Chapter Nineteen
LAWYERS AND SOCIAL CHANGE:
INSTITUTIONS

Private lawyers have always tried to change the rules for the benefit of their clients. The ACLU and the NAACP sought to adapt such strategies to unrepresented interests: the poor and disadvantaged, the unorganized, and the inchoate. Public interest law rapidly expanded in the 1970s, when government, foundations, organizations, and individuals provided financial support.

LIBERTY AND JUSTICE FOR ALL:
PUBLIC INTEREST LAW
IN THE 1980s AND BEYOND

Nan Aron

INTRODUCTION

In a 1984 precedent-setting case involving the Erwin nuclear processing plant in Tennessee—a facility that was leaking hazardous PCBs, cyanide, and mercury into the surrounding environment—the Natural Resources Defense Council forced the Department of Energy to comply with federal hazardous waste laws at all national nuclear weapons facilities.

In a significant 1986 case, Meritor Savings Bank v. Vinson, the Supreme Court ruled that businesses may be held liable for sexual harassment by supervisors, even if the company has not been informed of the conduct and the harassment has no economic impact on the victim. The case was championed by public interest groups such as the Women's Legal Defense Fund and the National Women's Law Center.

In 1982, as a result of an administrative petition filed by Public Advocates, Inc., the Food and Drug Administration and the Department of Health and Human Services required manufacturers of infant formula to place pictorial instructions on formula packages. The pictures enabled illiterate parents to prepare the formula and helped eliminate infant health problems associated with its improper use.

In a petition filed with the New York State Attorney General's office, the Center for Science in the Public Interest called on the state to enforce ingredients-labeling laws with regard to fast-food chains. The petition served as the catalyst for announcements by McDonald's and Burger King in 1986 that they would disclose ingredients information in their restaurants. The Attorney General's office described the decision as "unprecedented" and an essential public health measure.

The National Organization for Women (NOW) Legal Defense and Education Fund joined the State of Minnesota in persuading the Supreme Court in 1984 to allow full membership to women in the Jaycees. Before the Court issued its opinion in Roberts v. U.S. Jaycees, the Jaycees had limited women to second-class membership and did not permit them to vote or hold office. The decision set an example for other clubs throughout the country.

A 1984 study by the Children's Defense Fund revealed that one out of three American children lives in poverty. The story received widespread coverage in leading newspapers and magazines, fueling public debate on the welfare of children and mapping out legal strategies for the future.

HISTORY OF PUBLIC INTEREST LAW

The American Civil Liberties Union

Founded as a citizens' lobby designed to call public and governmental attention to violations of the First Amendment rights of pacifists and conscientious objectors during World War I, the ACLU is a direct antecedent of the public interest law firm. From the beginning, it relied on a variety of strategies—lobbying, litigating, grass-
roots organizing, educating the public, and using personal influence on sympathetic leaders—to oppose encroachments on the constitutional rights of individuals in cases primarily involving "sensitive issues of free speech, privacy, and due process."

Working mainly through volunteer attorneys and often limited to an amicus or "friend of the court" role, the ACLU nonetheless has built a semi-autonomous network consisting of local affiliates in every state. The affiliates focus on local disputes that involve important questions of federal law and social policy, and this emphasis on national issues has become a major characteristic of subsequent public interest law organizations. The ACLU has also promoted the idea that government needs a watchdog, an outside citizen's organization to monitor its functions and guard against corruption and abuses of power.

*The NAACP Legal Defense and Education Fund*

In the 1930s, the NAACP, founded two decades earlier, took a significant step in the evolution of public interest law. It initiated a "comprehensive campaign against the major disabilities from which Negroes suffer in American life—legal, political, and economic." The NAACP developed a legal strategy, a long-term litigation campaign that concentrated on eliminating racial segregation in education, employment, and housing based on the notion that the "separate but equal" doctrine was unworkable because separate facilities are inherently unequal. The NAACP/LDF, established as a separate entity in 1939, worked in concert with its parent organization to win the precedent-setting school desegregation decision, *Brown v. Board of Education*, before the Supreme Court in 1954. Brown was used to build a chain of decisions that eventually eliminated the legal basis for segregation in public facilities.

These legal victories in turn fostered a political climate that permitted the establishment of a federal Commission on Civil Rights in 1958 and the passage of the Civil Rights Act of 1964, which created a statutory basis for the federal enforcement of equality in education, employment, and public accommodations.

Another landmark case, *NAACP v. Button* (1963), removed potential legal obstacles to the practice of public interest law. The Supreme Court rejected attempts by the State of Virginia to prevent attorneys working with the NAACP/LDF from seeking out and providing representation on questions with clear political importance. *Button* made it possible for civil rights groups and later public interest lawyers to seek out clients and openly use litigation as a part of a broad strategy of reform. It also made it easier for subsequent public interest law centers to treat the law strategically.

To organize and perform its work, raise funds, and institutionalize victories, the NAACP/LDF developed an organizational model that today is used in one form or another by virtually all public interest law endeavors. The main features of this model are as follows:

Like legal aid societies, the organization uses a full-time salaried staff of highly qualified lawyers rather than relying on volunteers or counsel hired on an ad hoc basis.

Unlike legal aid societies, but like the ACLU, the organization does not handle routine "service" cases in which the matter is of concern only to those who are directly affected by the question at issue.

The organization rejects a reactive or defensive posture in representing the client's interest, instead assuming an active role in the strategic accomplishment of goals. Litigation serves as a primary tool for initiating changes in the way in which political and social institutions deal with minority interests.

The organization depends for its primary financial support upon a widespread national membership of concerned citizens that gives small sums to support the work of the organization, even though it serves a very special, relatively poor interest group. The organization rejects the simple accumulation of big cases in favor of a series of incremental victories that create a favorable legal climate while fostering a public concern that may convert victories in the courts into a change in public policy.

The organization works through a self-generated network of cooperating private attorneys to follow up victories achieved to convert theoretical statutory rights into practical substantive benefits.

