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In Defense of an Embattled Mode of Advocacy: An Analysis and Justification of Public Interest Practice

Supporters of the Administration plan [to eliminate federal funding of the Legal Services Corporation] . . . see it as a way of striking a blow against activist lawyers who, in their view, stir up unnecessary trouble. Mr. Reagan and other critics, from time to time, have accused legal aid attorneys of being too quick to pursue their own vision of the public interest.¹

Under the guise of helping the poor, these taxpayer-funded social engineers have promoted militant extremism, graduated state income tax, student protests, racial quotas in employment and education, increased government welfare programs, Indian land claims, homosexual demands, rent strikes and boycotts of private businesses. . . . [The program's] purpose and its impact is to change and, in effect, to make law. No other face can be put on it.²

Public interest law³ emerged as a significant force in the legal profession in the late 1960s and early 1970s. Although the total remained

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This Note was written before current attacks on the Legal Services Corporation reached their peak. Thus it does not directly analyze the details of the administration's proposals.


³. The term "public interest" law was first applied in the mid-1960s to the work of legal groups making efforts to secure legal services for those unable to obtain them through normal channels. See Cooke, *Public Interest Law and Lawyers for the Public Interest*, 34 REC. N.Y. CITY B.A. 6, 7 (1979). Today, the NAACP Legal Defense Fund, Inc., the American Civil Liberties Union (ACLU), the Public Citizen Litigation Group, and the Environmental Defense Fund are regarded as typical "public interest" law groups. See D. CLOVIS & N. ARON, *SURVEY OF PUBLIC INTEREST LAW CENTERS* app. B (1980); B. WEISBROD, J. HANDLER, & N. KOMESAR, *PUBLIC INTEREST LAW* 76-79 (1978).

It is difficult to identify the unique features of public interest practice. For a typical definition, see D. CLOVIS & N. ARON, *supra*, at 1 n.** ("non-profit, tax-exempt group that devotes a large share of its program to providing legal representation to otherwise unrepresented interests in court or administrative proceedings involving questions of important public policy"). Some of the typical structural characteristics of traditional public interest law groups—for example, nonprofit status—are shared by recently formed organizations that pursue very different goals. See id. at 6 (describing recent growth of business-oriented "public interest" legal groups); *The Naderites of the Other Side*, N.Y. Times, Sept. 30, 1979, § 3, at 7, col. 1 (describing "free-enterprise-oriented" groups).
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small,4 the number of public interest lawyers and legal organizations increased significantly during this period.5 Public interest lawyers made important contributions to civil liberties, civil rights, environmental, and consumer protection law.6 In the late 1970s and early 1980s, however, the fragility of public interest practice became startlingly apparent. The growth of public interest practice virtually ceased,7 financial support began to falter,8 and the critics of public interest law became increasingly strident. Adversaries directed many of their attacks at the methods used by public interest lawyers.9

Current attacks on public interest law are attributable, at least in part, to public interest lawyers’ failure to develop an adequate theoretical justification for their work. In particular, they have failed to explain some of the most controversial techniques of public interest representation. This Note seeks to develop a coherent justification for the use of activist methods by the public interest bar. It explores the systematic inequalities among individuals and groups in their ability to take advantage of the

4. Ambiguity in the definition of public interest practice, see note 3 supra, makes the phenomenon difficult to quantify. Various estimates of the number of public interest lawyers and legal groups have been given. See, e.g., D. CLOVIS & N. ARON, supra note 3, at 2 (Council for Public Interest Law’s survey in 1979 and 1980 found 117 public interest law centers employing 711 attorneys); COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE 81-82 (1976) (92 public interest firms identified; 86 that completed survey employed 589 lawyers); Marshall, Financing Public Interest Law Practice: The Role of the Organized Bar, 61 A.B.A.J. 1487, 1488 (1975) (250 public interest lawyers among 355,000 members of legal profession).

5. See D. CLOVIS & N. ARON, supra note 3, at 6 (between 1969 and 1975, 78 new public interest law centers opened); B. WEISBROD, J. HANDLER, & N. KOMESAR, supra note 3, at 50 (61 public interest law firms established between 1969 and 1975).


7. See D. CLOVIS & N. ARON, supra note 3, at 6 (only 23 public interest law centers opened between 1975 and 1979; only one in 1979).

8. Between 1975 and 1980, the total income of public interest law organizations increased by only two percent in real terms, from $40,076,000 to $52,803,115. D. CLOVIS & N. ARON, supra note 3, at 12. But the number of centers also increased from 86 to 110 during the same period. Id. As a consequence, many public interest law centers are now in a precarious financial position. See id. at 10, 12 (wealthiest 15 groups receive approximately half of total support, and 60% of public interest law centers have income below $300,000).

Contributions from major charitable foundations have declined. See id. at 18 (Ford Foundation, largest foundation contributor to public interest law, has reduced support, and Rockefeller Brothers Fund, fourth largest contributor, has announced plans to phase out support); COUNCIL FOR PUBLIC INTEREST LAW, supra note 4, at 238-42 (describing decline in foundation support for public interest law). Economic conditions, rather than weaknesses in the theoretical justification of public interest practice, were undoubtedly the primary cause of this decline in financial support.

legal system and argues that many of the apparently problematic aspects of public interest practice should be understood as legitimate efforts to reduce these inequalities.

I. Public Interest Law: Current Criticisms and Justifications

The activities of public interest lawyers are subject to increasing criticism. Although current justifications provide a starting point for understanding the role of the public interest lawyer, they do not explain many of the most distinctive aspects of public interest practice. In order to maintain a strong public interest law movement, public interest lawyers must develop a new theoretical foundation for their work and, in particular, for their techniques of representation.

A. Criticisms of Public Interest Practice

Public interest representation has been the subject of widespread criticism, generally directed not at the goals of public interest lawyers, but rather at the manner in which they pursue them. First, critics attack public interest lawyers for taking action, allegedly on behalf of their clients, when their clients may not even perceive either a legal or a nonlegal problem and have not requested assistance. Public interest lawyers have been accused of "cooking up" or provoking legal controversies. They have also repeatedly been attacked in the courts for soliciting clients.

Second, critics allege that there are no mechanisms to ensure that public interest lawyers' activities will benefit their clients and that, in fact, they often do not do so. Public interest lawyers often define a group of individuals, for example the poor people in a particular region, as their

10. Although a desire to frustrate public interest lawyers' pursuit of their goals may be the underlying motive of many critics, cf. Federal Program of Legal Aid Faces Conservative Challenge, N.Y. Times, Nov. 25, 1980, § B, at 13, col. 3 (conservative organizations seek elimination of federal legal services program), several of the most thoughtful critics have themselves been public interest lawyers. Two former staff attorneys with the NAACP Legal Defense Fund, Inc., have written articles criticizing civil rights lawyers' litigation strategy. See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976); Clark, The Lawyer in the Civil Rights Movement—Catalytic Agent or Counter-Revolutionary? 19 KAN. L. REV. 459 (1971).


12. See, Taylor, supra note 1, at 3, col. 1 (noting attacks on "activist lawyers" who "stir up unnecessary trouble"). But cf. Note, The New Public Interest Lawyers, 79 YALE L.J. 1069, 1125 n. 91 (1970) (public interest lawyers do not want judges to think cases are "cooked up by a social reformer attorney").

13. See, e.g., In re Primus, 436 U.S. 412 (1978) (disciplinary action against ACLU-affiliated attorney for referring woman required to undergo sterilization as condition of receiving welfare benefits to other ACLU attorneys); NAACP v. Button, 371 U.S. 415 (1963) (action against NAACP for soliciting plaintiffs for school desegregation litigation).

