READING PACKET for Session #9
March 30, 2017

Cause Lawyering

Scott Cummings, Professor of Law, UCLA School of Law

Oren Nimni, Movement Lawyer; Partner, Community Law Office; Founding Steering Committee Member, Law for Black Lives
Session #9  
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Speaker Biographies

Session Description

Readings: Pages  

Elizabeth Bartholet:  

Scott Cummings:  

Oren Nimni:  
Scott Cummings is Robert Henigson Professor of Legal Ethics and Professor of Law at UCLA School of Law, where he teaches and writes about the legal profession, public interest law, and community economic development. He is the faculty director of a new program, Legal Ethics and the Profession (LEAP), which promotes research and programming on the challenges facing the contemporary legal profession. He is also a long-time member of the UCLA David J. Epstein Program in Public Interest Law and Policy, a specialization training students to become public interest lawyers. Professor Cummings is co-author of the first public interest law textbook, Public Interest Lawyering: A Contemporary Perspective (with Alan Chen) (Wolters Kluwer, 2012), and co-editor of a leading legal profession casebook, Legal Ethics (with Deborah Rhode, David Luban, and Nora Engstrom) (7th ed. Foundation Press, 2016).

Professor Cummings began his legal career in Los Angeles building economic opportunity in low-income communities. In 1998, after clerking in Chicago, he was awarded a Skadden Fellowship to work in the Community Development Project at Public Counsel in Los Angeles, where he provided transactional legal assistance to nonprofit organizations and small businesses engaged in community revitalization efforts.


Building upon this research, Professor Cummings is currently co-Principal Investigator of a National Science Foundation funded study (with Richard Abel and Catherine Albiston), which examines the factors causing law students to enter and persevere in public interest careers. He is also writing a book on the role of lawyers in the labor
movement’s challenge to low-wage work in Los Angeles, under contract with Oxford University Press.

**Oren Nimni** is a movement lawyer in Boston and currently a partner at Community Law Office in Dorchester. Nimni uses a community lawyering model to partner with local organizing efforts and provide holistic representation for low income clients on issues including criminal defense, wage theft, housing discrimination, eviction, and civil rights violations. He is also a founding steering committee member of Law for Black Lives which seeks to leverage the law for social justice movements and to teach lawyers how to better support organizing efforts. Nimni is a board member for the Mass. National Lawyers’ Guild and is co-author of the Guild’s resolution regarding prison abolition. Additionally, Nimni is co-founder and legal editor of Current Affairs Magazine.
Session Description

Cause or Public Interest Lawyering has played a key role in the fight for justice for some of our country’s most powerless groups. Scott Cummings is a leading scholar of cause lawyering and its evolution over the decades to today's increased focus on community or movement lawyering. See, e.g., his recent book co-authored with Alan Chen, *Public Interest Lawyering: A Contemporary Perspective* (Wolters Kluwer 2013). Oren Nimni will share his experiences as a lawyer engaged over the years in cause lawyering, including movement lawyering and the Black Lives Matter movement in particular.
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International Adoption: The Child's Story

Elizabeth Barholet

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INTERNATIONAL ADOPTION: THE CHILD'S STORY

Elizabeth Bartholet*

Millions of infants and young children worldwide are desperately in need of nurturing homes. Many are living in institutions, and many on the streets, and almost all these children will either die in these situations, or if they survive, will emerge into adulthood so damaged by their childhood experience, and so deprived of parenting, educational and other essential childhood opportunities, that they will be unable to function in the worlds of family and work. International adoption could provide significant numbers of nurturing homes for these children. However, current policy restricts international adoption, limiting its ability to provide such homes. Moreover, most of the powerful organizations of the world that claim to represent children’s rights and interests have joined with other forces opposing international adoption.

This article argues that effective child advocacy is a challenge, given that infants and young children are unable to voice their views or promote their interests, and the related risks that adults will use children to further various adult agendas. True empathy is required to imagine what children would want were they able to think rationally and make informed decisions. But if we were to imagine homeless children capable of making such decisions,

* Professor of Law, Harvard Law School. The author is the founder and Faculty Director of Harvard Law School’s new Child Advocacy Program (CAP). CAP was created based on the premise that children’s interests are not adequately served by existing law and policy, and is designed to educate students about children’s issues and to inspire them to take on the challenge of child advocacy. See CAP website, http://www.law.harvard.edu/academics/CAP. This article is adapted from a speech given at the Georgia State University School of Law, Atlanta, GA, on March 29, 2007, as the 40th Henry J. Miller Distinguished Lecture, “International Adoption: The Child’s Story.” Related issues are discussed in Elizabeth Bartholet, International Adoption: Thoughts on the Human Rights Issues, 13 BUFF. HUM. RTS. L. REV. 151 (2007). For earlier Bartholet writings on international adoption see id. at note 1. The author has been deeply involved since 1985 in child welfare and adoption issues generally, and in international adoption issues in particular, and draws on this experience as well as cited materials throughout this article.
then it seems obvious that they would choose international adoption, given the horrors of institutional and street life, and the limited options for any kind of adequate home care in their countries of birth. Opposition to international adoption cannot be justified based on any best interest of the child principle, despite the claims of many children's rights organizations. Instead it is grounded in a group of commonly shared but deeply flawed ideas about children and the role of the state, and driven by adult agendas that are not truly informed by children's interests.
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I. INTRODUCTION

A. The Challenge of Child Advocacy

Advocating for children is a challenge for many reasons. Children are powerless in ways that even other groups we describe as powerless are not. African-Americans, women, the elderly, and persons with disabilities can all vote, use their purchasing power to wield influence, and get out onto the streets to demonstrate. Children by definition cannot vote, and even those old enough to shop and to demonstrate are subject to their parents' decision-making power and to special state restrictions. Infants cannot even speak to express their needs and desires, and young children do not have the knowledge base or the developed reasoning powers to make rational decisions for themselves. Children depend on adults both to figure out what children's interests are and to protect those interests.

The challenge of child advocacy is to ensure that children's interests are served when, in the end, adults make the decisions. One favorite legal solution has been to rely on each child's birth parents to make decisions for that child, based in part on the idea that parents will be "naturally" motivated to promote their own children's best interests. Another favorite legal solution has been to rely on the state to act as parens patriae, based in part on the idea that parents cannot be entirely trusted, and therefore the state should ensure that at least certain basic interests of the country's children are served. In the United States, as in other countries, we rely on both solutions in combination.1 We give parents powerful rights to raise their children without undue interference by others, including the state. At the same time, we give the state some right to intervene in the family to protect children against abuse and neglect by their parents, and to insist on certain basics in terms of education, health, and protection against such exploitation as child labor.

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People who see themselves as child advocates tend to divide between those who argue for more powerful parents’ rights, and those who argue for a more powerful state. Some also argue for giving children their own legal “rights”—rights, for example, to make certain decisions, to take certain actions, and to speak and be represented in court—but this kind of solution has limited applicability. As noted above, many children are too young to speak or to make rational decisions, and appointing someone to represent them simply means assigning some adult to decide for them; moreover, it is obviously not practicable to provide paid representatives or individual hearing rights to all children for all of the issues that matter. In the end we have to rely on adults for almost all decisions regarding children, and as a practical matter this usually means relying either on their parents, or on the state in its parens patriae capacity.

The problem is that neither parents nor the state can be entirely trusted to promote children’s best interests. Parents may be self-interested, or simply not fit as parents. The state may be helpful in countering parents’ selfish interests or incompetence; however, the state is selected and administered by adults, and there is always the risk that it may operate to further various adult group interests at the expense of children’s interests. Indeed, as I look at history and the current situation in terms of children’s interests, it seems clear to me that children get the short end all too often, despite the regularly repeated mantra that children’s best interests should be the guiding principle for law and policy. Policy-makers—themselves adults, of course—have to acknowledge the risk that children’s interests will not be well served, and then rise to the challenge of trying to understand in different substantive areas involving children, what truly will serve their interests, and how best to structure legal systems to promote those interests in an ongoing way.

2. See discussions of children’s liberation theories in id. at 108–20.
Chapter 1: Defining Public Interest Lawyering
Chapter 2: American Public Interest Lawyering: From Past to Present
Chapter 3: Political Ideology and Public Interest Lawyering
After decades of pro bono practice, no one yet has a sharp or clean definition of public interest law.


I. INTRODUCTION

This book is about the practice, pitfalls, and possibilities of public interest lawyering. In it, we examine which lawyers do it and why, the successes they have achieved, and the challenges they face. To do so requires that we first define the subject of analysis. This, it turns out, is no easy task. Indeed, what exactly it means to be a “public interest lawyer” or engage in “public interest lawyering” is a question that has generated debate and disagreement since the very beginning of the public interest law movement nearly a half-century ago. The discussion has focused on whether it is possible to adequately define lawyering in the “public interest,” and if so, precisely what that definition is. Many attempts at definition have been made, and an equal number have foundered, leaving some scholars to jettison the concept altogether as hopelessly indeterminate. Stuart A. Scheingold & Austin Sarat, Something to Believe In: Politics, Professionalism, and Cause Lawyering 5-6 (2004). This chapter confronts public interest law’s definitional problem as a threshold matter. What it reveals is that the concept of public interest lawyering is deeply contested. See Ann Southworth, Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,” 52 UCLA L. Rev. 1223, 1236-37 (2005) [hereinafter, Southworth, Conservative Lawyers]. Our goal is to clarify the terms of the debate and offer a means for analyzing it. In the end, we conclude that no definition is unsailable; all raise boundary questions and pose tradeoffs. We adopt the term public interest lawyering precisely because it has framed the boundary questions since the movement’s inception and does so in a rubric that is both historically
grounded and consistent with the term-of-art that contemporary American practitioners generally adopt. As we will see in Chapter 9, the term is also a vector of change—and controversy—around the world. See generally Scott L. Cummings & Louise G. Trubek, Globalizing Public Interest Law, 13 UCLA J. INT’L L. & FOREIGN AFF. 1 (2008).

Despite the disagreement over terminology, there long have been lawyers who have devoted their careers to promoting some version of the public good through their representation of individual clients, the pursuit of specific causes, or both. See Robert W. Gordon, Are Lawyers Friends of Democracy?, in The Paradox of Professionalism: Lawyers and the Possibility of Justice 31, 38-39 (Scott L. Cummings ed., 2011). These lawyers have played critical roles in defending and extending American democratic institutions, providing access to justice for those unable to afford it, and advancing the causes of marginalized groups unable to influence politics by other means. Richard L. Abel, Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994 (1995); Deborah L. Rhode, Access to Justice (2004); Laura Beth Nielsen & Catherine R. Albiston, The Organization of Public Interest Practice: 1975-2004, 84 N.C. L. REV. 1591, 1595-96 (2006). They have made significant contributions to foundational struggles over poverty and civil rights, thus embodying the highest ideals of a profession that aspires to serve the public good. Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973 (1993); Mark V. Tushnet, The NAACP’s Legal Strategy Against Segregated Education, 1925-1950 (2d ed. 2004). Although they are a relatively small fraction of the total lawyer population, public interest lawyers have had a disproportionate role in making good on the profession’s promise of “equal justice under law.” The most prominent of these lawyers have become national icons who represent the highest aspirations of the legal profession. There are many notable examples, which include: Thurgood Marshall, and other lawyers for the NAACP Legal Defense and Education Fund, Inc. (LDF) during the civil rights movement; Clarence Darrow, famous for his pro bono representation of unpopular and controversial clients, such as the 1925 defense of John Scopes against the charge of illegally teaching human evolution in Tennessee schools; Reginald Heber Smith, a lawyer in a private Boston law firm in the early 1900s, who first called the profession’s attention to the severely unmet legal needs of the poor; and Ruth Bader Ginsburg, who, before she was a U.S. Supreme Court Justice, was a leading women’s rights lawyer for the American Civil Liberties Union (ACLU) in the 1970s.

As we will see throughout this book, public interest lawyering extends far beyond these canonical cases to encompass a broad range of advocacy techniques (not just litigation) across various practice sites (not just nonprofit organizations) undertaken by different types of lawyers with distinct goals. This book is about these public interest lawyers and their efforts to create what they envision to be a better world. It seeks to understand their professional heritage, their personal choices, their most ambitious aspirations, and the practical limits on their achievements. It also seeks to present a picture of their day-to-day practice: the financial choices they face, the ethical problems they confront, and the strategies they deploy. In the end, we aim to present a comprehensive picture of contemporary public interest lawyering, assessing what it has attained so far and what the future holds.
Before we do, we begin with a preliminary, yet important, inquiry: What precisely do we mean by public interest lawyering? Does it represent a distinctive model of advocacy that contrasts with conventional lawyering? Does it encompass particular motivations? Does it refer to a set of clients or causes? The goal of this chapter is to provide a framework for thinking about the aspects of public interest lawyering that are most central to the concept and those that are more peripheral, while focusing on the always contested boundary cases and suggesting how the definitional debate has real world lawyering consequences. Ultimately, these materials point to an understanding of public interest law as a terrain upon which competing social interests do battle in order to define the very meaning of a just society.

II. TERMINOLOGY: WHAT’S IN A NAME?

At bottom, all lawyering affects the rules that guide our behavior as members of society. Every time lawyers act on behalf of clients to enforce, evade, reinterpret, distinguish, modify, repeal, or comply with law, they influence the basic terms of social interaction in ways that shape our collective experience of freedom and fairness. This is true whether we are talking about a plaintiff’s lawyer representing an employee in a wrongful termination case, an in-house lawyer counseling her company on legal compliance, or a solo practitioner advising his client on forming a small business venture.

A threshold question, therefore, is what separates these acts of day-to-day lawyering designed to advance client interests from lawyering that aspires to make society better. Of course, framing the question in this way reveals the heart of the problem: one person’s vision of a just society will be another’s vision of a society gone wrong. And there are so many visions—all deeply contested—that choosing among them is ultimately an exercise in political judgment. How we make that judgment will, in the end, determine what counts as lawyering in the public interest.

For at least the last century, lawyers have sought to deploy their legal skill to advance the interests of certain types of individual clients or social groups: legal aid lawyers from the early twentieth century who dispensed free legal services to aid the urban poor, so-called country lawyers who provided professional charity to help their less fortunate neighbors, and activist lawyers who defended war protesters, labor organizers, and racial minorities suffering discrimination. Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 15 (1976); Joel F. Handler et al., Lawyers and the Pursuit of Legal Rights 18-19, 22-24 (1978) [hereinafter, Handler et al., The Pursuit of Legal Rights].

Yet it was not until the 1960s that the term “public interest law” was coined in a self-conscious effort to describe a nascent movement to use legal advocacy, primarily litigation, to advance a political agenda associated primarily with the protection and expansion of rights for racial minorities, the poor, women, and other disadvantaged groups, while also seeking to protect collective goods, like a clean environment. Louise G. Trubek, Public Interest Law: Facing the Problems
of Maturity, 33 U. ARK. LITTLE ROCK L. REV. 417, 417-20 (2011); see also Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 STAN. L. REV. 2027, 2032 (2008). At the outset of the U.S. public interest law movement, its definition was sometimes couched in the language of market failure. In a classic study from the 1970s, public interest law was defined as “activity that (1) is undertaken by an organization in the voluntary sector; (2) provides fuller representation of underrepresented interests (would produce external benefits if successful); and (3) involves the use of law instruments, primarily litigation.” Burton A. Weisbrod, Conceptual Perspective on the Public Interest: An Economic Analysis, in Public Interest Law: An Economic and Institutional Analysis 22 (Burton A. Weisbrod, Joel F. Handler & Neil K. Komesar et al. eds., 1978) [hereinafter, Weisbrod, Conceptual Perspective] (emphasis added). This study drew upon economic analysis to elaborate the concept of “external benefits,” which was grounded in efficiency—putting productive resources “to their most ‘valuable’ uses”—and equity—ensuring that the distribution of the resulting goods and services was fair. Id. at 4-5. The central claim was that public interest law was activity that “if it is successful, will bring about significant external gross benefits to some persons; that is, the activity provides more complete representation for some interest that is underrepresented in the sense that the interest has not been fully transmitted through either the private market or governmental channels.” Id. at 20.

It was this notion of “underrepresentation” that informed other definitional efforts. For the program officers at the Ford Foundation, who designed and executed the funding initiative that launched the field in the 1970s, public interest law was “the representation of the underrepresented in American society.” Gordon Harrison & Sanford M. Jaffe, Public Interest Law Firms: New Voices for New Constituencies, 58 ABA J. 459, 459 (1972). This definition included the provision of legal services to “poor or otherwise deprived individuals who are unable to hire counsel,” as well as legal actions in the defense of “broad collective interests”—such as on behalf of “consumer protection and environmental quality”—“for the benefit of large classes of people” who could not individually afford the cost of mounting lawsuits and who could not easily organize collectively to advance their political interests. Id. One observer, writing about public interest law at the end of the 1980s, articulated a similar position:

Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, public interest law rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace.

Nan Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond 3 (1989) (emphasis added).

The classic definition, rooted in underrepresentation, came under attack from two directions. Beginning in the 1970s, and gaining momentum in the 1980s, the emergent conservative movement took issue with both the efficiency and equity rationales for public interest law. Southworth, Conservative
Lawyers, supra, at 1248-49. In terms of efficiency, conservatives argued that it was not obvious that regulation benefitted society at large, rather than simply making distributional choices. Id. at 1249. Thus, environmental regulation could have the effect of reducing jobs, or consumer regulation might increase prices. Without aggregating individual preferences for a clean environment and jobs, for consumer safety and low prices, it was not clear ex ante what the optimal social welfare function was. The concept of equity was indeterminate as well. What qualified as an underrepresented group? Conservatives argued that the concept of underrepresentation was politically contingent and changed over time. Whether or not one agreed with the conservative framing, it highlighted a fundamental tension in equity conceptions of public interest law: on contested issues of public policy, one group’s benefit could be construed as another’s burden.

As conservatives challenged the meaning of public interest law from the right, critics on the left challenged its practice—and offered new theories to supplant what many viewed as the outmoded and politically ineffective model of litigation-centered reform embodied in the conventional definition of public interest law. Beginning in the 1980s, new theories emerged with an impressive array of labels: community lawyering, critical lawyering, facilitative lawyering, political lawyering, progressive lawyering, rebellious lawyering, third dimensional lawyering, law and organizing, and legal pragmatism—to name some of the most prominent. Although these theories varied considerably, they shared the concern that rights-based efforts, by themselves, were inadequate to the task of radical social transformation. All of these efforts rested upon a liberal discomfort with lawyer-led strategies that undercut genuine participatory democracy and risked inflicting a double-marginalization on clients: disempowered first by society and then by the very lawyers who purported to act on their behalf.

Despite all the critiques of its political and conceptual coherence, the use of “public interest law” as a label for a distinctive form of lawyering has shown great resilience. Although it is unavoidably contested, public interest law remains the term of choice for U.S. practitioners, and has taken root in emerging democracies around the world. It retains its power not because there is an Archimedean point by which we may judge the public interest across the divisions of politics and culture, but rather precisely because it claims a higher political ground, asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms. In the end, the term “public interest lawyering” has continuing resonance because the contest over its meaning reveals the important political choices at stake. A label at the center of so much fighting must be worth fighting for.

This book uses the term “public interest lawyering” to refer to a broad and contested range of activities that includes legal advocacy focused on the representation of individuals shut out of the private market for legal services as well as lawyering to advance the collective interests of defined groups or constituencies (both liberal and conservative). Because there are no value neutral boundaries, what ultimately qualifies as public interest law turns on how one identifies the relevant criteria and values them in relation to one’s conception.
of a just society. It is therefore useful to start by breaking down and examining in more depth the criteria considered most important in defining what counts as public interest lawyering. We conclude by exploring how the definition of public interest law can have tangible consequences by influencing the meaning of professional identity and the scope of professional regulation, while also determining eligibility for certain types of subsidies and programs.

III. CRITERIA: WHAT COUNTS?

Today, people use the term “public interest” law as a gloss for a wide range of sometimes contradictory lawyering categories. Some people define “public interest” law as lawyering for the poor. Some define it as “cause” lawyering. Others think of it as lawyering specifically with a left wing or politically progressive agenda. Still others define the term as encompassing jobs in the public and nonprofit sectors. This last definition equates “public interest” law with law practiced in organizational forms in which lawyers do not take fees for their legal services from their clients.


A. EXERCISE: WHO IS A PUBLIC INTEREST LAWYER?

Before examining specific criteria, it is useful to think about your own perceptions of what constitutes public interest law. Consider the following narratives of lawyers in a range of settings about their commitment to the public good. Which ones would you classify as public interest lawyers? Why? For those who you do not consider to be public interest lawyers, what are your reasons?

Larry Ryan, Partner, Whitney & Phillips (250-person private law firm): I graduated from law school about 15 years ago. When I was in school, I participated in a lot of “leftie” organizations, such as the public interest society, which did some poverty work in the clinic. I enjoyed that and I still consider myself to be interested in using law for good things. Since I joined the firm, I’ve done a couple of pro bono matters helping battered women get protective orders. Still, my main work is products liability defense for large pharmaceutical companies, and I enjoy it a lot. It is intellectually stimulating, professionally rewarding, and I make a very good living. But I also feel like I’m doing good for society. The way I see my work is that there are an awful lot of frivolous lawsuits against drug manufacturers. I view my role as vigorously defending the companies when the suits have little or no merit. In that way, I help keep my clients’ costs down so that they can use that money for innovation — like finding a cure for serious illnesses. Also, I see my work as helping to maintain lower drug prices for poor consumers. I see my firm’s work lobbying on behalf of tort reform in the same light.
B. CLIENTS, CONSTITUENCIES, AND CAUSES

1. Which “Public’s” Interest?

The literal meaning of public interest lawyering is lawyering that advances the public’s interest as well as (or perhaps instead of) the client’s private interests. It therefore rests, in the first instance, on a crucial public-private distinction. Consider the following definition:

A decision is said to serve special interests if it furthers the ends of some part of the public at the expense of the ends of the larger public. It is said to be in the public interest if it serves the ends of the whole public rather than those of some sector of the public.

MARTIN MEYERSON & EDWARD C. BANFIELD, POLITICS, PLANNING, AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO 322 (1955) (emphasis added). The question we immediately confront is whether this public-private distinction does any analytical work to help us understand what makes public interest lawyering special. Is this distinction between special interests and the public interest persuasive? Why or why not? Can you think of any action that genuinely “serves the ends of the whole public”?

The authors of the classic 1970s study of public interest law referred to earlier proposed a “Public Interest Ratio” to measure the relationship of external benefits created by an organization’s work (inuring to members of the public outside the group’s membership) to the total benefits (including those accruing solely to the membership):

If all benefits are reaped by members of the group, external benefits are zero, and the ratio will be zero. In that case, the group can be said to be a pure “private interest” group, and its behavior can be explained in terms of the usual self-interest models. By contrast, the closer the value of the ratio is to unity—that is, the greater the value of external relative to internal net benefits—the more we might be justified in calling the group a public interest group, or the activity a public interest activity.

Weisbrod, Conceptual Perspective, supra, at 21. Is this formula useful? In applying it, how would one measure the benefits produced by a public interest law organization’s activities?

The key question posed by this approach is what constitutes an external benefit—and, by extension, the public interest. The work of many lawyers has the potential for producing externalities, positive and negative, beyond the immediate result obtained by a particular client. For instance, an attorney’s successful representation of Company A in a patent infringement suit may, in the long run, facilitate more innovation by that company and others, though the immediate goal is to protect A’s economic interests. A lawyer representing the alleged infringer advances the interests of her client, but also may argue that she is promoting a broader public interest in having valuable products available to more people at lower prices. This example underscores the definitional dilemma. Because the public is comprised of competing groups with conflicting normative views regarding what is best for society as a whole, the notion of the “public interest” becomes an ideological battlefield
on which groups compete for political influence by casting their claims in the language of the public good — and by labeling their adversaries as “special interests.” For example, one group might view extensive government regulation of handguns as benefitting all of the public, while another group might believe just the opposite. From this vantage point, groups advocating on behalf of the public interest might be most accurately described as asserting a political claim that their vision of the public good should be adopted by society at large.

2. The Representation Rationale

Because of the indeterminate meaning of the “public interest,” the effort to define public interest law as a category of practice has often been anchored to the types of clients lawyers represent and the causes they pursue. As we suggested earlier, a key concept is whether a particular group or cause is adequately represented — either through the existing private market for legal services or in the realm of democratic politics. Public interest legal representation is said to make up for deficient representation in the marketplace or political arena.

The market-based justification for public interest law begins with the unfairness of a legal system in which economic status determines one’s ability to access services. Those with great financial resources will never want for legal representation because the economic market will always attract sufficient legal talent to satisfy their needs. A well-known NEW YORKER cartoon by J.B. Handelsman illustrates this point, showing a lawyer quipping to his client, “You have a pretty good case, Mr. Pitkin. How much justice can you afford?” Indeed, the interests of large corporations and other well-resourced segments of society always will be more than adequately represented — equipped with the best lawyers money can buy.

But, as we discuss in more detail in Chapter 7, many people go without representation in a pure market-based legal services system. LEGAL SERVICES CORPORATION, DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 17 (2009). This is, in part, a result of the structure of the market for legal services, which is artificially limited by entry barriers (such as the bar examination) and dominated by private lawyers. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 28 (2004) (noting that, as of 2000, 74 percent of lawyers worked in private practice). As a result, the U.S. legal profession serves less than 30 percent of the legal needs of the poor. Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 WM. MITCHELL L. REV. 35, 47 & n.54 (2003); see generally RHODE, ACCESS TO JUSTICE, supra. Those who have limited financial means are less likely to be able to afford legal services for most types of legal problems, criminal or civil. Even those in the substantial middle class of American society would likely struggle to finance any sort of significant legal dispute. Joy, supra, at 47 n.54.

One approach to the definitional issue is therefore to say that public interest lawyers are those who serve the needs of clients who would not otherwise receive legal counsel or would receive insufficient legal counsel. Nan Aron’s statement in the previous section articulates this position, as does the following definition by the Council for Public Interest Law, the
trade group of public interest firms originally funded by the Ford Foundation in the 1970s:

Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such efforts have been undertaken in recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.

COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA: A REPORT 6-7 (1976). Note that the Council refers to “previously unrepresented groups and interests.” What happens when public interest lawyers begin to represent those groups and interests? Does that representation undercut the justification for associating those groups with the “public interest”? How far back should we go to determine if a group has been “previously unrepresented”?

David Luban offers a slightly different market-based definition of public interest law:

By “public-interest law,” I do not mean “law practiced on behalf of the public interest.” That usage would make the phrase completely tendentious, because people disagree fundamentally over what the public interest is. Those on opposite ends of the political spectrum are likely to insist that they are practicing law in the public interest but their counterparts on the other side are not. I think that one should instead look for less loaded criteria. As I use the term, a public-interest lawyer is a lawyer for whom making money is not the primary purpose for taking a case—or, to put it in different terms, a lawyer who would like to take the case pro bono if it were feasible to do so. This minimalist definition aims to capture common-sense usage. An additional criterion, different from and not always consistent with the minimalist one, is that public-interest lawyers represent interests that would not otherwise be represented in the legal system. Though different, the two criteria are connected, because most lawyers would not take on pro bono cases from clients who can afford paid counsel, even if it were economically feasible to do so. Thus, cases that meet the first criterion (the lawyer would like to take the case pro bono) will typically meet the second criterion as well (the client would not otherwise be represented in the legal system). These criteria, rough as they are, avoid begging political questions. They include public interest law on the right as well as the left, and they include lawyers delivering routine legal services to low income clients . . . as well as lawyers representing causes. The second criterion does rule out self-styled “public interest” organizations that are really front groups for well-funded corporate interests that think it bad public relations to operate under their own flag. Some might see this structure as an anticonservative bias built into the definition. But I think not calling front groups for well-represented parties “public-interest lawyers” simply eliminates the basic functional difference between public-interest lawyers and lawyers for paying clients.

to define this type of law practice? Does it include lawyers who work in private firms that enforce antidiscrimination law by bringing cases on behalf of women and minorities under contingency fee or fee-shifting arrangements? Before he became President, Barack Obama worked for Miner, Barnhill & Galland, a civil rights firm in Chicago, which among other things represents plaintiffs in important race discrimination lawsuits challenging violations of voting rights laws. Would he have been considered a public interest lawyer under Luban’s definition?

Luban’s definition is consistent with an access orientation to public interest law: free legal services should be provided to those unable to afford them. Under this view, lawyers who provide legal representation for those in lower socioeconomic groups would clearly qualify as public interest lawyers. But how are consumers and those interested in protecting the environment unable to secure legal representation? Because those two groups can conceivably cut across socioeconomic lines and include people who are wealthy, does the market-based rationale apply to lawyers who work on these issues?

