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Lawyers for Social Change: Perspectives on Public Interest Law

Robert L. Rabin*

I. INTRODUCTION

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

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

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

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

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

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

the legal profession to raise "standards of consumption and general well-being." Prior to 1970, sustained organized reform efforts on the part of lawyers were most unusual—although not, as we shall see, entirely nonexistent.³

Then a new phenomenon appeared on the professional scene: the "public interest lawyer." Immediately, the newcomers were heralded as an encouraging manifestation of social consciousness among young attorneys, as well as a healthy antidote to the ills of the pluralistic political system.⁴ They were much discussed in the law journals.⁵ Some early successes, perhaps most notably the *Alaska Pipeline* case,⁶ brought them to the attention of a wider audience.

The earlier flush of enthusiastic commentary has been succeeded by a period of relative quiescence. Little has been done to examine the reality of the public interest law movement in terms of the initial expectations voiced by its proponents. Indeed, those early, largely descriptive commentaries never really examined the then newly emergent phenomenon from a historical perspective. Were the public interest law firms, in truth, a distinctive departure from earlier organizations committed to law reform? If so, did the new movement's unique features augur well, or ill, for its long-term viability? Did its uniqueness suggest anything about the patterns of law reform activity in which it would engage?

A reexamination of public interest law seems in order. With the benefit of hindsight, we should be better equipped to discern whether public interest lawyering has broken new ground—fashioning, perhaps, a necessary qualification to Twiss' indictment of the legal profession. While avoiding any attempt to assess the overall impact of public interest law activities, this Article will explore the consequences, present and future, of adopting the movement's distinctive style of practice and set of professional values.

From a more ambitious perspective, the public interest law experience provides a vehicle for describing the general prospects for law reform activity in our system.⁷ Indeed, the primary purpose of this Article is to identify

3. See notes 9–52 *infra* and accompanying text.

4. See, e.g., Berlin, Roisman & Kessler, *Public Interest Law*, 38 GEO. WASH. L. REV. 675 (1970); Halpern & Cunningham, *supra* note 2; Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

5. See, e.g., *id.*; Cahn & Cahn, *Power To the People or the Profession?—The Public Interest in Public Interest Law*, 79 YALE L.J. 1005 (1970); Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 GEO. WASH. L. REV. 547 (1970); Symposium—*The Practice of Law in the Public Interest*, 13 ARIZ. L. REV. 797 (1971).

6. *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973). For the background of this litigation see Dominick & Brody, *The Alaska Pipeline: Wilderness Society v. Morton and the Trans-Alaska Pipeline Authorization Act*, 23 AM. U.L. REV. 337 (1973).

7. Two limitations should be mentioned: (1) my focus is on *private* law reform activity, rather than publicly subsidized efforts such as OEO Legal Services programs and Public Defender offices, and (2) my principal interest is in the lawyer functioning in his traditional role as advocate in an adversary—but not necessarily courtroom litigation—setting, rather than as lobbyist, organizer, etc.

the salient characteristics of lawyers' reform movements.⁸ What social and political problems have engaged the sustained reform efforts of lawyers? What strategies have been used to effect reform? And, not least, who pays the bill? As we shall see, public interest law provides distinctive, but not definitive answers to these questions. If we are to assess adequately the lawyers' reform impulse, it will be necessary to widen our net to include earlier initiated organized action.

II. EARLY LAW REFORM EFFORTS: THE ACLU AND THE NAACP LEGAL DEFENSE FUND

Lawyers have established a variety of means for satisfying a perceived public service commitment. Rarely, however, has reform activity entailed either a full-time professional undertaking by the individual attorney or the creation of a specific reform-oriented organization or group. The more typical instance of public service has been the occasional representation of a discrete individual client unable to secure effective legal assistance, that is, so-called "*pro bono*" representation.⁹

In fact, however, organized efforts to secure law reform through litigation activity have occurred throughout the 20th century,¹⁰ most notably exemplified by the work of the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People Legal Defense Fund (LDF).¹¹ These forerunners to the public interest law firms warrant especially close attention, since they have achieved long-term viability and widespread recognition. The steady, sustained growth of these groups suggests that they may possess organizational characteristics that will be useful in assessing the likely staying power, and perhaps even the feasible scale of operations, of newer efforts to organize law re-

8. At the threshold one might question in what sense a staff lawyer at a public interest law firm, or the ACLU or NAACP Legal Defense Fund, is engaged in a distinctive "law reform" practice. Is not the personal injury lawyer arguing against the retention of contributory negligence in a case before a state supreme court engaged in "law reform?" What of the securities lawyer arguing a novel issue of interpretation in a § 10(b)(5) case? More generally, one can ask why the private practice of law, probing and testing the limits of existing legal doctrine in a wide variety of areas, is not generally to be regarded as law reform activity.

9. The distinctive element for purposes of this Article is the criterion of case selection. The attorney who selects clients principally on the basis of whether representation would involve working on socially desirable cases is a lawyer engaged in law reform practice. Conversely, where the market is the principal, though not necessarily exclusive, determinant of docket priorities, the legal activity falls outside the scope of this Article.

10. For a general survey of the legal profession's multiple strategies for fulfilling its perceived public service obligations, see F.R. MARKS, K. LESWING & B. FORTINSKY, *THE LAWYER, THE PUBLIC, AND PROFESSIONAL RESPONSIBILITY* (1972).

11. Litigation is defined broadly to include representation before administrative as well as judicial forums, and to encompass negotiating, advising and similar traditionally litigation-related activities.

11. The LDF was established in 1939. My discussion of preceding law reform activity will focus on the NAACP; after 1939, I will limit my treatment to the LDF. For a discussion of the origin of the LDF, see note 36 *infra*.

form activity. And, of course, the existence—as well as the success—of these organizations undoubtedly influenced the budding public interest law movement as its founders struggled to create a viable form for achieving law reform through litigation. Hence, the link between the traditional organizations and the public interest law movement requires exploration.

A. *The American Civil Liberties Union*

In 1916 a small group of social workers, journalists and other genteel pacifists who had become progressively more concerned about the national drift towards involvement in the European War formed the American Union Against Militarism.¹² Within a year, a young social worker from St. Louis, Roger Baldwin, had become the moving force in the organization and, in response to American involvement in the hostilities, had organized a Bureau for Conscientious Objectors. The Bureau was too radical for a wing of the Union, causing a split within the organization that resulted in the formation of the National Civil Liberties Bureau. Baldwin and the new bureau immediately devoted their energies to lobbying officials in the War Department, attempting to insure fair regulations and decent treatment for conscientious objectors. In 1917, the Bureau's sphere of activities broadened to include a publicity and lobbying campaign to protest censorship practices and prosecutorial policy under the Espionage and Sedition Acts.

These early war-related activities tended to be highly personalized in nature. The Bureau was made up of notables with access to the highest officials in the federal executive branch. Rather than resorting to grass roots organizing or litigation, the Bureau made effective use of its individual members by employing their personal influence and reputation as a tool of persuasion to defend war resisters, as a class, against official discrimination.

During this period, the Bureau's defensive efforts involved frequent contacts with the radical labor movement, including the leadership of the International Workers of the World (IWW). Wartime strikes had led to a series of prosecutions of "labor agitators" under the Espionage Act, as well as consistent harassment by Post Office authorities armed with awesome censorship and search powers. After the war, as the prosecutions of IWW leaders continued unabated, the Bureau persisted in its efforts—directed at the Post Office, the Department of Justice and President Wilson himself—to use persuasion and publicity as weapons to combat governmental harassment.

Thus, the organization was led by its unfinished war-time commitments,

^{12.} The brief historical background of the ACLU that follows is drawn largely from D. JOHNSON, *THE CHALLENGE TO AMERICAN FREEDOMS* (1963).

as well as the postwar Red Scare, into a well-defined new area of involvement: the defense of labor agitators and organizers. To emphasize its broader commitment to dissidents and to escape its narrow identification with pacifism and antiwar activity, the organization was renamed and reorganized in 1920 as the American Civil Liberties Union.

Because Baldwin remained the dominant influence in the ACLU throughout the following three decades, the importance of these formative years can hardly be overstated. Despite its later reputation, the ACLU did not originate as a lawyers' organization, nor did it regard litigation as its primary means of attacking official misconduct. The early *modus operandi* was personal influence, and the corresponding organizational structure was informal and highly personalized—a socially conscious activist version of a small, select gentlemen's club.

Inevitably, the deluge of legal activity directed at the dissident element¹³—prosecutions under the Espionage and Sedition Acts, censorship by the Post Office, deportations under the Immigration and Naturalization Act, and "Palmer raids"¹⁴ by Department of Justice officials—led the ACLU into litigation activity. However, the organization never abandoned its other methods of protest: lobbying, publicizing and public protesting.