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client group. Critics suggest that the interests of such a group are too heterogeneous to be represented by a single organization of lawyers. Critics also argue that public interest lawyers ignore or even exploit the fact that their clients often lack the resources and skills needed to express their preferences or to voice their complaints effectively either individually or as a group.

Public interest lawyers are ordinarily not financially dependent on their clients and the clients often cannot afford other forms of representation. Thus market forces do not ensure that the lawyers provide legal assistance that satisfies their clients. Some critics suggest that public interest lawyers serve the interests of their financial supporters to the detriment of their client group. Other critics argue that they attempt to further their own ideological convictions. Public interest lawyers have also been accused of being principally concerned with receiving publicity and being unaware of or indifferent to their activities' actual impact on their clients and on society.

14. See, e.g., Bonfield, Representation for the Poor in Federal Rulemaking, 67 Mich. L. Rev. 511, 522 (1969) (poor are not “monolithic or homogeneous group with its own democratically elected representative structure”; representation is “necessarily . . . imperfect . . . artificial and imposed from above”); Stewart, The Reformation of American Administrative Law, 88 Harv. L. Rev. 1667, 1765 (1975) (interests to be represented in large unorganized class of persons not readily identifiable and may conflict); cf. Simon, Homo Psychologicus: Notes on a New Legal Formalism, 32 Stan. L. Rev. 487, 503 (1980) (organized bar's opposition to representation of groups of disadvantaged individuals implicitly assumes people in groups are “isolated individual[s] with personal interests which would be betrayed by any effort to achieve power by joining with others”).


16. See D. Clovis & N. Aron, supra note 3, at 16 (public interest lawyers' activities almost entirely financed by sources other than their clients).

17. See Cahn & Cahn, supra note 15, at 1036 (public interest lawyers have monopoly of legal services available to their clients).

18. See Bell, supra note 10, at 490 (civil rights lawyers' need to satisfy financial supporters affects their choice of actions); Clark, supra note 10, at 469 (same). Financial supporters are more articulate, better motivated, more easily identified, and fewer in number than members of the client groups. The supporters may wish to further the best interests of the clients, but their conception may differ from that of the clients. Middle-class blacks and whites, for whom school integration worked well, support litigation to desegregate urban schools, although there are greater difficulties involved in integrating inner-city schools and although lower-class blacks would prefer to improve the quality of their schools. See Bell, supra note 10, at 489.


20. See B. Weisbrod, J. Handler, & N. Komar, supra note 3, at 81-89 (public interest lawyers may pursue publicity and contact with elites as substitutes for income); cf. Lawyers, Clients & Ethics 101 (M. Bloom ed. 1974) (class actions are popular form of litigation in legal aid clinics partly because of "capacity to provide large sources of narcissistic gratification").

21. Cf. Edmonds, Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits, 3 Black L.J. 176, 178-79 (1973) (only small minority of clients of civil rights attorneys have access to attorneys); Note, supra note 12, at 1124-25 (public interest lawyers often have little contact with members of classes, including named plaintiffs).

22. Public interest lawyers have been criticized for disregarding the adverse social and economic...
B. Current Justifications and Their Shortcomings

Current justifications of public interest law fail to address these criticisms of the manner in which public interest lawyers represent clients; they explain only the basis for selecting clients. Public interest lawyers assert that their mission is to serve individuals and interests that have traditionally been underrepresented in the legal system. Some try to advance specific substantive goals, such as equality in the distribution of wealth or protection of an abstract right to free expression. Others, particularly environmental lawyers, practice law on behalf of otherwise unorganized groups with an interest in certain collective goods. Finally, some public interest lawyers provide low-cost or free legal services to individuals who are too poor to obtain private legal assistance.

These current justifications are incomplete. They assert that legal needs are not being met, but fail to recognize the complex nature of these needs and the methods of representation that are required to meet them.

consequences of their activities. See, e.g., Oakes, Saving the Web of Life, N.Y. Times, Dec. 28, 1979, § A, at 27, col. 5 (noting criticisms that environmental law groups tie up court system, interfere with implementation of energy policy, and contribute to slow economic growth); cf. Bellow & Kettleson, The Mirror of Public Interest Ethics: Problems and Paradoxes, in PROFESSIONAL RESPONSIBILITY 248 (1978) (public interest lawyers have special duty to restrict adverse, external effects of aggressive advocacy). But indifference to the external costs of litigation is not peculiar to public interest lawyers. See Oakes, supra (industries fighting environmental restrictions create at least as many external costs as public interest lawyers).

23. See, e.g., D. CLOVIS & N. ARON, supra note 3, at 1 n.**; COUNCIL FOR PUBLIC INTEREST LAW, supra note 4, at 3.


25. See Bellow & Kettleson, supra note 19, at 340 n.16 (some public interest lawyers seek to advance collective preferences of consumers and environmentalists). Legal service is a collective good when the benefits, spread across a group of people, exceed the cost, but no individual has a sufficient stake in the controversy to obtain legal assistance on his own. Free-rider problems and the transaction costs of organizing the affected group prevent the group from paying collectively for the desired legal service. See generally M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) (general analysis of collective goods). Several authors have attempted to fit all public interest practice into the collective goods paradigm. See, e.g., J. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM 5-14 (1978).

26. See COUNCIL FOR PUBLIC INTEREST LAW, supra note 4, at 7. Providing low-cost or free legal services is the primary function of legal services lawyers. Although these lawyers are not ordinarily considered public interest lawyers, some of them operate in essentially the same fashion as traditionally defined public interest lawyers. See A. Pollikoff, Support Center Study (Feb. 16, 1976) (unpublished report in Legal Services Corporation library) (describing "back-up" centers funded by Legal Services Corporation); cf. Note, Depoliticizing Legal Aid: A Constitutional Analysis of the Legal Services Corporation Act, 61 CORNELL L. REV. 734, 734-35 (1976) (legal services attorneys controversial because do not simply respond to individual clients' demands). Legal services attorneys also complement the work of traditionally defined public interest law groups, for example, by enforcing legal rights established by public interest lawyers. This Note considers all legal services lawyers to be public interest lawyers, but it is primarily concerned with their self-conscious attempts to serve the poor as a class.

27. Mayhew criticizes the narrow use of the term "legal needs" in analyses of the distribution of legal services, which enumerate "needs for legal services and opportunities for beneficial legal action . . . as if they were so many diseases or injuries in need of treatment." He explains that
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In particular, they do not take account of the fact that legal problems exist continuously during the life of any individual or group and hence require continuous, active legal assistance. Nor do these analyses explore either the obstacles that often prevent an individual from perceiving that she has a legal problem for which she could use legal assistance, or the resulting need for "solicitation" by public interest lawyers.28

Public interest lawyers’ failure to expand upon current justifications for public interest practice and to address their critics may have weakened the public interest movement. The following sections explore the complexity of legal needs and the ways in which differential access to lawyers affects individuals’ ability to use the legal system. This analysis provides a more complete justification for public interest practice and answers many of the criticisms of public interest lawyers.

II. The Nature and Distribution of Legal Goods

This Note defines legal goods29 as those advantages created or defined by legal rules and conferred through legal assistance. Legal goods include judicial determinations in favor of an individual in a dispute with another, as well as material benefits awarded by the government. People may also obtain legal goods without formally becoming involved in the legal system, for example, by learning to obtain something they desire without incurring legal sanctions.30 Legal goods are complex; they are neither discrete in time nor always perceivable by laymen. As a result, differential access to lawyers creates significant inequalities in persons’ ability to secure legal goods.