Proponents of the market-based definition point out that legal interests are not always unrepresented in the legal process solely because the clients lack financial resources. Sometimes the interests of disparate citizens may go unrepresented because the benefit to each individual is small and the transaction costs of organizing and seeking representation outweigh the individual benefit. This sort of inefficiency was a driving force behind the adoption of the class action litigation device. See Barbara Allen Babcock et al., Civil Procedure: Cases and Problems 941 (3d ed. 2006). Do you think this collective action problem justifies labeling environmental or consumer lawyers as public interest lawyers? Does the existence of mechanisms to aggregate claims and shift fees, which create financial incentives for private attorneys to take on some of these claims, affect your judgment?

What about groups unable to secure representation because their views or conduct are morally repugnant? Here are some groups whose interests are probably under- or unrepresented in the American legal system: Nazis, pedophiles, terrorists, and serial killers. Should attorneys representing these groups be classified as public interest lawyers?

Does a definition of public interest law that hinges on access to the legal system imply that substantive outcomes are irrelevant? Does it mean that there is no political content to public interest law? Consider the following commentary on this point:

Because of the increasing variety of organizations that claim its status, public interest law has defined itself so as not to exclude organizations based on substantive legal programs. The diversity of substantive claims made by today’s public interest law organizations and the tensions that result from the march of such a diverse group under one banner has generally required that public interest law define itself in procedural, representation-based terms.

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1. That is not to say that individual members of these groups necessarily lack representation in cases when they are charged with crimes. In that context, they may receive a legal defense from a public defender or court-appointed attorney.
In this way, the language of modern public interest law has become the language of procedural justice as articulated by [the philosopher John] Rawls. Presumably, the “public interest” is something to which everyone in a pluralistic society can reasonably agree. This is an application of Rawls’ theory of the “overlapping consensus.” Because this overlapping consensus cannot rely on any comprehensive religious, philosophical, or moral doctrines, modern public interest law does not permit religious, philosophical, or moral ideas to define what it is or does. Public interest law’s insistence on a procedural and value-neutral identity—that of merely assuring representation—embraces the Rawlsian notion of the priority of the right over the good.

This was not the definition of justice for the National Civil Liberties Bureau [predecessor of the ACLU] or the Civil Rights Movement. . . . The Reverend King’s movement represented a particular community with a particular substantive vision of the good whose cause was articulated as a moral and religious imperative. Modern public interest law faces an identity crisis as it seeks to reconcile the substantive visions of its predecessor organizations with the extirpation of visionary language from its modern “justice as procedure” rhetoric.

One public interest commentator attempts to solve this crisis of identity by recasting the substantive agendas of predecessor organizations in procedural justice terms. “Both [the NAACP and the ACLU] used the legal process to clarify and protect the rights of minorities—blacks and persons deprived of civil liberties—who would not otherwise have had adequate representation in the legal process.” This assertion—that African-Americans and other politically unpopular groups would have gone without representation but for the NAACP and the ACLU—is a crucial one. In modern public interest law rhetoric, it is essential that these groups otherwise go without representation, because without this need the ACLU and NAACP might be seen as endorsing the substantive views of their clients or, worse, claiming that their clients’ victories would enhance the common good. Modern public interest law, unlike its predecessors, denies the substantive good to be achieved by the victory of its clients.

David R. Esquivel, Note, The Identity Crisis in Public Interest Law, 46 Duke L.J. 327, 341-43 (1996). Do you agree with Esquivel’s argument that the procedural approach to thinking about public interest lawyering leads to a morally neutral definition that diminishes the importance of the substantive issues these groups are addressing? Is the procedural definition too narrow? Can public interest lawyering be viewed more broadly, as encompassing the idea of access not only to the justice system in the context of litigation, but also to other institutions of change, such as the political process? Could the ends sought through such a process then be viewed as “substantive,” thus addressing some of Esquivel’s concerns?

As these questions suggest, the representation rationale for public interest law may also relate to political, not just legal, representation. One reason for this is that public interest lawyering emerged during a period when the United States was gradually reducing formal barriers to participation in the political process, but members of many groups had yet to achieve political power, even in proportion to their numbers, because of the effects of historical—and persistent—discrimination. That is, it was not just that minority groups were unable for financial reasons to secure legal counsel. It was that lawyers
needed to represent these individuals and groups because the latter could not pursue social change through ordinary political channels because of limits on their political powerlessness. Lee Epstein, Conservatives in Court 9 (1985).

In perhaps the most famous example, the NAACP LDF’s legal work on behalf of African Americans was deemed necessary because the white majority population in the early to mid-twentieth century did not support racial integration and the eradication of Jim Crow laws. Although formal barriers to political participation, at least in terms of voting, were wiped out by the ratification of the Fifteenth Amendment, African Americans represented both a numerical minority and a relatively powerless group because of discrimination against them and state voting laws designed to limit their participation. In a similar way, political dissidents, such as Socialists or Communists, have been unlikely to exercise much political power in the world of ordinary partisan politics. When their speech is restricted by the major political parties, going to court is an alternative — and perhaps the only viable — approach to advance their interests.

In a decision recognizing that legal advocacy is protected activity under the First Amendment, the Supreme Court acknowledged the political role of litigation:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930’s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.


This perspective resonates with a familiar doctrine from constitutional law. One justification for judicial enforcement of the federal Constitution against other branches of government suggests that such enforcement is most justifiable when the courts are intervening where the political process has broken down. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1944) (stating in dicta that more stringent judicial review might be permissible to correct government “prejudice against discrete and insular minorities,” which “may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”). As discussed below, some conservatives have criticized this aspect of progressive public interest lawyering. They have claimed, among other things, that lawyers who work to change the law through litigation are elitists seeking a second bite at the apple, bypassing the democratic political process and going to court where they have failed to gain majoritarian support for their values. See David Luban, Lawyers and Justice: An Ethical Study 303 (1988) (summarizing these arguments).

The political representation rationale, along with its market-based counterpart, supports a vision of public interest lawyering predicated on procedural
fairness. It shows great faith in the adversary system of justice, as it relies on the assumption that if everyone’s interests were equally represented in the legal and political arenas, outcomes would be fair (or at least fairer). However, it raises a number of questions.

Chief among them is how to know which groups are politically underrepresented and what the relevant time frame is for assessing their political power. Does underrepresentation have to be ongoing or is it sufficient that it occurred sometime in the past? Are environmentalists still underrepresented? What about the interests of workers? Does it matter why a group is underrepresented? For some groups, like undocumented immigrants, there may be costs to organizing because members may suffer retaliation if they raise their profiles. Consumers of collective goods like the environment may have insufficient incentives to act collectively because they believe that they can benefit from the work of others (the classic “free rider” problem).

What happens when there are multiple groups laying claim to underrepresentation whose interests are in conflict? When the interests of underrepresented groups clash, can we still categorize all of the attorneys on both sides of disputes as public interest lawyers? Labor unions, which traditionally have supported strong civil rights laws, have sometimes backed legal restrictions on immigration because they have viewed immigrant labor as a source of competition for domestic jobs. See Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 LA RAZA L.J. 42, 58 (1995). Similarly, civil liberties organizations such as the ACLU, which staunchly support abortion rights, also have asserted the free speech rights of anti-abortion protestors. See Brief as Amicus Curiae of American Civil Liberties Union Supporting Petitioners at 6, Hill v. Colorado, 530 U.S. 703 (2000). Whose interests are more underrepresented: criminal defendants or crime victims? Environmentalists (backed by powerful groups like the Natural Resources Defense Council and Sierra Club) or small business owners? Minorities who benefitted from affirmative action or poor whites who received no preferences? Civil libertarians or defenders of religious rights? Are these the right comparisons to draw?

The following commentary revisits the classic definition of public interest law (referenced at the beginning of this chapter) as providing “fuller representation to underrepresented interests,” which was proposed in the 1970s by Joel Handler, Burton Weisbrod, and Neil Komesar.

SCOTT L. CUMMINGS, THE PURSUIT OF LEGAL RIGHTS—AND BEYOND


[W]e may fairly ask whether the original definition of public interest law, proposed by Handler and others, perhaps lacking the courage of its progressive political convictions, has led to a conceptual dead end—or whether it still offers a meaningful foundation for understanding the field. As the critiques of public interest law have made clear, it is not possible to define “external benefits” or “underrepresentation” in an absolute sense that is applicable across different contexts and over time. But this does not necessarily lead to the extreme relativistic point—that the “public interest” in public interest law is simply in the
eye of the beholder—that some conservative critiques of public interest law would suggest. In this vein, it is worth recalling that a key force behind the early mobilization of conservative public interest law organizations was the Chamber of Commerce, which—urged on by soon-to-be-Justice Louis Powell—sought to counter the rising influence of liberal groups in court by promoting conservative counterparts that would appropriate the form and label of public interest law. The manipulation of terms for the advantage of powerful groups does not mean that such terms apply equally by virtue of mere invocation. Rather, it should cause us to scrutinize the labels more carefully.

Toward this end, building on Handler’s definition might lead us to reframe the core element of contemporary public interest law in terms of relative disadvantage. Public interest law, as a category of practice, would thus be used to describe legal activities that advance the interests and causes of constituencies that are disadvantaged in the private market or the political process relative to more powerful social actors. Disadvantage, in this sense, relates to the resources (money, expertise, social capital) that a constituency may mobilize to advance individual or collective group interests. I draw attention to the relative nature of a constituency’s disadvantage since disadvantage is, at bottom, deeply situational—shaped by power inequality between rival constituencies. This framing suggests that it is possible to identify the constituencies served by different organizations, in different cases, and then to assess the power differential between them. It does not claim that this is calculation is easy—or even always possible. But it does point toward a metric—power—that can provide a basis for distinguishing which among competing causes might legitimately lay claim to the public interest.

The first type of disadvantage is basic market inequality, in which individuals, despite suffering a legal harm, are blocked from legal redress because they are too poor to pay for a lawyer (and there are no viable contingency or fee-shifting arrangements available). Public interest law responds to this type of disadvantage by providing no-cost or low-cost services to expand the entry of the poor into the legal system on an individual, case-by-case basis. Call this the access dimension of public interest law. Note that this dimension is the least controversial because it tracks the procedural justification for public interest law—facilitating representation as a means of achieving the equal opportunity to present claims—rather than advancing a substantive conception of the good by preferring some types of claims over others.

Market inequality maps onto, although it is not always coextensive with, forms of political inequality as well, which leads to the second (and more controversial) type of disadvantage: that of social groups or constituencies hindered in advancing collective interests through political channels. Several forms of such structural disadvantage continue to exist, despite important social gains, including disadvantage based on poverty, minority status, discrimination, and impediments to collective action. Members of disadvantaged groups have historically used American-style public interest law, particularly court-based litigation, to leverage policy gains that could not be effectively achieved through majoritarian politics. Thus, in the U.S. context, classic areas of public interest litigation have included welfare rights litigation on
behalf of the poor, civil rights litigation on behalf of communities of color, and environmental and consumer litigation on behalf of those diffuse interests. Call this the *policy dimension* of public interest law.

A key feature of these types of public interest law activities is that, unlike standard access lawyering, they are oriented toward the enforcement and reform of laws and institutions that affect broad social groups. Accordingly, they inevitably clash with adversaries who hold different policy views: civil libertarians versus defenders of religious rights; environmentalists versus developers; consumer advocates versus business interests. Groups on both sides of these policy disputes deploy law to advance their aims. Which is public interest law? Focusing on relative disadvantage would frame the policy dimension of public interest law as encompassing advocacy on behalf of constituencies who seek to mobilize law to make up for their relative lack of political power to move policy in legislative arenas. This calculus would require looking at the nature and depth of a group’s disadvantage vis-à-vis those against whom that group seeks to mobilize. This, in turn, would require attending to deeply entrenched and persistent forms of inequality based on poverty, race, national origin, gender, sexual identity, and other grounds. It would, on the other side of the political equation, lead us to ask whether proponents of public interest law legitimately pursue policy change on behalf of the less powerful—or whether they cynically invoke the banner of dispossession to mask the reality of privilege.

From this vantage point, public interest law would as a general matter include groups seeking to use legal means to challenge corporate or governmental policies and practices. This definition would encompass activities on both sides of the political spectrum that legitimately advance disadvantaged interests, but exclude lawyering on behalf of existing structures of power. It does not, in the end, suggest that all claims asserted by less powerful groups necessarily advance a normative conception of the public interest to which all segments of society should subscribe. Rather, it asserts that the public interest is served when constituencies that genuinely face greater barriers to influencing political decisionmaking because of their less powerful status gain meaningful avenues to assert their claims through law.

Building on Handler’s definition in this way does not avoid the boundary questions that inevitably and inescapably arise. To the contrary, it asks hard political questions. Where should we locate certain plaintiff-side lawyers, who might use law on behalf of individuals (accident victims, consumers, or investors) to challenge systematic practices by corporate actors (insurance companies, product manufacturers, or corporate insiders) but who do so in the pursuit of private enrichment instead of political reform? Or how should we think about libertarian groups that might select cases on behalf of sympathetic and relatively disadvantaged groups as a means to build deregulatory precedent designed to advance a broader pro-business agenda that redounds to the benefit of powerful corporate financial patrons? Similar questions might be posed about some Religious Right organizations, which use the backing of politically influential Christian-denominated churches in the pursuit of a wider role for religion in public life (which may, in turn, curtail the rights of religious minorities or religiously disfavored groups, like gays and lesbians). Or we might ask how to define government lawyers, who may, in some instances, mobilize the power of the state to validate the repression of minority groups
while, in others, might use their resources to advance minority interests? No
definition of public interest law can definitively answer these questions based
on neutral principles — but that does not mean that the questions should cease
to be asked. And, indeed, to the extent that the liberal vanguard of public
interest law has retreated from the definitional project, the questions are
being asked — and answered — by their adversaries.

Is this reframing around relative disadvantage or power useful? Is it too
facile to equate lawyering in the public interest just with lawyers who purport
to represent the less powerful? Those with power could themselves use it to
advance the public good. And lawyers for power holders could guide them
along this path. This notion is consistent with the ideal of the “people’s law-
yer” associated with prominent Progressive era lawyer and Supreme Court
Justice Louis Brandeis — someone who sought to be the “lawyer for the situa-
tion,” counseling powerful corporate clients on solutions that would not just
advance their private interest but also uphold the broader public interest.
Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*,
105 *Yale L.J.* 1445, 1472, 1502 & n.194 (1996). In another version of this
idea, consider the following statement from a well-known liberal federal
judge (and former legal aid lawyer):

I firmly believe that a prosecutor who wisely and fairly uses his or her power to
forego prosecuting someone when the interest of justice so requires furthers
the public interest just as much as a public defender who, from the trenches,
defends the criminally-accused indigent. A partner in a major law firm who
works to ensure that his or her corporate clients treat their employees in a non-
discriminatory manner, or that his or her clients take the high road even as
they pursue the bottom line (for example, consider Enron or Worldcom)
furthers the public interest just as much as the plaintiffs’ lawyer who sues
the corporation for discrimination or the government lawyer who charges
the corporate executive with fraud and malfeasance.

Hon. Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest
Henderson’s broader conception of pursuing public interest law? Why or
why not? Do any of the definitions discussed in this section make sense to
you? If you were a government official or in charge of philanthropic giving at a
foundation, would any of these definitions help you decide what types of law
practice are worthy of being subsidized as advancing the public interest?

3. Operationalizing the Definition

In private practice, the decision about which cases to take is generally a
business one. Clients who are solvent, can afford the law firm’s hourly rates,
and can pay bills regularly are likely to be taken on, assuming that the firm
has sufficient staffing for the job and no conflicts of interest bar the firm from
representation. Other reasons exist for law firms to turn down clients besides
the profitability of the work. A law firm might, for public relations purposes,
I. INTRODUCTION

This chapter provides a historical overview of public interest lawyering in American society, showing the trajectory of public interest practice from its incipient post-colonial expressions to the present state of the field. What it reveals is a dynamic set of institutions and practices that have deep historical roots in promoting the basic rule of law, but also have responded to and been shaped by crucial social and political ferment of the times—from the American Revolution of the eighteenth century to the civil rights revolution of the twentieth. In addition, as we will see, public interest lawyering has also been critically influenced by its relationship to the organized bar (sometimes hostile and sometimes supportive), and its location within the broader legal system, which has grown in complexity and expanded to cover a broader range of social disputes.

These materials chart the historical continuities of the public interest law movement, but also examine important moments of disjuncture and change. They highlight different (but by no means all) components of this history to provide a context for understanding key themes in contemporary public interest lawyering explored in later chapters—such as the historical divide between the legal aid model of dispensing individual legal services to the poor and more reform-oriented and transformative legal strategies. It also explores the degree to which public interest lawyering is the product of individual agency or a response to structural forces embedded in particular political and social contexts.

As you study these materials, can you think of individual lawyers, organizations, or movements that have inspired you to want to pursue a career in public interest law? What is it about these people, groups, or events that have motivated you?
generally involved individual efforts by courageous lawyers who staked their professional reputations on principle. The institutional structure of public interest law, marked by independent organizations with affiliated lawyers dedicated to the advancement of specific causes—although presaged by the abolitionist lawyers—would await the cataclysm of the Civil War, as the country sorted out the legacy of that “peculiar institution” in the context of political ferment, economic transformation, and the rupture of war.

III. THE INSTITUTIONAL FOUNDATIONS OF PUBLIC INTEREST LAW: FROM THE PROGRESSIVE TO POSTWAR ERA

The dawn of the twentieth century witnessed dramatic changes in the American political economy that spawned new social issues—and elicited innovative, and foundational, legal responses. The promise of post–Civil War Reconstruction gave way to the reality of Jim Crow; domestic peace ceded to world war; and the Industrial Revolution spawned economic dislocation and the Great Depression. These transformations occurred against the backdrop of dramatic changes in American governance, particularly the greater concentration of power in federal government, the “explosion” of legal regulation, and the increased stature and authority of the federal courts. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 503-37 (3d ed. 2005). It was in this context that the institutional foundations of public interest law were built.

A. EARLY PUBLIC INTEREST ORGANIZATIONS

Two national membership organizations most often associated with the emergence of law reform campaigns in the twentieth century are the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU).

1. Civil Rights

Beginning in the 1880s, a group of African-American leaders, taking the mantle from their abolitionist forebears, established a number of important groups designed to advance the cause of racial justice during the post-Reconstruction period. SUSAN D. CARLE, INVENTING CIVIL RIGHTS LAWYERING: NATIONAL ORGANIZING FOR RACIAL JUSTICE, 1880-1910 (forthcoming 2013). These included groups with a range of strategic approaches and political ideologies, from radical to accommodationist, which all aspired to create permanent institutions to promote racial equality. Id. One of these groups, the Niagara Movement, was formed in 1905 by W.E.B. Du Bois to challenge Booker T. Washington’s more moderate platform by promoting a national agenda of civil rights and economic justice. Id.

The backdrop to the NAACP’s development was the Supreme Court’s decision in *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896), which upheld laws requiring that providers of public accommodations, such as railroads, establish separate facilities for white persons and people of color. *Plessy* essentially endorsed the Southern states’ adoption and enforcement of Jim Crow laws, which mandated the strict separation of races in virtually all walks of public and private life. *Plessy* ensured that the formal segregationist policies of state and local governments were immune from challenges under the Fourteenth Amendment’s Equal Protection Clause so long as they required that the separate public and private facilities for whites and African Americans were roughly “equal.”

In the late 1920s, a private foundation called the Garland Fund issued a grant to the NAACP to implement comprehensive litigation “campaigns to enforce the Constitutional rights of African-Americans in the South.” Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP’s School Desegregation Campaign, 1930-1950*, 52 *Mercer L. Rev.* 631, 638-39 (2001). The NAACP placed attorney Nathan Margold in charge of developing an overall strategy. *Id.* at 639. Margold produced a study confirming that despite *Plessy’s* separate but equal requirement, Southern states provided facilities for African Americans that were far inferior to those provided for white persons. *Id.* at 639-40. As an example, an African-American train passenger at the time of *Plessy* described the “colored” railroad cars as “[s]carcely fit for a dog to ride in.” Klaman, *supra*, at 43. The Margold Report concluded that it would be too burdensome and inefficient to challenge the inequality of facilities across the nation in piecemeal fashion, arguing instead for a comprehensive attack on segregation. Ware, *supra*, at 640-41; Tushnet, *supra*, at 25-28. However, Charles Hamilton Houston, former dean of the Howard University Law School, who succeeded Margold as the head of the NAACP’s legal team, initially opted for smaller steps. Under his direction, the NAACP first developed a strategy to test *Plessy’s* staying power by filing individual equal
protection suits challenging the actual inequalities between facilities provided to whites and those provided to persons of color. Ware, supra, at 635, 641-42. He did so in part because he did not believe the Supreme Court was yet ready to revisit Plessy. Id. Eventually, these cases yielded important Supreme Court decisions invalidating many types of Jim Crow laws, particularly in higher education. See, e.g., McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 639-40, 642 (1950) (striking down a state university system that admitted an African-American student, but forbade him to use the same classrooms, libraries, cafeterias, and other facilities as white students); Sweatt v. Painter, 339 U.S. 629, 632-34, 636 (1950) (declaring the University of Texas’s legal education system unconstitutional because the African-American public law school was substantially inferior to the white law school); Missouri ex rel. Gaines v. Canada, 305 U.S. 337, 352 (1938) (invalidating a state university system that, instead of establishing a law school for African Americans, sent those students to a black law school in another state). Much of this work was carried out by the LDF, which NAACP officials created in 1940 because the NAACP could not maintain tax-exempt status due to its lobbying activities. JACK GREENBERG, CRUSADES IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 19 (1994); TUSHNET, supra, at 100-01.2

The strategy in these cases was not, in fact, to have courts declare every Jim Crow law in the country unconstitutional on a case-by-case basis. Indeed, the limited resources available for plaintiffs’ lawyers in these cases made such a goal impracticable. Rather, the lawyers’ strategy was to eventually make it economically impossible for state and local governments to maintain segregated facilities across the board, and to educate courts, and specifically, the Supreme Court, about the actual inequalities on the ground in states with Jim Crow laws. Robert L. Carter, A Tribute to Justice Thurgood Marshall, 105 HARV. L. REV. 33, 36-37 (1991). Thus, the organization’s approach embraced a gradualist strategy to undermine Plessy from the inside, and eventually dismantle racial segregation by changing controlling precedent. The strategy reached its culminating success in Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954), in which the Court overruled Plessy in holding that segregated public schools were unconstitutional. In many respects, Brown represents the paradigm of public interest lawyering—a model that set the stage for the deep investment in the “public interest law movement” that would follow in its aftermath. Yet the limits of what Brown accomplished also formed the basis of important critiques of public interest law that we will examine in later chapters.

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1. This approach had also been articulated by one of the NAACP’s chief officers, Walter White, in an earlier memorandum to the Garland Fund. TUSHNET, supra, at 13-14.

2. The two groups continued to work together until the late 1950s, when the Internal Revenue Service began to question the LDF’s tax-exempt status and its close affiliation with the NAACP. GREENBERG, supra, at 222-23. In 1957, the groups formally split and had a completely different set of board members and officers. Id. While the tax-exemption issue precipitated this formal separation, continuing disputes over direction and leadership had independently caused rifts between the two organizations. Id. at 478-86.
2. Civil Liberties

By the time the United States entered World War I in 1917, substantial opposition to the war effort and the related military draft had already developed. Antiwar activists formed organizations to oppose the war and to provide support for conscientious objectors to the draft. That opposition intensified as the country’s role in the war grew, but the federal government did not look favorably upon public protest during wartime. By 1920, a group concerned with the government’s expanding efforts to limit expression opposed to the war formed the National Civil Liberties Bureau, which would later become the American Civil Liberties Union (ACLU). Samuel Walker, In Defense of American Liberties: A History of the ACLU 46-47 (1990). Led by a pacifist political activist and social worker named Roger Baldwin, the ACLU split off from other antiwar groups that were more hesitant to aggressively support civil liberties during the war because of their concern that such advocacy might undermine their other antiwar efforts. Id. at 20-21; see also Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism 183 (2004).

Although the conventional historical account suggests that free speech law first developed as a direct outgrowth of the ACLU’s efforts to challenge the enforcement of the Espionage Act of 1917, free speech doctrine existed and began to develop before the war, and was advanced by the Free Speech League. David M. Rabban, The Free Speech League, the ACLU, and Changing Conceptions of Free Speech in American History, 45 Stan. L. Rev. 47, 48-49 (1992). Still, the ACLU emerged as the principal defender of civil liberties at least in part because of its high profile involvement in the fight against repression of political speech during this period.

Unlike the NAACP, the ACLU’s agenda was not to represent the interests of a particular constituency (though it did take on a number of free speech cases for labor organizers and persons perceived as “radicals”). During its formative years following the end of World War I, from 1920 to 1924, the ACLU addressed a wide range of civil liberties issues, including the rights of labor organizers to hold meetings, issues stemming from the war (such as mail censorship, amnesty for political prisoners, and state sedition laws), and free speech rights in public schools. Walker, supra, at 54-60. Even at this early stage, the group started employing a variety of legal tactics, including litigation, legislative advocacy, and public education (including educating public officials) on legal issues. Id. This period also saw early tests of the ACLU’s commitment to free speech without regard to the speaker’s political viewpoint. Though the ACLU advocated racial justice, it also publicly opposed restrictions on Ku Klux Klan meetings, on anti-Semitic articles published by industrialist Henry Ford’s newspaper, and on exhibition of D.W. Griffith’s racist film, Birth of a Nation (an issue that placed the ACLU in opposition to the NAACP). Id. at 61-62. During this period, the ACLU also struggled because of its association with the Communist Party, whose members it frequently represented. The Party’s tactics and positions, particularly its intolerance for free expression, were not always embraced by the ACLU’s representatives. Id. at 63-64. By and large, however, while this period saw sporadic activity by the ACLU, it yielded few civil liberties successes.
It was not until 1925 that the ACLU first started to gain momentum and develop both credibility and influence. Perhaps the most notable event raising the ACLU’s national profile was the famous Scopes “monkey” trial, in which ACLU volunteer attorney, Clarence Darrow, represented a Tennessee school-teacher who was prosecuted for violating state law by teaching evolution in a public school. The case centered on issues of academic freedom and tolerance for diverse religious viewpoints. *Id.* at 72-76. Though Scopes was convicted, his conviction was overturned on appeal on a technical ground. *Scopes v. State*, 289 S.W. 363, 367 (Tenn. 1927). As Samuel Walker has written, the case was important because the ACLU was seen for the first time as defending “a cause with which the national press and its readers could identify. That is, they had little interest in the rights of Communists but saw science and education as the key to progress.” *Walker*, *supra* at 73. Indeed, the ACLU raised enough money from the American Academy for the Advancement of Science to cover the expense of the trial. *Id.* at 75-76.

At the same time, the ACLU began to gain attention for bringing important cases to the Supreme Court. In *Gitlow v. New York*, 268 U.S. 652 (1925), the group represented a Communist Party founder who was convicted under a New York criminal syndicalism law for publishing a pamphlet that advocated revolution in a general way, but did not call people to imminent illegal action. *Walker*, *supra* at 79. The ACLU asserted that the abstract teaching of an idea is constitutionally protected by the First Amendment, and that the Constitution’s free speech guarantees were applicable to states through the Due Process Clause of the Fourteenth Amendment. *Id.* Although the Court ultimately upheld Gitlow’s conviction, for the first time it accepted the idea that the concept of due process encompassed free speech rights, and that the First Amendment applied to state and local laws. 268 U.S. at 666, 672. Although this statement was contained in dicta, *Gitlow* has long stood for the idea that the Due Process Clause “incorporates” the First Amendment. *Chemerinsky*, *supra* at 499.

Building on this early success, in the late 1920s and early 1930s the ACLU expanded its role in protecting civil liberties. It fought government censorship of literature, materials relating to sex education and birth control, and erotic materials as part of its free speech mission. *Walker*, *supra* at 82-86. Over some dissent, Roger Baldwin then called for the organization to expand its influence into other areas, such as racial equality for African Americans and Native Americans, police misconduct, immigrants’ rights, and compulsory military education in schools. *Id.* at 86. His most vocal opponent was board member (and later Supreme Court Justice) Felix Frankfurter, who argued that expansion of the ACLU’s mission would dilute its concerns about more central civil liberties issues, *id.* at 87, a debate that continues in current ACLU leadership circles. In the following decades, the ACLU’s docket grew to include cases raising civil liberties concerns with the expansion of government power during the New Deal, the persecution of minority religious groups like the Jehovah’s Witnesses, and wartime governmental abuses, such as the internment of Japanese Americans in camps during World War II. *Walker*, *supra*, at 95-149. Although the group defended suspected Communists and Communist sympathizers during the beginnings of the Red Scare, it became ensnared in internal
controversy about its affiliation with and representation of Communists, which caused it to take inconsistent positions during the Cold War period — purging Communists after a 1940 ban, but later relaxing its standards in 1954, a move that provoked the departure of the hard line anti-Communist bloc. *Id.* at 127-32, 208-11.