Baldwin and the other founders of the ACLU were part of a circle of wealthy, aristocratic social activists with roots going back at least as far as the abolitionists. As might be expected, the lawyers in this circle, men like Arthur Garfield Hays and Osmond Fraenkel, contributed their own unique resource—professional service. Consequently, the ACLU general counsel during the Baldwin regime, Hays and Morris Ernst, were men who could afford to serve the ACLU in a voluntary capacity. Similarly, the volunteer lawyers who rounded out the roster of ACLU attorneys were invariably engaged in the organization's cases out of a sense of personal commitment. They were neither members of the ACLU full-time staff nor lawyers retained for compensation on an occasional basis.¹⁵ In short, litigation was handled by highly skilled and experienced lawyers, retained in the standard ACLU operating style, through personal appeal.¹⁶

Despite its reputation, then, the ACLU was never a law office.¹⁷ When

13. The ACLU's predecessor, the NCLB, was itself subject to these attacks. See, e.g., D. JOHNSON, *supra* note 12, at 73–84.

14. These were raids on the meeting houses of the Union of Russian Workers, carried out in several cities under the direction of J. Edgar Hoover in late 1919 and early 1920. A. Mitchell Palmer, for whom the raids were named, was Attorney General of the United States at the time. See D. JOHNSON, *supra* note 12, at 136–45.

15. As late as 1960, the ACLU permanent staff consisted of only two attorneys in New York, and one each in Los Angeles, San Francisco and Chicago. Interview with Melvin Wulf, ACLU Legal Director, in New York City, May 21, 1975.

16. For a discussion of the activities of local affiliates in the early years, see B. Bean, *Pressure for Freedom*, Feb. 1955, at 208–45 (unpublished thesis in Stanford Law School Library).

17. One tangible piece of evidence is that the ACLU never has attempted to acquire the § 501(c)-

government action seemed to warrant an organizational response, the ACLU's predisposition was to attack on a number of fronts. Success might result in the Supreme Court upholding an injunction against interference with speech and assembly directed at a "Boss" Hague.¹⁸ But the ACLU did not simply run to the courthouse; it sent speakers like Norman Thomas to Jersey City to protest the Hague regime's discrimination against labor organizers. It consciously sought out publicity in the media, including more conservative establishment newspapers. It persuaded influentials like Walter Lippman and Dorothy Thompson to speak out. And it solicited the assistance of organizations like the CIO. While litigation was critical, it was nevertheless only a single element in a well-orchestrated campaign of resistance.¹⁹ And when the organization turned to litigation, its norms remained consistent: if like-minded citizens could be entreated to protest and publicize, why not to volunteer representational skills?

It has frequently been remarked that the ACLU got maximum mileage out of limited resources. By 1950, entering its fourth decade, the ACLU had established a national reputation through participation, in one form or another, in a number of nationally publicized conflicts over governmental encroachment on the Bill of Rights. Yet its budget in that same year was less than \$100,000—a figure that, moreover, represented a fairly steady increase over earlier years—and national membership was only about 10,000.²⁰

Midcentury was a critical turning point in the life of the organization, however. Beginning in 1950, ACLU membership doubled every 5 years as local chapters sprung up around the country. By 1974, the organization had 275,000 members in 49 state affiliates and 375 local chapters.²¹ Five thousand volunteer attorneys supplemented a litigation staff that included 34 full-time staff attorneys in 19 local offices and 18 lawyers in the ACLU national office.²² As numbers alone indicate, the vicissitudes of the 1950's, particularly Cold War paranoia and McCarthyism, and the sociopolitical ferment of the 1960's, wrought fundamental changes in the character of the ACLU.

In 1974, the ACLU was a truly national organization with a highly decentralized structure. As far as authority was concerned, local affiliates had only the most tenuous ties to the national office. Litigation approval was not required, and as a consequence, local chapters might even launch

(3) tax-exempt status accorded litigating units that refrain from lobbying and other "political" activities. See INT. REV. CODE OF 1954 § 501(c)(3).

18. *See Hague v. CIO*, 307 U.S. 496 (1939).

19. The Hague case is discussed in detail in B. Bean, *supra* note 16, at 256-57.

20. 4 ACLU ANN. REP., July 1944-December 1950 (1950).

21. ACLU ANN. REP., 1974, in CIVIL LIBERTIES, Jan. 1975, at 3.

22. Interview with Melvin Wulf, *supra* note 15. The national ACLU had another four attorneys in its Atlanta regional office and three in its Washington, D.C. branch. *Id.*

legal attacks on government programs before the national organization had decided what policy position it should take.²³ Local affiliates relied on a combination of staff attorneys, when available, and local volunteers, but whatever the mix of staff and volunteer counsel, the local affiliate very much determined its own policy priorities.

At the same time, the national office increasingly moved away from the voluntary counsel model. Fourteen of the 18 staff attorneys were involved in a strikingly new development, the establishment of special projects in a variety of areas: juvenile rights, abortion, prisoners' rights, women's rights, military law, amnesty, and sexual privacy. Unlike the "generalists," project attorneys were not supported by membership funds. Instead, the source that underwrote much of the public interest law movement contributed to the ACLU's new departure as well—namely, the private foundations. Concomitantly, the project attorneys devoted themselves exclusively to project work.

As a consequence of these developments, a quarter-century after the initial growth explosion the ACLU as a law reform unit looked conspicuously different from its earlier self. The organization was responding both to centrifugal and centripetal forces. It had become a confederation, with local chapters defining their own policy, tied to the national organization largely by a commonly shared ideological orientation.²⁴ Growth in membership had provided a base from which a nationwide law reform effort could be sustained, but only on a highly diffuse, fragmented basis. On the other hand, the national office maintained its distinctly centralized character, not by continuing to rely on a small cadre of volunteers, but by building a sufficiently large in-house professional staff to make the use of volunteers increasingly less attractive.²⁵ At the same time, however, foundation funding of distinct projects provided the impetus for growth of a specialized group of staff professionals that had no earlier counterpart.

The projects marked a departure from the first amendment generalist orientation of ACLU lawyering, yet less so than might appear to be the case at first blush. Even a brief perusal of the project areas indicates that they cluster around notions of privacy (*e.g.*, abortion and sexual privacy),

23. As an example, in early 1975 the NYCLU challenged the constitutionality of the Federal Election Campaign Act while the national office was attempting to work out its position on the issue. See *Buckley v. Valeo*, 519 F.2d 821, *prob. juris. noted*, 44 U.S.L.W. 3200 (U.S. Oct. 7, 1975).

24. More formally, each affiliate has a membership position on the national ACLU Board of Directors, and local affiliates receive a fixed percentage of general membership funds. Interview with Alan Reitman, ACLU Associate Director, in New York City, May 21, 1975.

25. Corresponding with this development, the organization largely abandoned its policy of amicus participation in favor of direct representation. It seems natural that the shift from amicus to direct participation should correspond with the movement from volunteer to staff representation. Generally, volunteers could not make the specific time commitments necessary to assume personal responsibility for an ACLU case. On the other hand, staff attorneys are unlikely to be satisfied with the secondary, and often largely symbolic, role of amicus counsel.

personal liberty (*e.g.*, prisoners' rights) and political dissent (*e.g.*, amnesty): the Bill of Rights concerns that express the core of the ACLU ideological commitment. Moreover, the generalists on the staff continue to practice as ACLU lawyers have in the past, principally taking cases involving currently sensitive issues of free speech, privacy and due process.

ACLU practice has always been—and essentially remains today—ad hoc, defensive, unplanned, reactive to current affairs. Clients walk in, phone in, come by referral, or are “found” by ACLU lawyers distressed by government practices they view as oppressive. This spontaneity means, of course, that ACLU law reform activities have never been programmatic in character; rather, they reflect to a considerable extent the immediacy and variety of the current headlines.

B. *The NAACP and the Legal Defense Fund*

While the ACLU arose as a defense against American xenophobia—the country's painful efforts to accommodate “foreign” influences and ideas—the NAACP was a response to the nation's most bitter internal conflict, relations between the races.²⁶ In 1908, William Walling, a white liberal journalist—ironically, descended from a Southern slaveowning family—wrote a compelling account of a brutal race riot in Springfield, Illinois. It seemed clear to Walling that the cancer of racial brutality was spreading to the North and that the efforts of concerned whites, as well as blacks, were essential if the disease were to be combatted.

His account served as the rallying point for a small group of white liberals—as with the ACLU founders, primarily wealthy socialist-leaning offspring of established Eastern families—who issued a “call” for a conference on the Negro problem. A year later, in 1909, the NAACP was formed, its leadership consisting almost exclusively of these genteel white reformers. In addition, the noted black, W.E.B. Du Bois, was persuaded to become editor of the organizational newsletter, *The Crisis*.