A. The Complexity of Legal Goods

To obtain the maximum benefit from the system of legal goods, individuals and organizations must be continuously aware of alternatives and...
consequences and must be able to plan their actions over time in light of their knowledge. A person who knows in advance the legal rules that apply to a particular situation can more easily avoid litigation, reduce the costs of litigation, and prepare for litigation that will produce a benefit. Even in the absence of judicial proceedings, perceptions of legal rules constantly influence the behavior of individuals and organizations. For example, a person’s perception, whether accurate or not, that he may violate a legal rule and possibly suffer sanctions may deter him from taking an action that would advance his preferences.

Despite the importance of legal goods, individuals and organizations often fail to perceive these goods. Obstacles to perception arise from the great number and detail of legal rules, the frequent inconsistencies between legal rules and social norms, and laymen’s lack of the critical perspective necessary to identify legal goods.

People may not perceive legal rules and thus may fail to obtain legal goods simply because the body of potentially relevant law is so vast and complex. Most laymen do not have time, resources, or incentives to learn how to find legal rules or to develop skill in manipulating them. Although most people are familiar with many broad legal principles, laymen are unlikely to be familiar with all the detailed rules in any field. Many of these rules are adopted to implement general principles, but they cannot be deduced from knowledge of these principles alone.

In addition, people may sometimes fail to perceive violations of their legal rights because some legal rules are neither based on nor consistent with social norms. These rules may be autonomous intellectual con-

31. Cf. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 90-92 (1977) (laymen discover particular rules in ad hoc manner and lack time or inclination to learn how rules fit together). It is not economically rational for most people to develop legal expertise in order to handle their personal legal problems. However, it is rational for specialists—lawyers—to acquire this knowledge and skill. Cf. id. at 93 (division of labor implies that lawyers view society differently than laymen view it).

32. Cf. R. LANE, POLITICAL IDEOLOGY (1962) (case studies of laymen’s basic understanding of central principles of society). But see Williams & Hall, Knowledge of the Law in Texas: Socioeconomic and Ethnic Differences, 7 LAW & SOC’Y REV. 99, 113-14 (1972) (individuals surveyed correctly answered an average of only 12 to 19 out of 30 questions about basic legal rules).

33. For example, an individual may understand the general principles of contract that prevent a landlord from withholding a security deposit unless the tenant damages the leasehold. But a tenant may not know that his landlord must return his deposit with interest and within a certain time period after termination of the tenancy or that if the landlord withholds part of the deposit he must give the tenant a written statement itemizing the damages. See, e.g., CONN. GEN. STAT. § 47a-21(d), (West Supp. 1981).

34. For example, a subrule may reflect a political compromise involving nonlegal considerations or an arbitrary choice among several reasonable alternatives.

35. This Note uses the term “social norm” to mean a generally accepted practice or pattern of expectations. Obviously, social norms are not always sharply defined nor are they uniform across social groups and settings. See Llewellyn, What Price Contract?—An Essay in Perspective, 40 YALE L.J. 704, 723 n.45 (1931) (“habit, or custom, or folk way, or practice, or institution is not a line-concept, but a belt concept, with an important range of variation”).
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structures, formed using theoretical principles, analytic techniques, and data that are not accessible to many laymen. As a result, laymen cannot easily predict either the exact content of such rules or how they ought to be applied. Laymen's knowledge of law may also be hindered by the application of legal rules that have been developed in and thus reflect the norms of one social setting, for example prisons, to other situations in which the norms are different, such as mental hospitals.

There is, of course, interaction between legal rules and social norms. When legal rules protect people in some manner or entitle them to some benefit, expectations are created and made legitimate. In addition, particularly in criminal law, social norms are sometimes adopted directly as legal rules and often indirectly influence the development and interpretation of legal rules. Once a social norm enters the legal system or a legal rule creates a social norm, however, the norm and rule begin to diverge.

36. For example, starting from utilitarian first principles, lawmakers might systematically analyze the economic effects of applying tort liability rules and adopt the rule that produces the optimal allocation of resources. See G. CALABRESI, THE COSTS OF ACCIDENTS (1970). Ackerman describes this type of reasoning as "scientific policymaking." See B. ACKERMAN, supra note 31, at 10-20. According to Ackerman, a scientific policymaker analyzes social situations using "categories that do not depend for their validity on their connection with the language used in everyday life." Id. at 194 n.15. This type of legal reasoning is "esoteric" and does not merely reflect "existing social practices." Id. at 177. Although Ackerman admits that lawyers employ several modes of thought, id. at 110, he argues that use of scientific policymaking is increasing. Id. at 114, 185.

The analytic techniques used to generate autonomous legal rules may not be self-consciously adopted by law makers; instead, they may reflect professional habits of thought shaped by the processes of lawmaking or the common background, needs, and interests of lawmakers. See Isaacs, How Lawyers Think, 23 COLUM. L. REV. 555, 558 (1923); Llewellyn, supra note 35, at 720 n.43. Lawyers' common interest in maintaining the status and independence of their profession may explain why they cultivate autonomous legal rules. See id. at 719 n.40; Tushnet, Perspectives on the Development of American Law: A Critical Review of Friedman's 'A History of American Law', 1977 Wis. L. REV. 81, 88-91.

37. See, e.g., Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), vacated on other grounds, 422 U.S. 563 (1975) (grounding mental patients' right to treatment on comparison of confinement of prisoners and mental patients). Public interest lawyers have actively sought to expand the rights of mental patients using law developed in the prison context. See MENTAL HEALTH LAW PROJECT, BASIC RIGHTS OF THE MENTALLY HANDICAPPED 115-18 (1975) (describing Donaldson litigation and similar cases).

38. See Denvir, supra note 6, at 1143; Tapp & Levine, Legal Socialization: Strategies for an Ethical Legality, 27 STAN. L. REV. 1, 4-5 (1974) (growing "penetration" of law increases its importance as socializing force).

39. In criminal law, in which the sanctions that flow from a finding of wrongdoing tend to be most severe, courts explicitly attempt to prevent legal rules and social norms from diverging. See, e.g., Lambert v. California, 355 U.S. 225, 229 (1957) (unconstitutional to punish convicted felons for not registering upon entering state because such action does not violate community norms).

40. See B. ACKERMAN, supra note 31, at 88-112 (defining "ordinary observation" as lawmaking that derives legal rules from dominant social practices); Bohannan, Law and Legal Institutions, in 9 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 75 (D. Shils ed. 1968) (law results from "double institutionalization" of custom).

41. In the words of Karl Llewellyn:

Law must grow fixed, in most of its parts, and relative to most of the ways of society apart from law... [T]he legal obligation ceases to function merely as an extra insurance that engagements will be performed... [a]nd comes to function also as a source of risk. If the other party appeals to law, then to the extent that the obligation is viewed by layman and by
A third reason that individuals cannot always recognize legal goods is that they lack the necessary critical perspective. Perception of legal goods requires an act of evaluation. Judges evaluate situations from a disengaged and comparative position, and many lawyers approximate that stance, functioning as critical legal observers. By contrast, most people have limited resources and pressing needs that prevent them from evaluating their situations carefully. Furthermore, limited experience outside their own social situations limits individuals’ abilities to compare their situation to others’ situations and may limit their ability to apply abstract legal standards to their own experiences. As a result, laymen often fail to abstract from and organize their experiences in a way that allows them to perceive legal goods.

B. The Distribution of Legal Goods

The complexity of legal goods affects persons’ ability to exploit the legal system. Because unassisted laymen have a limited ability to perceive legal goods, differences in access to legal assistance create significant differences in individuals’ and organizations’ relations to the legal system.

1. Organizations and Individuals With Continuous Access to Legal Assistance

law-man differently, I shall either get less, or be held to more, than the customary understanding calls for. . . . [S]uch a divergence, such an incursion of risk, is a constant tendency as soon as legal technique becomes specialized, as soon as officials begin looking for their solutions not directly at the life before them, but indirectly at the deposits of their own or their predecessors’ prior dealings with similar situations.