As the ACLU emphasized different substantive issues, important organizational changes were occurring as well. In the 1920s, lawyers played a relatively small role in the ACLU leadership, in part because litigation was yet to become an important feature of the organization’s mission. *Id.* at 69. Indeed, there was a dispute among the ACLU leadership about the propriety of seeking social change through the courts. ACLU founder Roger Baldwin was skeptical that the courts would ever take a central role in protecting civil liberties. *Id.* at 81. Frankfurter believed that it was inappropriate for courts to play such a role, preferring the legislative process as a vehicle for protecting civil liberties both because it was more democratic and more sustainable in the long run. *Id.* But other lawyers in the leadership believed the Supreme Court should and would step in to protect civil liberties interests. *Id.* Those volunteer attorneys, especially Walter Pollak, Walter Nelles, and Morris Ernst, began what would eventually become the ACLU’s extensive Supreme Court litigation program. *Id.* The ACLU hired its first permanent staff attorney in 1941. *Id.* at 111. As the organization evolved, it turned increasingly to litigation precisely because it often represented politically unpopular minority groups. Emily Zackin, *Popular Constitutionalism’s Hard When You’re Not Very Popular: Why The ACLU Turned to Courts*, 42 LAW & SOC’Y REV. 367 (2008).

What are the common themes leading to the emergence of these two major public interest lawyering organizations? Important differences?

B. THE PRIVATE BAR

In 1905, Louis Brandeis, a prominent lawyer in private practice, made an influential address at Harvard in which he argued that elite American lawyers had “allowed themselves to become adjuncts of great corporations and . . . neglected their obligation to use their powers for the protection of the people.” Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 555, 559 (1905). His address conveyed the message that lawyers could work for the public good in two distinct ways. First, they could engage in law reform practice to make the law better; second, they could counsel their private clients to help them be more sensitive to the societal implications of their conduct, and encourage them to act in ways that would not harm the public interest. DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 171 (1988). Brandeis and other reformers during the Progressive era took these ideas seriously, and engaged in a substantial amount of legal work directed at what they perceived to be the broader public good. Brandeis himself frequently did pro bono work where he viewed the issues in a case as having a public impact. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People’s Lawyer*, 105 YALE L.J. 30
He viewed the lawyer’s role as not only participating in pro bono cases, but also counseling his paying clients to conduct themselves in a manner that promoted the public good. David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VA. ND. L. REV. 717, 721 (1988). In the late 1800s, Brandeis engaged in efforts to prevent the monopolization of public transportation and gas companies in Boston, David W. Levy, *Brandeis, the Reformer*, 45 BRANDEIS L.J. 711, 714-15 (2007), and to reform and regulate the insurance industry, Philippa Strum, *Louis D. Brandeis: Justice for the People* 75-78 (1984).

One of Brandeis’s most significant roles was as general counsel for the National Consumers League (NCL), a coalition originally formed by women’s groups at the turn of the twentieth century to lobby for laws to improve conditions and wages for female employees. Lee Epstein, *Conservatives in Court* 6 (1985). As the political scientist Clement Vose reported in an early study, the NCL was one of the first organizations to use litigation systematically to achieve social change. Clement E. Vose, *National Consumers’ League and the Brandeis Brief*, 1 MIDWEST J. POL. SCI. 267, 276-90 (1957). While the NCL initially engaged in legislative work, it turned to the courts to defend constitutional attacks against much of the progressive regulation it had successfully lobbied to have adopted. Epstein, *supra*, at 6. One impediment to its role in court was that it was the responsibility of government lawyers, usually state attorneys general, to defend state laws. Id. The NCL found the state governments’ legal representation in these cases to be wanting, and beginning with *Muller v. Oregon*, 208 U.S. 412 (1908), a case challenging the constitutionality of a law capping the number of hours women could work, Brandeis persuaded the officials of many states to permit the NCL to defend these laws in court. Id. This unorthodox strategy led to a great deal of control on Brandeis’s part. Indeed, Brandeis (who served without salary) and the NCL did not appear on the briefs for the states, though Brandeis negotiated complete control and coordination of the litigation as part of the terms of his representation. Id.3 The other, more well-known, aspect of this litigation was Brandeis’s insistence that leaders of the labor movement collect statistical information about the harmfulness of the labor practices (such as long working days for women) and his incorporation of this data in his briefs, now widely known as “Brandeis briefs.” Id. This approach informed the work of later groups, like LDF, which famously used social scientific studies on the harmful impact of segregation as part of its litigation culminating in *Brown v. Board of Education*.

What are the important differences between the approach that Brandeis took and the strategies undertaken by the major public interest law groups that arose during the Progressive era (NAACP and ACLU)? What challenges might he have faced that the other groups did not? What advantages did he have that the other groups did not?

Brandeis embodied the paragon of elite professionalism, leveraging the moral authority of his status to serve as “lawyer for the situation” — guiding

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3. Some have observed, however, that in this unusual, hybrid role as a private lawyer representing the state, Brandeis took on an influential role in shaping the public agenda without being accountable by virtue of being in any official public position. See, e.g., Spillenger, *supra*, at 1456.
his corporate clients to make decisions consonant with (his version of) the public interest. There were other models of civic engagement, however, practiced by the majority of lawyers who fell outside this elite category.

At the lower echelons of the profession, public service was conceptualized as a form of charity to the poor, which was generally provided through court appointment or professional courtesy. ... On the civil side, state laws regarding civil appointments were ... spare. Federal courts did not have a procedure for requesting counsel for in forma pauperis litigants until 1892, and even then it was restricted to poor people with meritorious claims. The system of appointments, which relied on state coercion rather than professional volunteerism, rested on the notion that lawyers were officers of the court and therefore integral to the administration of justice. Lawyers who accepted appointments therefore demonstrated the profession’s commitment to standards of fairness while underscoring the centrality of client service — court-appointed attorneys owed the same duty of zealous representation to their indigent clients as to those who paid a fee.

Outside of the system of court appointments, public service meant simply being “available” to the community. This notion of professional courtesy was exemplified in the prototypical “country lawyer” who would do what he could to help his neighbors. It was also embodied in the professional code of ethics, which exhorted lawyers to give “special and kindly consideration” to “reasonable requests of brother lawyers, and of their widows and orphans without ample means,” providing them services for a reduced fee or “even none at all.” In contrast to the system of appointments, this form of service to the poor was voluntary, performed through the enactment of individual instances of professional charity.

Cummings, The Politics of Pro Bono, supra, at 10-11. How does the professional service of the “country lawyer” compare with that of Brandeis? Which do you think was more important? More professionally legitimate?

Another element of public interest work performed by the private bar came from union-side labor law firms, which, along with in-house union lawyers, played an important role in the labor movement. Among other things, labor lawyers facilitated union organizing and represented unions in suits brought by employers to enjoin a wide range of labor activity. See generally William E. Forbath, Law and the Shaping of the American Labor Movement (1991); Jennifer Gordon, A Movement in the Wake of New Law: The United Farm Workers and the California Agricultural Relations Act, in Cause Lawyers and Social Movements (Austin Sarat & Stuart A. Scheingold eds., 2006).

C. THE LEGAL AID MOVEMENT

The turn of the nineteenth century brought changes that moved the provision of legal services to the poor from the informal system of individual private lawyers dispensing professional charity to a more formalized system of organized legal aid offices. These changes included the influx of Southern and Eastern European immigrants to urban centers, which drew attention to the needs of the urban poor, and the increasing professionalization of the organized bar, which began to develop an infrastructure to address those
needs. The provision of basic civil legal services to those who could not afford them was an issue that concerned the legal profession as early as the late 1800s. Preceded by the short-lived Freedman’s Bureau, the first legal aid office was established in New York in 1876. Christine N. Cimini, Legal Aid/Legal Services, in 2 Poverty in the United States: An Encyclopedia of History, Politics, and Policy 434 (Gwendolyn Mink & Alice O'Connor eds., 2004); William P. Quigley, The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960’s to the 1990’s, 17 St. Louis U. Pub. L. Rev. 241, 243-44 (1998). It was established to “render legal aid and assistance, gratuitously, to those of German birth, who may appear worthy thereof, but who from poverty are unable to procure it.” Auerbach, supra, at 53 (quoting the New York Legal Aid Society statement of purpose); see also Susan E. Lawrence, The Poor in Court: The Legal Services Program and Supreme Court Decision Making 18 (1990). Charged with this duty the office became a general provider of legal services to persons without the means to hire a private attorney. Cimini, supra, at 434. Legal aid expanded modestly during the next few years, with legal aid societies opening in Chicago in 1886 and four other cities by the turn of the century. Auerbach, supra, at 53.

At that time, legal aid societies were funded exclusively by private donations, and operated independently of one another, with little or no coordination with other legal aid offices. Cimini, supra, at 434. Beginning in the 1900s, when private funding became more scarce, legal aid societies pursued affiliations with existing charitable organizations or sought local government funding to help finance their activities. Id. at 434-35. A national movement to establish a legal aid system was spurred by the 1919 publication of Justice and the Poor by Reginald Heber Smith, a Boston law firm partner who served as general counsel to Boston’s Legal Aid Society. Martha F. Davis, Brutal Need: Lawyers and the Welfare Rights Movement, 1960-1973 16 (1993). The book reported the results of a survey Smith conducted for the Carnegie Foundation on the state of legal services for the poor. Id. He concluded that the American justice system was unfairly dependent on the resources of the parties involved, imposing substantial injustice on the poor. Id. Moreover, in addition to calling for lawyers to represent poor people, Smith argued for legal aid organizations to pursue more systemic legal reform. Id.

Smith’s book attracted interest from the mainstream bar, including the ABA, which established a committee to study legal aid in 1921. Cimini, supra, at 435. Such recognition was an important step, as there had been substantial early resistance from the private bar, which was concerned that a government-established legal aid network would reduce demand for the services of private lawyers. Davis, supra, at 15 (1993); Cimini, supra, at 435. Following the publication of Justice and the Poor, the organized bar took on a greater role in funding legal aid, which grew from 40 legal aid societies in 1919 to 70 in 1947. Joel F. Handler et al., Lawyers and the Pursuit of Legal Rights 19 (1978). Yet many lawyers at the lower echelon of practice continued to resist legal aid as a financial threat. In the same way that calls for a nationalized health care system have led to concerns about “socialized medicine,” the legal aid movement met some resistance because of the concern that a nationalized legal aid system would represent a move toward socialized legal services.
DAVIS, supra, at 19; HANDLER ET AL., supra, at 19. The organized bar’s resistance began to give way in the face of a proposed state funded and regulated legal aid system modeled on England’s Legal Aid and Advice Scheme of 1950. DAVIS, supra, at 19. Rather than submit to state control, the bar redoubled its effort to fund and expand legal aid under its auspices.

By the 1960s, legal aid societies existed in nearly every major city. See Alan W. Houseman, Legal Aid History, in POVERTY LAW MANUAL FOR THE NEW LAWYER 18, 18 (Nat’l Ctr. on Poverty Law ed., 2002). However, bar support continued to be only a small portion of the total legal aid budget — by one estimate, only 10 percent as late as the 1960s — and thus legal aid was primarily supported by charitable contributions from individuals, foundations, and local businesses. Richard L. Abel, Law Without Politics: Legal Aid Under Advanced Capitalism, 32 UCLA L. REV. 474, 502 & n.163 (1985); Cummings, The Politics of Pro Bono, supra, at 12. As a result, “[c]ontroversial clients were generally avoided, cases that could generate fees were rejected, and client income eligibility was maintained at levels acceptable to private attorneys competing for lower-income clients. . . . Legal aid lawyers abjured reform-oriented advocacy and instead concentrated on resolving minor individual pursuits.” Id. at 12-13. This model of traditional legal aid, built in the first half of the twentieth century as a vehicle for individual client service, would be profoundly influenced by the broader movements for progressive social transformation beginning to sweep through the nation.

IV. THE RIGHTS REVOLUTION AND THE MAKING OF MODERN PUBLIC INTEREST LAW

By the midpoint of the 1900s, the basic organizational outlines of the modern public interest law system were established. The legal arms of the early public interest law groups — the NAACP and ACLU — continued to be major forces in the American legal system, and their success began to spawn counterparts in other fields. As the private bar grew and became more diverse, the ethos and extent of pro bono service also began to expand; there were, in addition, examples of “radical” private sector lawyers whose work for political dissidents or unions aligned them with progressive social movements of the time. And the infrastructure of legal aid had grown into a national network of staffed offices catering to the legal needs of the urban poor.

Midcentury proved to be a watershed moment for public interest lawyering. There were two major forces at play — and modern public interest law emerged at their intersection. One was the expanding power of the federal government, which created new opportunities for lawyering that sought to leverage that power to benefit marginalized groups or causes. The New Deal of the 1930s had created the infrastructure of the modern welfare state, providing new benefits and protections to the poor that could be enforced in court; the civil rights movement would result in seminal new protections — such as the Civil Rights Act of 1964 — that would further reinforce the federal government as the protector of minority groups against
harmful state and private action. Important federal administrative agencies, such as the Environmental Protection Agency, began to take shape and gain power, offering lawyers a new venue to promote their causes by shaping the nature of federal rulemaking. Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law,”* 2005 Wis. L. Rev. 455, 459. And, perhaps most significantly, the changing composition and role of the federal courts invited lawyers to assert rights as a means to reshape fundamental social relations. At the apex of the federal judiciary, the Warren Court signaled its intent to extend and reshape rights across a variety of legal domains—particularly in the areas of discrimination and due process—in order to promote greater equality and protections for individual liberty. And the power of the federal government was mobilized to help support the enforcement of those rights, as was the case with the Kennedy Administration’s Civil Rights Division in the Department of Justice. The Rights Revolution was upon the country. See Mark Tushnet, *The Rights Revolution in the Twentieth Century,* in *The Cambridge History of Law in America: The Twentieth Century and After* (1920-) 377, 377 (Michael Grossberg & Christopher Tomlins eds., 2008). Public interest law was one of its causes (in that public interest lawyers brought many suits that created new rights) and an important consequence (in that successful rights claiming motivated new and greater organizational investments in public interest law groups).

The other major force emanated from the streets in the form of mass movements, which demanded a voice for the multifaceted and idealistic New Left. The civil rights movement, the political mobilization against the United States’s involvement in Vietnam’s civil war, the growth of the environmental movement, and the development and diversification of the women’s movement were catalytic events that powered new transformative social visions—and sought to harness the power of law to realize their goals. For a brief period, New Left demands met with a receptive federal government to create “public interest law” as both a set of institutions and an ideal of social change.

We may understand the modern history of public interest law in the second half of the twentieth century as a story about the culmination of this ideal—and the subsequent reaction to it. It is thus a story about the fragile alliance between the federal government and public interest law, and the consequences of its unraveling, both in terms of institution building and political backlash. Thus, we may identify the period from *Brown v. Board* through the 1970s as one that coincided with the zenith of public interest law as a liberal political and institutional project, marked by the creation of new organizations and rights strategies largely (though never exclusively) mobilizing litigation to push the federal government toward reform. The period that followed is characterized by federal retrenchment and political backlash, resulting in the decline of the federal government as the protector of liberal rights claims, and the rise of a powerful conservative countermovement, which includes conservative public interest law as an important component. Thus, the historical trajectory of public interest lawyering is toward greater diversification—both in terms of the political nature of the organizations (multiple types of liberal and conservative groups) and the means they use to achieve their goals (beyond federal litigation to encompass other strategies).
A. LEGAL SERVICES FOR THE POOR

While efforts to provide free legal services to the poor in civil and criminal cases trace back to the turn of the century, the modern architecture of civil legal aid and public defense did not develop until the 1960s. For criminal representation, the turning point was the Supreme Court’s decision in Gideon v. Wainwright, 372 U.S. 335, 342-43 (1963), holding that criminal defendants were entitled to representation by an attorney for all felony charges. For civil representation, the watershed event was the establishment of the federal legal services program in 1965.

1. Criminal Representation: The Public Defender System

Until the early twentieth century, criminal defendants who could not afford legal counsel could only hope to retain a volunteer lawyer or, in some jurisdictions, receive appointment of a private lawyer by the court. The first publicized call for government-funded public defense was by lawyer and suffragist Clara Shortridge Foltz at the 1893 Congress of Jurisprudence and Law Reform, a meeting associated with the Chicago World’s Fair. Babcock, supra, at 1270-71. She argued that “[f]or every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund.” Id. at 1271 (citing text of speech). Though the recognition of a constitutional right to a criminal defense lawyer was decades away, Foltz maintained that public defenders would serve an important role in the criminal justice system. Id. at 1271-72. Foltz, who had substantial experience representing criminal defendants in the West, saw criminal defendants with limited financial resources as having a choice between sacrificing their economic futures or declaring indigence in order to gain a court-appointed attorney, who would often be inexperienced and lack sufficient resources to properly investigate the case. Id. at 1271. Foltz spent much of her life advocating for the creation of public defender systems and introducing legislation in various jurisdictions to accomplish this goal. Id. at 1273-74.

Despite the efforts of Foltz and others like her, support for public defense in the first half of the twentieth century was sporadic. In 1913, during the heart of the Progressive era, the City of Los Angeles created the first official public defender program. Id. at 1274. In the ensuing period, due to progressive support for the concept, a number of state legislatures introduced bills to create public defender offices. Id. Yet funds were limited and the idea itself remained controversial. A key dispute developed regarding the proper goal of public defenders and appointed defense counsel. One school of thought suggested that these defense lawyers ought to provide a defense comparable to that available to private defendants who could afford their own lawyers. Another camp argued that the government should provide defense counsel only to ensure minimal due process — protecting innocent defendants from wrongful conviction and helping maintain a generally fair system. Id. at 1268.

The status of defender programs began to change in the 1960s. First, the Ford Foundation began investing significant resources to increase the number and quality of defender programs with its 1963 National Defender Project. Handler, et al., supra, at 39. This effort, combined with the impetus to state
and local government efforts provided by Gideon, led to a significant increase in programs over the ensuing decade.

In 1961, defender programs existed in only 3% of the counties of the nation and served only about one-quarter of the population; by 1973, 650 defender programs were providing services in 28% of all United States counties, reaching two-thirds of the population. In addition, 16 states [had] organized and funded defender services at the state level.

Id.

Change took place at the federal level as well. Before 1965, the bar was the main source of counsel for indigent defendants in federal criminal cases. John J. Cleary, Federal Defender Services: Serving the System or the Client?, 58 LAW & CONTEMP. PROBS. 65, 67 (1995). Federal courts would often appoint private attorneys who were inexperienced and/or unwilling to serve, and no system existed to pay the attorneys or their expenses. Id. A report commissioned by Attorney General Robert F. Kennedy recommended a payment system for appointed counsel as well as the creation of a federal public defender system. Id.

In 1964, Congress passed a law providing some funding for federal indigent criminal defense, and in 1971, Congress established two distinct entities to provide criminal defense: a full-fledged federal defender service and a community defender organization to provide neighborhood-based defense services. Id. at 67-68.

Since then, the number of public defender programs has increased. But concerns about the quality of defender services persist — and have even grown stronger. The key problem is inadequate resources and enormous caseloads, which can undercut the ability of even the best lawyers to provide an adequate defense. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 7-28 (2004). In response to the contemporary crisis in public defense, some public defenders’ offices have begun to take action to address the substantial problems produced by drastically reduced financial resources and alarmingly high caseloads. The crisis makes it extraordinarily difficult for public defenders in many jurisdictions to adequately investigate their cases and challenge the government’s charges by going to trial. Erik Eckholm, Citing Workload, Public Lawyers Reject New Cases, N.Y. TIMES, Nov. 9, 2008, at A1. Concerned about the impact of these resource issues on both their clients’ constitutional right to counsel and their own ethical duties to competently represent clients, some offices have simply refused to take on new cases, while others have actually filed lawsuits to seek relief. Id. Some of the suits have been successful, with one in Florida resulting in a ruling that the Miami-Dade County public defenders’ office could turn down the cases of defendants charged with lower-level felonies so that they could provide adequate representation to clients facing more serious charges. Id. Another suit in Kentucky yielded a ruling allowing public defenders to decline cases they could not handle ethically because of their workload. Id. Similarly, in Missouri, a state oversight commission granted the public defenders’ offices permission to turn down misdemeanor cases and other lower-level charges that would not likely lead to imprisonment for convicted defendants. Id.
Why do you suppose that despite the existence of a federal constitutional right to a criminal defense attorney, at least in felony cases, and a widespread public defender structure, there continues to be a substantial crisis in basic criminal representation for the poor throughout the United States? Are there other systemic approaches to criminal defense that might respond to these deficiencies?

2. Civil Representation: The Federal Legal Services Program

The U.S. system of legal aid has followed a similar trajectory—from governmental support to governmental restriction. In the early 1960s, the Ford Foundation provided funding for several experimental projects in low-income areas of major urban cities to provide consumer, medical, educational, and legal services. Cimini, supra, at 435. These projects would foreshadow “the recurring battles over funding, politics, and independence of the legal aid/legal services movement.” Id. One project, in New Haven, Connecticut, was shut down after its founding lawyer, Jean Cahn, became involved in a controversial criminal case. Id.

Yet the Ford projects also created a national model that shaped President Lyndon Johnson’s War on Poverty, which was implemented by the newly established Office of Economic Opportunity. Davis, supra, at 32. In 1965, the OEO established a national legal services program, which authorized funding for indigent civil legal through local programs across the country. Id. at 32-34. In 1967, the program was providing more than $40 million to around 300 legal aid offices. Id. at 34; Earl Johnson, Jr., Justice and Reform: The Formative Years of the OEO Legal Services Program 71 (1974).

From its inception, the federal legal services program generated tension between those who viewed it as an institution whose primary goal should be addressing the specific legal problems of individual clients and those who envisioned it as a vehicle for social change. See Edgar S. Cahn & Jean C. Cahn, The War on Poverty: A Civilian Perspective, 73 Yale L.J. 1317, 1346 (1964). Early legal services lawyers took on issues of economic inequality, including affirmative claims to compel employers to pay wages to their workers. Jack Katz, Poor People’s Lawyers in Transition 7 (1982). Yet they generally focused on individual dispute resolution rather than pursuing an affirmative antipoverty agenda. Id. In the 1960s, the legal services program—powered by the example of civil rights lawyering—began to systematically pursue social reform. In this era, legal services offices sought social change in at least two distinct ways. Id. First, building on the traditional legal aid model, legal services lawyers aimed to provide balance in the legal system so that previously unrepresented clients could enforce and protect their rights. Second, legal services lawyers also took on broader law reform cases challenging the structural foundations of poverty. Cimini, supra, at 436. These law reform efforts were supported by “backup centers,” which were funded out of the federal legal services budget to provide assistance to local offices. Id. In one measure of their impact, the Supreme Court from 1967 to 1972 decided 136 cases filed by legal services attorneys, 73 of which changed the law in ways that advanced the interests of poor people. Id.
In response to these early achievements, however, some policymakers began to question whether it was appropriate for the federal government to subsidize poverty law, which was viewed by critics as ideologically driven and requiring the government to fund litigation against itself. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 Wm. & Mary L. Rev. 737, 754-55 (2002). Conservative critics questioned the structure of the federal legal services program, and in 1974 Congress enacted a law creating the Legal Services Corporation (LSC). *Id.* at 755-56. Although the establishment of LSC as a separate entity insulated it to some degree from Executive influence, it also signaled a shift toward greater restrictions. *Id.* In response to criticisms of impact cases, the federal government cut funding for backup centers and imposed new limits on the type of work that federally funded legal services lawyers could perform. Alan W. Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 20-22 (2007).

Over the past 30 years, LSC has continued to sit at the center of controversy. Because there is no constitutional right to counsel in civil cases, *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25-27 (1981), policy makers arguably have greater discretion to limit the scope of legal aid lawyers’ activities. President Reagan sought to abolish LSC and succeeded in curtailing its funding. See generally Luban, Lawyers and Justice. See generally Luban, Lawyers and Justice, *supra*, at 298-302. In 1996, President Clinton bowed to Congressional Republicans by signing an act that both substantially decreased legal services funding and restricted its lawyers’ activities in the most significant manner to date. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 §§501-509, 110 Stat. 1321, 1321-50 to 1321-59 (1996) (OCRAA). A summary of the scope of these changes follows:

LSC just barely survived the call for its total elimination, but not without suffering a crippling loss of funds. Program funding was reduced by thirty percent and resulted in dramatic reductions in staff and office closings. Aside from the loss of funding, new restrictions added new burdens on programs. Certain classes of clients were eliminated from eligibility for legal services, including prisoners (those already convicted as well as pretrial detainees), many categories of immigrants, and public housing residents alleged to have been involved in criminal drug activity. Those who remained eligible were limited in the types of legal issues which could be addressed on their behalf. Congress added to the list of prohibited substantive legal issues and forbade LSC-funded attorneys from engaging in any advocacy that challenged the constitutionality of state or federal welfare statutes or regulations in any forum.

Moreover, the legal tools and strategies available to pursue permissible representation were severely circumscribed. Class actions, characterized by opponents as “the sexier lawsuits,” were prohibited. Congress prohibited LSC lawyers from representing anyone who might have been provided with “unsolicited advice” to protect their rights by obtaining counsel or taking legal action. LSC lawyers were prohibited from lobbying legislative and administrative rule-making bodies. They were also denied the right to seek state or federal statutorily authorized attorney’s fees from adverse parties. This thwarted the ability of LSC clients to enforce statutory rights, to deter against repeated wrongdoing, and deprived LSC programs of the opportunity to obtain
additional revenue for program work. These restrictions distorted the traditional attorney-client relationship; they required disclosure of information related to the identity of legal services clients as well as the substance of their cases, neither of which is permitted in private attorney-client relations. Weissman, supra, at 765-66.

In recent years, the continuing justice gap for the poor has generated interest in exploring alternative ways of delivering services and new theories for expanding representation, including the “Civil Gideon” movement, which seeks to advance a right to legal representation in at least some types of civil cases. We return to these contemporary efforts in Chapter 7. For now, as you reflect on the history of the legal services program, how would you assess its success? Do you think that its founders were right to focus on reform efforts or was that a political miscalculation in light of the program’s dependence on government funding? Are there other methods of delivering legal services to the poor that might be more effective? Why do you think that there is not greater support for universal legal representation in the form of a “Civil Gideon” or otherwise?

B. THE EMERGENCE OF LIBERAL PUBLIC INTEREST LAW

1. Movements

In addition to civil rights and civil liberties, many other important social movements shaped the liberal wing of the public interest law field in the second half of the twentieth century. This section highlights three important movements—women’s rights, environmentalism, and consumer rights—as illustrative cases of movements whose efforts to leverage law to create change led to the development of important public interest law organizations and strategies on the political left.

a. WOMEN’S RIGHTS

The suffrage movement was a seminal part of the broader struggle for women’s rights in the United States. Indeed, a major part of the history of women in public life arises out of the battle, first, to include women in the Reconstruction era constitutional amendments, and later, to ratify the Nineteenth Amendment in 1920. Moreover, though the suffrage movement initially divided over support for the Fifteenth Amendment (because it did not enfranchise women), an independent women’s law activist movement emerged that maintained “an extensive law reform agenda that included but did not privilege suffrage, and . . . maintained relationships with both of the main, oppositional suffrage camps.” Gwen Hoerr Jordan, Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton, 9 Nev. L.J. 580 (2009). It is also important to understand that while the suffragist cause stands alone as a social movement, the women’s law reform movement focused on other battles for women’s equality that were closely related to the right to vote. As Barbara Babcock has observed, “Like voting, practicing law involved an unambiguous passage into the public sphere. That is why the cause of women lawyers was

In his work on identity-based social movements, William Eskridge frames the twentieth-century women’s movement in the context of three major efforts on behalf of women’s rights. William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 MICH. L. REV. 2062, 2115 (2002) [hereinafter, Eskridge, Effects]. First, the women’s movement addressed the underenforcement of laws protecting women from sexual assault and other physical harm. Id. Second, it focused on laws protecting women and their families from harmful conditions in the workplace, though this was controversial among feminists because of its paternalistic nature. Id. at 2115-16. Third, the movement addressed morality-based laws, such as those prohibiting abortion and limiting access to birth control, which restricted women’s freedom to control their own bodies and impeded their opportunities to pursue professional and public lives. Id. at 2117-24.

In 1961, President Kennedy formed a Commission on the Status of Women. Much of the groundwork for the legal theory expanding equal protection analysis was laid out in a memorandum by Pauli Murray, an African-American civil rights lawyer. Id. at 2128-29.

Murray’s arguments found their way into the congressional debates over the addition of “sex discrimination” to the jobs title of the Kennedy Administration’s civil rights bill. . . . Murray and other feminists supported [the addition] and ensured that it was preserved in the final statute. The EEOC, however, refused to make sex discrimination a priority in its enforcement of the new law, a stance that drew strong protests. When officials ignored their complaints at a 1966 conference on women’s status, Murray, Betty Friedan, and other feminists stormed out in protest and founded the National Organization for Women (“NOW”). As Friedan later recalled, “it only took a few of us to get together to ignite the spark” that grassroots feminist consciousness raising had already created, “and it spread like a nuclear chain reaction.” In its statement of purpose, NOW went beyond the ambivalent agenda of the President’s Commission and demanded not just formal equality for women, but also a dismantling of the separate spheres ideology. Women should not only have all the (public) economic and social opportunities as men, but men should also share in the (private) responsibilities of home and childrearing. In 1967, NOW set out an ambitious national agenda, including serious enforcement of the Equal Pay Act and Title VII by the EEOC and the courts; adoption of the ERA; and repeal of abortion laws. As Cynthia Harrison has argued, NOW’s agenda reflected the first coherent feminist philosophy of the century, one that combined an updated politics of protection with a new politics of recognition: childbearing should be separated from both sexual intimacy and from childrearing; both mothers and fathers are responsible for family as well as work.