Significantly, as with the ACLU, the early leadership did not include many lawyers. Neither Du Bois nor the first black executive secretary, James W. Johnson, were attorneys. Mary Ovington and Oswald Villard, central figures in the early years, were a social worker and newspaper editor, respectively; the first chairman of the Board of Directors, Joel Spingarn, was a former Professor of Comparative Literature at Columbia University. Among the highest officials, only Moorfield Storey, President of the NAACP until his death in 1930, was an attorney—and a highly prestigious name at the Bar.

26. An account of the early years of the NAACP may be found in C. KELLOGG, NAACP: A HISTORY OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (1967).

Like the ACLU, the NAACP operated on a number of fronts. Much of its early work was educational in nature. The organization attempted to enlighten the public about the devastating effects of racial discrimination through reports fed by its field investigators to friendly newspapers or through publication in *The Crisis*. In addition, the NAACP lobbied extensively in various forums. During World War I, it worked hard to combat instances of discrimination against Negro servicemen, and throughout the early decades, it fought to pressure local officials into taking action against the perpetrators of lynchings.

More than at the ACLU, litigation was viewed from the outset as an important tool for effecting reform. As early as 1914, Storey filed an amicus brief in *Guinn v. United States*,²⁷ where the Supreme Court invalidated the grandfather clause that Oklahoma had added to its constitution to restrict the black vote. Thirteen years later, NAACP lawyers were directly involved as counsel for the plaintiff in *Nixon v. Herndon*,²⁸ where the Texas white primary law was struck down. In the interim, the organization successfully persuaded the Supreme Court to invalidate the Louisville exclusionary zoning ordinance in *Buchanan v. Warley*.²⁹

These were landmark cases. But such successes must be read in context. In the period 1910–30, the NAACP engaged in no sustained litigation activity, concentrating instead on the single “big” case. Moreover, its commitment to a multifaceted attack on racial discrimination, combined with an extremely limited resource base, meant that even the big cases were few and far between. Thus, however attractive the judicial forum—and its attractions were many³⁰—it was only used in an occasional, ad hoc fashion.

A marked change occurred, however, in the third decade of organizational life. In 1930, the NAACP received a grant of \$100,000 from the American Fund for Public Service (the Garland Fund) “for a comprehensive campaign against the major disabilities from which Negroes suffer in American life—legal, political and economic.”³¹ Although the Depression drastically shrank the monies eventually received from the Fund,³² the grant represents a critical juncture in the NAACP’s history, for its receipt triggered a decision by the organization to plan a litigation campaign.

27. 238 U.S. 347 (1915).

28. 273 U.S. 536 (1926).

29. 245 U.S. 60 (1917).

30. Obviously, a major decision of the Supreme Court, associated with the NAACP, was of great publicity value entirely apart from its direct impact on the political system. In addition, it has been argued that “legal redress required only minimal dependence upon organized mass black protest or the public conscience. Indeed . . . the Association soon discovered that when sole reliance was placed upon appeals to the public conscience for the redress of grievances, usually the result was dismal failure.” B. Ross, J.E. SPINGARN AND THE RISE OF THE NAACP, 1911–39, at 35 (1972).

31. See NAACP ANN. REP. 22 (1934).

32. The actual figure was \$20,700. See J. GREENBERG, RACE RELATIONS AND AMERICAN LAW 37 (1959).

Nathan Margold, later Solicitor at the Department of Interior, was persuaded to assume planning responsibility. His subsequent report detailed a long-range campaign against state-sanctioned segregation that was to set the litigation agenda for the NAACP, and later the NAACP Legal Defense Fund, for the next 25 years. As early as 1934, the *NAACP Annual Report* states that "it should be made clear that the [Garland Fund] campaign is a carefully planned one to secure decisions, rulings and public opinion on the broad principle instead of being devoted to merely miscellaneous cases."³³ Moreover, the commitment to the Garland Fund plan led the NAACP to hire first Charles Houston and later Thurgood Marshall as special counsel, institutionalizing the role established to accommodate Margold.

Hence, the period beginning in the early 1930's must be marked as a departure from the earlier litigation approach of the NAACP. Previously, like the ACLU, the NAACP had attempted to allocate its scarce resources to an occasional case of national import;³⁴ the litigation program was essentially ad hoc and reactive in character. In contrast, after 1930 the NAACP parted company with the ACLU by adopting a strategic plan for cumulative litigation efforts aimed at achieving specified social objectives.

The successful implementation of that plan has been chronicled elsewhere.³⁵ For present purposes, the notable feature is, again, the relatively small scale of operations in the middle years. From 1940 to 1960, the first two decades of separate existence of the LDF, the staff consisted of four or five attorneys.³⁶

Beginning in 1960, however, the staff began to expand rapidly to a high point of 30 lawyers. In 1975, it had stabilized at 25 staff attorneys. During the same period, as the number of black attorneys in the South grew, the

33. NAACP ANN. REP. 22 (1934).

34. See NAACP ANN. REP. 19 (1932); B. Eisenberg, James Weldon Johnson and the National Association for the Advancement of Colored People, 1916-34, at 137 (1969) (unpublished dissertation in Stanford University Main Library) (stating that criteria for accepting a case included a requirement that principles affecting the entire race be involved).

35. Litigation strategy for school desegregation is discussed in Greenberg, *Litigation for Social Change: Methods, Limits, and Role in Democracy*, 29 RECORD OF N.Y.C.B. ASS'N 320, at 328-32 (1974). A discussion of the strategy used to attack restrictive covenants can be found in C. Vose, *CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES* (1959).

36. The LDF became a separate entity in 1939. Until *Brown v. Board of Education*, 347 U.S. 483 (1954), however, ties between the LDF and the NAACP remained close, as evidenced by interlocking leadership, an office-sharing arrangement, and an especially close attorney-client relationship. Shortly after *Brown*, however, the LDF became truly independent. A number of factors explain the development of a separate identity, including: (1) a status investigation launched by the Internal Revenue Service, (2) the growth of new constituencies such as Reverend Martin Luther King's Southern Christian Leadership Conference, and (3) the forceful and independent nature of Thurgood Marshall, the LDF's top official.

While the NAACP does have its own legal staff, it has not, for reasons beyond the scope of this paper, developed a substantial capacity to engage in law reform activity over a sustained period of time. Consequently, after 1940 this Essay focuses on the LDF.

LDF developed an extensive network of cooperating attorneys. In 1975, the LDF's roster of cooperating attorneys, reimbursed on a modest fee basis for LDF-authorized litigation, included a substantial number of contacts in virtually every state.³⁷

The LDF, then, was a very different organization in 1975 from that which had planned and successfully brought the *Brown* case two decades earlier. By the mid-1960's the character of LDF litigation had been so thoroughly transformed that continued management by the staff of a decade earlier would have been virtually impossible. First, in the 1960's, there was defense of the Movement: the freedom-riders, the sit-in demonstrators and the multitudes of other activists who required counsel during the heyday of Southern civil rights activities.³⁸ Then, beginning in the late 1960's, the LDF became involved in what was to become its major field of activity during the next decade: Title VII³⁹ employment discrimination litigation. A common thread running through these cases is the need for extensive lawyering manpower. The controlled, limited constitutional litigation of the *Brown* case could be managed by a handful of lawyers, a close-knit group of talented civil rights advocates. The staggering caseload of Movement activists and the subsequent massive workload of employment discrimination grievances required a substantial number of attorneys and, concomitantly, the additional resources to handle trials involving questions of fact.

While staff size has increased dramatically, the key factor in the recent development of the LDF has been the new role assumed by cooperating attorneys. The cooperating attorney serves as the organization's effective contact point with the outside world. He is the LDF's extension into the local community where an aggrieved black is most likely to be cognizant of the cooperating attorney's local reputation as a civil rights lawyer. The LDF provides the cooperating attorney, who is principally a private practitioner responsive to market forces, with varying degrees of assistance. In any litigative undertaking, the relationship depends on a number of factors, such as the complexity of the issues, the expertise and availability of the cooperating attorney, and the import of the case. A staff attorney may take virtually full responsibility for pursuing the case, or on the other

37. A large number of these cooperating attorneys were either trained by the LDF under its internship program or supported as students under its scholarship program. The only local branch employing staff attorneys is the San Francisco office. It was initially established by a grant from a wealthy donor, conditioned on locating the office in California. Interview with Jack Greenberg, Director-Counsel of the LDF, in New York City, May 20, 1975.

38. The LDF was only one of a number of lawyers' groups involved in defending civil rights activists. Lawyers affiliated with the Lawyers Constitutional Defense Committee, the Lawyers Committee for Civil Rights Under Law, and the National Lawyers Guild also played a major role. For a sampling of the lawyers' experience, see SOUTHERN JUSTICE (L. Friedman ed. 1965).

39. Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (1970).

extreme, he may exercise only the most superficial review of the work of an experienced and trusted local associate.⁴⁰

The critical point is that the LDF is a partnership—a mix of staff and cooperating attorneys managing a nationwide, heavy-volume caseload through a pooling of professional resources. It is the visibility of the local cooperating attorney that serves as the crucial link between the organization and its clientele.