Llewellyn, supra note 35, at 713-14.

42. See, e.g., G. HAZARD, ETHICS IN THE PRACTICE OF LAW 141 (1978) (corporation’s general counsel “routinely reviews all major transactions”).

43. Cf. P. FREIRE, PEDAGOGY OF THE OPPRESSED 48, 94, 100 (1970) (oppressed people fail to take revolutionary action because of difficulty of engaging in critical thinking about their situation).

44. See L. MAYHEW, LAW AND EQUAL OPPORTUNITY 164 (1968) (system based on individual discrimination complaints “predicate[s] law enforcement on the limited experiences and selective perspectives of a segmented and isolated population”); Carlin, Howard, & Messinger, Civil Justice and the Poor: Issues for Sociological Research, 1 LAW & SOC’Y REV. 9, 74-75 (1966) (“comparatively ‘narrow world’” of poor people limits their ability “to objectify events and experiences and to deal with abstract issues”); cf. P. FREIRE, supra note 43, at 48, 94 (“Submerged in reality, the oppressed cannot perceive clearly the ‘order’ which serves the interests of the oppressors whose image they have internalized.”) Moreover, personal experience alone may not produce enough data to reveal some legal violations; for example, violations of antidiscrimination or antitrust laws. Evidence of violations of such laws must be actively sought. Mayhew found that community and civil rights organizations bring stronger discrimination complaints than individuals because their complaints are based not on one individual’s experience, but on a comparison of many persons’ experiences. See L. MAYHEW, supra, at 179-80, 189.

45. See L. MAYHEW, supra note 44, at 197 (concluding from study of complaints filed with Massachusetts Commission Against Discrimination that “personal experience is too difficult to interpret to provide an adequate indicator of the presence or absence of discrimination”).

46. The following typology of actors is borrowed in large measure from Galanter, Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change, 9 LAW & SOC’Y REV. 95 (1974).
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It is both feasible and rational for people and organizations to establish ongoing relationships with lawyers when two conditions are satisfied. First, because legal assistance is expensive, the individual or group must be wealthy. Second, the potential benefits from continuous legal assistance must exceed the costs. The person or entity must encounter either highly repetitive legal goods or high-stakes legal goods that can be identified in advance or whose timing can be controlled. A large corporation is the paradigmatic example of this type of client. Repetitive legal transactions, retail sales for example, lead to economies of scale in the acquisition of ongoing legal advice. Predictable or controllable large-scale legal problems, such as tax payments or intercorporate contracts, justify hiring lawyers to help plan and execute the corporation's business over an extended period.

Individuals and organizations with continuing access to lawyers obtain more legal assistance and a qualitatively different type of legal assistance than others receive. Instead of seeking discrete pieces of advice or short-term representation in individual proceedings, they generally purchase assistance in bulk by having lawyers in-house or on retainer. These lawyers engage in long-range, comprehensive legal planning. Their perspective influences the formation of the clients' initial aspirations. Ongoing legal counsel also identify legal benefits for their clients. They follow the development of the law and think about new ways in which it can be

47. Because corporations are organizations, already structured to collect information from many sources, it is easier for them to integrate lawyers into their decision-making processes. In addition, lawyers' participation in corporate decision processes does not involve the same loss of personal autonomy and intrusion into private life as does providing the same type of assistance to individuals. Cf. Galanter, supra note 46, at 106 n.23 (organizations are less averse to litigation than individuals because members of organization who have contact with opposing party can be insulated from litigation by division of labor).

48. Compare Galanter, supra note 46, at 98 (routine litigation creates economies of scale) with Abel, Socializing the Legal Profession, 1 LAW & POL'Y Q. 5, 15-17 (1979) (when people encounter many dissimilar legal goods involving small stakes, such as those arising from consumer transactions, and sporadic, unpredictable legal goods involving high stakes, such as personal injury claims, cost of continuous assistance is likely to exceed benefits).


50. See J. DONNELL, THE CORPORATE COUNSEL 30 (1970) (in 1967, 61% of all business corporations and 91% of corporations with more than 25,000 employees had full-time legal staffs); Galanter, supra note 46, at 114 (repeat players buy services in "larger quantities" and "in bulk"); Legal Costs Spur In-House Staffing, N.Y. Times, May 16, 1980, § D, at 1, col. 4 (in 1979, 50 corporations had at least 50 attorneys in-house; A.T. & T. had largest staff with 902 lawyers, followed by Exxon with 384, and General Electric with 302).

51. Cf. Reich, The New Property, 73 YALE L.J. 733, 765 (1964) (one danger of increasing amount of "government largesse" is that groups with expertise acquire more largesse than others).

52. See Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK 229 (1967) (Prudential Insurance Co. lawyers screen every bill introduced in national and state legislatures). Businesses in
applied. Finally, they help their clients identify and select among alternative courses of action and act as their agents in a wide range of situations outside the courtroom.\textsuperscript{33} In this highly interactive relationship,\textsuperscript{34} the client and the lawyer act in tandem to identify legal goods.

Some groups with continuing access to lawyers, large corporations for example, may receive more legal assistance because they confront more legal rules than most individuals.\textsuperscript{35} Nevertheless, the qualitatively different type of assistance they receive gives them an advantage over people without ongoing assistance in the exploitation of all types of legal goods.\textsuperscript{36} They have a more accurate understanding of which actions will result in legal penalties and can therefore plan their behavior to minimize the restraining force of the rules and the possibility of incurring sanctions.\textsuperscript{37} These clients make more innovative demands on the legal system. Upon advice of counsel, they can alter their behavior when it is necessary to exploit particular legal benefits and protections.\textsuperscript{38} In short, individuals and

effect subsidize the publication of looseleaf services and newsletters upon which their lawyers rely to remain knowledgeable about law affecting business. Few individual clients can afford such expensive legal services.

53. See G. Hazard, supra note 42, at 141-42 (describing “intimate” relationship between general counsel and corporate client); Dodge, Evolution of a City Law Office: Office Flow of Business (pt. 2), 1956 Wis. L. Rev. 35, 48 (in 1950, firm primarily representing business organizations spent 59.7% of its time counseling, 31.6% negotiating, 0.6% involved with the clients’ organizations, and only 8.1% litigating).

54. Even if a formal, ongoing lawyer-client relationship has not been established, actors who repeatedly obtain legal assistance have more interactive relationships with their lawyers than people who receive legal assistance only occasionally. Lawyers tend to be familiar with the types of legal problems encountered by those who repeatedly obtain legal assistance. In addition, lawyers may ethically solicit former clients if the “advice is germane to the former employment.” ABA Model Code of Professional Responsibility, Disciplinary Rule 2-104(A)(1) (1980) [Disciplinary Rules hereinafter cited as DR without cross-reference]. Finally, individuals who can afford to hire lawyers frequently are more likely to interact with lawyers on a social basis. See M. Freedman, Lawyers’ Ethics in an Adversary System 116-17 (1975) (solicitation occurs in social settings).

55. Large corporations are subject to comprehensive regulatory programs because they engage in various activities with significant and widespread effects. In addition, legal rules applicable to corporations have become more complex in response to the efforts of corporate counsel to enable their clients to avoid legal obligations. Finally, corporations’ innovative demands on the legal system generate more legal rules.

56. See Galanter, supra note 46, at 98-103 (organizations repeatedly involved in litigation acquire litigation skills and resources and use individual cases to create legal rules that will favor them in later cases). The advantageous position of individuals who obtain continuous legal assistance is analogous to those who receive preventive medical care. A doctor can identify disease at an earlier stage than the patient and can recognize diseases, such as a heart murmur, that the patient himself may not be able to detect. Thus, he can help his patients avoid illness and recover more easily when they become ill. By revealing that certain conditions are remediable, the doctor may also influence a patient’s concepts of illness and health.