Like the NAACP, NOW established a Legal Defense and Education Fund to litigate issues of women’s equality. In 1971, the ACLU established its Women’s Rights Project, headed by Professor Ruth Bader Ginsburg. Representing a new generation of litigators, Ginsburg followed [women’s rights pioneer Dorothy] Kenyon and Murray in pressing the Court to rule that women have all the same
legal rights and duties as men. These lawyers filed constitutional challenges to statutory sex discriminations, and state and federal judges found many of the challenged policies unconstitutional. . . .

Id. at 2129-31; see also Nadine Strossen, The American Civil Liberties Union and Women's Rights, 66 N.Y.U. L. REV. 1940 (1991).

In addition to national advocacy groups such as the NOW Legal Defense and Education Fund (now known as Legal Momentum) and the ACLU, decentralized efforts to secure women's rights emerged as well. For example, a group of lawyers founded the Washington, D.C. Feminist Law Collective in 1976. Modeled on other law collectives discussed below, this group sought to form a law practice that explicitly incorporated its political goals not only into its legal work, but also into the way that members lived their professional and personal lives.

A central goal of many advocates in the women's right movement during the 1970s was the ratification of the Equal Rights Amendment (ERA) to the U.S. Constitution. At a time when the Supreme Court had not yet recognized a heightened standard of review for government discrimination on the basis of gender, activists supported an amendment providing that “[e]quality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” Although equal rights amendments had been introduced in Congress as early as 1923, support for such a measure reached its height in 1972, when Congress enacted it by a wide margin. Jane J. Mansbridge, Why We Lost the ERA 8-12 (1986). Securing state ratification, however, was a bigger challenge. Ultimately, the amendment was ratified by only 35 of the 38 states necessary to become part of the Constitution. Id. at 1. At the beginning, progressives were divided in their support for the ERA. Some women’s groups in the early twentieth century opposed efforts to ratify the ERA because they feared it would undermine efforts to secure legislative reform to protect women’s rights. Eskridge, Effects, supra, at 2125. Unions and other labor groups were opposed because they feared that if the ERA were ratified, it would be used to invalidate much of the Progressive era legislation protecting women in the workplace, which they had fought so hard to enact. Mansbridge, supra, at 8-9. Progressive support began to solidify in the 1970s, but an increasingly effective conservative opposition movement led by Phyllis Schlafly created sufficient doubt about the amendment that it was never ratified. Id. at 110-16.

Although this might have been a significant setback for the women’s movement, advocates for women’s rights were more successful in pursuing equal rights in other contexts. Even before Congress enacted the ERA, it had passed strong legislation to prohibit discrimination against women in the workplace with measures such as the Equal Pay Act of 1963 and Title VII of the 1964 Civil Rights Act. 29 U.S.C. §206(d) (2006); 42 U.S.C. §2000e (2006). As the women’s movement progressed into the later twentieth century, there emerged a new emphasis on challenging laws enacted on the assumption that women were less fit than men to serve various public functions (sitting on juries, running for office, working in a wide range of employment settings). Eskridge, Effects, supra, at 2126-27. Women’s advocates gravitated toward litigation attempting to expand the Supreme Court’s interpretation of the
Fourteenth Amendment’s Equal Protection Clause to protect women in the same way it was read to protect racial minorities and toward legislative efforts to add women as a protected class under civil rights statutes. Id. at 2126-30. These efforts ultimately culminated in new equal protection precedent requiring greater judicial scrutiny of laws overtly discriminating against women. Craig v. Boren, 429 U.S. 190, 197 (1976). Indeed, Reva Siegel argues that the political dynamic surrounding the ERA’s proposal and defeat may have laid the groundwork for shaping the emergence of stronger constitutional protection against gender discrimination. Reva B. Siegel, Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA, 94 CAL. L. REV. 1323 (2006).

Building on these efforts, women’s rights advocates won additional laws prohibiting employment discrimination on the basis of pregnancy and programs to support women’s advancement in education, employment and other settings; they also worked to limit the anti-abortion movement’s drive to increase government regulation of abortion and overrule Roe v. Wade. These successes were the product of organized political and legal advocacy. For example, the legislative campaign to pursue the federal Pregnancy Discrimination Act was led by a coalition of women’s groups, including the ACLU, the National Organization for Women, and the Pennsylvania Commission on Women. Feminist Leaders Plan Coalition for Law Aiding Pregnant Women, N.Y. TIMES, Dec. 15, 1976, at 40. The campaign also reached out to labor and civil rights groups as well, with the ACLU coordinating a legislative strategy meeting including representatives from 50 different organizations. Deborah Dininner, The Costs of Reproduction: History and the Legal Construction of Sex Equality, 46 HARV. C.R.-C.L. L. REV. 415, 469-70 (2011). Through its Reproductive Freedom Project, in conjunction with its state affiliates, the ACLU was able to monitor state legislation restricting women’s access to abortion and coordinate a national strategy on reproductive rights. Strossen, supra, at 1956-57.

As the women’s movement progressed, however, like other social change movements it became even more diverse and complex. For example, different schools of feminist thought led to conflicts within the women’s movement in specific cases. An oversimplified characterization of two of these schools is that one involved a quest for equal treatment under the law (by the government, employers, and others) without regard to gender. Another school of “difference” feminists argued that formal legal equality often yields inequality both because of past discrimination against women and because real differences between genders sometimes require accommodations that ultimately enhance equality. This debate manifested itself in California Federal Savings & Loan Ass’n v. Guerra, 479 U.S. 272 (1997). In that case, an employer challenged a state law requiring employers to provide female employees with up to four months of unpaid leave for disabilities relating to birth and pregnancy on the ground that the state law violated the federal Pregnancy Discrimination Act, which requires equal treatment of pregnant and non-pregnant workers. Id. at 274-79. Difference feminists argued in Guerra that though the law provided unequal treatment based on gender, that difference was justified as a way of overcoming the disadvantages women suffer in the employment context because of their child-bearing capacity. Brief for Coalition for Reproductive

As this debate suggests, one recurring issue with any identity-based social movement is uniformity of interest. Groups whose members have strong affinities and common interests are never monolithic. Thus, while the women’s movement has generally advocated for broad rights of access to abortion, not all women share that view. As the previous material illustrates, even feminists who generally agree may split on their view of specific issues. This raises questions about the identity of a particular movement, and may cause tensions and even splits within coalitions that form that movement. How much of this type of conflict is related to how far along a movement is in its evolution? Is uniformity of interest (or at least something closer to uniformity) more likely to be present when a group is seeking the most basic rights, such as voting and freedom from physical harm, and less likely after basic advances have been established? These tensions and conflicts create difficult challenges for lawyers associated with movements, who must sometimes take sides in internal movement debates (as in Guerra) or identify mechanisms to discern which position best represents the broader community’s interest.

b. ENVIRONMENTALISM

In 1892, a group of 182 naturalists who valued the natural beauty of the Western United States formed the Sierra Club:

[t]o explore, enjoy and render accessible the mountain regions of the Pacific Coast; to publish authentic information concerning them; to enlist the support and cooperation of the people and government in preserving the forests and other natural features of the Sierra Nevada Mountains; to take, acquire, purchase, hold, sell and convey real and personal property, and to mortgage or pledge the same for the purpose of securing any indebtedness which the corporation may incur, and to make and enter into any and all obligations, contracts and agreements concerning or relating to the business or affairs of the corporation or the management of its property.

regarded preservationist and writer. The Sierra Club was not initially formed strictly as a social change organization. In its original incarnation, the Sierra Club was a membership organization devoted to scheduling outings to enjoy and observe the natural environment on the Sierra Mountain range, as well as encouraging government action to preserve the environment. ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT 56 (2005). While other organizations, such as the Wilderness Society, the National Wildlife Federation, and the National Audubon Society, were also devoted to protecting the environment, the Sierra Club emerged as the first national organization to pursue an environmental agenda through legal action.

From the time of its creation through the early 1970s, the Sierra Club emphasized lobbying and organizing efforts on behalf of numerous environmental causes, including the creation of a national parks system and the designation of specific areas as national parks; the protection of redwood and sequoia trees; the enactment of the first major federal environmental legislation, the Wilderness Act and the National Environmental Policy Act; and halting the damming of many natural lakes, most famously in the Hetch Hetchy Valley in California. History of Accomplishments, THE SIERRA CLUB, http://www.sierraclub.org/history/downloads/SCtimeline.pdf (last visited Aug. 7, 2012).

Although it established a committee to advise it on legally related matters and built a network of volunteer lawyers who sometimes filed amicus curiae briefs on its behalf, the Sierra Club initially did not have an affirmative litigation program. TOM TURNER, WILD BY LAW: THE SIERRA CLUB LEGAL DEFENSE FUND AND THE PLACES IT HAS SAVED 5, 13 (1990); Robert L. Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 STAN. L. REV. 207, 257 & n.161 (1976). In fact, before the advent of the Sierra Club and other groups, lawsuits to protect the environment were conceived of as common law nuisance suits and had arisen in a number of different jurisdictions around the country. These cases were typically episodic and reacted to localized concerns.


One barrier to concerted efforts to draw environmental disputes into the federal courts was the doctrine of standing. Article III of the Constitution limits the judicial power of the United States to cases or controversies within the defined subject matter jurisdiction of the federal courts. U.S. CONST. art. III. While many environmental cases arise under federal law, they must be brought by a party who has a personal stake in the case: someone who has been injured by the defendant’s conduct. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). Before the 1960s, standing in federal litigation had
typically been limited to those who had been physically or financially harmed. In 1965, the Second Circuit held that persons with an “aesthetic, conservational, or recreational” interest with which a defendant’s conduct interfered had standing to bring a case in federal court. *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 615-18 (2d Cir. 1965).

In the mid-1960s, the Sierra Club opposed the U.S. Forest Service’s plan to open up the Mineral King Valley in the south Sierras for the construction and operation of an alpine ski resort. *Turner*, supra, at 9. The principal figure interested in developing the area was the Walt Disney Corporation (an ironic twist, since Walt Disney had been awarded a lifetime Sierra Club membership for his company’s production of wildlife films). *Id.* at 3. Though the Sierra Club tried to block federal approval for the development, by the end of 1967 all the federal agencies involved in the plan had granted permission to move forward. *Id.* at 13. The Sierra Club asked lawyers working for a small conservation organization to research possible legal theories for a lawsuit to block Disney’s development of Mineral King. *Id.* Leaders of the Sierra Club’s legal committee approved the ideas developed by these young lawyers, and the Sierra Club decided to move forward with the litigation, brought by attorneys at a private law firm. *Id.* at 16. The focus of the lawsuit became the Sierra Club’s standing to assert its environmental claims. Eventually, the U.S. Supreme Court ruled that the Club did not have standing because the complaint had failed to allege that it or any of its members actually used the Mineral King valley. *Sierra Club v. Morton*, 405 U.S. 727, 735, 741 (1972). However, in dicta, the Court’s opinion acknowledged what environmental activists had hoped: that aesthetic, conservational, or recreational harm to a plaintiff would, in the proper circumstances and with the appropriate factual grounding, constitute injury in fact that would provide such a plaintiff with Article III standing. *Id.* at 734. The Court also indicated that the decision did not preclude the Sierra Club from amending its complaint upon remand. *Id.* at 735 n.8.

While the decision was technically a loss for the Sierra Club, it is widely regarded as having been a major step in opening the federal courthouse doors to environmental groups to advance their causes. The concept of environmental harm as an Article III injury was one key to the expansion of conservation litigation, along with what would soon be the expansion of federal statutory causes of action for environmentalists, including so-called citizen-suit provisions granting statutory standing to those potentially harmed by violations of federal environmental standards. In later cases, the Supreme Court imposed more stringent standing requirements, especially in environmental litigation, *see*, e.g., *Lujan*, 504 U.S. at 560-61, thus arguably undercutting the effectiveness of litigation as a tool for environmental groups. *But cf.* Ann E. Carlson, *Standing for the Environment*, 45 UCLA L. REV. 931, 932-36 (1998) (arguing that tighter standing rules will compel environmental litigators to draft allegations and introduce evidence more strongly identifying the human impact of environmental harms, thus providing a more compelling case that will benefit the social movement as well as the litigants in individual cases).

In 1971, during the course of the Mineral King litigation, Don Harris and Fred Fisher, two volunteer attorneys affiliated with the Sierra Club’s legal
committee, formed the Sierra Club Legal Defense Fund (SCLDF) to pursue litigation to protect the environment. TURNER, supra, at 19. They had received a $98,000 start-up grant from the Ford Foundation for SCLDF (now known as Earthjustice). Id. SCLDF was formed independently of the Sierra Club to establish a litigation arm that would also qualify for tax-deductible contributions, a status the Club had lost a few years earlier. Id. SCLDF hired Jim Moorman, an attorney who had undertaken some major environmental litigation with the Center for Law and Social Policy (CLASP), to be its first executive director. Id. at 18-19.4 On remand from the Supreme Court, SCLDF represented the Sierra Club in the Mineral King litigation, amending its allegations to detail the direct impact the development would have on the Club and its members, and adding a claim under the newly enacted National Environmental Policy Act, which required the government to produce an environmental impact statement. Id. at 21. The litigation never proceeded to trial, but instead played out in the policy and political arenas until the pursuit of the ski area development lost steam. Id. at 21, 23.

SCLDF was not the first organization to form around the idea of using litigation as a tool to advance environmental concerns. In 1967, the Environmental Defense Fund (EDF) was established by lawyers and scientists concerned with the environmental hazards associated with the use of the chemical pesticide DDT. GOTTLIEB, supra, at 1896. A few years later, several Yale law students and some lawyers from a large New York corporate law firm, who had acted as pro bono counsel in a lawsuit concerning a controversial power plant along the Hudson River, received Ford Foundation funding to create the Natural Resources Defense Council (NRDC). Id. at 140-42. As the NRDC’s co-founder, Gus Speth, recalled, “it just occurred to me that there really should be an NAACP Legal Defense Fund for the environment” (quoted in PHILIP SHABECOFF, A FIERCE GREEN FIRE: THE AMERICAN ENVIRONMENTAL MOVEMENT 108 (rev. ed. 2003)).

Others took on environmental activism not through litigation, but by attempting to reach the mainstream public through awareness and education programs. These events shaped the beginnings of the modern environmental movement as well. In 1962, marine biologist Rachel Carson published Silent Spring, a book calling attention to the environmental impact and dangers to public health associated with unrestricted use of chemical pesticides. GOTTLIEB, supra, at 121. The book received national attention, and though it was assailed by pesticide industry officials, its impact was irreversible. Another successful attempt at environmental public outreach was Earth Day. Originally conceived of by U.S. Senator Gaylord Nelson, the first Earth Day was modeled on the teach-ins against the Vietnam War that activists routinely carried out. SHABECOFF, supra, at 106. The event, which involved local teach-ins about the environment across the nation, was designed in part to garner attention from a broader public audience beyond those already involved in the

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4. While Moorman was with CLASP before joining SCLDF, he also filed cases to force the government to forbid the use of chemical pesticides and to impose barriers to the construction of the Alaska oil pipeline. TURNER, supra, at 18.
environmental movement. Gotlieb, supra, at 148-49. Indeed, the event’s
national coordinator, a bright, young Harvard graduate student named
Denis Hayes, reported that he wanted the event to avoid the more confronta-
tional style associated with other social movements on the left. Id. at 150.
Moreover, there was a concerted effort to enhance the public salience of envi-
ronmental issues by connecting environmental hazards to human health. Sha-
becoff, supra, at 105, 109. The first Earth Day, held on April 22, 1970, was a
tremendous success, attracting broad media and public attention. Gotlieb,
supra, at 157. Although many of the older conservation groups did not play
an active role in Earth Day, the resulting surge in public attention to environ-
mental issues benefited them in the form of substantially increased member-
ship rolls. Shabecoff, supra, at 112.

Greater public awareness of the impact of development, timber harvesting,
pesticide use, industrial and automobile pollution of the air and water, and
other hazards to the environment helped expand the members and allies of
environmental organizations. Increased public attention to environmental
harm also placed pressure on elected officials to formulate policies responsive
to these concerns. In the 1960s and 1970s, the federal government adopted
numerous laws to regulate the increasing environmental hazards to air, water,
land, and species caused by the mass industrialization of American society.

Like other movements, the environmental movement has diversified since
its early phase. Traditional environmentalism has been challenged by advoca-
ces of the environmental justice movement, who have argued that
mainstream environmental groups have not paid sufficient attention to dis-
proportionate environmental harms suffered by poor and minority commu-
nities, and that current environmental and civil rights laws are not adequate to
address the problems that lie at the intersection of race, poverty, and the envi-
ronment. See Luke W. Cole, Structural Racism, Structural Pollution and the Need
erment as the Key to Environmental Protection: The Need for Environmental Poverty

c. CONSUMER RIGHTS

Consumer activist Ralph Nader began his career as a young lawyer attempting
to call the nation’s attention to automobile safety. Almost single-handedly,
Nader led a campaign against the American automobile industry, accusing it
of keeping costs down by cutting corners that made cars unnecessarily dangerous.
In 1965, expanding on an article about auto safety published in The Nation, Nader
published his first book, Unsafe at Any Speed: The Designed-in Dangers of the
American Automobile, an indictment of the automobile industry in general, and
of General Motors and its popular sports car, the Corvair, in particular. Barbara
Hinkson Craig, Courting Change: The Story of the Public Citizen Litigation Group 3-4
(2004). While it received some national attention, Nader’s book might not have
had a major policy impact had it not been for the fact that General Motors
reportedly hired a private detective to snoop into Nader’s personal life, hoping
to find some embarrassing information that it could use to discredit Nader (Nader
eventually sued General Motors for invasion of privacy and received a
considerable judgment, which he reportedly used to further finance his social causes). *Id.* at 5-6. The exposure of the conduct of General Motors, coupled with the fact that they did not find much of anything to use against Nader, catapulted Nader and his cause into the national spotlight. *Id.* These events are largely credited with leading to the first serious federal regulation of automobile safety, the National Traffic and Motor Vehicle Safety Act, and Nader would continue to pursue this issue in the following years. *Id.* at 6-7.

These incidents also established Nader, whose lifestyle has been reported to be extraordinarily ascetic, as an almost mythical figure in American progressive politics. This gave him both credibility and a platform to expand his social agenda to address a wide range of problems he associated with a nation predominantly controlled by large corporations. Nader’s vision of social change involved organizing ordinary citizens to become active in protecting their own interests, and arming them, and policymakers, with research and information about various safety, environmental, and other issues that could be used to both stir citizens into action and influence policymakers to adopt and enforce regulations to protect citizens’ interests. *Id.* at 7-9, 13-16.

Nader’s *modus operandi* was to call a press conference to detail harm being done and to furnish exhaustive statistical and technological evidence of abuses knowingly perpetrated by an industry. To follow up on the diagnosis, he would lay out a specific remedial plan. Then he campaigned to force action. He was the rational analyst, the policy innovator and the policy promoter rolled into one. His approach was a sharp contrast to the “expose-and-run” tactic of most investigative journalists. Even the people’s representatives in Congress more typically played the game of exposé for media visibility, not for lawmaking or corrective oversight of the executive branch. Indeed, as Nader would soon learn, even when Congress actually passed a law, it needed constant oversight to ensure it was implemented in the public interest. And, as he was learning from the auto safety issue, getting the government bureaucrats to implement Congress’ promises effectively, even when they were reasonably clear, was more than a full-time job. *Id.* at 8.

Another component of Nader’s success was that the national attention he received for his activism helped him recruit many lawyers, dubbed “Nader’s Raiders,” to join him in Washington to pursue his agenda. *Id.* at 27. He was highly successful in drawing activist lawyers to his organizations, and creating an infrastructure for his network of issue-specific policy centers. Nader was responsible for the formation of numerous organizations with distinct missions to protect the interests of various consumer and citizen constituencies. The first organization Nader founded was the Center for the Study of Responsive Law, formed in 1969. *Id.* at 9, 13. The Center was designed to enhance the accountability of agencies that formally were charged with regulating corporate interests to protect consumers from harm.

The Center’s actions are directed toward making corporations and regulatory agencies give greater weight in their decision-making to the consumer interest. To that end, the Center investigates corporate and agency activity, publishes reports to embarrass officials and shock the public, badgers administrative agency personnel, and at times seeks relief in the courts.
Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1103 (1970). Thus, the focus of the Center’s activities was on increasing corporate and government accountability through research and dissemination of the findings of that research to educate the public. CRAIG, *supra*, at 18-19; see also JOEL F. HANDLER, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* 216 (1978).

With the help of Nader lieutenants Joan Claybrook and Sidney Wolfe, Nader’s network of organizations expanded to include the Health Research Group, the Center for Auto Safety, and the Public Interest Research Group. *Id.* at 7, 14, 18-22. In 1971, Nader formed Public Citizen, an umbrella organization to oversee many of the different groups he had been influential in forming. CRAIG, *supra*, at 22. The groups have changed over time, but the issues addressed under this umbrella have included auto safety, food and drug safety, energy policy, congressional accountability, and public health. Because of the nature of Nader’s social change strategy, much of the work of his organizations took place in the context of federal regulatory agencies. A path-breaking political science work, Theodore Lowi’s *The End of Liberalism* (1969), suggested that many social reforms had largely been undermined by the failure of government to enforce its own laws. This was the product of powerful, organized interest groups becoming so involved with the regulatory process that the agencies became captured by the interests of those they were assigned to regulate. CRAIG, *supra*, at 28. From the intellectual foundation of Lowi’s work emerged a pragmatic and strategic response.

Public agencies were most often captives of the businesses they purportedly regulated, or were no longer interested in vigorously pursuing their legislative mandates, or both. If the government agency could not be trusted to represent the public interest, someone else would have to do so. . . . Participation in agency deliberations by submitting evidence and testimony generally turned out to be not enough. Litigation was the hammer necessary to get an agency to listen to the little voices of the public interest groups over the din of the powerful. As Nader had quickly discovered from this first Raiders’ efforts, public interest participation required public interest litigation. *Id.*

Thus, while Nader’s work had focused on lobbying and advocacy with policymakers, Public Citizen formed the Public Citizen Litigation Group in 1972 to pursue the organization’s agenda through court cases as well. *Id.* at 22. Nader hired an assistant U.S. Attorney named Alan Morrison as the group’s first director, and it has become an important component of the Nader network, complementing the more policy-oriented approaches of its partners. *Id.* at 22, 33.

As you reflect on these movement histories, what common features do you identify? What differences do you see? In each case, how did social movements feed into and inform the development of public interest law organizations—and vice versa? How much do you think that the emergence and development of public interest law organizations in these areas owe their existence and success to charismatic and talented leaders (like Ralph Nader)? What role do...
you think is played by broader political and economic changes that create structural opportunities for movement organizations to emerge?

2. Institutionalization

As the previous section suggests, as public interest practice evolved in the second half of the twentieth century, it became institutionalized across a range of practice settings. Public interest organizations continued to proliferate, evolve, and diversify, while the private sector developed new forms of public interest practice in addition to pro bono service.

a. THE NONPROFIT SECTOR: EVOLUTION, INNOVATION, AND DIVERSIFICATION

Many of the organizations discussed in this chapter evolved in a similar pattern. They started off devoted to pursuing specific causes, recruited volunteer lawyers to assist with the legal aspects of such work, and then created an in-house legal department to represent the group’s interests, in judicial, administrative, legislative, or other legal settings. Over time, these groups grew in size and saw their missions evolve to respond to both internal staff interest and external demands. The ACLU and LDF illustrate these trends.

During the 1960s and 1970s, the ACLU pursued a broad civil liberties agenda that led it to advocate for strong separation of church and state; the expansion of the rights of persons suspected of and charged with crimes; racial equality and civil rights for women, gays and lesbians, students, and persons with developmental disabilities; and the expansion of the right of privacy, including the right to an abortion. Walker, supra, at 217-320. Throughout this period, the organization also continued to advance its core mission, free speech, through cases related to the antiwar and civil rights causes. Id. at 240-42; 279-92. From a tactical standpoint, by the late 1960s, ACLU lawyers had moved from mainly filing amicus briefs in cases to taking on direct representation of clients for the purpose of protecting civil liberties. Id. at 262, 285. Much of this period coincided with the tenure of the Warren Court, which was more (though certainly not always) open to entertaining theories about constitutional civil liberties than past courts. Toward the end of this period, in 1977, a major controversy arose when the Illinois affiliate provided legal representation to a group of Nazi protestors who petitioned to hold a march in Skokie, Illinois, a location where numerous survivors of the Holocaust lived. Id. at 323-40. The controversial nature of this case, even for many ACLU supporters, caused some people to drop their memberships and resign from the organization. Id. at 327. Though its influence has ebbed and flowed, the ACLU has built itself into a national organization with more than half a million members, numerous state affiliate offices (many of them with their own full time legal staffs), a national legal office and several national project offices that work on different subject matter specialties under the broad umbrella of civil liberties. It has achieved numerous litigation successes in the federal and state courts. ACLU History, ACLU, http://www.aclu.org/aclu-history (last visited June 29, 2012). The organization also approaches the
protection of civil liberties through legislative work at the federal and state level, and through efforts to promote public education about civil liberties. *Id.*

In the post-civil rights period, the NAACP LDF emerged from its focus on dismantling Jim Crow laws to address other racial justice issues—such as racial disparities in the criminal justice system, particularly in the administration of the death penalty and in sentencing and incarceration. *History, NAACP Legal Defense Fund*, http://naacpldf.org/history (last visited Aug. 11, 2012). Its related work on educational access for minority communities and “dismantling” the school-to-prison pipeline has been an equally important part of its contemporary mission. *Id.* LDF has continued deploying traditional litigation strategies—for instance, seeking enforcement of the federal Voting Rights Act and defending affirmative action programs—while also expanding its strategic initiatives to include community organizing, educational reports to influence government officials and the general public, and national legislative work through its Washington, D.C. office. THE NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., 2009-2012 ANNUAL REPORT, at http://www.naacpldf.org/files/publications/2009-2010%20LDF%20Annual%20Report.pdf (last visited Aug. 11, 2012).

As we have seen, in addition to the evolution of these pioneering organizations, the late 1960s and 1970s saw the creation and expansion of innovative new “public interest law firms” growing out of progressive movements and based on the ACLU and LDF model of deploying law for social reform. Rabin, *Lawyers for Social Change*, supra, at 224, 232-33. Formed as nonprofit entities, these firms set out to engage in law reform in the pursuit of a range of social causes. *Id.* at 232-36. At the outset, many of these organizations were spurred by grants from the Ford Foundation. Craig, supra, at 27. Among these groups were the CLASP, the Center for Law in the Public Interest (CLIPI), the Mexican American Legal Defense Fund (MALDEF), the environmental groups SCLDF, EDF, and NRDC, and Public Advocates. Rabin, *Lawyers for Social Change*, supra, at 228-29, 228 n.65; see also Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. Little Rock L. Rev. 417, 418-20 (2011). Some of the groups, such as SCLDF and EDF, were devoted to a single cause and thus more closely resembled the model established by the NAACP LDF.

Other groups, such as CLASP, CLIPI, and Public Advocates, organized themselves as broader public interest law firms, with lawyers specializing in different areas of practice and focusing on specific types of law reform and social policy. Many of these public interest law firms were formed with the explicit goal of representing “underrepresented interests” that we explored in the last chapter. One example was CLASP, the creation of which was motivated by many of the same factors that produced the Nader organizations. As described by Charles Halpren, one of the CLASP’s founders, public interest law firms were a reaction to the fact that the conduct of corporations was driven primarily by the profit motive, without sufficient consideration of the social impact of their actions, such as environmental harm, risks to public safety, and fair treatment of their employees. Charles R. Halpern & John M. Cunningham, *Reflections on the New Public Interest Law: Theory and Practice at the Center for Law and Social Policy*, 59 Geo. L.J. 1095, 1096 (1971). At the same time,
public agencies responsible for regulating these corporations were similarly unresponsive to the public interest. *Id.* at 1097. Firms such as CLASP, run by lawyers independent of government or corporate control, were created to promote public participation in the regulatory process. Lawyers in these public interest firms would “use their special knowledge and skill to help citizen groups formulate and clarify their objectives, and to suggest appropriate techniques by which to work for these objectives.” *Id.* at 1102.