Despite these radical structural changes, the impulse to engage in programmatic reform has not been abandoned. As Jack Greenberg, Director-Counsel of the LDF, has emphasized, organizational control over the sequence and pace of litigation is the cornerstone of successful planned implementation of a law reform policy, the segregation cases being a prime example.⁴¹ While the LDF cannot always maintain the nearly absolute control it exercised in the *Brown v. Board of Education* sequence, there continue to be major areas of civil rights concern where litigation planning has been employed—litigation involving, for example, the death penalty, employment discrimination, fair housing and contemporary education law issues.⁴²

C. Characteristics of Early Law Reform Activity

Is it possible to generalize about the law reform activity engaged in by the ACLU and LDF? Distinguishing between the structural characteristics of law reform activity and the substantive goals pursued, consider first the structural component.

In the early years, both the NAACP and the ACLU were committed to a law reform strategy emphasizing diversification of attack; lobbying, educational efforts and protest played more important roles than litigation. Because the organizations relied on membership support, either in the form of funds or donated services, this diversified reform strategy was critical to the viability of the litigation effort.

The point is perhaps more obvious in the context of nonlitigation activities. Lobbying and publicity require a base of popular support; mem-

40. In general, the staff tends to handle important issues of law that arise on appeal, while the cooperating attorneys play a more significant role at the trial level.

41. See Greenberg, *supra* note 35, at 328–32.

42. Much of the programmatic reform initiative continues to emanate from a cadre of LDF attorneys and trusted associates. Through its semiannual meetings at Airlie House, however, the LDF has to some extent institutionalized strategy formulation. The meetings are attended by the staff, a large number of carefully selected cooperating attorneys, and activist law professors with deep roots in the civil rights movement. The major contemporary civil rights issues have been analyzed from a litigation-centered perspective at these meetings.

The Airlie House conferences also serve as a vital two-way flow of communications between staff and cooperating attorneys, involving the exchange of respective expertise and experience. Materials and forms developed for the conferences, as well as the seminars and meetings, educate the cooperating attorney as to the goals of the organization and ease his burden of case preparation.

bership is essential and the membership must be actively doing things—signing petitions, marching in demonstrations, meeting in protest, investigating grievances, and so on. The membership is *engaged*. Out of that sense of engagement comes the necessarily more abstract identification with organizational objectives, such as litigation, that neither require popular action nor yield immediate payoff. Identification with the latter type activity is demonstrated, of course, through the medium of monetary support allocable to the litigation program. Especially in a fledgling organization, however, the sense of personal engagement is of inestimable value in maintaining membership tolerance for more esoteric reform strategies.

In addition, the constituency of a diversified political reform organization invariably includes professionals who, identifying with the organization's commitment to action, sometimes fashion their contribution in terms of their specialized skills. Hence, the attorney volunteers his litigation services as his nonlawyer colleagues devote themselves to a variety of protest and publicity activities.

The structures of the ACLU and NAACP were markedly altered by the increasingly broad base of membership financial support consequent upon organizational growth. While the ACLU was somewhat slower to develop into a truly national membership organization, the dynamics of growth and maturity have been strikingly similar in both cases. In the early years, the organizations were highly centralized; a clique of founders determined policy and implemented it as well. If litigation seemed warranted, the lawyer-member either took personal responsibility or prevailed upon associates at the Bar to contribute their time and energy to the cause.

Growth fostered decentralization; ACLU local affiliates sprang up around the country and, inevitably, the local groups took a larger responsibility in the definition of priorities. Official threats to a local dissident's autonomy of action seemed of paramount importance to a local constituency. The LDF came to rely increasingly on cooperating attorneys as a means of access to aggrieved black minorities at the local community level. Funds were allocated to a growing network of local affiliates or cooperating attorneys. Centralized control of the litigation docket gave way to a more decentralized caseload. In both organizations, but particularly in the ACLU, lines of authority were attenuated and the definition of organizational policy became more diffuse.⁴³

43. A variety of factors account for the higher degree of decentralization in the ACLU. Most important, perhaps, is the tremendous diversity of concerns that fall under the commitment to protection of civil liberties. Many of the issues are highly localized and frequently call for informal non-litigative approaches to influential members of the community. Even if the issue is a recurring one, it would be an unusual case where the local ACLU lawyers required the kind of access to specialized experts and technical information that the national office of the LDF provides to its local affiliates and cooperating attorneys. Moreover, the basic ideology of the ACLU places great emphasis on the im-

Notwithstanding the marked tendency toward fractionalization, a consistent nexus with the past was maintained. The organizational core, a small professional staff with long tenure and corresponding experience, retained responsibility for a degree of coordination and determination of priorities essential to a tolerably coherent definition of the purpose and "image" of the organization.⁴⁴ As long as this organizational core—not the least important component of which was the professional fundraisers, as distinguished from staff counsel—remained intact, market forces did not pose a significant threat to continuing viability.⁴⁵ Alternatives to membership support, such as subsidization from government, foundations and the private bar, continued to be of secondary importance in maintaining the ongoing litigation enterprise.

Turning from structure to substance, we again find that the ACLU and NAACP (later, the LDF) have shared certain important characteristics. Both are, in an important sense, organizations with a singular ideological commitment. The ACLU has concentrated its collective energy on battling restrictions on the autonomy of the individual—threats to freedom of speech, religion and association, and governmental indifference to procedural due process. From defense of World War I antiwar activity and Vietnam protest to protection of labor or prison agitation, the ideological focus of the organization has remained fairly constant. Similarly, the NAACP carved out a distinct ideology—equality of treatment and opportunity for the black community—and has adhered to that commitment for a half century.

The singular focus of each organization has been critical to its long-term viability, for coherence of focus is indispensable as an organizing device. A movement must make its objectives intelligible and salient to a broad-based constituency if it is to have real organizing power. Moreover, agreement on relatively general principles is crucial if the movement is to resist the centrifugal forces that threaten any organization as the first flush of enthusiasm passes, and the second wave of organizational recruit-

portance of individual autonomy of action. Consequently, local chapters would be unlikely to look kindly upon efforts from within the organization directed at shaping their key commitments.

44. Even at the more decentralized ACLU, the organizational guidelines provide that the national office must approve any litigation taken to the United States Supreme Court, as well as policy positions on issues of national import. Interview with Alan Reitman, *supra* note 24. But see note 23 *supra*.

45. Like the ACLU, the LDF is dependent on \$10 to \$20 contributions from mass mailings to support its activities. These contributions are the major source of support for staff and provide the financial base for compensating the cooperating attorneys through a per diem arrangement. The LDF is exclusively involved in litigation, unlike the ACLU and NAACP, and is not a membership organization. Contributors do not participate in any real, or symbolic, activities sponsored by the organization. Instead, a sense of identification must be built on the nexus of a shared commitment to civil rights and a demonstrated concern for grass roots issues such as schooling, housing and employment. Interview with Jack Greenberg, *supra* note 35.

ment transforms the group into a relatively impersonal association of like-minded strangers.

Furthermore, the particular focus of each organization has been critical. The respective commitments to protection of dissidents and to advancement of blacks, for both historical and contemporary reasons, possess extraordinary motivating power within our society. Hence, in each case, a counterweight to impersonal market allocation of legal resources has been achieved by the powerful impetus to join an organization devoted to the support of a societal objective perceived as fundamental.

Note, however, that a distinction exists in the nature of those commitments: a dichotomy between *protection* (of civil liberties) and *advancement* (toward racial equality). While the ideological focus of the NAACP and LDF has emphasized improving the status of blacks, the ACLU has concentrated on maintaining, or providing a bulwark against encroachment on, individual autonomy. In the litigation context, this divergence in orientation has had identifiable consequences. Beginning in 1930, we have seen that the NAACP became committed to litigation planning, an approach to law reform that has carried over to the postsegregation era, as exemplified by the capital punishment, employment discrimination and education litigation. On the other hand, the law reform model established by the ACLU has been quite different. Throughout its history the organization has engaged in an essentially reactive strategy: when a state legislature refuses to respect the spirit of scientific inquiry in education, the ACLU represents the victimized teacher;⁴⁶ when state agencies seek to enforce loyalty oaths, the ACLU represents the conscientious objectors;⁴⁷ when the national government attempts to suppress dissent against an unpopular war, the ACLU defends the antiwar spokesmen;⁴⁸ and so on. Litigation is undertaken in response to the stimulus of recurring but constantly varying instances of repressive state action.

In one sense, however, these alternative strategies—programmatic versus reactive—can be reconciled.⁴⁹ For, in essence, each response is pro-

46. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

47. See, e.g., *Wieman v. Updegraff*, 344 U.S. 183 (1952).

48. See, e.g., *Oestreich v. Selective Service Bd.*, 393 U.S. 233 (1968); *United States v. O'Brien*, 391 U.S. 367 (1968).

