable lawyer-reformer was becoming a household name by publicizing agency practices generally hidden behind a curtain of bureaucratic resistance; and the received ideology of post-New Deal policymaking was under critical attack from a new generation of academics. And, there was that frustrating, unending war—creating an impulse in virtually every stratum of society, lawyers included, to do *something* about access to “the system.”⁶²

But what access strategy would maximize the lawyer’s effectiveness in changing the policy outcomes generated by the political system? Some, like Nader, opted for the publicist-lobbyist role; others chose to function as organizers or educators. Consistent with their professional training, however, many decided to work for change through litigation by organizing the law firms whose practice came to be identified as “public interest law.”⁶³

B. *The Parameters of Public Interest Law*

From one perspective, “public interest” practice might be defined as subsidized attorney services—that is, services afforded in the absence of market demand—undertaken primarily to promote either substantive or procedural systemic goals. So defined, public interest practice describes a continuum ranging from private practitioners engaged in occasional *pro bono* work to wholly subsidized practitioners whose activities are entirely of the *pro bono* kind.

Unfortunately, this perspective is both under- and over-inclusive. It is

62. If the public interest lawyers were a by-product of the “access explosion” of the late 1960’s, that explosion was, in turn, closely connected to a rather different notion of access that had received great currency in the immediately preceding years. Beginning with *Gideon v. Wainwright*, 372 U.S. 335 (1963), a flurry of activity similar to that described above—judicial approbation, scholarly discussion, seminal implementation efforts—had been launched on behalf of legal representation for the poor. See, e.g., Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964); Note, *Neighborhood Law Offices: the New Wave in Legal Services for the Poor*, 80 HARV. L. REV. 805 (1967).

In *Gideon*, the Supreme Court declared a right to representation for indigents in state court felony cases. Close on the heels of that decision, the Economic Opportunity Act of 1964 became law. 42 U.S.C. §§ 2701–94 (1970). Within another year, the Legal Services Program, a separate division within OEO, had been established. The concept of legal services for the poor, in civil as well as criminal matters, had been spawned. From that concept it was a short step to recognize the exigencies of access for traditionally unrepresented nonpoverty interests. Just as a half-decade later the Viet Nam War was to color all political activity, each of these events occurred against the backdrop of the Civil Rights movement. The participation of lawyers, particularly in defense work in the South, undoubtedly contributed to the nascent sense of obligation that was soon to ripen into public interest law.

63. And many others, of course, became involved in the governmentally funded OEO Legal Services Program. Such programs fall outside the scope of this Article. See note 7 *supra*.

over-inclusive with respect to the *pro bono* work of the traditional private practitioner. Unless the latter's commitment is part of an organized effort to affect the output of the judicial system (voluntary work for the ACLU or the LDF, for example), such sporadic involvement constitutes at most a *de minimis* contribution to law reform activity. On the other hand, a definition of public interest practice that turns on *subsidized* service fails to include market-based firms that have limited their clientele to fee-paying clients presenting "public interest" issues. In other words, we would be defining the field in a fashion that ignored an ongoing phenomenon: that our market economy has been able independently to sustain a modest level of legal services in support of broadly defined systemic goals.

Accepting a definition of public interest practice that seems most consonant with a law reform perspective, then, means focusing initially on the nature of the attorney's practice rather than the source of his funds. It is the character of public interest practice that is the key to the questions explored in the following sections—questions about the structure, viability, and impact of public interest law.

In discussing the ACLU and the LDF, it was possible to delineate the respective organizations' substantive policy perspectives with some confidence: each has been engaged in securing the rights of discernible minority interests in our society. When we turn to public interest practice, our task is more difficult, for the substantive goals of the litigation arm of the contemporary reform movement are considerably more diffuse.

The Ford Foundation, a primary source of support for public interest law,⁶⁴ initially funded a diverse group of 3- to 6-lawyer offices—some of which have expanded considerably—rather than supporting a single large law reform unit.⁶⁵ The Sierra Club Legal Defense Fund (SCLDF) and the Natural Resources Defense Council (NRDC), for example, are involved exclusively in environmental litigation. Both environmental firms are heavily engaged in legal action involving forest management practices, land use controls, power plant siting, air and water pollution control standards, and a miscellany of cases brought under the National Environmental Policy Act

64. The extent and nature of the Ford Foundation's contribution to public interest law is discussed in two reports to the trustees of the Foundation at the beginning and end of its first 5-year commitment to public interest law. See FORD FOUNDATION, *THE PUBLIC INTEREST LAW FIRM: NEW VOICES FOR NEW CONSTITUENCIES* (1971); FORD FOUNDATION, *THE PUBLIC INTEREST LAW PROGRAM—FIVE YEARS LATER* (1975).