57. See G. Hazard, supra note 42, at 2-3. But cf. Abel, supra note 48, at 21 (equalizing legal knowledge may have little impact on actors’ differing abilities to use law strategically because larger, wealthier actors can still dictate terms of legal relationship with other actors).

58. See, e.g., E. Smigel, The Wall Street Lawyer 6-7 (1969) (lawyers instrumental in altering corporate financing and control practices in order to take advantage of legal rules); P. Stern, supra note 49, at 145 (lawyers advise corporations to set up dummy “branches” in other nations to exploit tax regulations and other rules); Shuchman, The Fraud Exception in Consumer Bankruptcy,
organizations with ongoing legal assistance adopt an instrumental attitude, evaluating legal rules as potential liabilities and resources. 59

2. Organizations and Individuals Without Continuous Assistance

By contrast, people who lack continuing legal assistance cannot as effectively pursue their interests within legal bounds or use the legal system to advance their preferences. A misperception about a legal rule or the likelihood of its enforcement may deter them from taking an action that would not in fact result in sanctions. Alternatively, persons may engage in activity that exposes them to liability that they could have avoided had they been aware of legal rules. 60

Perhaps most significantly, individuals who lack continuous legal assistance do not perceive many opportunities to use the legal system actively to advance their preferences. 61 The litigation they initiate and their other demands for legal benefits are systematically limited in several respects. First, they primarily exploit traditional legal remedies. 62 Many of these

23 STAN. L. REV. 735, 761-62 (1971) (creditors adjust practices in order to utilize fraud exception to prevent consumers from discharging debts under bankruptcy law).

59. L. MAYHEW, supra note 44, at 27-74 (individuals, unlike organizations, do not “consciously utilize[e] . . . law as an instrument”); see Simon, supra note 30, at 85 (individuals with legal assistance and experience do not conceive of rules as “ends or imperatives, but rather as facts and tools for the manipulation of society to serve” own purposes); Galanter, supra note 46, at 98 (unlike “players” who litigate sporadically, those who litigate repeatedly “manage” their legal claims “routinely and rationally”).

60. See D. CAPLOVITZ, THE POOR PAY MORE 155 (1963) (many consumers not aware of “set of legal conditions embodied in the contracts they sign” or potential penalties until they violate condition). Individuals, particularly the poor, ordinarily lack ongoing legal assistance, see p. 1445 supra (describing preconditions for obtaining ongoing assistance), and are defendants more often than are organizations. See Wanner, The Public Ordering of Private Relations: Initiating Civil Cases in Urban Trial Courts (pt. 1), 8 LAW & SOC’Y REV. 421, 423-25, 431-32 (1974) (individuals are defendants in two-thirds, but initiate only two-fifths, of civil cases) [hereinafter cited as Wanner, Initiating Cases]; Yngvesson & Hennessey, Small Claims, Complex Disputes: A Review of the Small Claims Literature, 9 LAW & SOC’Y REV. 219, 236 (1975). In 12 out of 14 small claims courts studied, individuals were found to be defendants in 78% of cases or more, and plaintiffs in 42% or less). Individuals are also more often unsuccessful as defendants than organizations. See Wanner, The Public Ordering of Private Relations: Winning Civil Court Cases (pt. 2), 9 LAW & SOC’Y REV. 293, 302 (1975).

61. See Sykes, Legal Needs of the Poor in the City of Denver, 4 LAW & SOC’Y REV. 255, 262-63 (1969) (lawyers found that of 232 individuals who indicated they had no legal problems, 120 actually had a legal need). Individuals are plaintiffs in significantly fewer cases than organizations, particularly corporations. See Wanner, Initiating Cases, supra note 60, at 423-25 (individuals initiated 41.7% and organizations 49.16% of litigation in sample); Yngvesson & Hennessey, supra note 60, at 235-36 (in only 2 of 14 small claims courts studied were more than 42% of cases brought by nonbusiness plaintiffs; in 7, less than 17% of cases were brought by such plaintiffs).

62. See F. MARKS, THE LEGAL NEEDS OF THE POOR: A CRITICAL ANALYSIS 8 (1971) (“The poor are traditionalists in their conception of the legal system—in their identification of legal problems, legal need, and in the registration of demands upon the formal system.”); Levine & Preston, Community Resource Orientation Among Low Income Groups, 1970 Wis. L. REV. 80, 90 (low-income persons most likely to seek legal assistance when confronted with situations in which lawyers traditionally utilized, e.g., writing will, paying income taxes, purchasing real estate); Marks, A Lawyer’s Duty to Take All Comers and Many Who Do Not Come, 50 U. MIAMI L. REV. 915, 918-20 (1976) (many
remedies are purely formal, for example, an uncontested divorce. Although a legal proceeding is necessary in this type of case, it will seldom significantly influence existing conditions. In general, until a legal remedy has been established and its implications articulated through repeated application, unassisted individuals seldom perceive that the remedy is available. Prior to the articulation of a legal remedy, people may have no more than a diffuse feeling of discontent about a potentially remediable situation.

Second, because people without continuing legal assistance do not use legal rules to evaluate their experiences critically and do not alter their expectations in light of legal rules, they usually resort to the legal system only after they experience a breach of social norms. These deviations from social norms tend to be discrete, adverse changes or events, such as the breakdown of social relationships. Static conditions seldom provoke

individuals, poor in particular, fail to recognize that use of legal system is possible if legal remedy not already established.

63. See Galanter, supra note 46, at 108 (individuals often engage in nonadversarial, formal adjudications—"pseudo-litigation"); Shuchman, Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code, 37 GEO. WASH. L. REV. 244, 253 (1968) (individuals seek legal assistance when law requires, but do not benefit significantly from it).

64. Divorce actions are a large component of the litigation initiated by individuals, particularly poor individuals. See Mayhew, supra note 27, at 403 (40% of individuals seeking legal aid desire assistance with domestic difficulty); White, Lawyers and the Enforcement of Rights, in SOCIAL NEEDS AND LEGAL ACTION 21 (P. Morris, R. White, & P. Lewis eds. 1973) (in England, over 70% of those granted legal aid seek matrimonial proceeding). Since an overwhelming proportion of divorces are uncontested, see Galanter, supra note 46, at 108, divorce actions have little impact on the actual interpersonal relationships of the parties and may not even have significant collateral implications. See Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 YALE L.J. 104, 129-37 (1976) (divorce decrees seldom affect ancillary issues, e.g., property division and support obligations). Another example of formal use of the legal system is the registration of deeds after sales of property. See, e.g., CONN. GEN. STAT. §47-10 (West Supp. 1980) (recording of conveyance of land required).

65. Emphasis on traditional legal remedies slows the development of legal rules that might benefit people who lack ongoing legal assistance. See Abel, supra note 48, at 17, 30 (noting "cycle of mutually reinforcing ignorance," in which potential clients do not perceive problems as legal and lawyers lack incentive to acquire and convey information to change perception, causes inadequate development of favorable law); Morris, A Sociological Approach to Legal Services, in SOCIAL NEEDS AND LEGAL ACTION 54 (P. Morris, R. White, & P. Lewis eds. 1973) (describing same "vicious circle").

66. This is also a problem in the political process. See Connolly, The Challenge to Pluralist Theory, in THE BIAS OF PLURALISM 14 (W. Connolly ed. 1969) (some segments of society lack perspective or level of awareness to locate "structural causes of their vague feelings of anxiety, malaise, frustration, and resentment," which are therefore not "stated as clear-cut grievances [or]... organized as public issues"); cf. L. Peattie, The View From the Barrio 85-90 (1968) ("People shape their demands in terms of what is seen as possible.")