49. These alternative strategies—programmatic versus reactive—also raise a question regarding my basic definition of “law reform activity.” See text following note 63 *infra*. It could be argued that only programmatic activity is law *reform*; the ACLU, it might be said, is no more reformist than an institutional public defender who “reacts” on a more routinized basis to prosecutorial efforts by the State. This is an overly restrictive conception of reform activity. While the ACLU primarily has acted defensively, it has done so systematically in areas where broadly conceived substantive freedoms have been undefined (or ill-defined). In this important sense, the expansion of due process guarantees and Bill of Rights protections constitutes affirmative law reform activity.

Taking the definitional issue one step further, it could be argued that the traditional practice of law involves lawyers in the process of reform. Nonetheless, a basic distinction exists between the

voked by the stimulus of state-sanctioned *repression*. And the overwhelming importance of the repressive stimulus is its extraordinary power as an organizing device. Critics have too easily passed over this point. Both the ACLU and the NAACP have been criticized for the "remoteness" of their concerns; in each case, the claim is that the organizational ideology has been middle class, unconcerned with bread-and-butter issues.⁵⁰ Whatever the merits of that argument, one must nevertheless account for the longevity, indeed, continued growth, of each organization. Undoubtedly, the parallel growth of a socially conscious middle class is a factor; yet, I would argue that the commitment to combat organized repression is of central import. Such repression, state-mandated or encouraged, casts a long shadow; to those who are stirred by moral indignation, as well as those immediately affected, the impulse to support law reform activity is strong.

Finally, the image as well as the viability of both organizations has been strongly influenced by the type of litigation undertaken. Here, we confront another side of the argument that each organization has engaged in law reform activities "remote" from the real needs of its natural constituency. Neither the ACLU nor the NAACP has attempted to meet this criticism by adopting a more classical "law office" practice that would involve highly individualized representation. In establishing litigation priorities, the ACLU traditionally has shunned the service role that would involve civil liberties representation on a case-by-case basis in favor of highly selective representation on major constitutional issues. Indeed, until recently ACLU cases predominantly involved representation in only the most attenuated sense, through amicus briefs in appellate litigation. Even now, the combination of heavy reliance on volunteers at the affiliate level and a small, somewhat specialized staff in the national office best fits a strategy of selective constitutional litigation.

Similarly, the NAACP and the LDF have been strongly criticized from the early days when criminal defense activity—even in lynching cases—was down played, to more recent times when the multiplicity of legal problems facing low-income blacks has been attacked, if at all, by other legal service organizations. Instead, the LDF long paralleled the ACLU in its commitment to precedent-setting constitutional litigation.⁵¹ Only in its latest phase has the LDF—with the extraordinary growth of its staff and cooperating attorneys—turned in an organized way to the pursuit of cases,

lawyer whose essential commitment is to provide services in response to economic demand and the attorney who is primarily committed to improving—by his lights—the quality of society through his professional work. See note 8 *supra* for an elaboration of this distinction.

50. See, e.g., L. LOMAX, THE NEGRO REVOLT 101-20 (1962).

51. The obvious analogue here is to the intense debate over the role of the Office of Economic Opportunity Legal Services program: whether a law reform or service orientation should have been the governing perspective. See, e.g., Cahn & Cahn, *supra* note 5; Hazard, *Social Justice Through Civil Justice*, 36 U. CHI. L. REV. 699 (1969); Comment, *supra* note 4.

particularly in the employment discrimination area, where a successful outcome in the immediate conflict is the principal justification for representation.

This test case approach, however, has not been exclusively a by-product of the single-minded pursuit of deeply held convictions about organizational purpose. Economic realism has played a considerable role as well. A service orientation is enormously expensive when compared with law reform activity. The latter is by definition selective: priorities are established that emphasize taking the cases with the broadest potential impact. On the other hand, a service orientation suggests close attention to the diverse and virtually insatiable needs of a "community," whether defined in ideological terms (for example, all conscientious objectors) or locational terms (for example, all residents of a particular low-income area).

And more is involved than mere numbers of cases: constitutional litigation is "clean," in the sense that time-consuming problems of investigation, proof, and attendant courtroom delay are not involved. The potentially staggering expenses of litigation are consequently minimized through careful selection of test cases. An obvious corollary is that a reform organization is correspondingly able to rely more heavily on volunteer attorneys as an integral part of the litigation program.⁵² Selective constitutional litigation represented an attempt to achieve maximum returns from limited resources. As long as the ACLU and the LDF may have been the only feasible means of maintaining the image of representing a large national constituency.

What characteristics seem especially important in accounting for the long-term viability of these organizations? The constant overriding threat, of course, has been the impersonality of the marketplace: a sustained orientation toward law reform will not sell; it requires a subsidy. And litigation is costly. Establishing and administering priorities is, in itself, a major undertaking. Someone must invest the requisite time to explore the issues and to assess the likelihood of success so that an initial determination whether to proceed can be made. Moreover, even apart from trial, case preparation is time consuming and expensive. Finally, effective manpower to perform these lawyering functions does not come cheap; a skilled lawyer, particularly with litigation experience, commands a high fee in the competitive market.

Thus, the threshold concern is maintaining adequate long-term subsidization of the lawyering program. Both the ACLU and the LDF have been highly successful in creating mass constituencies with a sustained

52. The other side of the coin is that reimbursed assistance, as in the case of the LDF's cooperating attorneys, makes it possible for an organization to engage more heavily in trial litigation involving questions of fact. Indeed, the LDF is significantly more heavily involved in litigating complex issues of fact—for example, in Title VII cases—than is the ACLU.

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

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

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

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

III. THE SECOND WAVE: PUBLIC INTEREST LAW

A. *Immediate Antecedents*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

57. *Id.* at 1004–05.

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

59. 16 U.S.C. § 803(a) (1974).

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

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

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

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

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

B. *The Parameters of Public Interest Law*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Departures from the Law Reform Tradition

1. Notes on the structure of law reform activity.

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

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

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

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

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

reform movements were sustained in large part by contributed professional expertise, either in the form of donated or minimal-fee service. While a small professional staff "practiced" law reform, most lawyers associated with the reform movement maintained a full-time traditional practice and did voluntary work on the side. By contrast, the public interest lawyers have organized in the mode of a traditional law firm to engage in full-time law reform efforts.

Structurally, then, the public interest law firm looks very much like its corporate-commercial counterpart: it is a law office organized to manage a caseload involving the standard mix of judicial and administrative appearances as well as informal negotiations with clients and adversaries. A certain number of staff attorneys are complemented by a secretarial staff, paraprofessionals, and in some offices, a few student interns. Thus, the public interest firm is a hybrid of sorts, implementing the kind of broad ideological goals ordinarily associated with a multifaceted reform strategy through a traditional litigation-oriented form of organization.

The law office structure has had a singular effect on the channelling of law reform. Organizations that relied heavily on volunteers were correspondingly dependent on the expertise and continuity of staff whenever complex, time-consuming litigation was undertaken. As a consequence, concentration on a limited number of cases at any one time, involving relatively straightforward constitutional issues, was a necessity. In contrast, public interest lawyers frequently have been able to develop sufficient expertise in highly complex regulatory areas—such as communications law, various environmental fields, and consumer protection activities—to litigate on equal terms (subject of course to resource limitations) with the most highly accomplished private law firms.⁷⁸ Foundation commitment to the support of full-time legal practice, with almost no limitations on the recipient firms' areas of concentration, has been indispensable in this regard.

Virtually unrestricted freedom of action has led to specialization even in the diversified public interest firms. After mastering the intricacies of public utility rate regulation and establishing personal contacts at the Public Utilities Commission, the public interest lawyer is reluctant to ignore the efficiencies of further application of his newly developed expertise, particu-

recognizing that their greatest vulnerability is to publicity that tarnishes the populist image they strive to maintain.

In the last analysis, it is an empirical question whether public interest lawyers do in fact live up to the rhetoric about constituency representation that has been employed on their behalf. Before the returns are in, however, it would be a mistake to ignore the real world constraints that seriously qualify the public interest lawyer's ability to pursue his own idiosyncratic value preferences.

78. This reliance on professional staff can be contrasted to the markedly different structure recently developed at the LDF, based on a unique relationship between professional staff and cooperating attorneys. See text accompanying notes 37–42 *supra*. The LDF, too, has attained a high degree of litigation expertise in complex fields of law.

larly since his investigative work or pretrial discovery has most likely uncovered a host of other Commission practices that warrant attention, if not attack. This is a typical happenstance that is replayed regularly at a variety of agencies. In other words, full-time practice relatively unburdened by obligations to a diverse lot of clients encourages the development of ongoing monitoring relationships at particular agencies. While falling short of litigation planning on the grand scale practiced by the LDF, such relationships do potentially involve a substantial degree of probing and concerted deliberation about what might be done to reform the way a particular agency approaches the implementation of its regulatory mandate.