The idea of the Center was worked out through dialogue with a broad range of lawyers and legal educators. The dialogue centered not only on the need for new legal institutions to represent citizen interests but also on the excessive abstractness and narrowness of legal education. Thus, in its final form the Center had two primary goals: to provide legal representation to previously unrepresented groups in the federal administrative process; and to experiment with new forms of legal education involving intensive clinical experience and concentration on the public policy aspects of the law. In addition, the Center has tried to developed [sic] a more flexible and humane institutional style of legal practice. The Center’s goals have proven to be, as they were intended, closely interrelated. In twice-weekly seminars with students and staff, the Center attorneys and students have developed novel legal theories and have gained a dimension of awareness and self-criticism they could not have had otherwise.

*Id.* at 1103-04. Substantively, CLASP devoted itself to three areas of practice: environmental protection, consumer affairs, and the health problems of the poor. *Id.* at 1105.

The creation of CLASP and other groups in the first wave of public interest law transformed the field. By the 1980s, the nonprofit public interest law sector had grown and diversified to include a broad range of organizations that varied by size, location, substantive focus, legal strategy, and other characteristics. “Up to 1969, there were only twenty-three public interest law centers, staffed by fewer than fifty full-time attorneys. By the end of 1975, the number of centers had increased to 108, with almost 600 staff attorneys. In 1984, there were 158 groups employing a total of 906 lawyers.” Nan Aron, *Liberty and Justice for All: Public Interest Law in the 1980s and Beyond* 27 (1989). The median size of all groups was four attorneys, although there were some groups like the ACLU, LDF, and NRDC with much larger offices. *Id.* at 33. Most of the groups were headquartered in the Northeast, with about a quarter located in the West. *Id.* at 31. Of the groups, 15 percent served the poor, 13 percent were multi-issue, 10 percent focused on civil rights/civil liberties, another 10 percent were women’s rights groups, 9 percent focused on disability issues, environmental and children’s rights groups each were 8 percent of the total, and 4 percent worked on prisoners’ issues. *Id.* “About three-quarters supplemented their litigation with other forms of legal advocacy and legislative activities. Almost two-thirds represented or advised individuals, and an equal proportion engaged in community organizing or public education work.” *Id.* at 32. Funding came primarily from foundation grants (24 percent), individual contributions (20 percent), and membership dues (11 percent). *Id.* at 41.

How do you explain the growth and diversification of public interest law during this early period? What are the tradeoffs of creating a range of groups
with different missions and strategies? As you reflect on the types of groups described in this section, what do you think are the advantages and disadvantages of focusing on one issue (like LDF) as opposed to a broader range of concerns (like CLASP)? What are the tradeoffs of being associated with a non-legal partner (like the NAACP or NOW) as opposed to operating as a freestanding legal organization?

b. THE PRIVATE SECTOR: LAW COLLECTIVES AND RADICAL LAWYERS

One of the most important developments over the past half-century has been the changing role that the private sector has played in the public interest law field. A key change has been the increasingly organized system for delivering pro bono services, which has been anchored primarily (though not exclusively) in large law firms. A fuller discussion of this important development is reserved for Chapter 4's exploration of practice sites. Here, we highlight other institutional trends occurring outside of the nonprofit domain that influenced the practice and scope of public interest law during and after the civil rights era: the development of people’s law collectives and the rise of “radical lawyering” within private firm settings.

Based on radical political principles, such as Marxism or feminism (as discussed above in relation to the D.C. Feminist Law Collective) and devoted to the redistribution of wealth and power in the United States, law collectives developed in different communities across the country. See Paul Harris, Law Collectives as Power Bases, 2 New Directions in Legal Services 164 (1976); Paul Harris, The San Francisco Community Law Collective, 7 Law & Pol’y 19 (1985) [hereinafter, Harris, San Francisco]. Often closely linked to the National Lawyers Guild (NLG) these collectives attempted to integrate the political goals of their members with the practice of public interest law. A significant part of the philosophy was to create a non-hierarchical setting in which to practice law, with the goal of treating all members of the collective equally in terms of salary and decision making and not elevating lawyers to a higher professional status. Harris, San Francisco, supra, at 19. The D.C. Feminist Law Collective’s statement of purpose explains some of these goals.

One of the goals of our collective is the formation of a radical institution in which we do not split our lives between workplace and political effort. Another goal is to unify our personal lives and our work through the strong commitment we have to each other’s private concerns. The collective has recognized, for example, the need for schedule flexibility to accommodate our child care responsibilities.

We hope that the collective will offer a model for alternatives that involve basic structural change through redistribution of control over economics and politics. We realize, of course, that merely creating a small business does not protect or separate us from a repressive system. Our goal, however, is to create our own supportive structure while fighting the oppression around us.

A collective is defined by its sharing of growth, process, and power. The issue of hierarchy is central. We chose not to impose a hierarchical structure on an effort which is feminist in philosophy. Each member shares in making decisions, solving problems, and resolving conflict. For example, the collective will
decide where to allocate our resources for low fee cases; at the same time, the collective determines the distribution of income by considering each woman’s particular needs. We have bi-weekly meetings to discuss these and other issues, in an effort to continually analyze our work politically.

WASHINGTON, D.C. FEMINIST LAW COLLECTIVE STATEMENT OF PURPOSE (September 1976) (copy on file with authors).

Another important goal of collectives was demystifying the law to make it more accessible to those whose interests it could protect, thereby putting more power into the hands of clients and community groups. Harris, San Francisco, supra, at 19-20. Some collectives sought to serve as in-house counsel for community organizations engaged in social change. This approach was “based on the conviction that organizations of people struggling for change are more important to the revolutionary process than test cases dreamed up in lawyers’ offices.” Id. at 24. Although they do not constitute a substantial part of contemporary public interest practice, a number of law collectives continue to operate to this day, such as the People’s Law Office in Chicago. Home Page, PEOPLE’S LAW OFFICE, http://peopleslawoffice.com (last visited June 29, 2012).

Outside of law collectives, radical lawyers used private practice to advance different causes. From the early days of the public interest law movement, there were private firms established by lawyers who had been active in progressive movements. Arthur Kinoy and William Kunstler, two charismatic and energetic progressive lawyers, formed Kunstler, Kunstler & Kinoy, a private law firm that was intended to carry on the individual work they had engaged in during the civil rights movement. ARTHUR KINOY, RIGHTS ON TRIAL: THE ODYSSEY OF A PEOPLE’S LAWYER 211 (1983). Kinoy and Kunstler would later found the Center for Constitutional Rights, a nonprofit civil liberties organization that is still actively engaged in public interest law. Center for Constitutional Rights, Mission and History, at http://ccrjustice.org/missionhistory (last visited Aug. 12, 2012). Kinoy and Kunstler were also closely associated with the NLG, an organization that supported a more radical form of lawyering for clients and causes. As Thomas Hilbink observes, “A willingness to transgress norms of the profession was a key aspect of radical lawyering in the 1960s and 1970s. . . . National Lawyers Guild attorneys involved in the civil rights movement were ‘more supportive of demonstrations and sit-ins, less legalistic, and less interested in whether they antagonized the local power structure.’” Thomas M. Hilbink, You Know the Type . . . : Categories of Cause Lawyering, 29 LAW & SOC. INQUIRY 657, 670 (2004). As this suggests, radical lawyers—in contrast with some of their more traditional counterparts—were interested in using law as a means to advance movements and build power. Thus, they took on affirmative cases with movement implications but also engaged in defensive legal practice to protect the rights of protestors and other dissidents subject to criminal prosecution. Unlike nonprofit lawyers, who relied on philanthropy to fund their activities, radical lawyers also had to figure out how to do cause-oriented work while also paying the bills. Over time, they experimented with different models—some (like the tobacco lawyers profiled below) relying on contingent fee cases and others developing different models based on fee-shifting statutes and other mechanisms for subsidizing cause work.
C. THE CONTEMPORARY PUBLIC INTEREST LAW FIELD

More than 40 years after its founding, public interest law occupies a radically different place within the profession. No longer in “fragile alliance” with the organized bar, public interest law in the United States now enjoys the status of a stable, distinct, and strongly supported occupational category within the legal profession. From an organizational perspective, the field has shown impressive expansion. Although direct historical comparisons are not possible, the available data points to significant growth in both the number and size of public interest law groups over the movement’s lifespan. Using data collected in 1975, Joel Handler and his colleagues identified 576 lawyer positions in 86 public interest law organizations nationwide (excluding legal aid organizations), yielding an average of approximately seven attorneys per group. Joel F. Handler, Betsy Ginsberg & Arthur Snow, *The Public Interest Law Industry, in Public Interest Law: An Economic and Institutional Analysis* 42, 51 (Burton A. Weisbrod et al. eds., 1978). In addition, by 1972 there were approximately 2,660 legal aid staff attorneys. Johnson, *supra*, at 188. Taken together, these public interest lawyers were approximately 0.8 percent of the total bar at the time. According to Laura Beth Nielsen and Catherine Albiston’s 2004 survey data, there were slightly more than one thousand public interest law organizations (including legal aid organizations) with an average of 13 lawyers per group, for an estimated total of 13,715 attorneys in the field—approximately 1.3 percent of the total bar. Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975-2004*, 84 N.C. L. REV. 1591, 1618-19, 1618 n.85 (2006). Although the 1975 and 2004 data are not directly comparable—and it is clear that public interest lawyers remain a tiny fraction of the overall bar—it does seem likely that significant growth has occurred, with these figures suggesting that the size of the public interest sector relative to the total bar grew by about two-thirds during this period. And this figure does not include public interest lawyers working in other sites, such as government, small firms, or clinical programs.

Consider the following perspectives on the state of contemporary public interest law. In the first, Nielsen and Albiston summarize the results of their national survey of public interest law organizations (PILOs). In the second, Rhode discusses some lessons from her research on a smaller subset of the nation’s most prominent public interest law groups.

We have indeed seen very significant changes in the field of PILOs. In a sense, the field has “matured.” It now consists of larger organizations, paralleling organizational growth in the legal profession more generally. Like other sectors of sophisticated law practice, the PIL sector has witnessed trends toward leveraging lawyer talent with the efforts of non-lawyers. It has also become more diverse as the causes served by PILOs have become more diverse.

But these trends also embody many of the tensions in public interest law that have been present for many years and remain unresolved. . . . [I]t appears that there now are two PIL industries—publicly-funded and privately-funded. On the one hand, we now see PILOs that receive a large amount of their funding from the LSC and other government agencies, largely provide direct services, and are statutorily prohibited from engaging in many law reform
activities. As a result, this sector of the field has grown, but also has become increasingly constrained.

Despite the increasing size of some organizations that rely heavily on federal and state funding, these organizations fall far short of delivering anything approaching an adequate level of civil representation to the poor. For example, using census data to estimate the number of people eligible to receive legal services from LSC-funded organizations (those who live in households with incomes less than 125% of the federal poverty rate), recent research demonstrates that the client to legal aid attorney ratio for those living in poverty is 1:6,861, while for Americans overall, the ratio of private lawyers to individuals is 1:525. Thus, lawyers who work in LSC-funded organizations attempt to meet an enormous potential legal need with resources far inferior to those available to private clients. Moreover, public funding comes at a price. These lawyers face significant demands at a time when government constraints on LSC organizations restrict their ability to leverage limited resources into sweeping legal reform through class actions or social change litigation.

In sharp contrast to the publicly-funded sector, we see a sector of privately-funded organizations that, while often smaller in budget and size, are free to pursue law reform activities as they please. Because this sector retains the professional autonomy to pursue social change through law, it may be a much more potent force for systemic change than the larger LSC-funded organizations despite significantly smaller budgets. Unlike the early period of PIL activity, this sector is now populated by conservative as well as liberal groups, by groups concerned with interests of the middle class, the wealthy, and the socially powerful, as well as the poor and socially disadvantaged. . . .

Our study demonstrates that PILOs have grown the most in sectors supported by government funding, where lawyers primarily representing people in poverty are most constrained in efforts at systemic change. The privately-funded sector of PILOs remains a context where lawyers can seek to have maximum impact on social policy through law, yet liberal groups no longer have a monopoly in this sector. Private power has realized that it too can lay claim to the mantle of “public interest.”

Nielsen & Albiston, supra, at 1619-21.

Deborah Rhode’s study of prominent public interest law groups concludes with the following assessment of the movement’s achievements:

When assessing the achievements of public interest law in their field, participants in this study identified contributions along multiple dimensions. Some leaders emphasized the effect on individual lives. Brian Wolfman, litigation director of Public Citizen, noted the thousands of deaths and serious injuries prevented through litigation securing greater governmental accountability on health and safety issues. Heads of criminal justice organizations stressed the lives saved, the defendants exonerated, and the injustices reduced as the result of legal challenges and broader reform efforts in the indigent defense system. For disability rights leaders, the measures of success included increases in access to facilities, services, and opportunities that materially improved the quality of individual lives.

Other leaders stressed landmark legislation and legal decisions that have protected fundamental rights, established crucial principles, and safeguarded the environment. Providing checks on arbitrary or overreaching actions by judicial and governmental officials has also been critical. In fields that have
emerged over the last quarter century, such as women’s rights, environmental preservation, gay and lesbian rights, disability law, and information technology, public interest organizations have helped develop the central frameworks in which law and policy have evolved. As a consequence, the institutional landscape of many public and private sector organizations has been transformed. Commonly cited examples include racial integration of schools, workplaces, and the military, work/family innovations in employment, and environmentally responsive policies for corporations and regulatory agencies.

Many leaders also stressed more intangible but equally crucial advances in public awareness, social attitudes, and client empowerment. Their organizations’ litigation and policy work, along with similar efforts documented in other studies, has helped to raise awareness, legitimate goals, mobilize support, attract funding, and gain leverage in dispute resolution and policy settings. The result is that Americans have a much greater understanding of problems affecting children and low-income and minority communities; of errors plaguing the American criminal justice system; of international human rights abuses; of the extent of environmental challenges; and of the concerns posed by new technologies. Many traditionally disempowered constituencies, and the groups that represent them, have gained greater respect and legitimacy. Poor communities have a voice in more of the decisions that affect them, and many grassroots organizations have increased their capacity to influence public policy.


How do you think the field of public interest law has changed from the earlier years of the movement? How has it stayed the same? Does Rhode’s description of the ‘movement at midlife’ make you think that public interest lawyers have achieved the goals they set 40 years ago? How does her description compare to Nielsen and Albiston’s cautious tone about the limitations on groups promoting access to justice for the poor? After reviewing the materials in this chapter, would you say that the public interest law has been a “success”? In what ways? Have there been failures, missed opportunities, or other shortcomings?

QUESTIONS

1. You have now reviewed accounts of many prominent public interest law movements. Pick one of these histories and discuss the following: What causes public interest law to emerge as a tool to advance a particular cause? What factors influence the particular form public interest organizations and advocacy strategies take? Explain what historical events or circumstances were important to the development of this area of public interest lawyering. Describe how the absence of this historical context might have affected the success of this realm of public interest lawyering.

2. Consider the following quote, from Richard Ayres, one of the founders of the Natural Resources Defense Council:

   [I]n the 1960s “there was a whole series of issues which people my age saw as part of one seamless web of need for social change — ending the war, a better
Other contexts exist in which progressive groups find themselves opposed to one another. Attorneys who identify as public interest lawyers line up on opposite sides of these cases to advocate for their own vision of good. What other examples of ideological conflicts on the left can you think of? In them, can either side make a superior claim to be acting in the public interest? If not, can lawyers on both sides of such disputes equally claim to be public interest lawyers? Is this even the right question?

IV. PUBLIC INTEREST LAWYERING ON THE RIGHT

Although academic interest in studying conservative public interest lawyering is relatively new, researchers have noted that several influential conservative groups began using litigation as a tool for social change and employing test case strategies as early as the late nineteenth and early twentieth century. Lee Epstein, Conservatives in Court 16 (1985); Southworth, Conservative Lawyers, supra, at 1224 n.2. This section looks at the development of conservative public interest lawyering, mapping its continuities and points of conflict.

A. FIRST-WAVE CONSERVATIVE PUBLIC INTEREST LAWYERING

In a comprehensive study, Lee Epstein breaks conservative groups into three categories: those that pursue economic litigation; those engaged in social litigation; and conservative public interest law firms (PILFs). Epstein, supra, at 16. We use this framework to compare developments in the first wave of conservative lawyering in the first half of the 1900s, to second-wave developments primarily after the civil rights period.

1. Economic

During the Progressive era, federal and state lawmakers enacted stronger protection for persons in the workplace, including authorizing labor unions and regulating wages, hours, and working conditions in the private sector. Id. at 16-30. Some groups consciously developed strategies to combat New Deal economic recovery programs, focusing their efforts on the negative impact such regulation might have on the economic interests of different industries. Id. at 18-30. While industry trade associations had existed before this period, organizations such as the American Anti-Boycott Association (AABA), the Executive Committee of the Southern Cotton Manufacturers, and the Edison Electric Institute were formed specifically to engage in litigation to protect private corporate interests. Id. at 17-19. As with many contemporary legal organizations, the AABA created its own legal affairs department, recruiting...
talented lawyers to pursue litigation and a public relations staff to attract more industry members. Id. at 19-20. One of its major campaigns involved bringing suits challenging union boycotts as violations of the Sherman Antitrust Act. Id. at 20-21. Conservative groups also brought legal challenges to laws prohibiting child labor (including *Hammer v. Dagenhart*, 247 U.S. 251, 271-72 (1918) (invalidating federal law prohibiting child labor), overruled by *United States v. Darby*, 312 U.S. 100, 116 (1941)), and requiring minimum wages. Epstein, supra, at 24. Also, these groups consciously selected test cases, not only for the purpose of achieving legal victories with substantial impact, but also to generate positive publicity and enhance their membership rolls. Id. at 22. Their success faded as the New Deal Supreme Court began to transform the law under the Commerce Clause and Due Process Clause. Id. at 23-24.

2. Social

Other conservative groups employed legal tactics to challenge the expansion of progressive social reforms, such as women’s suffrage and federal aid to states to develop programs to reduce infant mortality. Id. at 34-37. Unlike the economic conservative groups, these organizations typically opposed government intervention in the private sphere of life on moral, religious, and social grounds, rather than out of concern for economic liberty. Id. at 31. While the social issue groups also recruited elite legal talent and were repeat players in the litigation process, they were unable to achieve substantial success during these early years, possibly because their strategies often involved seeking wholesale changes in law, rather than pursuing incremental reform. Id. at 37-38. Some groups in both of these first two categories adopted what might have been construed as progressive rhetoric, arguing for the liberty of employers and businesses in the case of the groups opposing economic legislation, and the liberty of the family in the case of opponents of social welfare legislation. Id. at 38.

3. PILFs

Finally, in the first half of the twentieth century, conservative activists formed the first conservative PILFs. The most noteworthy of these was the National Lawyers’ Committee (NCL) of the American Liberty League (ALL). Id. ALL itself grew out of the movement to repeal prohibition, but was officially formed to challenge New Deal legislative reforms. Id. at 39. In 1935, NCL was established as an arm of ALL and used legal tactics to advocate for less government regulation, specifically challenging the constitutionality of much New Deal legislation. Id. at 38. Whereas ALL engaged in traditional lobbying and public relations campaigns to oppose big government, NCL recruited the best available conservative attorneys and created a library of reports about the constitutional infirmities of many government efforts to deal with economic recovery. Epstein, supra, at 40. Many of the challenges focused on arguments initially accepted by the Supreme Court, such as the claim that these programs exceeded Congress’s powers under the Commerce Clause and that state economic regulations violated the Due Process Clause (the theory embraced in *Lochner v. New York*, 198 U.S. 45 (1905)). Id. at 40.
B. SECOND-WAVE CONSERVATIVE PUBLIC INTEREST LAWYERING

The second wave of conservative legal groups emerged in the latter half of the twentieth century, seeking to emulate—and limit—the success of their liberal counterparts. By many accounts, they surpassed the first-wave conservative groups both in terms of the scope of their institutionalization and their impact on politics.

1. Economic

Conservative economic issue groups in the latter part of the twentieth century focused on opposition to the labor movement and to what they viewed as excessive and costly government regulation of business practices. In 1968, a conservative organization called the National Right to Work Legal Defense Foundation (NRWLDF) was established to attack federal laws creating closed shops in employment settings. Id. at 45-46. The groups in this movement argued that the federal recognition of compulsory unions conflicted with the right of people who did not wish to join unions to compete for employment opportunities. Id. NRW LDF met with some success, lobbying for state right to work laws and winning some important court cases. Id. at 47-48. Initial success led to favorable publicity, as well as an increasing acceptance among the group’s leaders that litigation was a useful tool for achieving changes in the law. Id. As with many other legal organizations, NRW LDF explicitly modeled itself on the NAACP LDF, recruited top legal talent, and selected test cases to secure broader social goals. Id. at 49-50. It was successful in many of its efforts, including victories in the U.S. Supreme Court. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976); Ball v. City of Detroit, 269 N.W.2d 607 (Mich. Ct. App. 1978).

As the following excerpt describes, another critical development was the collaboration of large business firms to respond to government regulation:

An important moment in the mobilization of business constituencies behind new public interest law organizations was the publication of the “Powell Memorandum.” In 1971, shortly before he was appointed to the United States Supreme Court, Lewis Powell delivered a memo to the U.S. Chamber of Commerce asserting that “[n]o thoughtful person can question that the American economic system is under broad attack.” He cited Ralph Nader as “[p]erhaps the single most effective antagonist of American business” and argued that “the time has come—indeed it is long overdue—for the wisdom, ingenuity and resources of American business to be marshaled against those who would destroy it.” Powell asserted that American business had neglected to exercise significant influence in the courts, where “the most active exploiters . . . have been groups ranging in political orientation from ‘liberal’ to the far left.” He urged business to take a more aggressive stance “in all political arenas,”
but he asserted that “[t]he judiciary may be the most important instrument for social, economic and political change.”

The Powell memorandum contemplated that the U.S. Chamber of Commerce would become the primary representative of American business in the courts and agencies, and his proposal eventually led to the establishment of the National Chamber Litigation Center [NCLC] in 1977 as a nonprofit, tax-exempt membership organization.

Southworth, Conservative Lawyers, supra, at 1241-42.

The U.S. Chamber of Commerce had previously stayed away from litigation because of the cost. Epstein, supra, at 59. NCLC, in contrast, acted as a law firm representing individual businesses, which funded the litigation rather than using the Chamber’s resources. Id. at 59-60. As another cost saving measure, NCLC represented these firms mostly through filing amicus curiae briefs rather than bringing direct litigation. Id. at 60. As other organizations have done, NCLC established criteria for selecting its cases to most effectively advance its political goals. Id. Its criteria for entering a case included the importance of the issue raised to the national business community; whether the broader perspective of business entities was being adequately represented by the parties to the underlying case; whether there was a good likelihood of success; the relationship of the case to NCLC priorities; and the availability of resources. Id.

In 1976, lawyers and business leaders formed the Equal Employment Advisory Council, a group concerned about the effects of federal employment discrimination law on businesses. Id. at 63-64. Like NCLC, this group emphasized filing amicus briefs rather than direct litigation. Id. at 64. Also, fearing adverse publicity and responses by government and civil rights groups, the council specifically decided to avoid media attention. Id. at 65. Instead, it emphasized behind the scenes work, such as publishing materials to help lawyers defend against employment discrimination suits. Id. at 66.

As the federal courts in general, and the Supreme Court in particular, have become more receptive to business claims, groups like NCLC have achieved significant success. In 2008, Jeffrey Rosen, writing in the New York Times Magazine, reported that the NCLC filed amicus briefs in 15 cases before the Supreme Court in the 2007 term and won 13. Jeffrey Rosen, Supreme Court Inc., N.Y. Times, Mar. 16, 2008 (Magazine), at 38.

Recall the criteria we outlined in Chapter 1 to help define public interest lawyering. Do you think the work of the NCLC qualifies? Under what criteria?

2. Social

Conservative groups emerged to take on a range of social issues, such as obscenity, crime, and abortion, in the latter part of the twentieth century. A major proponent of the enforcement of obscenity laws against producers and sellers of erotic material was the Citizens for Decency through Law (CDL), which was founded in 1957 and began using litigation in 1963. Epstein, supra, at 80. Started as a local group in Cincinnati, Ohio, CDL was launched as a national group by its founder, Charles Keating (later convicted of fraud during the national savings and loan scandal in the late 1980s). Id. at 80-82. CDL
called for more police enforcement of obscenity laws and saw its role as helping prosecutors obtain convictions in obscenity cases. *Id.* at 83. In conjunction with that effort, CDL identified and developed a pool of experts to provide psychiatric testimony in these cases. *Id.* Their early success was limited in part because their briefs were highly emotional and not sound from a technical legal perspective. *Id.* at 84. The group achieved a higher profile when President Nixon appointed Keating to the President’s Commission on Obscenity and Pornography in 1969. *Id.* at 85. Keating found himself in the minority on the Commission, whose final report recommended abolishing obscenity laws as applied to consenting adults. *Id.* at 86. His dissenting report, which Nixon endorsed, gave him a platform to gain national media attention for his cause. *Id.* at 85-86. Through this attention and a direct mail campaign, CDL was able to expand its efforts, professionalize its staff, and hire more experienced attorneys. *Id.* at 86. It used a combination of direct litigation, amicus briefs, and support for local prosecutors to pursue its cause, and began to achieve greater success by the early 1980s. *Id.* at 86-88.

In the law enforcement arena, Americans for Effective Law Enforcement (AELE) was founded in 1966 by Northwestern University law professor Fred Inbau in response to the Warren Court’s decisions expanding the constitutional rights of criminal defendants. *Id.* at 89. It was also envisioned as an organization to counter the influence of civil liberties organizations such as the ACLU. *Id.* AELE’s Law Enforcement Legal Center, formed in 1973, pursued a litigation strategy emphasizing the filing of amicus briefs in Supreme Court cases. *Id.* at 91. Its role in direct litigation was inherently limited because criminal cases, by definition, are brought by state or local prosecutors. *Id.* AELE’s positions were sometimes adopted by the Court or otherwise influenced the shape of constitutional doctrine, achieving notable success, for example, in cases involving the Fourth Amendment as applied to police searches of automobiles. *Id.* at 90-93. It built successful alliances with other organizations, found support through donor funding, and effectively used statistics and law review articles to support its positions. *Id.* at 90-94. AELE was the precursor to more recently formed “law and order” advocacy groups such as the Criminal Justice Legal Foundation, formed in 1982, and the Crime Victims Legal Advocacy Institute, created in 1985. Southworth, *Conservative Lawyers*, *supra*, at 1244.

Formed in 1971, Americans United for Life (AUL) is among several groups that have been influential in the anti-abortion movement. Epstein, *supra*, at 94-95. While AUL worked in opposition to pro-choice groups, lobbying for the retention of abortion prohibitions in the state legislatures, it created a separate legal arm, the AUL Legal Defense Fund (AUL LDF), in the mid-1970s. *Id.* at 95, 98-99. AULLDF has participated in much of the major abortion litigation in the Supreme Court, focusing on amicus briefs as a vehicle for influencing abortion policy. *Id.* at 101. After the Court decided *Roe v. Wade*, anti-abortion groups lobbied for laws regulating and/or limiting abortion, such as statutes requiring spousal or parental consent for abortions and laws removing public funding for abortion services. *Id.* at 97-98. AULLDF built up a network of cooperating attorneys to help and routinely filed amicus briefs in favor of these types of state restrictions on abortion when challenged. *Id.* at 99-102. While some observers have argued that AULLDF, like CDL, achieved limited success in its earlier
stages because of the highly charged emotional nature of its briefs, in later years it crafted its briefs with more technical legal rigor and found greater receptiveness to its arguments. Id. at 101. It also shifted from a pure amicus strategy to providing direct representation to intervenors in some abortion cases. Id. at 102.

AUL LDF is one example of a larger network of conservative organizations that developed based on advocacy surrounding religious faith.

Religious conservatives produced their own public interest law groups beginning in the 1970s. The Catholic League for Religious and Civil Rights was founded in 1973 to protect the rights of Catholics to participate in public life. Americans United for Life, which began as a nonsectarian educational organization in 1971, was closely allied with the Catholic Church, and in 1976 it established its Legal Defense Foundation to serve as the legal arm of the pro-life movement. The first of the protestant evangelical groups to litigate was the Center for Law and Religious Freedom, established by the Christian Legal Society in 1975 to address First Amendment issues and to promote state accommodation of religious beliefs.

Protestant evangelical groups initially focused primarily on defending private religious schools from government interference. They did not begin to initiate litigation until the mid-1980s, when they mobilized to fight abortion and to promote greater religious expression in the public sphere, particularly in public schools. In 1979, televangelist Jerry Falwell campaigned to persuade fundamentalists to overcome their distaste for politics and to engage with secular legal institutions. In the early 1980s, evangelical leaders began urging lawyers to confront the forces that had removed prayer and Bible reading from schools and that had culminated in the Supreme Court’s ruling in Roe v. Wade. In 1980, editorials in Christianity Today asserted that evangelicals were “apathetic” in the face of the abortion rulings. “For all practical purposes, the Supreme Court has unwittingly legalized murder,” one stated, and “Christians must stand up, speak out, and be counted.” In 1981, Francis Schaeffer published A Christian Manifesto, in which he decried the “shift from the Judeo-Christian basis for law” toward a “new sociological law.” He asked: “[W]here were the Christian lawyers during the crucial shift from forty years ago to just a few years ago? . . . [S]urely the Christian lawyers should have seen the change taking place and stood on the wall and blown the trumpets loud and clear.” In a conference on federalism that launched the Federalist Society for Law & Public Policy Studies in 1982, John T. Noonan, then a Berkeley law professor, noted that the pro-life movement was impaired by “an amateur, predominantly nonlegal leadership” that was “in great need of expert advice,” and he urged law students to enlist in the effort to “reverse what, by every standard, is the most serious invasion of state power in our century.” The Christian Right began fielding their own legal advocacy organizations to translate dismay about the Supreme Court’s rulings on religion and abortion into a new brand of public interest law.