67. See F. Marks, supra note 62, at 6-7 ("where community response was either unclear or in flux, the poor showed a predisposition not to see a legal dimension to problems"; thus, because legal right to welfare not backed by social norm, only 16.3% of sample would seek legal assistance if denied benefits); Marks, supra note 62, at 9 (poor did not recognize legal remedy if broad community support for their position or internalization of legal rules was lacking).

68. Mayhew, in his study of discrimination complaints, found that "[t]he vast majority of disputes that arise within a system of private law do not challenge the social order." L. MAYHEW, supra note 44, at 273. Instead, "[l]itigants seek redress for grievances that arise through misunderstandings, di-
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affirmative legal demands.69

Third, individuals without ongoing legal counsel seldom consider the legal context in selecting a course of action.70 Yet sometimes one must alter his behavior in order to be in a position to invoke a legal rule.71 For example, a black carpenter must stop working for contractors and submit his own bids for projects in order to benefit from rules designed to channel public funding to minority contractors.72 A black worker, in order to take advantage of antidiscrimination laws, may have to apply for a different type of job than he currently has or would ordinarily seek. However, legal rules rarely motivate unassisted individuals to alter traditional patterns of action.73

III. The Role of Public Interest Lawyers

In order to represent their client groups effectively, public interest lawyers must try to provide the same type of continuous assistance that corporate counsel provide to their clients. The activities of public interest lawyers that appear the most problematic and generate the most criticism can be understood as efforts to achieve this ideal.

vergent interpretations of situations and other points of friction." Id. In his study, he found that 20.3% of employment discrimination complaints concerned discharge, 57.6% refusal to hire, and only 5.1% involved promotion; housing complaints almost exclusively concerned unsuccessful attempts to move and none related to exorbitant rent, bad sanitation, or ill repair. Id. at 160, 164, 165. See Galanter, supra note 46, at 108, 110 (rupture of ongoing relations provokes litigation); Summers, Individual Rights in Collective Agreements: A Preliminary Analysis, 9 BUFFALO L. REV. 239, 252 (1960) (over three-fourths of cases in which workers asserted rights under collective bargaining agreements arose out of disciplinary discharge).

69. This Note's description of the conditions under which people who lack continuous legal assistance invoke the legal system is similar to Fiss' distinction between "dispute-resolution" and "structural reform" litigation. See Fiss, The Forms of Justice, 93 HARV. L. REV. 1, 18 (1979). The former involves disputes within a set of socially accepted norms. The latter involves using relatively autonomous values embedded in the legal system to attack institutions or norms that perpetuate deviations from these values. Id.

70. See Shuchman, supra note 63, at 253-54 (lawyers who represent small clients seldom counsel "in any meaningful sense" because clients usually come to them only to gain their official approval or after an unexpected, adverse event when "the game is already made").

71. Cf. note 58 supra (corporate counsel advise their clients to alter their behavior to take advantage of legal opportunities).

72. E.g., 41 C.F.R. § 24-1.715 (1980) (Department of Housing and Urban Development policy of encouraging minority businesses to compete for contracts).

73. This is confirmed by the results of Mayhew's study of complaints filed with the Massachusetts Commission Against Discrimination. See L. MAYHEW, supra note 44. Mayhew found that individual blacks challenged employers with above-average proportions of black workers much more often than employers with below-average numbers. Civil rights and community groups, unlike individuals, concentrated on "strategic targets"—employers and neighborhoods with below-average proportions of blacks. Id. at 171-74. He concluded that individuals did not use the law in a "purposive, directed, and systematic" manner to attack "influential" and "historically exclusive" targets; the "structure of enforcement" was therefore tied to "the structure of the Negro community and its established patterns of participation in the economy." Id. at 273-74.
A. Redefining the Tasks of Public Interest Lawyers

The preceding analysis indicates the need for a public interest lawyer to adopt several strategies in order to provide effective legal assistance to her client group. First, she must initiate contact with and offer her assistance to members of the client group. Within the continuous relationship between corporate counsel and their clients, such solicitation occurs regularly. Similarly, public interest lawyers often engage in solicitation by contacting their parent organizations or other organizations that they repeatedly represent. In addition, public interest lawyers must actively offer assistance to individuals within the client group. Although the American Bar Association's Model Code of Professional Responsibility prohibits solicitation unless the lawyer has a special relationship with the prospective client, the Supreme Court recognized in In re Primus that public interest lawyers' effectiveness often depends on their ability to solicit individual clients. The Court held that the First Amendment protected the right of an American Civil Liberties Union attorney to advise an individual of her legal rights and to refer her, by letter, to other attorneys affiliated with the ACLU.

74. See pp. 1445-46 supra (describing interactive relationship between corporate counsel and client). The Code of Professional Responsibility does not prohibit counsel from soliciting a former client if the advice is germane to the former employment. See DR 2-104(A)(1). The ABA recently reaffirmed that "[i]t certainly is not improper for a lawyer to advise his regular clients of new statutes, court decisions, and administrative rulings which may affect the client's interests," and indeed it "might even be his duty." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 2-104(A)(1) at 17 n.82 (1980) (citing two 1941 opinions). Thus, corporations and wealthy individuals may be solicited because they have ongoing counsel or are "regular clients" of specific lawyers. Moreover, because these clients interact informally with lawyers, unethical solicitation is more difficult to detect. In contrast, solicitation of an individual with whom a lawyer does not have an established relationship is generally proscribed by the ethical rules. See DR 2-103. This double standard has been severely criticized. See, e.g., M. FREEDMAN, supra note 54, at 116-17; Shuchman, supra note 63, at 255-57.

75. See J. HANDLER, supra note 25, at 31 (lawyers perceive problem and contact leaders of organizations they have previously represented). Public interest lawyers' relationships with organizations they frequently represent resemble the formal ongoing relationships established between corporate attorneys and their clients. See Rabin, supra note 24, at 234-35.

76. See DR 2-103(A), -104 (solicitation barred except when person solicited is lawyer's friend, relative, or former client).


78. Id. at 439. However, the Court did not make clear whether the type of organization involved or the lawyer's actual motive in soliciting the client was critical to the result, nor did it specify what types of organizations or motives are constitutionally protected. Id. at 422-31, 434-39. The discussion draft of the proposed ABA rules of professional ethics allows solicitation "under the auspices of a public or charitable legal services organization or a bona fide political, social, civic, fraternal, employee, or trade organization whose purposes include but are not limited to providing or recommending legal services." ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT Rule 9.3(b)(3) (discussion draft Jan. 30, 1980). Although the definition of groups that may solicit is ambiguous, most public interest lawyers would be permitted to solicit under this rule.

The Court did not hold that all forms of solicitation are protected. See 436 U.S. at 438-39 (state is free to fashion "reasonable" restrictions with respect to time, place, and manner of solicitation and to
Second, the public interest lawyer should maintain continuous contact with her clients in order to learn of their most important needs for legal services. Without such a continuing relationship, the public interest lawyer’s ability to provide assistance would depend upon her clients’ limited understanding of legal goods and on her own haphazard social contacts with the client group.

Third, the public interest lawyer should adopt an instrumental attitude in representing her clients. She should discover their aspirations and dissatisfaction and determine whether and how legal assistance could advance their interests. For example, an attorney might find that poor people cannot obtain medical care at a local hospital. Although the poor are likely to perceive this as a problem, they are not likely to perceive it as a legal problem. The lawyer should evaluate the situation, investigate its legal implications, and think creatively about legal actions that might force the hospital to serve the poor.