*Expansion of Public Interest Law*

The late 1960s and the early 1970s saw a great proliferation of public interest law activity. This growth was fostered by the increase in foundation support; previously the philanthropic com-
munity had been hesitant to venture into granting funds to law-related programs. Foundations began to fund civil rights organizations and a whole spectrum of consumer, environmental, and multi-issue public interest law firms. The willingness of philanthropists to support organizations that proposed to use the law to advance new causes was crucial to the rapid development of new public interest law centers such as the Center for Law and Social Policy, the Center for Law in the Public Interest, the Citizens Communication Center, the Institute for Public Representation, the Natural Resources Defense Council, Public Advocates, Inc., and the Sierra Club Legal Defense Fund.

**A PROFILE OF PUBLIC INTEREST LAW BASED ON THE 1983-84 SURVEY**

Despite a hostile political climate and unusually adverse economic circumstances over the past few years, public interest legal organizations as a whole kept apace. An extensive survey of 158 groups carried out by the Alliance for Justice in 1983-84 shows, in general, an upward trend in public interest legal activity since surveys in 1975 and 1979. The number of groups has increased, the number of staff attorneys has grown, and there is greater variety in the issues these organizations address, the types of clients they serve, and the strategies they employ.

Of the 158 centers surveyed, 41 percent were classified as "cause-defined" and 59 percent as "client-defined." Multi-issue and civil rights/civil liberties groups were the most numerous of the cause-defined type, accounting for 13 percent and 10 percent, respectively, of all organizations surveyed. Centers concentrating on environmental issues made up about 8 percent of the survey group. Among the client-defined groups, those serving the poor were the most numerous, accounting for about 15 percent of all centers surveyed. Groups serving the disabled constituted 9 percent; women, 10 percent; children, 8 percent; and prisoners, 4 percent. The survey demonstrates that public interest legal centers are now more likely than in past years to focus on a specific issue or type of client.

Up to 1969, there were only 23 public interest law centers, staffed by fewer than 50 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. The 1970s saw tremendous growth in the number of public interest legal organizations, with 111 groups established, an average of 11 per year. Since that time, the rate of growth has slowed considerably, with only nine new groups forming between 1980 and 1984.

Between 1969 and 1975, the first groups serving consumers, minorities, the elderly, prisoners, workers, and gays and lesbians emerged. Since 1975, there has been an increase in the number of organizations concerned with protection of the disabled and with international human rights. The number of multi-issue groups such as the Center for Law and Social Policy (CLASP), the Center for Law in the Public Interest (CLIP), and New York Lawyers for the Public Interest also grew during this period.

Public interest law centers remained concentrated in the Northeast: 62 percent of the groups in the 1983-84 survey were headquartered there, almost the same proportion as reported in the 1975 survey. Twenty-three percent were located in the West, 8 percent in the Midwest, and 7 percent in the South. The cities with the most organizations were Washington, D.C. (45 groups), New York (30), San Francisco (13), Los Angeles (nine), and Boston (nine). Still, about one-third of the centers, many of them working at the state or regional level, practiced outside these urban centers in locales as diverse as Eugene, Oregon; Walthill, Nebraska; Austin, Texas; and Gainesville, Florida. A significant change from 1975 was that the proportion of groups headquartered in Washington, D.C. fell from 44 to 29 percent.

The annual budgets of those surveyed ranged from $16,000 to $10 million, with most organizations (64 percent) in the $100,000 to $999,999 range. Only four groups, the American Civil Liberties Union (ACLU), the NAACP Legal Defense and Education Fund (NAACP/LDF), the Natural Resources Defense Council, and California Rural Legal Assistance, reported 1983 budgets of $4 million or more; the largest, the ACLU, had an annual budget of $10.7 million.

The number of full-time public interest attor-
neys increased from fewer than 50 in 1969 to 600 in 1975, to 906 in 1984. But this increase was the result of the inclusion of new centers, not a sign that organizations were expanding. Indeed, the proportion of organizations with more than five full-time attorneys on staff shrank from 46 percent in 1975 to 28 percent in 1984; 38 percent had three to five lawyers, and 33 percent employed one or two. Poverty and civil rights firms employed the largest number of full-time attorneys. The median number of attorneys was four, again indicating that the large offices of such groups and the ACLU, the NAACP/LDF, and the Natural Resources Defense Council were the exceptions rather than the rule. Civil rights centers accounted for 10 percent of all organizations but employed 17 percent of all attorneys; poverty law firms, representing 15 percent of the survey group, employed 25 percent of the total number of lawyers. At the other end of the scale, women's law organizations constituted 8 percent of the total but employed only 4 percent of the attorneys.

Much of the legal work of public interest organizations was performed not by the full-time staff attorneys but rather by cooperating attorneys. Over three-fourths of the groups called upon outside counsel to handle some of their litigation, with more than half of these attorneys working on a voluntary basis. Outside attorneys performed 28 percent, on average, of the legal work of surveyed groups. The Women's Legal Defense Fund, for example, retained approximately 60 volunteers in its Emergency Domestic Relations program and offered them periodic training sessions and a manual on defending battered spouses. Some of these attorneys worked for government or corporations, while others were recent law school graduates seeking public interest experience.

For several decades the NAACP/LDF has operated a cooperating attorney program which retains 40 to 60 lawyers each year. These attorneys pursue civil rights cases in cooperation with the Fund, either as volunteers or as part of their private practice. Cooperating lawyers are brought together at a yearly conference to discuss current civil rights issues. In addition, NAACP/LDF's Capital Punishment Program augments its small staff with a network of well over 100 volunteer attorneys handling cases on behalf of death row inmates. The Sierra Club Legal Defense Fund has approximately 60 lawyers in its outside counsel program.

In addition to staff and outside attorneys, almost 1,500 law students participated annually in internship programs, about twice the 1979 number. Some of these internships are in-house, while others are clinical legal education programs operated in cooperation with public interest firms. These interns continue to be an important legal resource for many organizations. Some, such as the Lawyers' Committee for Civil Rights Under Law, pay their interns a stipend during the summer.

The 1983–84 survey identified 906 full-time staff attorneys working for public interest legal organizations. About one-fifth were experienced lawyers who had been practicing 12 years or more. On the other hand, more than one-third had been at the bar for five years or less, and many were just entering the field. Public interest attorneys received comparatively modest salaries. Almost half earned $30,000 a year or less, and another one-fourth earned between $31,000 and $40,000. Only one-tenth earn $50,000 or more. In dramatic contrast, a recent graduate starting out in a large New York firm in 1984 could have expected to receive a salary of $50,000.