65. The funding of relatively small offices may have been partially a matter of circumstances. The proposals submitted by early recipients of Ford Grants such as the Center for Law and Social Policy, Public Advocates, the Natural Resources Defense Council, the Center for Law in the Public Interest, the Sierra Club Legal Defense Fund, and the Environmental Defense Fund, envisioned relatively small legal staffs. In the same sense, circumstances could be said to account for the divergent goals of the funded firms. But the result was at least partially caused by Ford's willingness systematically to build a multiplicity of distinctive law reform units rather than adhering to a blueprint established by any single recipient of funds. See note 64 *supra*.

(NEPA).⁶⁶ The dockets of these firms, detailing the various cases in each of these categories, arguably demonstrate a degree of coherence of policy perspective centered on protection of the environment that is about equivalent to that of the long-established law reform groups, the ACLU and LDF.

On the other hand, the Ford Foundation funds a number of firms that have either avoided environmental litigation altogether or tried to mix environmental work with litigation in other fields. The former category would include firms such as the Citizens Communication Center, which monitors the activities of the FCC and the broadcast industry, and the Mexican American Legal Defense Fund (MALDEF), a minority rights organization. Firms in the latter category, including the Center for Law and Social Policy, Public Advocates, and the Center for Law in the Public Interest, are engaged in a wide variety of matters, such as consumer protection, employment discrimination, mental health, and access to government files.⁶⁷ The largest and most senior of the nonsubsidized public interest firms, Berlin, Roisman & Kessler,⁶⁸ has a similarly diversified practice, as do the various Nader-related litigation units.

Some commentators have attempted to create a sense of substantive coherence by arguing that public interest law firms represent the traditionally unrepresented "consumer" interest, just as the ACLU represented the interest of political dissenters generally in our society.⁶⁹ As I have argued elsewhere,⁷⁰ this position cannot be sustained: in many public interest areas (*e.g.*, employment discrimination) the relationship to a consumer interest is highly tenuous. In other areas, such as environmental protection, the public interest advocate will sometimes be arguing that consumption must take second place to noneconomic considerations that bear substantial unavoidable costs. More generally, aesthetic sensibility, occupational safety, public health, and a host of other values bear a price tag that, assuming internalization, must be borne by "consumers."

Similarly, the suggestion of a broad majoritarian or "societal" interest

66. 42 U.S.C. §§ 4321-47 (1970). Of course, even among environmental firms, each has its distinctive interests. SCLDF, for example, reflects the traditional concerns of the Sierra Club: protection of the San Francisco Bay Area, the Sierra, and the national forests and wilderness areas. Another firm, the Environmental Defense Fund, has been in the forefront of the litigation on toxic chemicals, wetlands and energy sources.

67. As with the environmentalists, each "diversified" firm has its own unique perspective. Public Advocates, for instance, has a strong commitment to poverty-related public interest issues; the Center for Law in the Public Interest has focused primarily on regional and local problems in the Los Angeles area; the Center for Law and Social Policy has developed special projects in the international, mental health and women's rights areas.

For a complete list of Ford grantees and a selective description of their activities, see FORD FOUNDATION, *THE PUBLIC INTEREST LAW PROGRAM—FIVE YEARS LATER* Appendix B, 8-26 (1975).

68. Because of changes in membership at the firm, it was recently renamed Roisman, Kessler & Cashden.

69. See, *e.g.*, S. LAZARUS, *THE GENTEEL POPULISTS* (1974).

70. See Rabin, *Abandoning Our Illusions: An Evaluation of Alternative Approaches to Law Reform* (Book Review), 27 *STAN. L. REV.* 191 (1974).

as the underpinning for public interest law⁷¹ is unconvincing. In an important sense, of course, we are diminished as a society by the consumption of irreplaceable historic monuments or scenic wonders. As a consequence, when the advocates of development demonstrate significant economic returns, we confront perplexing short-run versus long-run considerations. It is hard to avoid the conclusion that an appropriate resolution of many environmental controversies depends on value choices between economic and aesthetic-recreational preferences that do not invariably weigh most heavily in one direction. Indeed, if a majoritarian interest means something other than the consumer's interest, the distinction is unclear, nor is it apparent in what sense these interests are being translated into well-defined substantive policy objectives that are being pursued in some consistent manner by public interest lawyers.

It has frequently been suggested that public interest law is ideologically coherent not in substantive but in procedural terms.⁷² From this perspective, the pattern that emerges from the various strands of environmental litigation and the many other substantive pursuits of the public interest lawyer is discernible if the viewer focuses on inputs into the judicial-administrative system. Here we again confront the notion of *access*.⁷³ Environmentalists, consumers, the mentally ill and racial minorities do share one common characteristic: traditionally, each such "interest" has been largely unrepresented in the political arena, including the judicial and administrative systems.