The fourth desirable characteristic of the public interest lawyer’s role is a critical perspective. She cannot serve her clients well if she simply responds to their perceived needs. She uses her skills to analyze her clients’ situations in light of abstract legal doctrine and to compare them to similar settings in which legal rules have been utilized. As a result of her critical evaluation of her clients’ needs, the public interest lawyer stimu-
lates demands among her clients and shapes their nonlegal demands into legally cognizable claims, just as lawyers for wealthy individuals and corporations help them develop preferences and expectations.

For example, black workers may not feel injured if they are not promoted under a seemingly race-neutral seniority system. But if the system does not satisfy the legal definition of a "bona fide seniority system," it illegally perpetuates past discrimination. Public interest lawyers attempting to provide continuing assistance to the group of black workers would reveal this illegality to their clients, even though the clients would not otherwise feel aggrieved. In this sense, the public interest lawyer provokes legal controversies.

Finally, public interest lawyers should seek to educate their clients about the law. Whereas corporate counsel can personally advise their clients, public interest lawyers cannot serve all the individuals in their client group directly. The clients are generally numerous and unorganized, and often seek noncollective goods. Public interest lawyers must therefore use more indirect means. For example, they often initiate nontraditional types of litigation and gain media attention in order to create awareness of new rights and to alter the social expectations of the client group. This strategy frequently stimulates private enforcement of new rights. Public interest attorneys can also advise their clients on a group basis. For example, public interest lawyers distribute pamphlets that inform members of the client group of their rights and help them plan basic legal transactions. They also distribute standardized legal forms, such as leases, that protect their clients' interests.

83. Stimulating demands is not the same as falsifying clients' preferences. Cf. M. DUVERGER, POLITICAL PARTIES 378, 380 (1954) (formation of opinion necessarily modifies raw, instinctive opinion but strengthens it and enables it to be expressed); cf. p. 1448 supra (articulation of legal remedies helps focus individuals' aspirations and dissatisfactions).

84. This example is based on the case of Bryant v. California Brewers Ass'n, 585 F.2d 421 (9th Cir. 1978), vacated and remanded, 444 U.S. 598 (1980).

85. See, e.g., Harrison & Jaffe, Public Interest Law Firms: New Voices for New Constituencies, 58 A.B.A.L.J. 459, 466 (1972) (Center for Law and Social Policy shifted litigation to urban issues and away from environment after environmental law principles well established).

86. See Mayhew, supra note 27, at 420 ("Through the process of specification, that is by affirming new rights through the manipulation of the symbols of normative order, the creative lawyer generates large classes of aggrieved parties."); cf. p. 1443 supra (courts' decisions shape beliefs and expectations).

87. See Mayhew, supra note 27, at 422 (public interest, "proactive" litigation is precondition for effective representation of presently unrepresented groups by private lawyers in new areas).

88. See, e.g., P. STERN, supra note 49, at 21 (Albert Kramer of Citizens' Communication Center taught local citizens' groups how to monitor broadcasts, question station managers, and inspect station files in light of federal regulations); Tapp & Levine, supra note 38, at 66-67 (Rhode Island Legal Services attorneys taught inner-city high school students about consumer, housing, environmental, juvenile, and criminal law; lawyers from Center for Study of Student Citizenship Rights and Responsibilities taught poor, inner-city families about rights in relation to schools).

89. See, e.g., F. PIYEN & R. CLOWARD, REGULATING THE POOR 301, 316 (1971) (during 1960s legal services lawyers distributed manuals concerning rights to welfare, bail bonds, hospital care, ur-
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This analysis provides a response to critics who argue that it is improper for public interest lawyers to represent individuals who have not initiated the lawyer-client relationship and do not initially even perceive a legal or nonlegal problem. Because of the complex nature of legal needs, a client's autonomous perception and definition of a problem and unsolicited request for legal assistance are not necessary preconditions for beneficial legal representation. Rather, solicitation of individual clients and the active creation of legal controversies are useful tools in public interest lawyers' efforts to serve their clients.

B. The Accountability Problem

Although this more complete explanation of the public interest lawyer's role effectively answers the criticism that public interest lawyers solicit clients and provoke controversies, it does not respond directly to the argument that there are no mechanisms to ensure that public interest lawyers' activities will actually benefit their clients. To the extent that public interest lawyers reach out for clients and controversies, accountability concerns become correspondingly more serious. Although the analysis in this Note does not solve the accountability problem, it does provide a new framework for viewing it. First, it reveals that the problem is not unique to the relationship between the public interest lawyer and her client group. Second, the analysis suggests that several of the factors that increase the accountability of corporate lawyers can be replicated in the public interest context.

Accountability is most problematic when public interest lawyers represent a class or an individual plaintiff who wishes to further a group's interests. An individual's interest in maximizing his gain in a specific controversy may conflict with the group interest. For example, an individual may wish to settle a case that might produce law reform favorable to the group. See Galanter, supra note 46, at 100-03 (describing inability of unorganized groups to advance their long-term interests effectively through individual members' self-interested litigation); cf. Simon, supra note 14, at 503 (arguing that overemphasis on value and uniqueness of individual lawyer-client relationship has prevented lawyers from effectively serving poor as class).

Accountability is less problematic when public interest lawyers simply represent individual members of client groups in situations in which the interests of the group as a whole are not implicated. But see pp. 1439 supra (financial independence and clients' lack of sophistication give lawyers broad discretion). Some public interest lawyers may operate both in the individualistic mode, as in divorce actions, and in the collective mode, as in welfare rights litigation.

Problems of accountability might be dismissed as risks which must be taken in order to allow public interest lawyers to serve their clients adequately. See Simon, supra note 14, at 504 (NAACP's continuous and active representation of blacks is most effective way for victims of segregation to pursue their ends, and "risk of betrayal," if any, was price individuals had to pay to take effective action).
1. The Pervasiveness of the Accountability Problem

Corporate counsel are the paradigmatic example of attorneys who provide continuing legal assistance to clients. Despite the differences between public interest and corporate lawyers, the accountability of both to their client groups is problematic for several reasons. Corporations utilize several mechanisms to counteract accountability problems, but they are only partially successful.

First, although a corporation is highly organized and is presumed to pursue a relatively narrow range of goals, it comprises many individuals who often have divergent interests. Different representatives of the corporation may give different interpretations of the corporation's interests. As a result, corporate lawyers may have difficulty determining how to represent their clients.

Second, because lawyers have specialized skills, it is difficult for corporate officers to evaluate the legal assistance they receive. They can do so more effectively than can most people, however, because of their relative sophistication and their repeated involvement with similar legal problems, which produces some familiarity with the law. Because corporations often use several sets of lawyers for different functions, they can to some extent compare the quality of their lawyers' work and use different sets of lawyers to review each other's work. However, corporations generally do not receive numerous, relatively uniform bits of legal assistance from different lawyers. As a result, they cannot easily compare the benefits of the legal assistance provided by various lawyers.

Third, lawyers' financial dependence on their clients does not yield a very refined form of control. Because continuous assistance is valuable, switching lawyers is costly. Corporations attempt to counter their limited

94. As William Simon suggests, when a lawyer represents a corporation, he serves a group of people acting though an "impersonal institution." Id. at 504-05. Simon argues that the bar has "ration-alized loyalty to established organizations," primarily corporations, despite its assertion that "the attorney-client relation is personal and unique," by "treating the organizations as persons entitled to personal care and trust." Id. at 503, 505. However, this fiction is not employed in the public interest context. Compare ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 5-18 (1980) (lawyer representing corporation owes "allegiance" not to individuals but to "entity") with id., ETHICAL CONSIDERATION 2-33 (lawyer working with legal assistance organization must be loyal to "interests of individual clients").