Litigation planning—even in the modest guise of continuous monitoring of a discrete area of regulatory activity—requires, at a minimum, three organizational characteristics: (1) a certain threshold staff size, (2) relatively absolute control over clientele, and (3) surplus nonearmarked funds. The size of the firm must be large enough to support attorney specialization. In theory, of course, a solo practitioner with unlimited subsidization could become the leading authority on fast-breeder atomic reactors or the fairness doctrine. In practice, however, the public interest lawyer is responsive to a variety of constituencies, including his donors, potential clients and professional peers. In virtually every instance, the pressures converge: diversify, take a wide range of important cases.⁷⁹ With less than four or five full-time attorneys, lawyer specialization is unlikely to occur to the extent necessary to permit a regularized input into the decisionmaking process of a particular agency.

Control over clientele is similarly critical to litigation planning. Even with a sufficient number of staff lawyers to allow some degree of specialization, there is an apparent tension between the law office mode of operation and a sustained role in achieving law reform, caused by the simple fact that lawyers are dependent upon a highly unpredictable and frequently uncontrollable agent: *clients*. More specifically, one might suppose that the law office structure would straitjacket the firm into ad hoc, unsystematic representation of a diverse mix of client-generated issues. In fact, nonsubsidized public interest practitioners to some extent have been forced to practice in just such a first-in, first-out fashion.

For the subsidized firm the pressure to respond to existing demand for

79. Why do the pressures to diversify converge? Foundations are generally sensitive about becoming identified with a narrow definition of "the public interest." It better fits their image if a grantee is active on a wide variety of fronts, especially where politically charged issues are being raised. Potential individual donors to the firm are a diverse lot whose interests run the spectrum of liberal causes. Thus the public interest firm seeking support from wealthy individuals is, again, under some pressure to diversify. Potential clients and professional peers similarly have concerns that run the gamut of liberal causes—sex and race discrimination, poverty, consumer and environmental problems, and so on. As long as a mass of diverse unsatisfied grievances seriously outstrips the supply of public interest lawyers, the pressures to diversify will remain substantial.

services is less compelling. In theory, once a case is taken a willful or restless client retains the ability to upset the best laid litigation strategy.⁸⁰ But the extent of this threat is in fact dependent upon the type of client. A public interest firm representing an ad hoc citizens group will frequently lay down certain ground rules in advance: the group may be led to understand that it is getting subsidized legal assistance and, as such, must defer to the lawyers handling the case. Such an agreement relegates the client to a role analogous to that of the nominal defendant in a tort suit handled by an insurer.

It is critical to understand that public interest involvement is generally in the nature of class action litigation. The classical tension that the poverty or criminal lawyer sometimes confronts between establishing broad precedent and safeguarding the rights of his client is hardly ever an issue because public interest advocates simply do not have discrete clients whose personal liberty or property is at stake. Moreover, as noted earlier, *Church of Christ I* and *Scenic Hudson I* have dramatically liberalized the formal rules of access to the point where an ad hoc citizens group organized in response to a particular local or regional conflict (less charitably characterized as a “paper organization”) will frequently be allowed to intervene in an administrative forum without procedural protest.⁸¹ Hence, the public interest law firm’s departure from the membership-based structure of the traditional law reform organizations turns out to be less critical than might superficially appear to be the case.

On the other hand, a firm representing the Sierra Club operates in a context where its client has a sharply defined set of organizational priorities. If the Sierra Club decides that its continuing participation in a lawsuit is undercutting its lobbying activities for a related legislative proposal, the law firm may find itself without a client. More often than not, however, large-scale organizational clients like the Sierra Club, and the small number of public interest lawyers that handle their cases, would not reach a joint decision to participate in a litigative effort without first establishing common assent on the objectives sought in the case.

Generally, when a public interest firm identifies a critical issue, it rarely has any difficulty in finding a client willing to pursue the matter. In fact, the relationship between major consumer, political reform and environmental organizations, on the one hand, and public interest lawyers, on the other, bears rather striking similarities to the retainer arrangements estab-

80. Obviously, one need not view client control from a jaundiced perspective. Indeed, the propensity of public interest firms to define their own priorities has been attacked by some as demonstrating their “elitist” character. See note 77 *supra*. Whatever may be said for this argument, it is undoubtedly sharpened by the contrast with the more passive traditional service role of the private practitioner.

81. See notes 56–61 *supra* and accompanying text.

lished by major corporations with the law firms that handle their political-regulatory affairs. The public interest lawyer, like the large corporate firm, has a mandate to practice preventive law, rather than merely to engage in defensive undertakings. But the analogy to the commercial setting is not perfect. The public interest lawyer goes a step further by suggesting issues that may be sufficiently interesting to persuade the client to lend its name as a moving party.

Without the flexibility to dictate the timing and scope of attack, affirmative law reform activity would be greatly diminished. Virtually every regulatory agency from the Bureau of Land Management (BLM) to the FCC operates at an extremely low level of visibility. To get wind of an upcoming FCC investigation may require close perusal of the Federal Register; to uncover off-road vehicle activities in the California desert may necessitate discrete questioning of a BLM official. There may be no client to perform these monitoring roles, and if a moving party cannot be readily provided when the time for action arises, there will be no incentive for the public interest advocate to perform the monitoring-investigative function in the first instance. Significantly, two of the largest environmental public interest firms, the NRDC and the EDF, are membership organizations and frequently serve as their own plaintiff; another environmental firm, the SCLDF, is the coordinator, and frequently the attorney, in litigation conducted for the Sierra Club.

The final, and indispensable, ingredient in fostering programmatic law reform activity is subsidization through the provision of nonearmarked funds. Consider the public interest firm without subsidization. Aside from the roster of clients it represents, the privately funded public interest firm is largely indistinguishable from other private law firms: it takes what business comes its way; it is almost always hard pressed by the exigencies of daily survival; it bills on an hourly basis, and pursues a case accordingly; and it develops the degree of specialization and expertise that the market dictates. Only at a subsidized firm does a staff attorney set aside time to learn a new area in pursuit of his self-determined effort to develop a specialization that fits comfortably with the existing priorities of the office.

While law office organization is not an essential medium for programmatic law reform activity, it has significant advantages over the decentralized voluntary network of lawyers associated with the traditional reform organizations. Indeed, it seems accurate to suggest that the LDF achieved its early programmatic successes *despite*, rather than because of, its organizational structure. Within LDF, a small core of staff attorneys and insider volunteers maintained close control over the various attempts to undertake strategic litigation planning. The public interest lawyers are far less con-

cerned with major constitutional litigation; programmatic law reform more often involves close perusal of the administrative process. Whatever the strengths of a coordinated volunteer effort, and there are many, it is probably even less well-suited to the highly specialized nature of much public interest law work.⁸²

Hence, foundation support of the public interest law movement, particularly the Ford Foundation commitment, is an important landmark in 20th century law reform activity. It made possible a new departure—litigation directed at social change with the benefits of a corporate law firm structure: centralized control over caseload, stimulating collegiality, a full-time professional staff, and the opportunity to specialize. At the same time, foundation subsidization abrogated the limitations of corporate practice tied to client control. Moreover, the hazardous painstaking endeavor to build a membership base that so markedly characterized, and limited, the growth of earlier litigation-oriented law reform organizations was circumvented.

2. Notes on law reform through litigation.

By now it should be clear that public interest law has created new dimensions of reform activity. Broader ranging in scope than previous law reform movements, public interest law has developed a capacity for highly specialized concentration on important, but frequently overlooked, government regulatory activities. Some critical questions need to be explored, however. How do public interest law firms establish reform priorities? Is it possible to generalize about the types of cases that are most salient to the public interest law practitioner? How, if at all, can we assess the impact of public interest law reform? And to what extent do our answers to these questions further establish a claim to uniqueness for the public interest law enterprise?

a. Setting priorities.

Let us begin with the matter of priorities. Consider the public interest firm that confronts the question whether it ought to represent a citizens group that wants to intervene before the state Public Utilities Commission to protest a rate increase requested by a major utility. What is the firm's yardstick for determining: (a) whether it ought to participate, and (b) if so, to what extent?

Lawyers representing an aggrieved industrial user would have no comparable decisionmaking problem; the resources committed to the legal effort, as in most commercial litigation, would be determined by the client's

82. Moreover, there is a very real problem in recruiting high quality legal personnel to staff positions largely involving the coordination of activities. Attorneys committed to law reform activity would ordinarily chafe at the predominantly administrative tasks associated with managing a docket of litigation conducted in the field.

determination of probable costs and benefits. If the benefits from seeking to block the rate increase were estimated to exceed the costs of contesting the issue, the lawyers would be instructed to proceed.