The financial support of individuals, through donations and membership dues, was the largest single source of funding, accounting for 31 percent of all income. (Of this figure, 20 percent came from charitable contributions and 11 percent from membership dues.) Foundation grants were the second most important source of income, supplying 24 percent of total revenues, while the federal government supplied only 18 percent. Together, these three sources accounted for 73 percent of aggregate income. The remaining 27 percent was supplied by the following: court-awarded attorneys' fees (9 percent); corporate donations (3 percent); state and local government grants (3 percent); sales of materials (2 percent); Combined Federal Campaign contributions (1 percent); and income from a variety of sources, such as interest on bank accounts, speaker fees, and luncheons and conferences (7 percent). Church contributions, funds from the private bar, lawyer trust
fund accounts, and loans made up the remaining 2 percent of total income.

The overall funding picture showed a 51 percent increase in total resources between 1975 and 1983, from $70,107,500 to $105,588,110. However, the increase in aggregate funding has not kept pace with the growth in the number of groups, from 86 in 1975 to 158 in 1983. The budget of the average group in the 1983–84 survey was $776,383, a drop from the 1975 average of $815,203. Between 1975 and 1979, the number of groups increased by 28 percent, while overall funding remained static, resulting in a decrease in the budget of the typical group. However, between 1979 and 1983, the increase in aggregate funding outpaced the growth in number of groups, and average group income increased 23 percent. The most dramatic change was in the amount supplied by sources other than the “big three” (foundations, government, and public contributions): alternative funding increased from $2.2 million in 1975 to over $105 million in 1981. For the typical center, which experienced a decline in the amount of funding from traditional sources, the amount supplied by other sources increased from approximately $33,000 to over $200,000.

Foundation support for public interest law remained constant between 1975 and 1983. However, because the number of groups increased by 58 percent during the same period, the average group actually experienced a 16 percent decline. With the election of Ronald Reagan in 1980, government funding for social and legal services was slashed. It rose slightly between 1975 and 1979 and then plummeted between 1979 and 1983, the aggregate by 12 percent and the average group by 29 percent. Attorneys’ fees awarded by the courts to prevailing parties in public interest cases provided a substantial amount of income for public interest legal centers. In the 1983–84 survey, 98 groups reported applying for awards, and 67 actually collected fees, most of them computed at market rate, totaling over $9.2 million. This represented a 200 percent increase over the $3 million collected in 1979. Nearly half of all attorneys’ fee awards in the 1983–84 survey went to civil rights and minority defense organizations, a higher proportion than in 1979. Poverty groups received almost 10 percent of the total, ten times more than they did in 1979. Senior citizens’ and children’s advocates also won more fee awards.

Social Change Strategies

During the 1960s and early 1970s, public interest law organizations relied on forums such as the courts and administrative agencies to protect the rights of unrepresented persons and groups and to enforce public health and civil rights statutes. During the past two decades, environmental, civil rights, consumer, children’s, and senior citizens’ organizations have lobbied Congress to enact or strengthen public health and civil rights laws. The classic stereotype of the Washington lobbyist who engages in influence peddling and runs up huge entertainment bills while supposedly “working” social contacts has been joined by a new, less monied, but more serious breed. Once accustomed to playing a behind-the-scenes role, preparing legal memoranda for use by citizen lobbies, public interest organizations are themselves taking up legislative advocacy.

Veteran public interest lawyers are now widely recognized for their expertise in environmental, civil rights, and consumer law. They are regularly consulted by members of Congress and congressional staff for information and advice. Over the years such interaction has put some of the “tools of the trade” of the lobbyist—an extensive set of personal contacts on the Hill, knowledge of who the decision-makers are, and an understanding of the policy-making process—in the hands of public interest lawyers. For the public interest community, lobbying is largely an aspect of coalition work. Some formal coalitions, such as the Leadership Conference on Civil Rights, are supported by dues-paying member organizations to coordinate lobbying strategies on civil rights issues.

Public interest centers often serve as the legal arm and adviser to coalitions. The National Senior Citizens Law Center (NSCLC), for example, works with the American Association of Retired Persons, the National Council on the Aging, the National Council of Senior Citizens, and other organizations in the Leadership Council of Aging Organizations, a coalition that has emerged as a powerful voice for the elderly. Similarly, the Institute for Public Representation
served as coordinator and chief legal adviser to the 55-member Voting Access Coalition that lobbied in support of the Voting Accessibility for the Elderly and Handicapped Act. Passed in 1984, the Act requires all polling places and a reasonable number of voter registration facilities to be accessible to elderly and disabled voters.

Unusual alliances may develop in the course of such legislative advocacy. For example, in 1981, the steel industry and environmental groups jointly asked a Senate committee to act quickly on legislation to give businesses three additional years to meet clean air standards. The proposal allowed companies to spend antipollution monies on modernizing plants, rather than on installing pollution control devices on outmoded equipment. In another unusual alliance, this time in the regulatory arena, the Environmental Defense Fund (EDF) joined several large oil companies in 1982 in opposing efforts by the Environmental Protection Agency (EPA) and small oil refiners to raise the acceptable level of lead in gasoline. Together, EDF and the oil companies presented scientific studies showing that airborne lead can cause brain damage in children and persuaded EPA to forgo changes in the existing regulations.

Legislative advocacy and litigation often go hand in hand. Cases won in the courts may be in danger of being overturned by laws later enacted by Congress. For example, in 1970 the Center for Law and Social Policy successfully challenged in the courts the construction of the Alaska gas pipeline. After this victory, Congress passed a bill permitting construction to continue. On the other hand, cases lost in the courts may spur remedial congressional action. In 1985 the National Wildlife Federation unsuccessfully challenged in court the Department of Interior’s sale of coal leases in Montana and Wyoming at less-than-market rates. The Federation argued that this practice of underselling had resulted in the loss to the federal treasury of millions of dollars and was threatening precious natural resources with destruction. By bringing these practices to light, the court action, although unsuccessful, sparked a furor in the press and focused public attention and Congressional scrutiny on the government’s coal leasing program.

Members of Congress consulted with the Federation in designing legislative action to stop the sales. A commission was established to evaluate the government’s coal leasing program and a moratorium on future sales was passed.