Southworth, Conservative Lawyers, supra, at 1243-44.
In what sense do these groups represent the public interest? Are religious communities underrepresented or otherwise disadvantaged? Which ones? How should we understand the role of religion in the public interest law field? Note that these religious groups seek to challenge governmental restrictions—does that qualify them as public interest organizations?

3. PILFs

As the preceding account by Southworth suggested, the first modern conservative PILFs began to appear in the early 1970s, beginning with the Pacific Legal Foundation, arguably the most successful of these groups to date. Epstein, supra, at 121. PLF was founded by members of Ronald Reagan’s administration while he was the governor of California. Id. at 120-21. The staffers—Ronald Zumbrun, Raymond Momboisse, and Edwin Meese—had witnessed the influence of liberal public interest groups in challenging parts of Reagan’s state welfare reform programs. Id. In 1973, Zumbrun and Momboisse became the first staff attorneys of PLF, located in Sacramento. Id. at 121. PLF’s website describes its mission as follows:

Pacific Legal Foundation is devoted to a vision of individual freedom, responsible government, and color-blind justice. Like America’s founders, we believe the blessings of liberty are beyond measure. And like them, we believe each generation must defend those blessings against government encroachment. Every day, PLF attorneys litigate to build a future of economic freedom and equal opportunity.

PLF’s litigation focuses on three major projects: to defend the fundamental human right of private property; to promote sensible environmental policies that respect individual freedom and put people first; and to create a nation in which people are judged by the content of their character and not the color of their skin. In addition, PLF’s Economic Liberty and Free Enterprise Projects are devoted to protecting the right to earn a living, and protect businesses against unfair burdens.


PLF began small, but soon added a second office in Washington, D.C. Epstein, supra, at 121-22. Initially, it had little funding, but after early success through amicus participation and direct litigation, it drew attention and resources from conservative foundations and individuals. Id. at 122. Its docket covers a wide range of conservative issues, including the rights of private property owners against government regulation, especially environmental regulation, opposition to affirmative action, and tort reform. See PLF Cases, Pacific Legal Foundation (2012), http://www.pacificlegal.org/page.aspx?pid=258 (last visited July 27, 2012). Because the group was formed in part to oppose progressive public interest organizations, in its earlier years it steered away from creating its own agenda and bringing test cases (liberal group tactics that PLF had criticized), preferring instead to get involved in systemic litigation initiated by liberal PILFs. Id. at 122-23. At the same time, it has successfully emulated many of the strategies that long-standing liberal PILFs have used, such as employing stringent case selection processes, recruiting and training expert attorneys, and engaging

Another influential conservative PILF is the Washington Legal Foundation (WLF), founded by former Nixon staffer Dan Popeo in 1977. *Epstein, supra,* at 130. Like PLF, WLF was formed in response to the success of progressive groups, most notably the Nader organizations and liberal PILFs, which Popeo believed were the cause of unnecessarily increased and arbitrary government regulation. *Id.* WLF’s initial mission was to pursue the interests of businesses burdened by excessive government regulation, the rights of crime victims, and the civil liberties of small businesspersons. *Id.* It established its reputation in the conservative community through its participation in high profile litigation, including a case challenging the return of the Panama Canal and a victim’s rights suit on behalf of a secret service agent injured during the assassination attempt on President Reagan. *Id.* at 131. WLF has steered away from test case strategies, responding instead to the actions of liberal groups; in addition, it has engaged in the recruitment of expert attorneys and developed ties to law schools in order to enhance its network. *Id.* at 132.

In the mid-1970s, a coalition of conservative PILFs was formed under the umbrella of the National Legal Center for the Public Interest (NLCPI). *Id.* at 125-26. The agenda of these organizations—which include the Southeastern Legal Foundation, Mid-America Legal Foundation, Great Plains Legal Foundation, Mountain States Legal Foundation, and Capital Legal Foundation—was largely oriented toward promoting the interests of the American business community rather than other conservative causes. *Id.* Some critics argued that the NLCPI network was not initially successful because it was viewed as narrowly focused on business interests and because NLCPI ended up competing for funds with its affiliate organizations. *Id.* at 127-29. Some of the affiliate organizations now advocate on behalf of a broader set of conservative causes. See, e.g., *About SLF, Southeastern Legal Foundation* (2011), http://www.southeasternlegal.org/about-slf/ (last visited July 27, 2012) (providing links to the organization’s case centers, which include challenges to affirmative action, campaign finance reform, and defending the display of the Ten Commandments, in addition to its general mission of limiting government regulation and promoting individual economic freedom).

Note that these conservative PILFs promote a broad range of conservative causes, but among them are the same types of corporate antiregulatory initiatives championed by first-wave economic groups like the AABA. To what extent does this work advance the public interest? Does it matter how the
work is framed— for example, as protecting small businesses from excessive government regulation or advancing corporate interests? Does it matter how the work is funded? For example, would it matter to you if PLF’s antiregulatory work was largely bankrolled by corporate donors? What role do you think corporate funding plays in supporting progressive public interest work?

C. THE CONSERVATIVE PUBLIC INTEREST MOVEMENT: CAUSES, COORDINATION, AND CONFLICT

1. The Rise of the Right

Scholars of the conservative public interest law movement have identified a number of related factors that have supported its development. These include high motivation on the part of conservative activists to counteract liberal successes of the civil rights period; a changing political opportunity structure that has been more supportive of conservative legal claims; and enhanced and more focused funding sources.

Beginning in the 1960s, conservative groups perceived themselves as adversely affected by the actions of progressive public interest lawyers and a broader political system that both was shaped by and supported their success. Conservative groups thus began to position themselves as the political counterpart to progressive public interest law and build organizational models that emulated the latter’s success—and both promoted and took advantage of the political backlash against their agenda. As Southworth has observed:

The conservative public interest law movement was a direct response to the creation of public interest law organizations in the late 1960s and 1970s and to the legal and social changes these groups helped produce. A small band of liberal public interest lawyers, dubbed “the new public interest lawyers” in a 1970 comment in the *Yale Law Journal*, created intense interest in an alternative model of legal practice through which lawyers might promote significant social change. The success of these organizations presented an obvious counterstrategy for conservatives: to beat liberals at their own game by creating public interest law groups to speak for competing values and constituencies. They adopted the organizational form and rhetoric of public interest law to serve sometimes conflicting causes of the conservative movement. . . .

Galvanized by the achievements of this new breed of [progressive] lawyers and their organizations, some conservatives responded by attacking the premises of the movement. . . . Conservatives, however, also sought to create their own organizations with similar form and opposing mission. While liberal public interest law groups were thought to resort to the courts to redress their political disadvantage in other arenas, conservative public interest law groups were primarily a response to liberal groups’ perceived dominance in the courts and administrative agencies. One libertarian lawyer observed that liberal PILFs were “extremely successful,” and “conservatives tried to replicate that.” Another said: “[A]ll these liberal litigating organizations are out there bringing citizen suits, . . . and the idea was to take a leaf from their book and start conservative litigating organizations that would bring lawsuits from their side of the spectrum.” The organizational counterattack began with business-oriented groups. Christian evangelicals, whose ambivalence about engaging
with secular law delayed their participation in legal rights advocacy, took up the challenge soon thereafter.

Southworth, Conservative Lawyers, supra, at 1231-32, 1240-41.

In the early years of conservative legal institution building, conservatives viewed government as relatively inhospitable to their claims. Although Richard Nixon, a Republican, was President, Democrats still controlled Congress by a substantial majority. Moreover, Nixon's appointment of conservative justices Warren Burger and William Rehnquist to the Supreme Court did not alter the Warren Court's progressive bent until years later. See The Burger Court: The Counter-Revolution That Wasn't (Vincent Blasi ed., 1983). The goal of the conservative movement was to change this institutional equation.

Beginning in the 1980s and growing stronger by the end of the century, conservative lawyering began to more powerfully influence and, in turn, draw support from the transformation in American politics. Just as the establishment of liberal public interest groups during the early and mid-twentieth century was nurtured by sympathetic political elites (recall the federal legal services program) and the federal bench, conservative groups began to thrive at a time when American political institutions, especially at the federal level, were moving significantly to the right. Ronald Reagan's election as U.S. President in 1980 on a conservative platform, and the simultaneous Republican Party ascension to the majority position in the U.S. Senate, began a major shift in partisan politics at the national level. Aron, supra, at 14-17. Republicans held the White House and Congress for much of the period between the early 1970s and 2008, and the federal courts have also become increasingly conservative. These changes gave conservative organizations more influence, which they used to reinforce and build the strength of conservatism in politics and the judiciary. See Southworth, Conservative Lawyers, supra, at 1255. But see Mark Tushnet, Op-Ed, Who's Behind the Integration Decision?: It's the Pacific Legal Foundation, Champion of Right-Wing Causes for 35 Years, L.A. Times, July 7, 2007, at 19 (arguing that conservative groups have not been as successful as progressive organizations because of their lack of follow through, and that they have achieved some successes in the Supreme Court, but have failed to work as successfully in the lower courts to help shape the details of the law after their initial successes). These conditions, the inverse of those during the founding of liberal public interest law, created a favorable opportunity structure for conservative groups to take advantage of:

Political conservatism has reshaped the field of public interest law. . . . Politically, conservatism has transformed the "social context" of public interest law. From an advocacy perspective, the major change has been the declining role of the federal government as the guarantor of legal rights associated with political liberalism. While deregulation and decentralization have weakened administrative agency oversight, the most striking change has come in the judicial arena, where the struggle over the ideological composition of the federal bench has moved the weight of the judiciary toward a constitutional vision skeptical of economic regulation and minority rights. Republican control of the presidency for seven of the ten terms before the 2008 election of Barak Obama reversed majorities of Democratically appointed judges at both the circuit and district court levels, and solidified the
conservative majority on the U.S. Supreme Court. This has produced profound jurisprudential changes at the federal level, moving the weight of the federal judiciary toward a constitutional vision skeptical of economic regulation and claims of minority rights. The federal court, deemed the final arbiter of liberal claims to social justice during the civil rights period, has thus been transformed into, at best, an unreliable ally and, at worst, a hostile enemy to be avoided. This change has not been uniform and there have been important recent victories for liberal groups in the Supreme Court on noncitizen detention and climate change. However, liberal groups are more circumspect about turning to the federal courts. This reticence was on prominent display in South Dakota in 2006, when women’s rights groups refused to bring a legal challenge to a state law enacted by the legislature that prohibited nearly all abortions (and was passed with the aim of provoking a lawsuit enabling the Supreme Court to revisit Roe v. Wade) and instead organized to successfully reverse the ban through a statewide ballot initiative.


Conservative legal advocacy has also benefited from focused and sustained funding. For example, pro-business development groups, which are often pitted against environmental, labor, and consumer groups, receive generous funding from corporate members. One of the messages in the Powell memorandum to the U.S. Chamber of Commerce was its call to the national business community to respond to attacks from the “better financed” left by engaging in well-coordinated policy and educational initiatives to be financially supported by American corporations. LEWIS POWELL, JR., CONFIDENTIAL MEMORANDUM, ATTACK OF AMERICAN FREE ENTERPRISE SYSTEM 30 (August 23, 1971) (copy on file with authors) (“The type of program described above (which includes a broadly based combination of education and political action), if undertaken long term and adequately staffed, would require far more generous financial support from American corporations than the Chamber has ever received in the past.”).

2. Conservative Networks

Conservative organizations have benefited from deliberate efforts to coordinate distinct factions within their movement. A representative of the conservative think tank, the Heritage Foundation, observed that this organization, “founded in 1972 . . . was to be kind of a clearinghouse for what we might call, for want of a better name, ‘conservative’ organizations—organizations that were dedicated to individual liberties, limited government, free market economics, a strong national defense.” Heinz et al., Lawyers for Conservative Causes, supra, at 36. As Heinz, Paik, and Southworth describe:

Last year’s annual Heritage meeting convened more than 400 people representing 210 or more organizations from 17 countries. Twice per year, Heritage conducts a “Legal Strategy Forum” with lawyers from about 30 organizations around the country, to “talk about joint efforts and cooperation.” A libertarian lawyer interviewed for this project said that these meetings serve “an exceedingly valuable function” in coordinating the conservative movement and
enabling diverse constituencies to operate as “a loose community.” Heritage also holds a monthly meeting of legal organizations in the D.C. area to “keep them informed about each others’ activities,” to educate them about “what’s going on on the Hill,” and to promote cooperation on amicus briefs and seminars. A lawyer with a long history of work with religious organizations said that these meetings facilitate “philosophical interfacing,” allowing him to test his arguments with other smart lawyers “who are not necessarily in our circle.” Heritage produces a weekly summary of Supreme Court decisions, delivered by e-mail to organizations around the country, and it sponsors moot court sessions judged by “the best appellate lawyers from the law firms downtown and from some of the public interest groups” to prepare conservative lawyers of all stripes who have arguments before the Supreme Court. One lawyer active in religious liberties issues described the Heritage Foundation (and the Federalist Society) as the “crossroads of the conservative movement.”

Id. at 36-37. At the same time, as discussed in the next section, considerable tensions exist within the conservative public interest lawyering community that pose challenges to these networking efforts.

In addition to the coordination of groups such as Heritage, the conservative legal movement has benefited from a deliberate effort to facilitate networking in law school. The Powell memorandum called for “more ‘publishing’ by independent scholars who do believe in the system” to counteract the work of “liberal and leftist faculty.” Powell, supra, at 22. Toward this end, a group of conservative law students formed the Federalist Society for Law and Public Policy Studies in 1981. Southworth, Conservative Lawyers, supra, at 1244-45. Its stated goals were “to reorder ‘priorities within the legal system to place a premium on individual liberty, traditional values and the rule of law.’” Id. at 1258 n.196. The Federalist Society was formed in part because of conservative law students’ disenchantment with what they perceived as the dominance of liberal viewpoints in legal academia. Jason DeParle, Nomination for Supreme Court Stirs Debate on Influence of Federalist Society, N.Y. Times, Aug. 1, 2005, at A12; Neil A. Lewis, A Conservative Legal Group Thrives in Bush’s Washington, N.Y. Times, Apr. 18, 2001, at A1; About Us: Our Purpose, The Federalist Society, http://www.fed-soc.org/aboutus/ (last visited July 17, 2012). By some accounts, it has been successful in transforming the composition of elite law schools in more conservative directions. See George W. Hicks, Jr., The Conservative Influence of the Federalist Society on the Harvard Law School Student Body, 29 Harv. J.L. & Pub. Pol’y 623, 626-27 (2006).

The Federalist Society has played an important part in nurturing the political commitments of conservative and libertarian lawyers, helping them network with one another, and facilitating their involvement in legal advocacy for conservative and libertarian causes. It began as a small debating society launched in 1981 by several Yale law students, including Steven Calabresi, with encouragement from Ralph Winter and Robert Bork, who were Yale law professors at the time. The same year, two of Calabresi’s friends from Yale College, Lee Liberman and David McIntosh, established a chapter at the University of Chicago Law School, with Antonin Scalia, then a member of the faculty, as their adviser, and professors Richard Epstein, Richard Posner, and Frank Easterbrook providing support. The two chapters convened a
symposium on federalism in the spring of 1982, with money raised from the Institute for Educational Affairs (on whose board Irving Kristol served), the Olin Foundation, and the Intercollegiate Studies Institute. The national organization grew out of that conference, with the Olin Foundation funding a Federalist Society speakers bureau and helping the organization establish chapters at other law schools. The Harvard Journal of Law & Public Policy, launched by Spencer Abraham and Steven J. Eberhard in 1978, became the Federalist Society's official publication.

Southworth, Conservative Lawyers, supra, at 1256-57. The Federalist Society has been credited in both academic literature and popular media as an important organizational force in conservative public interest lawyering.

Although the Federalist Society takes no official public policy positions, admirers and critics alike observe that it has played an important role in staffing the Bush administration and vetting federal judicial nominees. The Society says that it has “created a conservative and libertarian intellectual network that extends to all levels of the legal community.”


The success of the Federalist Society in professional networking has subjected it to scrutiny and criticism, particularly from those on the left who believe it has had an undue amount of influence over who is appointed to federal judgeships by Republican presidents. See, e.g., DeParle, supra, at A12 (reporting that 15 of 41 federal judges appointed by George W. Bush identified themselves as Federalist Society members). It has also been a source of emulation, with liberal law students launching the American Constitution Society in 1994 to work for positive change by shaping debate on vitally important legal and constitutional issues through development and promotion of high-impact ideas to opinion leaders and the media; by building networks of lawyers, law students, judges and policymakers dedicated to those ideas; and by countering the activist conservative legal movement that has sought to erode our enduring constitutional values.

About ACS: Shaping Debate, Building Networks, Making a Difference, AMERICAN CONSTITUTION SOCIETY FOR LAW AND POLICY, http://www.acslaw.org/about (last visited July 20, 2012). Just as the conservative movement proved in building its public interest infrastructure on the successful model of its liberal precursors, imitation is the sincerest form of flattery when it comes to innovative ideas to advance public interest lawyers’ competing agendas.

3. Fault Lines in the Conservative Public Interest Law Field

Advocates on the left have attacked the legitimacy of the developing conservative movement. Some have contested the idea that conservative lawyers could be acting in the “public interest,” arguing instead that many conservative lawyers are really just shills for the commercial interests of large business entities. See, e.g., Timothy L. Foden, The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement,
This criticism is rooted in the conception of conservative PILFs as part of the corporate counterstrategy articulated in the Powell memorandum. Southworth, *Conservative Lawyers*, supra, at 1241-42. Others have pointed to overt calls from conservatives for business leaders to fund such ventures and the proportion of funding for conservative organizations that comes from business interests. *Id.* at 1226. Even within the circle of advocates who view themselves as conservative public interest lawyers, there has been substantial disagreement about the bona fide nature of conservative beliefs as well as the strategy for constructing a successful movement.

Within the conservative movement, several influential critics suggested that conservative PILFs established in the 1970s had adopted the form of liberal PILFs without grasping why those groups succeeded. One critic, Michael Horowitz, a lawyer who later served as General Counsel to the Office of Management and Budget in the Reagan Administration, persuaded the Scaife Foundation in the late 1970s to finance a study of conservative public interest groups. His scathing report asserted that “advocates for and members of the traditional public interest law movement have largely isolated their conservative counterparts as hyphenated ‘public-interest’ pretenders.” He predicted that “the conservative public interest movement will make no substantial mark on the American legal profession or American life as long as it is seen as and is in fact the adjunct of a business community possessed of sufficient resources to afford its own legal representation.” Horowitz argued that the existing conservative PILFs were parochial, overly dependent upon business patrons, focused excessively on litigation—particularly filing amicus briefs—and, for the most part, staffed by “appallingly mediocre” lawyers. He decried their failure to cultivate relationships with academics and elite law schools. Horowitz urged conservative foundations to withdraw support from most of the existing groups and to invest in organizations that would replicate the strategic choices of liberal public interest law firms and build intellectual and moral content into their programs.

Horowitz argued that challenging the left’s definition of public interest practice was critical to the effort: “[W]hat is at stake in public interest law is not so much a battle over cases won and lost as of ideas and ideologies. . . .” He asserted that conservative public interest firms “[have] had essentially no impact on the still-prevailing notions of law students and young attorneys that their career options are largely restricted to serving the public interest (i.e., enhancing governmental power) or ‘selling out’ (i.e., working for a private law firm and its private sector clients).” He urged conservative foundations to support groups that made plausible claims to speak for unrepresented interests, built relationships with law schools and bar associations, and recruited talented young attorneys. The latter goal, he argued, was particularly important:

Only when the staffs at conservative public interest law firms are comprised of law review editors, former law clerks and, in no small part, of alumni of national law schools, will the movement be in a position to initiate and participate in a real dialogue and in a truly national competition as to which legal policies and ideologies are truly “in the public interest.”

Southworth, *Conservative Lawyers*, supra, at 1252-53. One way of reading this passage is to see the conservative public interest lawyering movement as
engaged in its own internecine dispute over the bona fide nature of conservative beliefs and their connection to this type of lawyering. Another way might be to see the conservative call to “support groups that made plausible claims to speak for unrepresented interests” as a way to market the policies these groups advocate in a way that packages them in the language of public interest law—though the underlying policy positions would remain unchanged. Which do you find more plausible? Does it matter?

Another tension in conservative public interest lawyering is that at least one component of conservative ideology is institutional conservatism, which embraces “a narrow role for the judiciary, or at least . . . disfavor[s] judicial innovation.” Fallon, supra, at 450. One of the principal late-twentieth-century conservative attacks on liberal public interest lawyering centered on the purported illegitimacy of the latter’s use of courts to achieve social policy changes, which conservatives have argued circumvented the democratic process. Southworth, Conservative Lawyers, supra, at 1240. This is one reason that some contemporary conservative organizations have eschewed test case litigation of their own. Epstein, supra, at 122-23, 132. Rather, they have viewed their mission as counteracting the effect of progressive public interest lawyers and limiting the role of the courts in implementing social change through judicial decisions. Southworth, Conservative Lawyers, supra, at 1250. This has influenced the way that conservative groups participated in cases, pushing them toward filing amicus briefs rather than engaging in direct litigation. Id.

Finally, tensions exist between business/free enterprise conservatives and social conservatives motivated by religious belief. One study of conservative lawyers found considerable antipathy between the core constituencies. An attorney who worked on religious liberty matters described his contempt for law school classmates whose “big ambition was to work for a large, smelly corporate ‘big dog’ law firm in downtown Chicago and commute from their nice home.” A lawyer who had been a partner in a prominent corporate firm before abandoning that position to devote himself full-time to Christian legal work noted that he had become increasingly uncomfortable in a law firm culture that worshiped “two false gods — personal autonomy and wealth.” By his own account, his partners were equally uncomfortable with him; he could see that they viewed him as “one of those wild-eyed evangelicals.” Eventually his partners confronted him and asked him to stop handling anti-abortion matters pro bono. Similarly, a corporate lawyer said that “the religious right . . . makes my skin crawl.” Several libertarian lawyers observed that monthly meetings at the Heritage Foundation often generated heated exchanges between socially conservative and libertarian lawyers. We conclude that the lawyers who serve the two core constituencies within the American conservative movement inhabit separate social worlds. For the most part, they identify with the views of their clients. When those views conflict, the lawyers are, perhaps, no more likely to forge consensus than are other interested parties. Heinz et al., Lawyers for Conservative Causes, supra, at 40.

Notwithstanding these tensions, the conservative movement has enthusiastically embraced public interest lawyering. Going back to the criteria
identified in Chapter 1, some conservative lawyers view themselves as engaged in altruistic (as opposed to completely self-interested) advocacy, select the cases in which they get involved based on a specific set of criteria unrelated to the profitability of the work, seek to accomplish goals beyond those of their individual clients, work for nonprofit organizations, and use their professional legal training to change the status quo. What is more, like progressive attorneys, many conservative lawyers see their role as representing un- or under-represented persons, organizations, and causes. As just one example, Southworth’s observations from interviews of conservative lawyers indicate that “[s]ome lawyers for religious and libertarian groups described themselves as champions of vulnerable groups or individuals. Abortion opponents, for example, viewed themselves as protectors of unborn children.” Southworth, Identity and Commitment, supra, at 92-93. Similarly, advocates representing crime victims, who are dragged into the criminal justice system involuntarily and often do not have financial means for representation, may see their roles as taking on the cause of an otherwise unrepresented party. How do you evaluate these claims?

4. Lessons

How has the rise of the conservative public interest movement influenced beliefs about the role of law in social change? It is instructive to compare views on the left and the right. The left, as Chapters 5 and 10 explores in more detail, has been skeptical of the efficacy of law as a social change tool, with scholars arguing that legal decisions cannot change action on the ground, that law deradicalizes and co-opts movements, and that lawyers are prone to dominate clients, particularly poor clients of color. See Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107 (1991); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1 (1990). In contrast, conservatives have invested heavily in building a rights-claiming network and using the opening provided by the changed composition of the federal courts to litigate their issues to the highest levels. In so doing, they have seen some major recent successes in the U.S. Supreme Court. See, e.g., Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876 (2010); Dist. of Columbia v. Heller, 554 U.S. 570 (2008). By most accounts, the Citizen United victory, in particular, has had significant real world impacts on the amount of corporate money in politics. Thus, rather than emphasize collaboration, some conservative groups have prioritized impact litigation integrated into broader political strategies. It may be that the right has similar reservations about law-based social change but has not yet articulated them with the same force as scholars on the left. Or it may be that the right is not as concerned about movement co-optation, which raises the question: Why not? Does the left have a different relationship to principles of democratic accountability and grassroots empowerment that produces a greater anxiety about the law as an elitist tool and a greater affinity for collaborative approaches?
LETTER TO A LAW STUDENT
INTERESTED IN SOCIAL JUSTICE

WILLIAM P. QUIGLEY*

Dear Bridgette:

I am delighted to learn of your commitment to social justice law. Despite many decades practicing some form or other of social justice advocacy, I too still have much to learn. I hope some of these thoughts will help you; it helped me to write them down.

Let Me Start With a True Story. After Hurricane Katrina, hundreds of law students volunteered to work in the Gulf Coast region over the winter holidays. Dozens of students helped out with a case in the lower ninth ward challenging the City of New Orleans’ unilateral demolition of hundreds of damaged homes without notice to the owner or an opportunity to be heard. Most of these homes had been literally swept off their foundations by the brutal onrush of huge walls of tons of water when the levees broke. Many homes were upside down, some were sitting in the middle of the street blocks away from where they started, and some were on top of cars or even other homes. Regular methods of property ownership checks were insufficient since the houses were often scattered far from the lots and street addresses where they originally sat. Since all of the homeowners were still displaced far outside of the city and still prohibited by martial law from living in their houses, they had no way of knowing that the authorities planned to demolish their homes before they

* Janet Mary Riley Professor of Law and Director of the Law Clinic and the Gillis Long Poverty Law Center at Loyola University New Orleans College of Law. For further reading on this topic, see William P. Quigley, Revolutionary Lawyering: Addressing the Root Causes of Poverty & Wealth, 20 Wash. U. J.L. & Pol’y 101, 125 (2006).
could get back to either fix them up or even remove personal effects. In teams, students went to each house scheduled to be demolished to see if they could figure out who the owners were. Then, the teams tried to contact the displaced owners to see what they wanted us to do about the impending demolition.

At the end of a week of round-the-clock work trying to save people’s homes, a group of law students met together in one room of a neighborhood homeless center to reflect on what they had experienced. Sitting on the floor, each told what they had been engaged in and what they learned. As they went around the room, a number of students started crying.

One young woman wept as she told of her feelings when she discovered a plaster Madonna in the backyard of one of the severely damaged homes – a Madonna just like the one in her mother’s backyard on the West Coast. At that moment, she realized her profound connection with the family whom she had never met. This was not just a case, she realized, it was a life – a life connected to her own.

Another student told of finding a small, hand-stitched pillow amid the ruins of a family home. The pillow was stitched with the words “Blessed Are the Meek.” It told a lot about the people who lived in that small home. Not the usual sentiment celebrated in law school.

The last law student to speak had just returned from working in the destroyed neighborhood. He had been picking through a home trying to find evidence that might lead to the discovery of who owned the property. He also was on the verge of tears. The experience was moving. The student felt that it was a privilege to be able to assist people in such great need. It reminded him, he paused for a second, of why he went to law school. He went to law school to help people and to do his part to change the world. “You know,” he said quietly, “the first thing I lost in law school was the reason that I came. This will help me get back on track.”
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Letter to a Law Student Interested in Social Justice

SOCIAL JUSTICE LAWYERING IS COUNTER-CULTURAL IN LAW SCHOOL AND IN THE LEGAL PROFESSION

“The first thing I lost in law school was the reason that I came.” What a simple and powerful indictment of legal education and of our legal profession. It is also a caution to those of us who want to practice social justice lawyering.

Many come to law school because they want in some way to help the elderly, children, people with disabilities, undernourished people around the world, victims of genocide, or victims of racism, economic injustice, religious persecution or gender discrimination.

Unfortunately, the experience of law school and the legal profession often dilute the commitment to social justice lawyering.

The repeated emphasis in law school on the subtleties of substantive law and many layers of procedure, usually discussed in the context of examples from business and traditional litigation, can grind down the idealism with which students first arrived. In fact, research shows that two-thirds of the students who enter law school with intentions of seeking a government or public-interest job do not end up employed in that work.