But the public interest firm's client has no financial stake in the outcome. From its standpoint, optimizing the employment of legal resources is irrelevant;⁸³ there is no comparable limit on the lawyering resources that ought to be expended on the conflict.⁸⁴ And the public interest firm itself, how is it to decide? The sole realistic alternative is to proceed, in a rough fashion, to review the unexpended annual budget, reassess the manpower and financial resources committed to ongoing litigation, estimate the alternative potential litigative efforts in the near future, and determine, finally, the import and magnitude of involvement in the rate protest. Proceeding, then, in an environment involving a good deal of guesswork, unstructured by client financial control (and reward), the public interest firm sets priorities with an eye to its fixed, limited resources.⁸⁵

A commercial firm may allocate a number of attorneys to full-time work over a period of years on a single complex antitrust matter. If such representation is worth the cost to the client, it will be provided. Obviously, this is not so in the public interest practice. The complicated factual case, where investigative and discovery techniques would create substantial costs, is generally avoided.⁸⁶ This economic pressure to avoid complex factual litigation is reinforced by the public interest lawyer's commitment to law *reform*, and a correlative sense that cases establishing broad precedent make, on the whole, a greater contribution to the reform objective than do the favorable resolution of discrete controversies.

How far does this law-fact distinction take us in understanding the priorities of the public interest lawyer? Substantial qualifications are necessary. At the outset, a rationale must be provided for cases like *Mineral King*,⁸⁷ *Scenic Hudson*,⁸⁸ and the DDT controversy,⁸⁹ where environmen-

83. There is a parallel in government litigation involving federal administrative agencies. Because the agencies are represented in court by the Department of Justice, they are sometimes insensitive to the costs of litigation, placing their program needs in the forefront. Like the public interest client, the agency may not view the litigation option as a scarce resource, since the agency does not directly foot the bill for cases it brings or defends. For a discussion of the attorney-client relationship of the federal administrative agencies and the Department of Justice, see Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

84. Of course, there may be noneconomic organizational considerations that militate against total litigative warfare with the government. For example, "responsible behavior" in negotiating a settlement may enhance the prospects of future access to decisionmakers within the adversary agency.

85. This analysis is limited to the subsidized public interest firm. Those firms supported by a fee base are responsive to the market conditions that shape a traditional law firm's work. But there is a major difference: unlike the commercial firm, the fee-supported public interest practitioner has many clients who are sometimes represented by subsidized firms. As a consequence, he may have a far more difficult time convincing his client that his projected costs are reasonable.

86. Equally significant in such cases is the frequent necessity to exhaust seemingly interminable administrative remedies.

87. For a history of the decision to develop Mineral King and a discussion of the litigation up to 1972, see Comment, *Mineral King: A Case Study in Forest Service Decisionmaking*, 2 ECOLOGY

talists have spent years investigating and litigating controversies that involve major factual disputes. The critical factor in such cases appears to be the singular commitment of a client group. In each of these cases, for example, the issue in dispute either served as the group's initial organizing vehicle or tested the basic commitment of an established group. As such, the cases also came to take on symbolic value to the organizations apart from the importance of victory.

Consider *Mineral King*, for example. Essentially, the conflict is between two recreational uses: development of a mass recreation skiing and winter resort area by Disney Enterprises, as contrasted with conservation for more solitary souls, the hikers and backpackers represented by the Sierra Club. Mineral King Valley is located in the Sierra, making it of special concern to the public interest lawyers' client, the Sierra Club. The conflict, focusing on the multiple use authority of the Forest Service,⁹⁰ has dragged on for years and has received nationwide publicity. Consequently, an important sector of the general public, both within and without the organization, has become aware of *Mineral King* and will view the outcome as a signal of the strength and legitimacy of the environmental movement.

Scenic Hudson has been pursued by a determined group of environmentalists, including some wealthy estate owners, who have been successful in raising the funds necessary to retain prestigious counsel at reduced fees as the conflict gradually has become a *cause célèbre*.⁹¹ From the outset, the case was the client group's *raison d'être*. Similarly, the DDT controversy was the focal point for organizing the Environmental Defense Fund

L.Q. 493 (1972). The standing issue was determined adversely to the Sierra Club in *Sierra Club v. Morton*, 405 U.S. 727 (1972). However, the Club amended its complaint and, at this date, is engaged in discovery in preparation for trial in the District Court, Southern District of California.

88. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966), *reconsidered in* 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972). The case was subsequently reopened before the FPC for further testimony on the fish-kill issue. At the date of this writing, the FPC had not yet acted. The facts of the case are discussed at note 58 *supra* and accompanying text.

89. See *EDF v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir. 1971). See also *EDF v. Hardin*, 428 F.2d 1093 (D.C. Cir. 1970). On June 14, 1972, the EPA finally banned general use of the pesticide and the ban was upheld, *EDF v. EPA*, 489 F.2d 1247 (D.C. Cir. 1973).

90. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (1970). The multiple use mandate of the Forest Service is described in detail in Note, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L.J. 787 (1973).

91. In some respects, *Scenic Hudson* has the classic dimensions of the landmark English case of *Rylands v. Fletcher*, [1866] L.R. 1 Ex. 265, *aff'd*, [1868] L.R. 3 H.L. 330, where damage done by escaping underground water served as the occasion for expanding the limits of strict liability in tort. *Rylands* has frequently been described as a confrontation between the expanding industrial society in mid-19th century England and the established landed gentry. See, e.g., Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298, 317-25 (1911).

While *Scenic Hudson* is commonly viewed as an "environmental" case, the plaintiff organization did not consist exclusively of backpackers and hikers. Indeed, wealthy estate owners, upset by the prospect of having a large hydroelectric power plant as a neighbor, were instrumental in engaging a leading New York law firm and in obtaining grants to carry on the litigation. Efforts by this group to institutionalize the work done in the *Scenic Hudson* case were critical in the subsequent formation and funding of the Natural Resources Defense Council.

(EDF).⁹² Hence, public interest lawyers have become involved in these fact-based disputes in the occasional case where a client's most fundamental organizational tenets were endangered and where, at the same time, fairly substantial financial backing for litigation was available.⁹³

A second qualification to the law-fact distinction is fairly obvious: where a case appears likely to yield a clear-cut victory with a minimal resource commitment, the public interest firm will become involved. Recently, there was a major controversy over the construction of a nuclear power plant at Point Arena, a scenic coastal reserve north of San Francisco. Public interest law firms participated, convinced that the earthquake dangers were sufficiently evident to insure a successful outcome without the massive drain on resources typically associated with an Atomic Energy Commission hearing. The prediction proved accurate.⁹⁴

Inevitably, effective monitoring of an agency's work requires still another qualification to the law-fact dichotomy. Both the Sierra Club Legal Defense Fund and the Natural Resources Defense Council, for example, have developed strategies for maintaining a watchful eye over Forest Service multiple use management, particularly with respect to timber contracts in roadless areas. These cases must be taken through various levels of appeal at the Forest Service, and they require in-depth understanding of the ecological and recreational characteristics of a given area.⁹⁵

The project has been undertaken for two reasons. The Forest Service's mandate under the Multiple-Use Sustained-Yield Act of 1960⁹⁶ confers such vast discretion on the agency that its orientation can only be changed through intensive monitoring activity.⁹⁷ There is no extensive network of formal procedural safeguards, let alone substantive limitations, that can serve as leverage for securing review on nonfactual grounds. Instead, the cases have to be continuously scrutinized for compliance with the NEPA requirement that there be adequate assessment of environmental impact. Thus, if Forest Service timber management policy is accorded a very high

92. The EDF had its origins in a local dispute on Long Island over the use of DDT. A group of scientists, who comprised the nucleus of the organization opposing further use of the chemical, subsequently formed EDF and took their battle against DDT into the national arena, initially at the Department of Agriculture and later at the EPA. See note 89 *supra*.

93. In fact, once a public interest law firm is involved in such a case, it becomes virtually impossible to withdraw. This has important implications for the mass of less dramatic fact-based controversies. Conservatism fostered by the unnerving unreliability of economic forecasting in complex factual litigation is substantially reinforced by the compulsion to stick by a commitment once undertaken.

94. See *San Francisco Chronicle*, Jan. 20, 1973, at 1, col. 4.

95. For a case illustrating the problems that arise in judicial review of Forest Service multiple use land management, see *Parker v. United States*, 309 F. Supp. 593 (D. Colo. 1970), *aff'd*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).

96. 16 U.S.C. §§ 528-31 (1970).

97. For a highly critical discussion of the Forest Service's sweeping mandate, see Note, *supra* note 90.

priority, the only effective administrative-litigative recourse is arguably case-by-case monitoring.

In addition, an extensive network of local fishing and hiking organizations, many affiliated with the Sierra Club, regard Forest Service policy as paramount in environmental significance. These groups have frequently mobilized to identify questionable Forest Service decisions and to assist in developing the factual basis in local controversies. Consequently, the absence of feasible alternatives to case-by-case attack converges with highly motivated client assistance to explain the willingness of public interest lawyers to take on these discrete factual disputes.