The publications of legal groups provide advocates with information that is not easily obtainable elsewhere and present it in a format that laypersons can understand and use. For example, the Citizen Handbook on Groundwater Protection, published by the Natural Resources Defense Council (NRDC), gives citizens and public officials background material on current issues so that they may act as informed advocates for better groundwater protection policies. Another NRDC publication, Children’s Art Hazards, alerts teachers and parents to the health hazards posed by commonly available art materials. The Mental Health Law Project, the Food Research and Action Center, and other legal services support centers compiled a handbook on federal and state entitlement programs for use by operators of charitable soup kitchens, emergency shelter providers, and other advocates for homeless people.

A broad range of newsletters, from Youth Law News of the National Center for Youth Law to Nutrition Action Health Letter of the Center for Science in the Public Interest, keeps members and friends abreast of an organization’s current activities, upcoming government actions, and emerging issues in the field. Sometimes these newsletters become important tools in mobilization efforts. For example, in a 1982 issue of its newsletter, Update, the Mental Health Law Project described a newly adopted Social Security Administration policy that terminated the benefits of many mentally ill people by classifying them as capable of supporting themselves through paid employment. The story drew a tremendous response from newsletter readers, who told the project about cases of benefits being terminated under this dubious rationale. Some of these newsletter story contacts eventually became plaintiffs in a successful challenge brought by the project to what it termed a “clandestine policy” to change eligibility criteria. A federal appeals court in New York ordered the federal government to restore benefits that had been denied to 50,000 mentally ill people in the
state, and a few months later Congress passed the Disability Benefits Reform Act of 1984, which forbade such cutoffs.

The Women's Legal Defense Fund receives more than 6,000 calls a year for legal assistance. Equal Rights Advocates in San Francisco has instituted an advice and counseling program to respond to the hundreds of calls each year from women who believe they have been victims of sexual discrimination and need information and guidance. Some organizations have installed hotlines to handle the volume of public inquiries. The Center for Public Representation in Madison, Wisconsin, developed the Medigap hotline, which counsels senior citizens on the purchase of supplemental health insurance. The program proved so popular that the Board on Aging and Long Term Care was founded to continue it. The Natural Resources Defense Council maintains a toll-free Toxics Hotline, which provides information about hazardous substances to anyone concerned about possible exposure or seeking accurate information on toxic substances.

Litigation remains the crucial weapon in their arsenal. The ability to sue is the great equalizer among parties to a public interest law case. Even if no lawsuit is brought, it is often the record of past litigation successes that puts “teeth” into these other strategies. Much of public interest litigation aims simply to enforce existing laws. The vast bulk of environmental and consumer cases deal with day-to-day issues such as monitoring public health statutes, and even a substantial portion of civil rights litigation is of the watchdog variety: keeping businesses operating within the law, or trying to make federal and state regulatory agencies perform their functions.

Public interest litigation complements the legislative process in several ways. Judicial decisions that follow the passage of new legislation often serve to interpret its provisions. Even when unsuccessful, a public interest case may dramatize and publicize loopholes or injustices in existing law, thus spurring legislators to rethink public policy and pass new legislation to address the needs raised in trial.

The evolution of the Voting Rights Act of 1975 illustrates this process. In 1982, a major civil rights case, City of Mobile v. Bolton, contested Alabama's election system as discriminatory and therefore illegal. The trial court upheld the claim of discrimination and the Court of Appeals affirmed the decision, but the Supreme Court reversed it. The justices argued that, in order to prevail, the civil rights plaintiffs would have had to prove an intent to discriminate under Section II of the Voting Rights Act of 1965. As a direct result of this ruling, Congress clarified its policy in its reauthorization of the Voting Rights Act in 1982, stating that both intentional and de facto voting discrimination were illegal. A similar process led to the passage of the Pregnancy Discrimination Act in 1982. A large coalition of women's labor, civil rights, and abortion groups joined together to persuade Congress to pass a bill reversing the Supreme Court's decision in General Electric v. Gilbert, which had denied pregnant women the same protections guaranteed other working women under Title VII of the Civil Rights Act of 1964.

Public interest court cases not only raise social issues, they also bring out the facts involved and stimulate public debate involving all concerned parties. Through discovery proceedings, public interest lawyers can obtain information that the ordinary citizen would have great difficulty in procuring, including on-the-record interviews with public officials, relevant documents of public agencies, and records of actions taken by participants. Often, the expertise of public interest groups reveals obscure facts.

Bringing hidden conditions to light was crucial in the three-year court case in which the New York Civil Liberties Union and the Mental Health Law Project struggled to improve conditions in Willowbrook State School, a scandal-ridden institution for the mentally retarded. Courtroom evidence of neglect, injuries, and even deaths in this home for mentally retarded children and adults sufficiently aroused public consciousness to cause state officials to work toward a consent decree to ameliorate conditions for residents. The well-publicized case also educated the public about the rights of retarded people to a normal life as possible and about the importance of providing care in smaller, community-based facilities.

The petition brought before the Nuclear Reg-
ulatory Commission by Ellyn Weiss for the Union of Concerned Scientists significantly increased public awareness. In 1977, six months after the Three Mile Island incident, the petition focused public attention on the inadequacies of the evacuation plan for communities around the Indian Point Nuclear Power Plant in New York. It pointed out that Indian Point was within 50 miles of New York City, a location chosen in the 1950s, before siting standards were written, and at a time when "the implicit assumption was that there would be no nuclear power plant accidents," recalls Weiss. The New York Public Interest Research Group joined the case, contacting local groups and public officials. A total of 150 witnesses—local government officials, police, school officials, and citizen groups—testified at the hearing, an unprecedented number for the Nuclear Regulatory Commission. Although the petition failed in its attempt to shut down the Indian Point plant, better emergency planning procedures were adopted, and community consciousness of nuclear safety issues was raised.

Another example of the public education role of litigation involved the New York Lawyers for the Public Interest's (NYLPI) successful case to restore the jobs of ten mentally disabled Postal Service workers. Employees of ten years' standing, they were fired when the managers who had hired them were replaced by new supervisors. NYLPI sued, the cases were settled out of court, and the postal workers were rehired. According to former director Jean Murphy, NYLPI took full advantage of the public education aspects of the case, making it into "an opportunity to do some consciousness-raising about disabled people" with both union and Equal Employment Opportunity Commission officials.