95. See G. HAZARD, supra note 42, at 43-57 (lawyer retained by organization must resolve conflicts by conscious choice because "client identity is ambiguous" and "continuously problematic"); Stewart, supra note 14, at 1765 n.457 (corporate lawyer may have difficulty identifying client's interests because of "conflicting aims of corporate officials").

96. See Q. JOHNSTONE & D. HOPSON, supra note 52, at 205 (corporations with legal departments also hire private firms).

97. Much of the following analysis is informed by Albert Hirschman's examination of accountability. See A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

98. See pp. 1446-47 supra (describing ability of groups with ongoing assistance to exploit legal system).
ability to control their lawyers through indirect, market pressures by establishing highly interactive relationships with their lawyers. By expressing its preferences and dissatisfactions to its lawyers on a continuing basis and by integrating them into its organization, a corporation encourages its lawyers to assume the corporation's perspective.

Fourth, accountability is problematic in a more fundamental sense because lawyers actually shape their clients' aspirations and feelings of dissatisfaction. Thus clients' judgments about whether their lawyers' actions have served their interests are affected by the type of legal advice and counseling the lawyers have provided. This problem is less serious in the corporate context than in other lawyer-client relationships, however, because corporations tend to have more fully defined goals.

2. Methods for Increasing Lawyer Accountability

Although the problem of lack of accountability is not unique to the public interest lawyer nor completely remediable, it is still appropriate to seek to maximize the accountability of the public interest lawyer to her client group. Several strategies similar to those used in the corporate context can be pursued to create a type of accountability in the public interest context.

If the client group that a public interest lawyer seeks to represent is organized, she can rely on the organization to articulate the preferences of the group. If the organization's membership is broad enough, the lawyer might simply take the organization directly as her client. She can also help organize her clients. Representatives of the client group can be chosen to exercise advisory and policymaking power in the public interest law organization. Because of the difficulty of organizing many client groups

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99. Cf. A. Hirschman, supra note 97, at 15-16, 21-29, 33-36, 80 (contrasting "exit"—"neat," "impersonal," "indirect" form of control—with "voice"—direct articulation of preferences, which is needed to maintain accountability when exit is ineffective or otherwise unappealing).

100. See pp. 1445, 1448 supra (lawyers' advice and individuals' perception of available legal remedies shape preferences for legal services).

101. However, if a corporation wished to respect "fair" legal constraints as well as maximize profits, lawyers might influence the corporation's conception of fairness and thus affect its evaluation of the legal services it receives.

102. See note 75 supra (public interest lawyers often represent client organizations); Note, supra note 12, at 1125 (California Rural Legal Assistance guideline for class actions requires consultation with affected poverty organizations). But cf. Stewart, supra note 14, at 1767 (organizations often purport to represent nonmembers; no method for determining how representative they are).

103. Several organizations concerned with public interest law have advocated this strategy. See, e.g., NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, HANDBOOK OF STANDARDS 2-3 (1970) (advisory committee of community residents); Cahn & Cahn, supra note 15, at 1041 n.45 (ABA Standing Committee on Legal Aid adopted resolution in 1970 proposing Clients' Councils be established to evaluate legal services programs). Public interest law groups have created various types of advisory groups to represent clients' interests. See, e.g., Note, Neighborhood Law Offices: The New Wave in Legal Services for the Poor, 80 Harv. L. Rev. 805, 829 (1967) (many Office of Economic
and of ensuring that the chosen voice is truly representative, the public interest lawyer should also investigate and solicit the preferences of the unorganized segments of these groups. The lawyer must also acknowledge the possibility of conflicts of interest among factions within the client group on particular issues and facilitate separate representation of the various interests.

Public interest lawyers should attempt to educate their clients. Legal knowledge reduces clients' dependence on lawyers and enables them more effectively to monitor the lawyers' work. If there are several public interest law groups attempting to serve one broadly defined client group, the clients have several independent sources of information they can use to judge the quality of the legal services they receive.

A plurality of legal groups also creates the possibility of market-type accountability. Clients can seek out another public interest group if they are dissatisfied with the assistance they obtain. Choices might also be provided within particular public interest legal groups by instructing clients that they can request a different lawyer from the group if they are dissatisfied with their lawyer's service. These mechanisms allow clients to express their complaints effectively without having to articulate them so forcefully and persuasively that the original lawyer will change her practice.

Decentralization would facilitate the operation of several of these mechanisms. Public interest lawyers, like in-house corporate counsel, could operate from within the communities they assist.

Opportunity (OEO) legal services programs attempted to place poor on board of trustees or separate advisory panels). But see C. PATMAN, PARTICIPATION AND DEMOCRATIC THEORY 48 (1970) (noting findings that low socio-economic status correlates with low participation); p. 1439 supra (public interest lawyers' clients often unskilled and unmotivated). Efforts to induce participation in legal services programs have seldom been successful. See Note, supra, at 829 (OEO legal services programs); cf. Rosenbaum, The Paradoxes of Public Participation, 8 ADMIN. & SOC'Y 355 (1976) (federal social programs).

Some public interest lawyers have imposed this type of requirement on themselves. See, e.g., NATIONAL LEGAL AID AND DEFENDERS ASSOCIATION, supra note 103, at 5-6 (standards require lawyers to consult served community on priorities in many ways, e.g., meetings, discussions with representatives, and surveys).

If there are several public interest law groups representing a single client group, different lawyers can present the various positions held by members of the group. In class actions, members of the class whose interests diverge from the named plaintiff may be able to intervene. See FED. R. CIV. P. 23(d)(2) (conditions for permissive intervention); Bell, supra note 10, at 509-11 (encouraging use of subclasses in desegregation litigation). The lawyers may also be able to persuade their clients not to raise issues on which there is conflict in order to pursue shared goals more effectively.

See, e.g., F. PIVEN & R. CLOWARD, supra note 89, at 315-18 (Office of Economic Opportunity legal aid offices trained poor as "lay advocates" in 1960s); note 88 supra (describing some of public interest lawyers' efforts to educate their clients).

See Note, supra note 103, at 833 (lawyers in neighborhood legal services program should be "surrounded by poor people"); cf. Danzig, Toward the Creation of a Complementary, Decentralized System of Criminal Justice, 26 STAN. L. REV. 1, 37-41 (1973) (describing role of neighborhood attorney in decentralized criminal justice system); Tapp & Levine, supra note 38, at 59 ("Lawyers . . . can
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... interest lawyers can operate local branch offices or work through and with community-based lawyers. Although they may serve a broad clientele, the lawyers would thus interact continuously with a particular, representative segment of that clientele. Decentralization would increase the interaction between lawyers and clients, facilitating the organization and education of clients and the identification of clients' interests. It would also improve clients' ability to choose between different groups of public interest lawyers. If client groups are served by lawyers who are members of the group they serve or who live and work among their clients and thus develop empathy for them, the lawyers' influence on their clients' aspirations and feelings of dissatisfaction is less problematic.

A fuller theoretical analysis of the role of the public interest lawyer thus makes it possible to identify methods of remedying genuine problems and to justify practices that are integral to the effective practice of public interest law.

usefully function as 'house counsel' for a community.

108. See Rabin, supra note 24, at 224 (national offices of NAACP Legal Defense Fund, Inc. and ACLU work with local "cooperating attorneys" and branches respectively). The Legal Services Corporation supports 12 "back-up" centers, each concerned with an area of law relevant to poor people, see A. POLIKOFF, supra note 26, as well as numerous community offices. Many other centralized public interest groups consult informally with a network of community-based legal services lawyers and social services groups interested in the same issues as the public interest lawyers.