... Women and minorities (African Americans and Hispanics) were much more likely to go into public service jobs after graduation. Students who stated at the start of their second year that they placed a high value on helping people through their work were also significantly more likely to enter GPI [government or public interest] careers as were people who rated the ability to bring about social change as very important. Students who began law school with the desire to enter GPI were significantly more likely to do so. And students who worked in GPI jobs in either summer during law school were much more likely to enter public service careers than those who held other summer jobs. School type also had some significant effects. Students who attended schools in the small, ra-
It pains me to say it, but justice is a counter-cultural value in our legal profession. Because of that, you cannot be afraid to be different than others in law school or the profession – for unless you are, you cannot be a social justice lawyer.

Those who practice social justice law are essentially swimming upstream while others are on their way down. Unless you are serious about your direction and the choices you make and the need for assistance, teamwork and renewal, you will likely grow tired and start floating along and end up going downstream with the rest. We all grow tired at points and lose our direction. The goal is to try to structure our lives and relationships in such a way that we can recognize when we get lost and be ready to try to reorient ourselves and start over.

There are many legal highways available to people whose goal is to make a lot of money as a lawyer – that is a very mainstream, traditional goal and many have gone before to show the way and carefully tend the roads.
Letter to a Law Student Interested in Social Justice

For social justice lawyers, the path is more challenging. You have to leave the highway sending you on towards the traditional legal profession. You have to step away from most of the crowd and create a new path – one that will allow you to hold onto your dreams and hopes for being a lawyer of social justice.

Your path has different markers than others. The traditional law school and professional marks of success are not good indicators for social justice advocates. Certainly, you hope for yourself what you hope for others – a good family, a home, good schools, a healthy life and enough to pay off those damn loans. Those are all achievable as a social justice lawyer, but they demand that you be more creative, flexible and patient than those for whom money is the main yardstick.

Our profession certainly pays lip service to justice, and because we are lawyers this is often eloquent lip service, but that is the extent of it. At orientations, graduations, law days, swearing-in days and in some professional classes, you hear about justice being the core and foundation of this occupation. But everyone knows that justice work is not the essence of the legal profession. Our professional essence is money, and the overwhelming majority of legal work consists of facilitating the transfer of money or resources from one group to another. A shamefully large part of our profession in fact consists of the opposite of justice – actually taking from the poor and giving to the rich or justifying some injustice like torture or tobacco or mass relocation or commercial exploitation of the weak by the strong. The actual message from law school and on throughout the entire legal career is that justice work, if done at all, is done in the margins or after the real legal work is done.

But do not despair! Just because social justice lawyering is counter-cultural does not mean it is nonexistent.
There is a rich history of social justice advocacy by lawyers whose lives rise above the limited horizons of the culture of lawyers. We can take inspiration from social justice lawyers like Mohandas Gandhi, Nelson Mandela, Shirin Ebadi, Mary Robinson, Charles Hamilton Houston, Carol Weiss King, Constance Baker Motley, Thurgood Marshall, Arthur Kinoy and Clarence Darrow. Attorneys Dinoisia Diaz Garcia of Honduras and Digna Ochoa of Mexico were murdered because of their tireless advocacy of human rights issues. Ella Bhatt is one of the founders of an organization that supports the many women of India who are self-employed. Salih Mahmoud Osman is a human rights lawyer in Sudan, a nation struggling with genocide and other human rights violations. In addition to those named

2 Mohandas Gandhi was a lawyer in South Africa for twenty years. Nelson Mandela was also a South African barrister. Shirin Ebadi is an Iranian lawyer who won the Nobel Peace Prize. Mary Robinson is an Irish lawyer who headed the United Nations Commission on Human Rights. Charles Hamilton Houston was a law professor and pioneer in civil rights litigation. Carol Weiss King was a human rights lawyer in the middle of the 20th century. Constance Baker Motley was a civil rights lawyer and federal judge. Thurgood Marshall was also a civil rights lawyer and Justice of the United States Supreme Court. Arthur Kinoy was a law professor and advocate for civil and human rights. Clarence Darrow was a lawyer celebrated for the Scopes trial but made his name and living as a defender of unions. This information comes from an online subscription-based website. Biography Resource Center. Farmington Hills, Mich.: Thomson Gale (2007), http://glenet.galegroup.com/servlet/BioRC (perform search of individual name and results will be displayed).


5 For general information on the work of Ella Bhatt see the account of her work for human rights in her own words. ELLA BHATT, WE ARE POOR BUT SO MANY: THE STORY OF SELF-EMPLOYED WOMEN IN INDIA, 3-6 (2006).

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here, there are thousands of other lawyers working for social justice, mostly unknown to history, but many still living among us.

It is our job to learn the history of social justice lawyering. We must become familiar with these mentors of ours and understand the challenges they faced to become advocates for justice.

We must also be on the lookout for contemporary examples of social justice lawyering. There are many, and they are in every community, even though they may not be held up for professional honors like lawyers for commercial financiers or lawyers for the powerful and famous. But if you look around, you will see people doing individual justice work – the passionate advocate for victims of domestic violence, the dedicated public defender, the volunteer counsel for the victims of eviction, the legal services lawyer working with farm workers or the aging, the modestly-paid counsel to the organization trying to change the laws for a living wage, or affordable housing, or the homeless or public education reforms.7 These and many more are in every community.

Learning About Justice

Some people come to law school not just to learn about laws that help people but also with a hope that they might learn to use new tools to transform and restructure the world and its law to make our world a more just place.

There is far too little about justice in law school curriculum or in the legal profession. You will have to learn most of this on your own.

One good working definition of “social justice” is the commitment to act with and on behalf of those who are suffering be-

cause of social neglect, social decisions or social structures and institutions.\(^8\)

Working and thinking about how to transform and restructure the world to make it more just is a lifelong pursuit.

Social justice is best described by a passage from a speech Dr. Martin Luther King, Jr. gave on April 4, 1967:

I am convinced that if we are to get on the right side of the world revolution, we as a nation must undergo a radical revolution of values. We must rapidly begin the shift from a “thing-oriented” society to a “person-oriented” society. When machines and computers, profit motives and property rights are considered more important than people, the giant triplets of racism, materialism, and militarism are incapable of being conquered. A true revolution of values will soon cause us to question the fairness and justice of many of our past and present policies.\(^9\)

**BE WILLING TO BE UNCOMFORTABLE**

One night, I listened to a group of college students describe how they had spent their break living with poor families in rural Nicaragua. Each student lived with a different family, miles apart from each other, in homes that had no electricity or running water. They ate, slept and worked with their family for a week. I knew these were mostly middle-class, suburban students, so I asked them how they were able to make the transition from their homes in the United States to a week with their


host families. One student said, “First, you have to be willing to be uncomfortable.”

I think this is the first step of any real educational or transformative experience – a willingness to go beyond your comfort zone and to risk being uncomfortable.

The revolutionary social justice called for by Dr. King is not for the faint of heart – it calls on the courage of your convictions. It takes guts.

Questioning the fairness and justice of our laws and policies is uncomfortable for most because it makes other people uncomfortable.

Many people are perfectly satisfied with the way things are right now. For them, our nation is the best of all possible nations, and our laws are the best of all possible laws, and therefore, it is not right to challenge those in authority. For them, to question the best of all possible nations and its laws is uncalled for, unpatriotic and even un-American. These same criticisms were leveled at Dr. King and continue to be leveled at every other person who openly questions the fairness and justice of current laws and policies.

So, if you are interested in pursuing a life of social justice, be prepared to be uncomfortable – be prepared to press beyond your comfort zone, be prepared to be misunderstood and criticized. It may seem more comfortable to engage in social diversions than to try to make the world a better place for those who are suffering. But if you are willing to be uncomfortable and you invest some of your time and creativity in work to change the world, you will find it extremely rewarding.

NEVER CONFUSE LAW AND JUSTICE

We must never confuse law and justice. What is legal is often not just. And what is just is often not at all legal.
Consider what was perfectly legal 100 years ago: children as young as six were employed in dangerous industries. Bosses could pay workers whatever they wanted. If injured on the job – no compensation, you went home and need not return when you recovered. Women and African Americans could not vote. Any business could discriminate against anyone else on the basis of gender, race, age, disability or any other reason. Industrialists grew rich by using police and private mercenaries to break up unions, beat and kill strikers and evict families from their homes.

One hundred years ago, lawyers and judges and legislators worked in a very professional manner enforcing laws that we know now were terribly unjust.

What is the difference between 100 years ago and now? History has not yet judged clearly which laws are terribly unjust.

Social justice calls you to keep your eyes and your heart wide open in order to look at the difference between law and justice. For example, look at the unjust distribution of economic wealth and social and political power. It is mostly legally supported, but is actually the most unjust, gross inequality in our country and in our world. You must examine the root causes and look at the legal system that is propping up these injustices.

**Critique the Law**

Critique of current law is an essential step in advancing justice. Do not be afraid to seriously criticize an unjust or inadequate set of laws or institutions. People will defend them saying they are much better than before, or they are better than those in other places. Perhaps they will make some other justification. No doubt many of our laws today and many of our institutions represent an advance over what was in place in the past; however, that does not mean that all of our laws and institutions are better than what preceded them, nor does it mean that the justice critique should stop.
Critique alone, however, is insufficient for social justice advocates. While you are engaged in critique, you should also search for new, energizing visions of how the law should and might move forward.

You have some special talents in critiquing the difference between law and justice because of your legal training.

All laws are made by those with power. There are not many renters or low-wage workers in Congress or sitting on the bench. The powerless, by definition, are not involved in the lobbying, drafting, deliberating and compromising that are essential parts of all legislation. Our laws, by and large, are what those with power think should apply to those without power. As a student of law, you have been taught how to analyze issues and how to research.

Social justice insists that you first examine these laws and their impacts not only from the perspective of their legislative histories, but also from the perspective of the elderly, the working poor, the child with a learning disability and the single mom raising kids, who are often the targets of these laws.

So how do you learn what the elderly, the working poor or the single moms think about these laws? It is not in the statute, nor the legislative history, nor the appellate decision. That is exactly the point. If you are interested in real social justice, you must seek out the voices of the people whose voices are not heard in the halls of Congress or in the marbled courtrooms.

Keep your focus on who is suffering and ask why. Listen to the voices of the people rarely heard, and you will understand exactly where injustice flourishes.

Second, look for the collateral beneficiaries. *Qui bono?* Who benefits from each law, and what are their interests? Why do you think that the minimum wage stays stagnant for long periods of time while expenditures on medical assistance soar year after year?
This inquiry is particularly important since the poor and powerless – by definition – rarely have any say in the laws that apply to them.

“Follow the money,” they say in police work. That is also good advice in examining legislation. Do not miss the big picture. You probably have a hunch that the rich own the world. Do you know the details of how much they actually own? You are a student of the law, you have learned the tools of investigation – you use these tools to find out. Then ask yourself: if the rich own so much, why are the laws assisting poor, elderly and disabled people, at home and abroad, structured in the way they are?

Third, carefully examine the real history of these laws. Push yourself to learn how these laws came into being. Learning this history will help you understand how change comes about. Social security, for example, is now a huge statutory entitlement program that is subject to a lot of current debate and proposals for reform. But for dozens of decades after this country was founded, there was no national social security at all for older people who could not work. As you look into how social security came into being, who fought for it, how people fought to create it and the number of years it took to pass the law, you will discover some of the stepping stones for change.

As part of your quest to learn the history of law and justice, learn about the heroic personalities involved in the social changes that prompted the changes in legislation. Biographies of people who struggled for social change are often excellent sources of inspiration.

Once you learn about the sheroes and heroes, push beyond these personalities and learn about the social movements that really pushed for revolutionary change. There is a strong tendency for outsiders to anoint one or more people as THE lead-

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ers or mothers or fathers of every social justice struggle. Unfortunately, that suggests that social change occurs only when these one-in-a-million leaders happen to be in the right place at the right time. That is false history. For example, as great as Dr. Martin Luther King, Jr. was, he was not the civil rights movement – he was a part of a very widespread and diverse and often competitive and conflicting set of local, regional, national and even international groups and organizations of people pushing for civil rights.¹¹

So, look for real histories about the social movements behind social change and legislation. See how they came about. You will again discover some of the methods used to bring about revolutionary social justice.

Fourth, look at the unstated implications of race, class and gender in each piece of the law. Also look carefully at the way laws interconnect into structures that limit particular groups of people. Race, gender and economic justice issues are present in every single piece of social legislation. They are usually not stated, but they are there. You must discover them and analyze them in order to be a part of the movements to challenge them.

The critique of law is actually a process of re-education – challenging unstated assumptions about law. This is also a lifelong process. I have been doing this work for more than 30 years and I still regularly make mistakes based on ignorance and lack of understanding. We all have much to learn. Real education is tough work, but it is also quite rewarding.

¹¹ The trilogy of books by Taylor Branch does a great job in detailing the many fronts on which the many people and organizations that comprised the civil rights movement were fighting. See Taylor Branch, Parting the Waters: America in the King Years, 1954-63 (1989); Taylor Branch, Pillar of Fire: America in the King Years, 1963-65 (1998); and Taylor, Branch, At Canaan’s Edge: America in the King Years, 1965-1968 (2006).
CRITIQUE THE MYTHS ABOUT LAWYERS AND SOCIAL JUSTICE

There is a lawyer-led law school and legal profession myth that suggests social justice law and the lawyers practicing it are at the cutting edge of social change. I think history demonstrates it is actually most often the opposite – developments in law follow social change rather than lead to it.

Lawyers who invest time and their creativity to help bring about advances in justice will tell you that it is the most satisfying and the most fulfilling work of their legal careers. But they will also tell you that social justice lawyers never work alone – they are always part of a team that includes mostly non-lawyers.

Take civil rights for example. There is no bigger legal, social justice myth than the idea that lawyers, judges and legislators were the engines that transformed our society and undid the wrongs of segregation. Civil rights lawyers and legislators were certainly a very important part of the struggle for civil rights, but they were a small part of a much bigger struggle. Suggesting that lawyers led and shaped the civil rights movement is not accurate history. This in no way diminishes the heroic and critical role that lawyers played and continue to play in civil rights advances, but it does no one a service to misinterpret what is involved in the process of working for social justice.

Law school education, by its reliance on appellate decisions and legislative histories of statutes, understandably overemphasizes the role of the law and lawyers in all legal developments. But you who are interested in participating in the transformation of the world cannot rely on a simplistic overemphasis of the role of the law and lawyers. You must learn the truth.

In fact, the law was then and often is now actually used against those who seek social change. There were far more lawyers, judges and legislators soberly and profitably working to uphold the injustices of segregation than ever challenged it. The same is true of slavery, child labor, union-busting, abuse of the environment, violations of human rights and other injustices.
Letter to a Law Student Interested in Social Justice

The courts and the legislatures are but a few of the tools used in the struggle for social justice. Organizing people to advocate for themselves is critically important, as is public outreach, public action and public education. Social justice lawyers need not do these actions directly, but the lawyer must be part of a team of people that are engaged in action and advocacy.

BUILD RELATIONSHIPS WITH PEOPLE AND ORGANIZATIONS CHALLENGING INJUSTICE: SOLIDARITY AND COMMUNITY

“If you have come to help me, you are wasting your time. But if you have come because your liberation is bound up with mine, then let us struggle together.”

Social justice advocacy is a team sport. No one does social justice alone. There is nothing more exciting than being a part of a group that is trying to make the world a better place. You realize that participating in the quest for justice and working to change the world is actually what the legal profession should be about. And you realize that in helping change the world, you change yourself.

Solidarity recognizes that this life of advocacy is one of relationships. Not attorney-client relationships, but balanced personal relationships built on mutual respect, mutual support and mutual exchange. Relationships based on solidarity are not ones where one side has the questions and the other the answers. Solidarity means together we search for a more just world, and together we work for a more just world.

Part of solidarity is recognizing the various privileges we bring with us. Malik Rahim, founder of the Common Ground Collec-

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12 This quote is often attributed to Lila Watson an aboriginal activist. However, through telephone interviews conducted by Ricardo Levins Morales with Ms. Watson’s husband in 2005, Ms. Watson indicated that the quote was the result of a collective process and thus should be attributed to “Aboriginal activists group, Queensland, 1970s.”

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tive in New Orleans, speaks about privilege often with the thousands of volunteers who come to help out with the grassroots repair of our community. In a recent interview with Amy Goodman, Rahim said:

First, you have to understand the unearned privilege you have in this country just by being born in your race or gender or economic situation. You have to learn how you got it. You have to learn how to challenge the systems that maintain that privilege. But while you are with us, we want to train you to use your privilege to help our community.

This is the best summary of the challenge of privilege and solidarity in social justice advocacy I have heard recently. This is a lifelong process for all of us. None of us have arrived. We all have much to learn, and we have to make this a part of our ongoing re-education.

So, how do social justice advocates build relationships of solidarity with people and organizations struggling for justice? These relationships are built the old-fashioned way, one person at a time, one organization at a time, with humility.

Humility is critically important in social justice advocacy. By humility, I mean the recognition that I need others in order to live a full life, and I cannot live the life I want to live by myself. By humility, I mean the understanding that even though I have had a lot of formal education, I have an awful lot to learn. By humility, I mean the understanding that every person in this world has inherent human dignity and incredible life experi-

14 Democracy Now! is a daily television and radio news program. The interview can be found at http://www.democracynow.org/article.pl?sid=06/08/28/1342226&mode=thread&tid=25 (last visited Aug. 23, 2007).
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iences that can help me learn much more about the world and myself.

There is a wise saying, “What you see depends on where you stand.” Latin American liberation theologians insist that a preferential option for the poor must be one of the principles involved in the transformation of the world.\(^\text{15}\)

Our choices in relationships build our community. If we want to be real social justice advocates, we must invest ourselves and develop relationships in the communities in which we want to learn and work. That sounds simple, but it is not. As law students and lawyers, we are continually pulled into professional and social communities of people whose goals are often based on material prosperity, comfort and insulation from the concerns of working and poor people. If we want to be true social justice advocates, we must swim against that stream and develop relationships with other people and groups.

For example, helping preserve public housing may seem controversial or even idiotic to most of the people at a law school function or the bar convention, yet totally understandable at a small church gathering where most people of the congregation are renters.

Seek out people and organizations trying to stand up for justice. Build relationships with them. Work with them. Eat with them. Recreate with them. Walk with them. Learn from them. If you are humble and patient, over time people will embrace you, and you will embrace them, and together you will be on the road to solidarity and community.

**Regularly Reflect**

In order to do social justice for life, it is important to engage in regular reflection. For physical and mental health, regular re-

Reflection on your life and the quest for justice is absolutely necessary. For some people, this is prayer. For others, it is meditation. For still others, it is yoga or some other method of centering reflection and regeneration.

Most of the people I know who have remained engaged in social justice advocacy over the years have been people who regularly make time to reflect on what they are doing, how they are doing it and what they should be doing differently. Reflection allows the body and mind and spirit to reintegrate. Often, it is in the quiet of reflection that insights have the chance to emerge.

I am convinced that ten hours of work is considerably less effective than nine and a half hours of work and 30 minutes of reflection.

In an active social justice life, there is the tendency to be very active because the cause is so overwhelming. Advocates who do not create time for regular reflection can easily become angry and overwhelmed and bitter at the injustices around and ultimately at anyone who does not share their particular view about the best way to respond. They consider themselves activists, but they may be described as hyper-activists. They have often lost their effectiveness and the respect of others, which just makes them even more angry and more accusatory of everyone who disagrees with them. We all sometimes end up like that. When we do, we need to step back, reflect, recharge and reorder our actions.

**Practice, Patience and Flexibility in Order to Prepare for Chaos, Criticism and Failure**

One veteran social justice advocate told me once, “If you cannot handle chaos, criticism and failure, you are in the wrong business.” The path to justice goes over, around and through chaos, criticism and failure. Only by experiencing and overcoming these obstacles can you realistically be described as a social justice advocate.
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We must be patient and flexible in order to do this work over the long run. There are no perfect people. There are no perfect organizations. Most grassroots social justice advocacy is carried out by volunteers – people who have jobs and families and responsibilities that compete with their social justice work for time and energy. There is usually not any money for the work. Often the people on the other side, who are upholding the injustices you are fighting against, are well-paid for their work and have staff and support to help them preserve the unjust status quo. This translates into challenging work. Patience with our friends, patience with ourselves and patience with the shortcomings of our organizations are essential. That is not to suggest that we must tolerate abusive or dysfunctional practices, but while we work to overcome those, we must be patient and flexible.

If you challenge the status quo, you better expect criticism from the people and organizations that are benefiting from the injustices you are seeking to reverse. Though it is tough to really listen to criticism, our critics often do have some truth in their observations about us or our issues. Sometimes criticism can be an opportunity to learn how to better communicate our advocacy or to think about changes we had not fully considered. Other criticism just hurts your backside, and you just have to learn how to tolerate it and move on.

Successes do occur, and we are all pretty good at handling success. However, failure is also an inevitable part of social justice advocacy. Failure itself cannot derail advocacy, it is the response to failure that is the challenge. Short-term social justice advocates feel the sting of failure and are depressed and hurt that good did not triumph. They become disillusioned and lose faith in the ability of people and organizations to create justice. People doing social justice for life are also hurt and depressed by failure. They spend some time tending to their wounds. But then they get back up, and patiently start again, trying to figure out how to begin again in a more effective manner.
JOY, HOPE, INSPIRATION AND LOVE

In order to live a life of social justice advocacy, it is important to have your eyes and heart wide open to the injustices of the world. But it is equally important that your eyes and heart be wide open to and seek out and absorb the joy, hope, inspiration and love you will discover in those who resist injustice.

It may seem paradoxical, but it is absolutely true that in the exact same places where injustices are found, joy, hope, inspiration and love are found. This has proven true again and again in my experiences with people and communities in the United States, in Haiti, in Iraq and in India. In fact, many agree with my observation that the struggling poor are much more generous and have more joy in their lives than other people living with much more material comfort.

Since Katrina devastated the Gulf Coast, I have been inspired again and again by the resiliency and determination of people who suffered tremendous loss.

Recently, I attended an evening meeting of public housing residents held in the bottom room of a small, newly-repaired church. I was pretty tired and feeling pretty overwhelmed. It was a small group. There were a dozen plus residents and a couple of children there. All had been locked out of their apartments for more than 20 months. One was in a wheelchair. Another was in her cafeteria-worker smock. One was the exclusive caregiver for a paralyzed child. Most had no car, yet they got a ride to a meeting to try to come up with another plan to save their apartment complex. Many of their neighbors were still displaced. Others who were back in the metro area were overwhelmed and had given up. We held hands, closed eyes and started with a prayer. Then we dreamed together of ideas about how to turn their unjust displacement around. Some of our dreams were impractical, others unrealistic, a few held out possibility. All at once, I realized almost everyone there was a grandmother. They had already raised their kids, and many were now
helping raise their kids’ kids. Most were on disability or social security. They had a fraction of the resources that I had, and they had been subjected to injustices unfathomable in my world; yet they were still determined and fighting to find a way to re-claim affordable housing for themselves and their families and their neighbors. When we finished, we said another prayer, set the date for another meeting, hugged and laughed, and people piled into a van and drove away.

These grandmothers inspire me and keep me going. If they can keep struggling for justice despite the odds they face, I will stand by their side.

Hope is also crucial to this work. Those who want to continue the unjust status quo spend lots of time trying to convince the rest of us that change is impossible. Challenging injustice is hopeless they say. Because the merchants of the status quo are constantly selling us hopelessness and diversions, we must actively seek out hope. When we find the hope, we must drink deeply of its energy and stay connected to that source. When hope is alive, change is possible.

A friend, who has been in and out prison for protesting against the School of the Americas at Fort Benning, Georgia, once told me that there are only three ways to respond to evil and injustice. I listened to her carefully because when she is not in jail for protesting, she is a counselor for incest survivors, so she knows about evil. She told me that there are only three ways to respond to evil and injustice. The first is to respond in kind, perhaps to respond even more forcefully. The second response is to go into denial, to ignore the situation. Most of our international, national, communal and individual responses to injustice and evil go back and forth between the first and second variety. We strike back, or we look away. We forcefully swat down evil,

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or we try to ignore it. But there is a third way to respond. That is to respond to evil and injustice with love. Though a response of love is the most difficult, it is truly the only way that injustice and evil can be transformed.

Love ends up at the center of social justice advocacy. Love in action; not the love of dreamy-eyed, soft-music television commercials, but the love of a mother for her less able child, the love of a sister who will donate her kidney to save her brother, the love of people who will band together to try to make a better world for their families. These are examples of real love. This is the love that will overcome evil and put justice in its place.

**CONCLUSION**

Every good law or case you study was once a dream. Every good law or case you study was dismissed as impossible or impractical for decades before it was enacted. Give your creative thoughts free reign, for it is only in the hearts and dreams of people seeking a better world that true social justice has a chance.

Finally, remember that we cannot give what we do not have. If we do not love ourselves, we will be hard pressed to love others. If we are not just with ourselves, we will find it very difficult to look for justice with others. In order to become and remain a social justice advocate, you must live a healthy life. Take care of yourself as well as others. Invest in yourself as well as in others. No one can build a house of justice on a foundation of injustice. Love yourself and be just to yourself and do the same with others. As you become a social justice advocate, you will experience joy, inspiration and love in abundant measure. I look forward to standing by your side at some point.

*Peace,*
*Bil Quigley*

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**CONCLUSION**

Every good law or case you study was once a dream. Every good law or case you study was dismissed as impossible or impractical for decades before it was enacted. Give your creative thoughts free reign, for it is only in the hearts and dreams of people seeking a better world that true social justice has a chance.

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Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation

Derrick A. Bell, Jr.†

In the name of equity, we . . . seek dramatic improvement in the quality of the education available to our children. Any steps to achieve desegregation must be reviewed in light of the black community's interest in improved pupil performance as the primary characteristic of educational equity. We define educational equity as the absence of discriminatory pupil placement and improved performance for all children who have been the objects of discrimination. We think it neither necessary, nor proper to endure the dislocations of desegregation without reasonable assurances that our children will instructionally profit.

Coalition of black community groups in Boston¹

¹ This paper is a part of a larger study on the Roles of Courts in Desegregation of Education Litigation sponsored by the Institute of Judicial Administration through a grant from the Ford Foundation. The results of this research will be published in a forthcoming book on this subject.

† Professor of Law, Harvard University. Pamela Federman, Susan Mentser, and Margaret Stark Roberts assisted in researching and preparing this article.

¹ Freedom House Institute on Schools and Education, Critique of the Boston School Committee Plan, 1975, at 2 (emphasis added) (on file with Yale Law Journal). This 15 page document was prepared, signed, and submitted in February, 1975, directly to federal judge W. Arthur Garrity by almost two dozen of Boston's black community leaders. The statement was a critique of a desegregation plan filed by the Boston School Committee in the Boston school case: Morgan v. Hennigan, 379 F. Supp. 410 (D. Mass.), aff'd sub nom. Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), cert. denied, 421 U.S. 963 (1975); Morgan v. Kerrigan, 388 F. Supp. 581 (D. Mass.), aff'd, 509 F.2d 590 (1st Cir. 1975); Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass. 1975), aff'd, No. 75-1184 (1st Cir., Jan. 14, 1976). It was written during two all-day sessions sponsored by the Freedom House Institute, a community house in Boston's black Roxbury area. Judge Garrity had solicited comments on the School Committee's plan from community groups. Those who prepared this statement did so on behalf of the Coordinated Social Services Council, a confederation of 46 public and private agencies serving minority groups in the Boston area. The cover letter was signed by Otto and Muriel Snowden, co-directors of Freedom House, Inc. and two of the most respected leaders in the Roxbury community. They advised Judge Garrity that the statement "represents the thinking of a sizable number of knowledgeable people in the Black community, and we respectfully urge your serious consideration of the points raised." Letter from Otto and Muriel Snowden to Judge W. Arthur Garrity, Feb. 4, 1975 (on file with Yale Law Journal).

Plaintiffs' counsel in the Boston school case, supra, expressed sympathy with the black community leaders' emphasis on educational improvement, but contended that the law required giving priority to the desegregation process. Few of the group's concerns were reflected in the plaintiffs' proposed desegregation plan rejected by the court. See Morgan v. Kerrigan, 401 F. Supp. 216, 229 (D. Mass. 1975), aff'd, No. 75-1184 (1st Cir., Jan. 14, 1976). For a more detailed account of the Boston litigation, see pp. 482-83 & notes 38-10 infra.
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The espousal of educational improvement as the appropriate goal of school desegregation efforts is out of phase with the current state of the law. Largely through the efforts of civil rights lawyers, most courts have come to construe *Brown v. Board of Education*\(^2\) as mandating "equal educational opportunities" through school desegregation plans aimed at achieving racial balance, whether or not those plans will improve the education received by the children affected. To the extent that "instructional profit" accurately defines the school priorities of black parents in Boston and elsewhere, questions of professional responsibility are raised that can no longer be ignored:

How should the term "client" be defined in school desegregation cases that are litigated for decades, determine critically important constitutional rights for thousands of minority children, and usually involve major restructuring of a public school system? How should civil rights attorneys represent the often diverse interests of clients and class in school suits? Do they owe any special obligation to class members who emphasize educational quality and who probably cannot obtain counsel to advocate their divergent views? Do the political, organizational, and even philosophical complexities of school desegregation litigation justify a higher standard of professional responsibility on the part of civil rights lawyers to their clients, or more diligent oversight of the lawyer-client relationship by the bench and bar?