Taking major public interest cases to court is costly and growing more so. Indeed, it is difficult to predict the total costs of a case at the outset. The NAACP Legal Defense and Education Fund has found that the costs of civil rights cases, which involve a great deal of fact finding and discovery, have tripled over the past five years. To litigate an average employment discrimination case cost $65,000. The price of litigation, however, can go much higher: the costs of one Kansas desegregation case rose to $800,000.

In litigation, the focus of the court proceeding frequently shifts from whether something should be done to address the grievance of the plaintiff to more complex questions of what remedies might be appropriate or what compensation would be adequate for an entire class of people affected. However, working out such an affirmative decree may be time-consuming and complex.

Perhaps the greatest frustration of litigation for those who practice public interest law is that "individual victories require constant monitoring so that they don't become paper victories" resulting in very little change. The difficulties experienced by the Prison Project in persuading courts to issue remedial orders, particularly when the public is hostile or apathetic, extend to the entire civil rights community. Advocates for deinstitutionalization have witnessed an even more ironic turn of events. The movement achieved great legal victories in obtaining the release of many mental patients from prison-like institutions. However, without the establishment of sufficient community-based care facilities, many former mental patients may go untreated and experience severe relapses, often ending up destitute and homeless.

**Discussion Questions**

1. Why did public interest law emerge when and where it did? Although the United States was slow in institutionalizing a national legal aid program, and remains niggardly in funding, compared to other advanced capitalist nations, it has always been preeminent in public interest law. What explains this?


3. What resources can public interest law mobilize? What are its greatest weaknesses? How do you explain its victories? Defeats? To what extent can the models of the ACLU and NAACP be generalized? What are the relative advantages and disadvantages of public and private interest lawyers? How do public interest law and legal aid compare with respect to: goals, strategies, struc-
ture, limitations, and vulnerabilities? Should legal aid emulate the use by public interest law of volunteer attorneys? Law students?

Why did public interest law expand in the 1960s and 1970s? What are its prospects today? How could public interest law expand its resources? What new constituencies have sought to use public interest law? How has their success compared with earlier efforts?

4. Public interest law is not the exclusive domain of those on the left of the political spectrum. Conservative groups have challenged environmental regulation as takings and affirmative action as discriminatory. What are the relative advantages of "liberal" and "conservative" public interest law firms and campaigns?

**Suggested Reading**


That the form is politically neutral is shown by Lee Epstein, *Conservatives in Court* (1985). On the phenomenon in Britain, see Jeremy Cooper and Raajeev Dhavan (eds.), *Public Interest Law* (1986).

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The previous chapter examined legal aid and public defender offices from the perspective of the lawyers themselves. Now we turn to the structural limits on what government-funded lawyers can achieve. Unlike privately funded public interest lawyers, most of their cases are routine and repetitive; both kinds of lawyer operate under restrictions that derive from their funding. But there are also structural limitations on what they could accomplish, even with adequate funding and fewer strings attached.

**LAW WITHOUT POLITICS: LEGAL AID UNDER ADVANCED CAPITALISM**

Richard L. Abel

The core of legal aid consists of three main areas: reproducing labor power, disciplining capital and the welfare bureaucracy, and restraining state coercion.

Family law dominates all legal aid programs. It represents as much as 90 percent of the work of private practitioners under judicature schemes, and even in staffed offices it frequently is the single largest topic. This is neither surprising nor likely to change. Indeed, legal aid lawyers who complain about such dominance are both ahistorical and ungrateful, for civil legal aid might never have been created but for the dramatic rise in the divorce rate in the last half century. In part, the mix of cases simply results from legal aid lawyers’ inability to perform several of the functions that preoccupy private practitioners. They cannot transfer, protect, or invest property because their clients have none, and they cannot redress civil wrongs because of the jealousy of private practitioners. The dominance of family matters also reflects the growing role of the state within the domestic sphere. All societies must devise ways to support those members who are not directly involved in production because they are too young, too old, or too disabled, or are caring for such a person, and who therefore cannot appropriate the resources they need. Most societies rely on kinship obligations for this purpose, but private relationships no longer perform that function adequately under advanced capitalism. The state therefore creates a variety of legal rights and remedies so that “nonproductive” members of society may claim support from those held responsible: the elderly from their descendants and especially wives and children from husbands and fathers. Because the party who is socially, economically, and politically weaker is asserting a claim against one who is stronger, the state also furnishes the claimant with legal representation. As long as a sexual division of labor continues to characterize the performance of essential tasks of nurturance, state intervention will be a necessary adjunct of social reproduction. There can be no doubt that state support for the legal representation of wives and mothers makes a significant contribution toward equalizing the conflict between estranged spouses.

Yet the limitations of this function also must be recognized. Although I do not wish to underrate the importance of redressing sexual inequalities, providing women with legal representation in family matters at most affects a horizontal or intraclass transfer of resources without altering class differences. Indeed, dividing the already inadequate resources of working-class families between two households may aggravate income inequalities. Furthermore, the state, not the wife (or descendant), actually seeks redress from the defaulting husband (or ascendant) because it is the state that has advanced welfare benefits and wants to recover them. Finally, there is some danger that alleviating a wife’s dependency on her former husband through the intervention of a (usually male) lawyer may subtly reinforce sexual stereotypes. These last two reservations require further thought. What is the desirable relationship between spouses and between parents and children after divorce? How could women assert legal claims without relying on lawyers?

A second function of legal aid is to discipline both capital and the welfare bureaucracy. Because market failure arguably is more common in the provision of goods and services to the poor, the state has sought to regulate capital, for instance, in transactions involving rental housing or credit. And because regulations are not self-enforcing, lawyers must assert claims on behalf of the poor. But it is the state that responds to market failure, primarily by taking direct responsibility for redis-
tributing income and for distributing goods and services in kind. The bureaucracy that delivers these benefits is vast and highly decentralized. Although the federal government finances welfare, it relies on state and local officials, private philanthropy, entrepreneurs, and professionals to deal with the ultimate recipients. Legal aid is just one of many mechanisms—including internal hierarchy and external review by ombudsmen, politicians, and the media—that promote adherence to rules. Certainly legal aid lawyers secure real and significant economic benefits for their clients: better housing, greater security of tenure, less usurious credit, relief from debts, higher welfare benefits, etc. Perhaps as important, they help poor people assert these rights with greater dignity. Yet, again, there are serious limitations. Lawyers enforce existing private and public law rights. They may be able to compel landlords to render an apartment habitable, but they cannot make them lease it at a rent poor people can afford; they can prevent lenders from discriminating on grounds of race or gender, but they cannot make them lend to people who are bad credit risks by reason of their poverty. They can require the welfare system to grant benefits mandated by law, desist from unconstitutional discrimination, and observe due process, but they cannot determine the amount and content of welfare entitlements. As in family matters, there is some danger that what is gained for one poor person may be taken from another.