It is clear that environmentalists, consumers and others are getting representation that previously was unavailable, and the existence of such representation does provide a coherent underpinning for public interest practice. The public interest lawyer, by providing representation to groups that have been unable to organize effectively to compete in the marketplace for the services of skilled advocates, has broadened the range of value advocacy.⁷⁴

While it has been accurately pointed out that public interest practitioners are quite selective in the "unrepresented" interests they choose to represent,⁷⁵

71. See S. LAZARUS, *supra* note 69, at 271.

72. See, e.g., Halpern & Cunningham, *supra* note 2, at 1109; Terris, *Hard Times Ahead for Public Interest Law*, JURIS DOCTOR, July/Aug. 1974, at 22.

73. Again, it is critical to keep separate the questions of formal access (standing) and effective access. Compelling officials to hear unfamiliar arguments is not necessarily tantamount to insuring that those officials will *listen* to the arguments. See note 53 *supra*.

74. This is not to suggest that public interest law is procedural in the sense that its practitioners are primarily engaged in—or ideologically committed to—litigating formal access issues. A specific firm, like MALDEF, may be as substantive in its orientation as the ACLU or the LDF. Similarly, those public interest lawyers that represent environmentalists are predominantly involved in fashioning new substantive environmental law principles, just as the ACLU attorneys litigate substantive civil liberties issues. Rather, I am suggesting that the sole common denominator that can be applied to the spectrum of public interest law activities is the articulation of perspectives on a wide range of problems that previously were given much less, if any, formal consideration by governmental decision-makers.

75. See, e.g., Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV.

that hardly constitutes a departure from the practices of the established reform organizations. Despite the official credo of the ACLU and a handful of much-publicized legal battles, the organization has never had much enthusiasm for representation of rightwing political movements.⁷⁶ At no time has any substantial proportion of ACLU resources been allocated to such efforts, nor could such an eventuality have occurred without a virtually complete revamping of the organizational leadership. As discussed earlier, the NAACP and LDF have been similarly selective in defining litigation priorities within the broad range of black grievances, let alone defining "colored" to include the legal needs of other racial minority groups.

A coherent ideological focus requires no more than a set of priorities that provides a rational basis for the activities undertaken; it does not necessitate a random selection of cases falling within the reform organization's broad ideological objectives. Like the older reform organizations, then, public interest practitioners can take claim for representation of their "constituency," the traditionally unrepresented, despite their reluctance to provide representation to every interest arguably needing effective articulation.⁷⁷

C. Departures from the Law Reform Tradition

1. Notes on the structure of law reform activity.

As with government subsidization of the Legal Services Program, foundation support has created a new, distinctive style of lawyering. Earlier

1669, 1762-70 (1975). The author points out that limited resources ensure restrictions on the range of values that public interest lawyers will vigorously represent. As note 74 *supra* indicates, the public interest advocates' ideological commitments may impose further limitations on the scope of their "public interest" concerns. Is there a special problem raised by the public interest lawyer's circumscribed value commitment? While an "ideal" world might provide even more broad-based value advocacy, it surely is not self-evident that the second-best position is value advocacy limited exclusively to organized interests that can justify legal representation on economic grounds. Is it not preferable to have a limited range of salient noneconomic perspectives reflected in the decisionmaking process rather than none at all?

76. See D. JOHNSON, *supra* note 12, at iv-vi; Bishop, *Politics and the ACLU*, COMMENTARY, Dec. 1971, at 50-58. A reply to Bishop can be found in the ACLU's newsletter. See Hentoff, *Commentary and Carbon Papers: Fantasizing the ACLU*, CIVIL LIBERTIES, Mar. 1972, at 1, col. 4.

77. Stewart points out that usually there is no basis for assurance that the public interest lawyer represents any "constituency" but himself. See Stewart, *supra* note 75, at 1765-66. See also Cahn & Cahn, *supra* note 5. The public interest advocate's client may be largely a "paper organization" consisting of a handful of zealots, or a group of individuals organized on an ad hoc basis who lack any precise notion of the long-term effects of the proposal they support, or a membership group with only the vaguest understanding of the issues involved in any given litigative effort undertaken in their behalf. In such cases, where is the "constituency" that the public interest lawyer claims to represent?

Obviously, there is a real risk that subsidization could foster a self-appointed ideological elite. But there are important constraints on the public interest lawyer's freedom of action that must be taken into account. The foundation-funded firm must articulate its policy and clear its cases with a board of trustees that typically consists of prestigious establishment lawyers who are not very far removed from the political mainstream of the practicing bar. Similarly, foundation officers are highly sensitive to criticism that they are promoting causes that lack any meaningful amount of public support. While the foundations have remained at arms-length from their grantees' daily activities, their officers have quite clearly indicated, through a variety of channels of communication, an interest in representation of broad-based values. Finally, the public interest firms are sensitive to media criticism,