As is so often the case, a crisis of events motivates this long overdue inquiry. The great crusade to desegregate the public schools has faltered. There is increasing opposition to desegregation at both local and national levels (not all of which can now be simply condemned as "racist"), while the once vigorous support of federal courts is on the decline. New barriers have arisen—inf/lation makes the attainment of racial balance more expensive, the growth of black populations in urban areas renders it more difficult, an increasing number of social science studies question the validity of its educational assumptions.

Civil rights lawyers dismiss these new obstacles as legally irrelevant. Having achieved so much by courageous persistence, they have not waivered in their determination to implement *Brown* using racial balance measures developed in the hard-fought legal battles of the last two decades. This stance involves great risk for clients whose educational interests may no longer accord with the integration ideals of their attorneys. Indeed, muffled but increasing criticism of "unconditional integration" policies by vocal minorities in black communities is not limited to Boston. Now that traditional racial balance reme-


dies are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools.

This article will review the development of school desegregation litigation and the unique lawyer-client relationship that has evolved out of it. It will not be the first such inquiry. During the era of “massive resistance,” Southern states charged that this relationship violated professional canons of conduct. A majority of the Supreme Court rejected those challenges, creating in the process constitutional protection for conduct that, under other circumstances, would contravene basic precepts of professional behavior. The potential for ethical problems in these constitutionally protected lawyer-client relationships was recognized by the American Bar Association Code of Professional Responsibility, but it is difficult to provide standards for the attorney and protection for the client where the source of the conflict is the attorney’s ideals. The magnitude of the difficulty is more accurately gauged in a much older code that warns: “No servant can serve two masters: for either he will hate the one, and love the other; or else he will hold to one, and despise the other.”

I. School Litigation: A Behind-the-Scenes View

A. The Strategy

Although Brown was not a test case with a result determined in advance, the legal decisions that undermined and finally swept away the “separate but equal” doctrine of Plessy v. Ferguson were far from fortuitous. Their genesis can be found in the volumes of reported cases stretching back to the mid-19th century, cases in which every con-
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ceivable aspect of segregated schools was challenged. By the early 1930's, the NAACP, with the support of a foundation grant, had organized a concerted program of legal attacks on racial segregation. In October 1934, Vice-Dean Charles H. Houston of the Howard University Law School was retained by the NAACP to direct this campaign. According to the NAACP Annual Report for 1934, "the campaign [was] a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases." These strategies were intended to eliminate racial segregation, not merely in the public schools, but throughout the society. The public schools were chosen because they presented a far more compelling symbol of the evils of segregation and a far more vulnerable target than segregated railroad cars, restaurants, or restrooms. Initially, the NAACP's school litigation was aimed at the most blatant inequalities in facilities and teacher salaries. The next target was the obvious inequality in higher education evidenced by the almost total absence of public graduate and professional schools for blacks in the South.

Thurgood Marshall succeeded Houston in 1938 and became Director-Counsel of the NAACP Legal Defense and Educational Fund (LDF) when it became a separate entity in 1939. Jack Greenberg, who succeeded Marshall in 1961, recalled that the legal program "built precedent," treating each case in a context of jurisprudential development rather than as an isolated private law suit. Of course, it was not possible to plan the program with precision: "How and when plaintiffs sought relief and the often unpredictable course of litigation were frequently as influential as any blueprint in determining the

9. J. GREENBERG, supra note 8, at 35. Houston's work as the early architect of test cases that led eventually to the Brown decision is reviewed in McNeil, Charles Hamilton Houston, 3 BLACK L.J. 122 (1974).
10. J. GREENBERG, supra note 8, at 35, quoting from 1934 NAACP ANNUAL REPORT 22.
11. See note 7 supra.
13. See J. GREENBERG, supra note 8, at 37. The NAACP continued its legal program under its General Counsel, Robert L. Carter, who was succeeded in 1969 by Nathaniel Jones, the current General Counsel.
14. Id. at 39.
sequence of cases, the precise issues they posed, and their outcome.\textsuperscript{15}

But as lawyer-publisher Loren Miller observed of Brown and the four other school cases decided with it, "There was more to this carefully stage-managed selection of cases for review than meets the naked eye."\textsuperscript{16}

In 1955, the Supreme Court rejected the NAACP request for a general order requiring desegregation in all school districts, issued the famous "all deliberate speed" mandate, and returned the matter to the district courts.\textsuperscript{17} It quickly became apparent that most school districts would not comply with Brown voluntarily. Rather, they retained counsel and determined to resist compliance as long as possible.\textsuperscript{18}

\textsuperscript{15} Id. Mr. Greenberg recently wrote about the early school cases:

The lawyers who brought the cases had adequate financial resources and an organizational base which could produce cases which presented the issues they wanted decided, where and when they wanted them. But this was far from automatic and not subject to tight control. Applicants had to appear and desire to go to the schools in question, but this sometimes could be encouraged and, more important, unpropitious cases could be turned down. No one, other than the NAACP and the NAACP Legal Defense Fund, was then interested in or financially able to bring such suits.

In essence, there was a large measure of control, a substantial ability to influence the development and sequence of cases, which does not exist with many other efforts to make law in the courts today.\textsuperscript{\ldots} Greenberg, Litigation for Social Change: Methods, Limits and Role in Democracy, 29 RECORD OF N.Y.C.B.A. 320, 331 (1974).


The state cases all presented the issue of the application of the equal-protection-of-law clause of the Fourteenth Amendment, and the Court could have reached and decided that question in any one of them, but the wide geographical range gave the anticipated decision a national flavor and would blunt any claim that the South was being made a whipping boy. Moreover, the combination of cases included Kansas with its permissive statute, while other cases concerned state constitutional provisions as well as statutes with mandatory segregation requirements. Grade-school students were involved in the Kansas case; high-school students in the Virginia case, and all elementary and secondary students in the Delaware and South Carolina cases. The District of Columbia case [Bolling v. Sharpe, 347 U.S. 497 (1954)] drew due process of law into the cases as an issue, in distinction to the equal-protection-of-law clause, and also presented an opportunity for inquiry into the congressional power to impose racial segregation. The NAACP had touched all bases.

\textit{Id.} at 345.

\textsuperscript{17} Brown v. Board of Educ., 349 U.S. 294 (1955) (\textit{Brown II}).

\textsuperscript{18} Issues concerning the professional behavior of attorneys who assisted school boards in resisting compliance by using every imaginable dilatory tactic and spurious argument are beyond the scope of this article. A review of materials discussing the refusal of virtually all lawyers in the Deep South to represent civil rights clients until the late 1960's is found in V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY 579-89 (1966). See also Frankel, The Alabama Lawyer, 1954-1961: Has the Official Organ Atrophied?, 64 COLUM. L. REV. 1243 (1964). The failings of civil rights lawyers due to over-commitment to their ideals, with which this article is concerned, pale beside the conduct of many lawyers representing school boards and state agencies.

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By the late 1950's, the realization by black parents and local branches of the NAACP that litigation would be required, together with the snail's pace at which most of the school cases progressed, brought about a steady growth in the size of school desegregation dockets. Because of their limited resources, the NAACP and LDF adopted the following general pattern for initiating school suits. A local attorney would respond to the request of a NAACP branch to address its members concerning their rights under the Brown decision. Those

of the misconduct of school board lawyers is the line of decisions that depart from the American rule denying attorneys' fees to successful litigants. In Bell v. School Bd., 321 F.2d 494 (4th Cir. 1963), the court justified its departure from the general rule:

Here we must take into account the long continued pattern of evasion and obstruction which included not only the defendants' unyielding refusal to take any initiative, thus casting a heavy burden on the children and their parents, but their interposing a variety of administrative obstacles to thwart the valid wishes of the plaintiffs for a desegregated education. To put it plainly, such tactics would in any other context be instantly recognized as discreditable. The equitable remedy would be far from complete, and justice would not be attained, if reasonable counsel fees were not awarded in a case so extreme. Id. at 500. The Bell decision was followed in Felder v. Harnett County Bd. of Educ., 409 F.2d 1070, 1073-76 (4th Cir. 1969) (Sobeloff, J., dissenting); Bradley v. School Bd., 345 F.2d 310 (4th Cir.), vacated and remanded on other grounds, 382 U.S. 103 (1965); Kelley v. Altheimer, 297 F. Supp. 753 (E.D. Ark. 1969); Pettaway v. County School Bd., 290 F. Supp. 480 (E.D. Va. 1964). For a general discussion, see Note, Awarding of Attorneys' Fees in School Desegregation Cases: Demise of the Bad-Faith Standard, 39 Brooklyn L. Rev. 371-402 (1972).

Congress viewed these awards as sufficiently appropriate to include a provision for such awards in § 718 of the Emergency School Aid Act of 1972, 20 U.S.C. § 1617 (Supp. IV 1974). The Supreme Court interpreted this provision in Northcross v. Board of Educ., 412 U.S. 427 (1973), as entitling prevailing parties in school desegregation litigation to a reasonable attorney's fee as part of the cost, absent special circumstances rendering such an award unjust. The provision was given a degree of retroactivity in Bradley v. School Bd., 416 U.S. 696 (1974). There the Court held that § 718 can be applied to attorneys' services that were rendered before that provision was enacted, if the propriety of the fee award was pending resolution on appeal when the statute became law. Lower courts have also interpreted the provision liberally. See Thompson v. Madison County Bd. of Educ., 496 F.2d 682, 689 (5th Cir. 1974) (rejecting defenses based on employment of plaintiffs' counsel by a civil rights organization and on the fact that plaintiffs incurred no obligation for legal fees); Henry v. Clarksdale Municipal Separate School Dist., 480 F.2d 583 (5th Cir. 1973); Davis v. School Dist. of the City of Pontiac, Inc., 374 F. Supp. 141 (E.D. Mich. 1974). But see Thompson v. School Bd., 303 F. Supp. 458, 466 (E.D. Va. 1973), aff'd, 498 F.2d 195 (4th Cir. 1974).

Many school board lawyers would probably defend their actions on the theory that Brown did not automatically become the "law of the land," and that, as one Alabama lawyer put it, "[n]o federal or state court of record in America has ever held that a decision of the Supreme Court of the United States or that of any other federal court is 'the law of the land' or 'the law of the Union.' Such decision is never anything more than the law of the case actually decided by the court and binding only upon the parties to the case and no others." Pittman, The Federal Invasion of Arkansas in the Light of the Constitution, 19 Ala. Law. 168, 169-70 (1950), quoted in Frankel, supra at 1249. Responding to this position, Professor (now Judge) Marvin Frankel suggested that orderly processes would come to a halt if this "law of the case" theory were followed generally in other areas of the law. He took exception to the advice given Southern school officials that they should "ignore Brown until or unless they are specifically sued," suggesting that such advice nourished "a kind of lawlessness at all levels of society." Frankel, supra at 1249-50.
interested in joining a suit as named plaintiffs would sign retainers authorizing the local attorney and members of the NAACP staff to represent them in a school desegregation class action. Subsequently, depending on the facts of the case and the availability of counsel to prepare the papers, a suit would be filed. In most instances, the actual complaint was drafted or at least approved by a member of the national legal staff. With few exceptions, local attorneys were not considered expert in school desegregation litigation and served mainly as a liaison between the national staff lawyers and the local community. 19

Named plaintiffs, of course, retained the right to drop out of the case at any time. They did not seek to exercise “control” over the litigation, and during the early years there was no reason for them to do so. Suits were filed, school boards resisted the suits, and civil rights attorneys tried to overcome the resistance. Obtaining compliance with Brown as soon as possible was the goal of both clients and attorneys. But in most cases, that goal would not be realized before the named plaintiffs had graduated or left the school system. 20

The civil rights lawyers would not settle for anything less than a desegregated system. While the situation did not arise in the early years, it was generally made clear to potential plaintiffs that the NAACP was not interested in settling the litigation in return for school board promises to provide better segregated schools. 21

19. Local attorneys filed papers and gathered information; they usually played a subordinate role in hearings and seldom made or even suggested major tactical decisions in the litigation. This is not to minimize the important role that local attorneys played. Without their assistance, particularly in the early days, many school desegregation cases could not have been filed. Local counsel often made the preparations for hearings and generally moved the admission, for the purposes of the case, of national staff lawyers who were not usually admitted to practice before the courts where the litigation was pending. They were on the scene to meet with the plaintiffs and members of the class, explain the progress of the case, and provide the national office staff with information and factual data. As they gained expertise, some local attorneys did much more and, in a few instances, handled every aspect of the case both at the district court level and on appeal. The latter situation was less frequent during the late 1950’s and early 1960’s than it is today. See Rabin, supra note 8, at 217 (“key factor in the recent development of the LDF has been the new role assumed by cooperating [local] attorneys”).

20. For example, in Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430 (9th Cir.), cert. granted, 96 S. Ct. 355 (1976), the graduation of the named plaintiffs provided the basis of the school board’s claim in the Supreme Court that the desegregation suit (which was not certified as a class action) was moot. Brief for Petitioner at 24-25.

21. I can recall a personal instance. While working on the James Meredith litigation in Jackson, Mississippi, in 1961, at a time when the very idea of school desegregation in Mississippi was dismissed as “foolishness” even by some civil rights lawyers, I was visited by a small group of parents and leaders of the black community in rural Leake County, Mississippi. They explained that they needed legal help because the school
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parents generally felt that the victory in Brown entitled the civil rights lawyers to determine the basis of compliance. There was no doubt that perpetuating segregated schools was unacceptable, and the civil rights lawyers' strong opposition to such schools had the full support of both the named plaintiffs and the class they represented. Charges to the contrary initiated by several Southern states were malevolent in intent and premature in time.\(^2\)

B. The Theory

The rights vindicated in school litigation literally did not exist prior to 1954. Despite hundreds of judicial opinions, these rights have yet to be clearly defined. This is not surprising. Desegregation efforts aimed at lunchrooms, beaches, transportation, and other public facilities were designed merely to gain access to those facilities. Any actual racial "mixing" has been essentially fortuitous; it was hardly part of the rights protected (to eat, travel, or swim on a nonracial basis). The strategy of school desegregation is much different. The actual presence of white children is said to be essential to the right in both its philo-

board had closed the black elementary school in their area even though the school had been built during the 1930's with private funds and was maintained, in part, by the efforts of the black community. Closing of the school necessitated busing black children across the county to another black school. In addition, the community had lost the benefit of the school for a meeting place and community center. The group wanted to sue the school board to have their school reopened. I recall informing the group that both LDF and NAACP had abandoned efforts to make separate schools equal, but if they wished to desegregate the whole school system, we could probably provide legal assistance. The group recognized as well as I did that there were only a few black attorneys in Mississippi who would represent the group, and that those attorneys would represent them only if a civil rights organization provided financial support. Sometime later, the group contacted me and indicated they were ready to go ahead with a school desegregation suit. It was filed in 1963, one of the first in the state.

The Leake County incident was unusual at that time because, in most instances, civil rights lawyers advised black parents of their rights under Brown in situations where there was little or no discussion of alternatives to integration. I did not consider my advice to the Leake County representatives anything more or less than the best and most accurate legal counsel I could provide. My view then was that a federal suit designed simply to reopen a segregated black school, even if successful, would constitute far less than the full realization of rights to which these parents were entitled under Brown. Following my detailed exposition of what their rights were, it was hardly surprising that the black parents did not reject them. To put it kindly, they had not been exposed to an adversary discussion on the subject.

This NAACP insistence on integration even preceded Brown. Davis v. County School Board, which reached the Supreme Court as a companion case to Brown, originated with a request by blacks to the NAACP for legal help following an unsuccessful year-long effort to obtain a new high school. According to one commentator, "[t]wo attorneys did come; but they explained that, in view of the new policy of the N.A.A.C.P., they could not help with litigation unless a suit was filed to abolish school segregation." Wilkerson, The Negro School Movement in Virginia: From "Equalization" to "Integration," in II The Making of Black America 259, 269 (A. Meier & E. Rudwick eds. 1969).

22. See p. 494 infra.
sophisticated and pragmatic dimensions. In essence the arguments are that blacks must gain access to white schools because "equal educational opportunity" means integrated schools, and because only school integration will make certain that black children will receive the same education as white children. This theory of school desegregation, however, fails to encompass the complexity of achieving equal educational opportunity for children to whom it so long has been denied.

The NAACP and the LDF, responsible for virtually all school desegregation suits, usually seek to establish a racial population at each school that (within a range of 10 to 15 percent) reflects the percentage of whites and blacks in the district. But in a growing number of the largest urban districts, the school system is predominantly black. The resistance of most white parents to sending their children to a predominantly black school and the accessibility of a suburban residence or a private school to all but the poorest renders implementation of such plans extremely difficult. Although many whites undoubtedly perceive a majority black school as ipso

23. "About half of the Nation's black students, 3.4 million, are located in the 100 largest school districts." STAFF OF SENATE SELECT COMM. ON EQUAL EDUC. OPPORTUNITY, 92d CONG., 2d Sess., REPORT: TOWARD EQUAL EDUCATIONAL OPPORTUNITY 111 (Comm. Print 1972).

24. Whether because of school desegregation or not, there has been a sharp decline in the number of white children in many urban public school districts. While the national decline in white enrollment between 1968 and 1973 was about one percent annually, white pupil totals during the five year period fell by 62 percent in Atlanta, 41 percent in San Francisco, 32 percent in Houston, 21 percent in Denver, 40 percent in New Orleans, and 26 percent in New York. Boston lost 40 percent of its white pupils, or about 5,000 per year, from 1970 to 1975. Ravitch, Busing: The Solution That Has Failed to Solve, N.Y. Times, Dec. 21, 1975, § 4, at E3, col. 1.

Dr. James Coleman, the nationally known education expert whose studies furthered the school desegregation effort, see, e.g., HEW, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966), sparked an ongoing debate with a new study suggesting that school desegregation orders in large cities significantly encourage the exodus of whites from cities to suburbs. See Integration, Yes; Busing, No (Interview with Dr. James Coleman), N.Y. Times, Aug. 24, 1975, § 6 (Magazine), at 10. In a symposium called to evaluate Dr. Coleman's findings, one social scientist reported that although a statistical analysis of population changes in 125 school systems over a five year period revealed that a majority lost white students, there was no "significant" statistical link between the rate of desegregation and the level of immigration. Farley, School Integration and White Flight, in SYMPOSIUM ON SCHOOL DESSEGREGATION AND WHITE FLIGHT 2 (Center for Nat'l Policy Rev., Catholic Univ. & Center for Civil Rights, Notre Dame, G. Orfield ed. Aug. 1975).
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facto a poor school, the schools can be improved and white attitudes changed. All too little attention has been given to making black schools educationally effective. Furthermore, the disinclination of white parents to send their children to black schools has not been lessened by charges made over a long period of time by civil rights groups that black schools are educationally bankrupt and unconstitutional per se. NAACP policies nevertheless call for maximizing racial balance within the district as an immediate goal while supporting litigation that will eventually require the consolidation of predominantly white surrounding districts.

The basic civil rights position that Brown requires maximum feasible desegregation has been accepted by the courts and successfully implemented in smaller school districts throughout the country. The major resistance to further progress has occurred in the large urban areas of both South and North where racially isolated neighborhoods make school integration impossible without major commitments to

25. See, e.g., D. Bell, Race, Racism and American Law 579-83 (1973); Black Manifesto For Education (J. Hawkins ed. 1973); J. Comer & A. Poussaint, Black Child Care 217-18 (1975); A. Davis, Racial Crisis in Public Education: A Quest For Social Order (1975). Quality schooling was available in some black schools even prior to Brown. See, e.g., Sowell, Black Excellence—The Case of Dunbar High School, 35 Pub. Interest 3 (1974). A recent study has uncovered 71 public schools in the Northeast which are effective in teaching basic skills to poor children. Thirty-four of these schools serve student populations that are 50 percent or more black. Sixteen of the schools have black percentages greater than 75 percent. Letter from Ron Edmonds, Director, Center for Urban Studies, Harvard University Graduate School of Education, to author, Feb. 11, 1976 (on file with Yale Law Journal).

26. L. Fein, The Ecology of the Public Schools: An Inquiry Into Community Control 6 (1971): In effect, the liberal community, both black and white, was caught up in a wrenching dilemma. The only way, it appeared, to move a sluggish nation towards massive amelioration of the Negro condition was to show how terrifyingly debilitating were the effects of discrimination and bigotry. The more lurid the detail, the more guilt it would evoke, and the more guilt, the more readiness to act. Yet the same lurid detail that did, in the event, prompt large-scale federal programs, also reinforced white convictions that Negroes were undesirable objects of interaction.

27. Significantly, LDF does not share NAACP’s thirst for bringing more metropolitan school cases. James Nabrit reported that “in our litigation program at the Legal Defense Fund, at least for the short run future, we have no plans to pursue requests for interdistrict relief in the courts. I take the Milliken case to send us a broad signal that such cases are unlikely to succeed.” Conference Before the United States Commission on Civil Rights, Milliken v. Bradley: The Implications For Metropolitan Desegregation 21 (Gov’t Printing Off. Nov. 9, 1974).

28. The standards are contained in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), and Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). In a companion case to Swann, lower courts were directed to make “every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation.” Davis v. Board of School Comm’rs, 402 U.S. 33, 37 (1971). Except where problems of distance and majority black percentages intervene, most courts continue to order plans patterned after the directives in Swann, Keyes and Davis. See, e.g., United States v. School Dist., 521 F.2d 530, 533 n.7 (8th Cir. 1975); Spangler v. Pasadena City Bd. of Educ., 519 F.2d 430 (9th Cir.), cert. granted, 96 S. Ct. 355 (1975).
the transportation of students, often over long distances. The use of the school bus is not a new phenomenon in American education, but the transportation of students over long distances to schools where their parents do not believe they will receive a good education has predictably created strong opposition in white and even black communities.

The busing issue has served to make concrete what many parents long have sensed and what new research has suggested: court orders mandating racial balance may be (depending on the circumstances) educationally advantageous, irrelevant, or even disadvantageous. Nevertheless, civil rights lawyers continue to argue that black children are entitled to integrated schools without regard to the educational effect of such assignments. That position might well have

29. Of the more than 256,000 buses that traveled over 2.2 billion miles in 1971-1972, only a small percentage were used to achieve school desegregation. NAACP Legal Defense and Educational Fund, *It's Not the Distance, "It's the Niggers,"* in *The GREAT SCHOOL BUS CONTROVERSY* 322 (N. Mills ed. 1973).

30. See pp. 482-86 infra; note 1 supra.


32. NAACP General Counsel Nathaniel R. Jones cites frequent statements by Chief Justice Earl Warren to support his organization's position that "the Brown decision was not an educational decision resting in educational considerations. Rather, it was a decision regarding human rights." Denying that the quality of segregated schools is a major priority in NAACP school suits, he writes, "When we bring desegregation suits on behalf of black and white children, we do so because state-imposed school segregation is a living insult, in that it perpetuates that condition which the 14th Amendment prohibits." Comments of Nathaniel R. Jones at Harvard Law School, May 2, 3, 1974, at 1-2, 5 (on file with Yale Law Journal).

Civil Rights lawyer J. Harold Flannery, counsel in the Boston school desegregation case, asserts:

The constitutional objective is, and has always been, to rid this public institution completely of official segregation and discrimination, and comprehensively desegregated schools, i.e., each a microcosm of the district as a whole, is the central indicium of compliance—wholly without regard to educational consequences.


Rhetoric irretrievably linking the relief under Brown to integration does not alter the educational decision made when racial balance remedies are advocated and obtained. Professor Alexander Bickel recognized as much:

Inevitably the Supreme Court [in Swann and its companion cases] imposes a choice of educational policy, for the time being at least, when it orders maximum integration, a choice committing moral, political and material resources to the exclusion of alternate attempts to improve the educational process, and I don't think we can be sure that the choice is the right one everywhere.

Bickel, *Education in a Democracy: The Legal and Practical Problems of School Busing,* 3 HUMAN RIGHTS 53, 54 (1975). In the same article, Professor Bickel suggested that,
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shocked many of the Justices who decided Brown, and hardly encourages those judges asked to undertake the destruction and resurrection of school systems in our large cities which this reading of Brown has come to require. Troubled by the resistance and disruptions caused by busing over long distances, those judges have increasingly rejected such an interpretation of Brown. They have established new standards which limit relief across district lines and which reject busing for intradistrict desegregation "when the time or distance of travel is so great as to either risk the health of children or significantly impinge on the educational process." Litigation in the large cities has dragged on given the paucity of alternative suggestions by either plaintiffs or school board counsel, racial balance remedies are adopted "because there is not much else that a court can do that will have an impact." Id. at 59-60.

Of course, the NAACP position that integration is required regardless of its educational effect allows it to ignore the social science studies pointing to disappointing minority group academic achievement in desegregated schools. See note 31 supra.

33. In Milliken v. Bradley, 418 U.S. 717, 745 (1974), the Supreme Court held (5-4) that desegregation remedies must stop at the boundary of the school district unless it can be shown that deliberately segregative actions were "a substantial cause of interdistrict segregation": Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Id. at 744-45. The Court so held despite the fact that the only effective desegregation plan was a metropolitan area plan. The majority opinion, severely criticized by the dissenting Justices, has also been attacked by legal writers. See, e.g., Symposium, Milliken v. Bradley and the Future of Urban School Desegregation, 21 WAYNE L. REV. 751 (1975); Amaker, Milliken v. Bradley: The Meaning of the Constitution in School Desegregation Cases, 2 HASTINGS CON. L.Q. 349 (1975); Comment, Milliken v. Bradley, Roadblock or Guide Post?: New Standards For Multi-District School Desegregation, 48 TEMPEST L.Q. 966 (1975).

The Milliken standard was followed in United States v. Board of School Comm'rs, 503 F.2d 68 (7th Cir. 1974), cert. denied, 421 U.S. 929 (1975). The district court deemed its interdistrict order necessary because requiring what it termed a massive "fruit basket" scrambling of schools within the city would simply lead to a white exodus from what would become substantially black schools. The court of appeals reversed all orders relating to a metropolitan remedy, but found "white flight" an unacceptable reason for failing to desegregate the city schools. But see Newburg Area Council, Inc. v. Board of Educ., 510 F.2d 1358 (6th Cir. 1974), cert. denied, 421 U.S. 931 (1975), approving in the light of Milliken standards a pre-Milliken order requiring consolidation of city and county school districts on findings that neither had fully complied with the Brown desegregation mandate. After remand of the case, the Jefferson County and Louisville school districts merged under the provisions of state law. The court of appeals subsequently granted plaintiffs a writ of mandamus directing the district court to approve a desegregation plan for the newly created district to take effect for the 1975-1976 school year. Newburg Area Council, Inc. v. Gordon, 521 F.2d 578 (6th Cir. 1975). For similar cases, see Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), aff'd, 96 S. Ct. 381 (1975); United States v. Missouri, 515 F.2d 1365 (8th Cir. 1975), cert. denied, 44 U.S.L.W. 3280 (U.S. 1975).

34. Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1, 30-31 (1971). See also Davis v. Board of School Comm'rs, 402 U.S. 33, 37 (1971) (requiring "every effort to achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation").
for years and often culminated in decisions that approve the continued assignment of large numbers of black children to predominantly black schools.  

II. Lawyer-Client Conflicts: Sources and Rationale

A. Civil Rights Rigidity Surveyed

Having convinced themselves that Brown stands for desegregation and not education, the established civil rights organizations steadfastly refuse to recognize reverses in the school desegregation campaign—reverses which, to some extent, have been precipitated by their rigidity. They seem to be reluctant to evaluate objectively the high risks inherent in a continuation of current policies.

1. The Boston Case

The Boston school litigation provides an instructive example of what, I fear, is a widespread situation. Early in 1975, I was invited by representatives of Boston's black community groups to meet with them and NAACP lawyers over plans for Phase II of Boston's desegregation effort. Implementation of the 1974 plan had met with violent resistance that received nationwide attention. Even in the lulls between the violent incidents, it is unlikely that much in the way of effective instruction was occurring at many of the schools. NAACP lawyers had retained experts whose proposals for the 1975-1976 school year would have required even more busing between black and lower class white communities. The black representatives were ambivalent about the busing plans. They did not wish to back away after years of effort to desegregate Boston's schools, but they wished to place greater emphasis on upgrading the schools' educational quality, to maintain existing assignments at schools which were already integrated, and to minimize busing to the poorest and most violent white districts. In response to a proposal filed by the Boston School Committee, they sent a lengthy statement of their position directly to District Judge W. Arthur Garrity.


37. See note 1 supra.