There also are problems with the limited goals lawyers can pursue. First, since they cannot assert every legal claim the poor conceivably might make against capital and the state, the disciplinary effect of those they make must depend on some theory of deterrence: the belief that the particular capitalist or public official whose conduct is challenged will observe the law in the future and others will conform for fear of being challenged. But this assumption is implausible and unsubstantiated. Joel Handler has analyzed incisively what he calls the “bureaucratic contingency” and has demonstrated the numerous obstacles to implementation of rules. Clearly the legal order—statutory, regulatory, or judicial—is just the beginning of the enforcement process, not the end. The likelihood is infinitely small that subsequent deviance by that actor or another will be sanctioned. To the extent that legal aid lawyers seek to discipline public rather than private bureaucracies, they cannot even mobilize the profit motive as a source of leverage. Legal aid lawyers cannot translate the promises of the regulatory/welfare state into reality because these promises never were intended to be fulfilled. From the point of view of both capital and the state, paying off would be far too expensive—an enormous vertical transfer of surplus that would reduce capital accumulation and fuel inflation. Therefore, when poor people begin to assert legal rights with greater frequency (even if nothing like that of their middle-class counterparts), we hear complaints about “litigiousness” and a “rights explosion.” Legal rights under capitalism are luxury goods, which are cheapened when everybody has them.

Resisting state coercion is the third major task of legal aid. Just as the high visibility of coercion in criminal prosecutions explains why the accused is the first “litigant” to be granted legal aid, so it also explains why criminal defense attracts dedicated practitioners. The assertion of rights within the family, regulatory enforcement, and the claim of welfare benefits rarely generate comparable drama. Every criminal defense reenacts the bourgeois revolution in miniature by asserting the citizen’s right under the rule of law to be protected against state coercion. When that right is denied or begrudged—when success is most difficult, for example, in countries that repudiate liberal ideals or curtail them for defendants unpopular by reason of race, political belief, or the acts of which they are accused—then defense is truly heroic. Indeed, at certain moments, collective identification with and defense of an accused assumes revolutionary significance.

Yet the actual practice of criminal defense rarely exhibits these qualities. The lawyer may long for a principled confrontation that tests the state’s commitment to formal justice, but clients usually want an acquittal or lenient sentence. Lawyers actually pursue and obtain the same gains for their criminal clients that they seek for their civil clients: a somewhat better deal than the client would get without a lawyer. Although in some countries legal aid represents the majority
of accused (compared with a much smaller fraction of civil litigants), it does so only at trial, not during the preliminary interaction with police or during the subsequent incarceration. Furthermore, just as due process and equal protection can tolerate inadequate family budgets, poor housing conditions, and low welfare benefits, so they can tolerate long sentences, atrocious prison conditions, and a convict population composed disproportionately of ethnic minorities.

Thus far I have dealt with the strengths and weaknesses of legal aid as they pertain to the particular tasks that legal aid lawyers commonly perform. Some of the limitations are generic. Contrasting the conditions under which lawyers act for individual paying clients provides one method of uncovering the limitations. By virtue of the professional monopoly that lawyers have secured and defend, they are able to charge very high fees. They can extract those fees only when the amounts at stake are sufficiently large to justify and absorb such expense. Thus, lawyers make their services useful, indeed indispensable, in situations concerning the aggregate resources of many people (i.e., a business) or those resources that an individual has accumulated over time. Lawyers are involved in the preservation and transfer of property (both \textit{inter vivos} and inter-generational), including residences, trusts, marital dissolution, and estate planning and administration; on the other hand, they rarely handle residential tenancies because the property interest is temporally limited rather than aggregated and thus insufficiently valuable. Similarly, lawyers assert and defend personal injury claims that aggregate labor value (lost wages), experience outside work (pain and suffering), and medical expenses over time, but lawyers are less involved in workers’ compensation cases, in which payments are periodic and there is no remedy for pain and suffering. As long as the profession exercises control over the market for legal services, the cost will disproportionately outweigh the monetary value of poor people’s problems. Therefore, it is inevitable that private lawyers will be reluctant to undertake legal aid work for the poor, and the state will be equally reluctant to spend scarce resources on salaried lawyers.

That poor people react to law rather than use it facilitatively, just as they react to life, also constrains legal aid. I do not mean to invoke the justly criticized concept of a culture of poverty. I am arguing, instead, that the poor use their only resource—poverty—as a source of strength. In politics they are apathetic; this simultaneously undermines democratic ideology and conveys the implicit threat that their vote, if ever exercised, would significantly alter the configuration of power. This fear is evidenced by Republican opposition to Democratic efforts to expand voter registration rolls. In the market, poverty signifies underconsumption and the problems this creates for capitalist economies; when the poor do buy, they rely on credit, threatening to default on particular debts and declare bankruptcy for the totality. In law, their modal response again is exit. The legal system would collapse if the poor claimed all the rights to which they are entitled. In the meantime, they respond to legal demands with passive noncompliance—for example, failing to pay alimony and support, or repay welfare benefits, or appear in response to a summons—knowing that the cost of enforcement usually outweighs the benefit to the claimant.

Even if lawyers were prepared to work for poor clients at price levels commensurate with the matters at stake and clients were eager to employ them, legal aid still would encounter significant obstacles. Law and lawyers are most effective in mediating interaction among strangers, severing existing relationships, and shaping arm’s-length transactions in anticipation of future rupture: consider property transactions, contract formation or breach, torts, and inheritance. When people are involved in an ongoing relationship they typically use political, economic, social, or psychological means to adjust it and to resolve conflict. But legal aid clients lack those other sources of influence and are forced to use law in ongoing relationships: within the family (before it has been formed, while it is intact, and after dissolution) and between landlord and tenant, creditor and debtor, state and welfare beneficiary. Perhaps most important, legal aid operates almost entirely within the sphere of reproduction and exchange—the family, the market, and public distribution of goods and services—leaving rela-
tions of production wholly untouched. Most of those eligible for legal aid are not productive workers; among the few who are, many look to unions, not legal aid, for support in workplace struggles. Thus, legal aid contributes to an image of legal equality in the only sphere where such a myth is credible, just as money conveys the appearance of freedom and equality in the market, and the vote does so in politics, while all three preserve unaltered the central source of inequality—relations of production.

If legal aid is limited in what it can do, it also is constrained by fears of success shared by both ends of the political spectrum. Conservatives resent the fact that law, once the exclusive province of the elite, now is claimed by the masses. Radicals attack law in the name of their own communitarian vision. The diverse and often antagonistic ideas inspiring this latter movement are embodied in the creation of “alternatives” to legal and judicial institutions, which offer the poor therapy, negotiation, and mediation in place of rights and adjudication in family conflict, landlord-tenant disputes, small-claims courts, the administration of welfare benefits, tort claims, and criminal prosecutions.

The enthusiasm for alternatives expresses not only an aversion to both conflict and the legalistic assertion of rights (if the distaste is highly selective) but also the pressures of an ever-increasing and apparently limitless caseload. Of course, case overload is not peculiar to legal aid or even the legal system; it afflicts all public-sector delivery of goods and services. In the private sector, increased demand signifies success, stimulating a responsive increase in supply through the reinvestment of retained surplus, technological innovation, enhanced productivity, and the entry of new producers. In the public sector, increased demand portends disaster. The satisfaction of some demands stimulates the expression of others, by both new clients seeking conventional services and old clients seeking new ones. But this demand does not elicit a comparable increase in funding; Welfare budgets almost never grow as fast as the rate of inflation. Nor do gains in productivity make up the difference. All service providers have been slow to adopt new technology, and public legal service providers have been slower still. The constant pressure on welfare programs to display heightened “efficiency” through lower unit costs can be satisfied only by lowering quality. But lawyers as professionals seek intrinsic rewards from their work and therefore resist such a solution. This tension between the state’s obsession with “efficiency” and professional concern for “quality” is an inescapable predicament of welfare services.

Given the structural constraints on legal aid—a series of tasks that must be performed within the inherent limitations of public funding—does the experience of the last half century offer any lessons about how programs should be structured? I will suggest three. A number of commentators have argued that legal aid would be strengthened by extending its eligibility ceiling to include the middle class. Welfare programs that serve a middle-class constituency as well as the poor attract broader political support and thus enjoy higher levels of funding; compare public education (especially the tertiary sector) or social security in the United States, or the National Health Service in Britain, or highways anywhere, with food stamps, or public housing, or AFDC in the United States, or prisons anywhere. The legal aid programs that have secured the most generous funding are those that serve a majority of the population, as in Britain, the Netherlands, and Sweden. These programs also may elicit and sustain greater lawyer enthusiasm because the clientele is more diverse, lawyers find it easier to identify and communicate with middle-class clients, and the problems of the latter appear more significant because they involve larger amounts of money. Yet there are dangers associated with this strategy, whether it succeeds or fails. The middle class always consumes more than its share of public services, diverting resources away from the poor. On the other hand, if the middle class views the quality of public services as inadequate, it will buy private substitutes (as is happening in American education and British medicine), quickly changing a supportive constituency into rebellious taxpayers. Because the middle-class clientele no longer appears to be truly “needy,” the program may be attacked as inviting abuse by “welfare scroungers.” Finally, to the extent that the legal problems of the poor diverge from those
of the middle class, lawyers who serve both may gain variety at the expense of specialized expertise in poverty.

A second strategic choice opposes salaried lawyers to judicare programs. Full-time legal aid lawyers offer higher-quality services, more closely attuned to the particular concerns of poor people, with greater potential for structural change, at lower unit costs. If the political climate were sympathetic to further expansion of their budgets, I would oppose any diversion of public resources to private practitioners. But given the conservative turn in a number of leading capitalist states, I think a qualified case can be made for a mixed system. Clients seem to prefer private lawyers for many of their most common legal needs, such as divorce and its aftermath, residential land transactions, wills and estates, and criminal defense. Even if the basis for this preference is suspect—private lawyers are not technically more competent but develop a better "bedside manner" because they enjoy lower caseloads and have an economic incentive to seek business—I see no reason to deny private practitioners the chance to compete with staffed offices for clients. Their success, to whatever extent, would free salaried lawyers from the routine drudgery and case overload that contribute to burnout and allow them to work on matters with greater potential for structural change. A mixed program also would enable salaried lawyers who leave staffed offices for private practice to continue representing poor clients, thereby retaining their accumulated expertise. Such a program also stands a better chance of enlisting the organized legal profession's support; indeed, some concession to judicare may be the price of the higher eligibility levels advocated above, which otherwise would engender intolerable jealousy among private practitioners. Perhaps because judicare potentially involves the entire legal profession, it is subject to fewer political constraints than staffed offices. Allowing private practitioners to advertise and thus generate the mass clientele that permits economies of scale may alleviate the tension between price and quality. Judicare harnesses professional self-interest in creating demand for legal services to the task of expanding representation of poor clients.

Yet the dangers and drawbacks of judicare should not be overlooked. If private lawyers handle the kinds of legal problems the poor share with the middle class, their availability may reduce the urgency to provide additional services for problems unique to the poor. Furthermore, the routine services furnished by private practitioners are unlikely to identify recurrent problems that might best be handled by law reform litigation, lobbying, or community organization. Regardless of the relative quality of the legal services offered by private and salaried lawyers, clearly there is less control over the former: little hierarchical supervision or selectivity in hiring and even less scope for the play of market forces. There is real danger, therefore, that low levels of remuneration combined with freedom to advertise will produce judicare mills that offer low-quality services while defrauding the state. If judicare makes private lawyers into legal aid supporters, it is a tenuous alliance. Most practitioners earn too little from the program to have a significant financial stake in its funding. On the other hand, those specializing in legal aid matters are concerned only with judicare; they see staffed offices as irrelevant, at best, and rivals when the two delivery systems compete for business. Private lawyers reimbursed by legal aid may suffer fewer political constraints, but they seem to make little use of their greater freedom to challenge the state. Though private lawyers may have an economic incentive to enlarge the scope of legal services rendered under legal aid, there is no guarantee that these additional activities will benefit their clients.

A third innovation also seeks to increase the legal resources of the poor. In the United States today, more than half of all legal services are devoted to advising and representing businesses rather than individuals. In countries with judicare systems, the vast majority of private practitioners do little or no work under the legal aid scheme. In countries with staffed office programs, salaried lawyers comprise less than one percent of the profession. Furthermore, most of them leave the program after a few years. This minimal involvement in legal aid contrasts sharply with findings that a substantial proportion of law students—considerably more than
half according to some studies—choose a legal career because they want to help people, especially the disadvantaged and oppressed. They abandon this ideal only because they cannot find jobs in which to pursue it. Some have attributed these altruistic motives to the temporary imbalance between supply and demand for lawyers in the 1960s, combined with the political ferment of that period, but the commitment to legal aid has a much longer history. Law students have volunteered to work in its offices throughout this century, and I see increasing social commitment, undoubtedly connected with the greater proportions of women, minority, and mature students.

How can we tap this reservoir of idealism? First it is necessary to accept burnout as an inevitable concomitant of full-time salaried legal aid work: high caseloads, great emotional intensity, and repeated defeats. Legal aid programs share these characteristics with other occupations displaying high turnover, such as elementary and secondary school teaching, nursing, and social work (although these traditionally female occupations also inflict on their work forces the tension between job and family). Widespread turnover is not an unalloyed benefit, for it undermines the accumulation of expertise. But the greater dedication of law students and recent graduates more than offsets their relative inexperience. Therefore, I would like to see law schools require every student to take a clinical course in poverty law; even the reluctant may be influenced by what is likely to be their first contact with the legal problems of poor people. A postgraduate internship should follow, in a staffed office legal aid program or a private practice that handles legal aid work under a judicare scheme and meets minimum requirements of quantity and quality; this should be mandatory or at least encouraged by strong incentives (for instance, loan forgiveness). The requirement is amply justified by the 19 years of free or heavily subsidized education that every law graduate has received. Of course, most lawyers would leave such a practice at the end of their internship. But some who otherwise never would have considered this work might join staffed offices or continue to represent poor clients under a judicare scheme. All lawyers would acquire greater sensitivity to the legal problems of the poor, inevitably making these lawyers more sympathetic to legal aid programs.

And the enormous cohort of students and new entrants to the profession involved in these programs would increase the resources of legal aid severalfold.

Legal aid cannot end patriarchy within the family before or after divorce, but it can alter the balance of power between men and women. It cannot transform capitalist relations of production, but it can regulate the market and discipline the welfare state. It can mitigate, if not eliminate, the pain of the criminal process. Legal aid will be most effective in promoting these vitally important, though limited, goals if it draws upon the best features of the national programs we have examined. Eligibility ceilings should be raised to include the bulk of the population, thus ending the segregation of the poor and creating a politically powerful legal aid constituency. Programs should combine staffed offices with judicare: the former should be increased whenever there is the political will; if it is lacking, the latter should be expanded in order to recruit the legal profession as an ally against conservative administrations eager to cut state funding. The idealism that inspires lawyers everywhere, because it is inherent in law, should be mobilized by making exposure to legal aid an intrinsic part of professional socialization.

**DISCUSSION QUESTIONS**

1. How should we understand the emergence of legal aid, first as a charitable activity, then as a municipal enterprise, and finally as a function of national government? Can we explain why each phase occurred when it did? Why does the state ever subsidize lawyers to challenge it? Why does capital? What limitations would you expect to arise from this contradiction? What are the interests of the several actors in the legal aid enterprise: private philanthropy, the three branches of government, capital, labor, social movements, individual clients, various kinds of lawyers, bar associations?

How should we understand attacks on and limitations of legal aid? Could it be eliminated entirely? How can it resist partisan efforts to
restrict lawyers' functions? Attacks in the 1970s prohibited legal aid lawyers from handling cases involving desegregation, abortion, and selective service, encouraging strikes, pickets, boycotts, or demonstrations, seeking to influence legislation, initiatives, or executive orders, or participating in voter registration or community organization. In 1988 President Reagan’s chairman of the Legal Services Corporation deplored that his grantees were...

...expanding the “reproductive freedom” of children, arguing that children have a “constitutional right of privacy to engage in voluntary sex.” Other centers have participated and/or co-counseled in cases with organizations such as the American Civil Liberties Union and Planned Parenthood…. one support center challenged [Florida’s] requirement that high school seniors pass a literacy exam before receiving a diploma…. Legal services attorneys have fought the Department of Labor’s H-2 worker program because it allegedly permits immigrants to take farm jobs from U.S. citizens. A crop of L.S.C. lawyers are fighting research in California to improve farm production.

Reagan proposed zero funding for the Corporation in each of his eight years in office. In 1996 legal aid lawyers were forbidden to challenge reapportionment or the census, represent prisoners, defend evictions from public housing based on drug use, or file class actions. The budget was cut 30 percent. At the behest of an LSC lawyer, a New York judge has ruled that Congress cannot control how LSC offices use non-LSC funds. Valerie Bogart, who had brought a class action on behalf of thousands of homeless seeking accessible hearings to appeal the denial of Medicaid and welfare benefits, protested: “I was told by Congress that I could not be the lawyer for my own clients anymore....” How do you expect legal aid to fare during periods of fiscal crisis? What claims can it make for scarce public resources?


3. On the attack, see *Los Angeles Times*, A5 (2.15.93), B3 (9.1.95); *New York Times*, A28 (3.31.95), A1 (9.5.95), A9 (9.14.95), A6 (10.7.95), A12 (10.11.95), A14 (1.6.96), A16 (7.16.96), A14 (8.1.96), A11 (12.27.96).

2. What difference does legal aid actually make to: women, children, criminal defendants, welfare recipients, tenants, consumers, workers, the undocumented, the homeless? What are the contributions, and limitations, of legal challenges to poverty, exploitation, discrimination, and governmental abuse? Under what circumstances can legal aid lawyers change rules? Implement rules? obstruct government? What can they do proactively? Reactively?

3. How could legal aid be strengthened against political attack? Would you favor an extension of eligibility? A mix of salaried lawyers and “judicare” reimbursement of private practitioners? Compulsory service as a condition of entrance to the profession?

SUGGESTED READING