Having suggested a number of qualifications to the law-fact distinction—qualifications arising from either a distinctive ideological-financial commitment by a client group, a client-cooperative effort, or the certainty of easy victory—it is nevertheless possible to salvage the general principle. On the whole, public interest firms have not been enthusiastic about individualized fact-based attacks across a broad spectrum of public interest areas. Army Corps of Engineers dam building projects, AEC and FPC power plant licensing projects, and FCC fairness doctrine attacks afford a few examples.⁹⁸ These matters simply tend to be too time-consuming, narrow in impact and unpredictable in outcome to warrant an extended participatory effort.⁹⁹

The point can be further supported by reference to the history of NEPA litigation.¹⁰⁰ During the first stage of NEPA litigation, public interest law firms were responsible for dramatic victories, such as *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,¹⁰¹ extending the impact statement requirement to the farflung reaches of the administrative system. Indeed, Stage I litigation, addressed to the question of when an impact statement is required, continues to be used in a highly imaginative fashion; witness, for example, the recent decision in *NRDC v. SEC*,¹⁰² where a federal district court judge required the SEC to initiate Administrative Procedure Act rulemaking proceedings centering on the necessity for corporate disclosure in registration materials of potentially harmful environmental projects.

98. In some cases, a firm that specializes in a particular area, such as the Citizens Communications Center in FCC-media conflicts, can overcome the economic barriers imposed on more diversified public interest practitioners. Even then the tangible assistance of independent client groups is essential. Cf. note 122 *infra*.

99. It seems highly unlikely that a public interest firm other than SCLDF—with its direct link to Sierra Club local chapters—would become heavily involved in isolated Forest Service disputes. See text accompanying notes 95–97 *supra*. Similarly, one can speculate that public interest firms would have been far more reluctant to take employment discrimination cases in the absence of statutory fees. Again, this class of cases involves highly complex factual determinations. See text accompanying notes 132–35 *infra*.

100. For a good treatment of NEPA litigation, see F. ANDERSON, NEPA IN THE COURTS (1973).

101. 449 F.2d 1109 (D.C. Cir. 1971), discussed in text accompanying note 111 *infra*.

102. 389 F. Supp. 689 (D.D.C. 1974).

Stage II NEPA cases raised questions about procedural satisfaction of the statute. In other words, assuming the agency was required to prepare an environmental impact statement what had to be in it? Was it necessary to canvass every conceivable alternative to the proposed project, and in how much detail did the various options have to be examined? Here, as in Stage I, the cases essentially raised points of law. Frequently, it was unnecessary to hire experts, take extensive testimony and conduct detailed examinations of commission documents, because the agencies had not yet made the bureaucratic accommodations necessary to meet their new responsibility effectively.

But in the present Stage III, the agencies know approximately what is required to meet judicial expectations under NEPA. While it would be naive to suggest that judicial discretion is eliminated, increasingly the public interest lawyer has painstaking factual propositions to establish or rebut against an agency that has learned its lesson and become adept at preparing an adequate paper record. Correspondingly, the public interest firms appear to have become less enthusiastic about the ever-proliferating mass of cases involving the adequacy of individual impact statements.

Thus, like their forerunners, the ACLU and LDF, public interest law firms have gravitated naturally to issues that establish broad legal precedent.¹⁰³ But the new reformers have concentrated on questions of statutory interpretation, procedural adequacy, and administrative authority, rather than the sweeping constitutional litigation traditionally associated with the ACLU and LDF. This fairly sharp contrast again highlights the distinctive nature of the public interest law movement: its diffuse character, seeking effective access in a broad range of forums rather than pursuing implementation of identifiable constitutional principles.

Particularly the ACLU, with its focus on safeguarding individual freedoms provided for in the Bill of Rights or due process and equal protection clauses of the fourteenth amendment, established itself in a substantive field that invariably involved constitutional litigation. ACLU practice was defensive. Its clients generally were threatened with criminal penalties, and the ACLU attorney's task was to establish official misconduct manifested either in promulgation of offensive laws or implementation through improper means. Adverse parties met in the courthouse and argued constitutional doctrine.

Especially in the early years, the LDF was similarly preoccupied with issues of broad constitutional principle derived from the equal protection clause. Prior to enactment of the Civil Rights Act of 1964,¹⁰⁴ the fourteenth

¹⁰³. This became increasingly less true of the LDF as its funding base made it possible to expand substantially the size of the staff and especially as its network of cooperating attorneys grew.

¹⁰⁴. 42 U.S.C. §§ 1981–2000h-6 (1970).

amendment, used as a weapon against state-sanctioned race discrimination, was the cornerstone of LDF litigation. As with the ACLU, the emphasis was on striking down state laws or prohibiting administrative misconduct by recourse to constitutional principle.

In contrast, the public interest lawyer's concern for effective access has led him into the many byways of the administrative process, where the focus has been on defining the agency's mandate and testing official compliance with it.¹⁰⁵ For decades, it must be remembered, the limits of administrative authority were unexplored at the Civil Aeronautics Board, Interstate Commerce Commission, FCC, Forest Service, Food and Drug Administration and innumerable other agencies, simply because third-party intervention was virtually unheard of. The regulator and regulated participated in establishing policy. Moreover, particularly in the environmental area, much of the key legislation, such as the Clean Air Act,¹⁰⁶ the Federal Water Pollution Control Act¹⁰⁷ and NEPA,¹⁰⁸ is contemporaneous with the birth of public interest law. Hence, in 1970, the federal administrative system was virtually unexplored territory for reformers. Constitutional considerations were rarely in the foreground as the public interest lawyers attempted to establish fundamental guidelines for administrative practice at a wide variety of agencies.

b. Achieving results: implementation and avoidance.

Is it possible to reach some general conclusions about litigation as a tool for law reform? It is commonplace to observe that court cases are rarely self-implementing, that a "favorable" decision may have no impact at all if it is ignored by the parties to whom it is addressed. In an earlier study, I examined a classic example, the Supreme Court decision in *United States v. Seeger*,¹⁰⁹ that substantially liberalized the reach of the conscientious objector exemption.¹¹⁰ Most draft boards simply ignored the case and, as a consequence, a registrant seeking the exemption continued to face the unpleasant prospect of prolonged litigation—with the threat of jail hanging over his head—to secure his due.

Yet, can one really say that the decision had no impact? Surely, it boosted the morale of pacifist organizations like the American Friends Ser-

¹⁰⁵. Again, it should be emphasized that the contrast with the LDF is not so sharp after that organization began to move into its implementation phase in education and voting cases. But the public interest lawyer is still far more likely to be involved in monitoring an ongoing policy-making process rather than in achieving a particular result and making it stick.

¹⁰⁶. 42 U.S.C. §§ 1857-57(1) (1970).

¹⁰⁷. Ch. 758, 62 Stat. 1155 (1948), as amended, 33 U.S.C. §§ 1251-1376 (Supp. 1973).

¹⁰⁸. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-47 (1970).

¹⁰⁹. 380 U.S. 163 (1965).

¹¹⁰. Rabin, *Do You Believe in a Supreme Being—The Administration of the Conscientious Objector Exemption*, 1967 WIS. L. REV. 642.

vice Committee and the Central Committee for Conscientious Objectors that had long opposed the draft. Those organizations, and others opposed to war—or to the Vietnam War specifically—used the case as an educational tool to inform perplexed young men of the limits on governmental authority to compel military service. And what of the registrants who did, in fact, subsequently secure an exemption—sometimes by doggedly pursuing a defense through to the circuit court of appeals? As to them, clearly the *Seeger* decision had an “impact.” Having given *Seeger* its full due, however, one cannot avoid the conclusion that the case had only a marginal impact on the administrative system to which it was directed as a “reform” measure.

The lesson to be drawn from the *Seeger* example has more general applicability. Where litigation yields a “principle” that must be implemented by affirmative administrative action, a determined administrative authority can generally deflect the initial thrust of the reform measure by a variety of avoidance techniques: delay, calculated misunderstanding, simulated compliance, and so on. Indeed, the line between avoidance and good faith compliance is sometimes difficult to discern in the real world. In *Calvert Cliffs' Coordinating Committee, Inc. v. AEC*,¹¹¹ for example, the District of Columbia Court of Appeals held that NEPA required the AEC to weigh carefully environmental and safety considerations before issuing licenses for construction of nuclear power plants. The AEC responded by adopting detailed new regulations for processing licensing applications—rules that, on paper at least, created real procedural safeguards against an overly restrictive focus on energy needs.¹¹² In subsequent proceedings, when the agency (now the Nuclear Regulatory Commission) issues a license after scrupulous compliance with the new procedures, has it simply produced a written record to rationalize an unalterable pro-power bias, or has it really decided “in good faith” that on balance the project is warranted?¹¹³

While the answer is not obvious, one ought to be skeptical about the reorienting potential of a case like *Calvert Cliffs'*. If an administrative agency is deeply committed to a particular decision, policy or orientation, it can with some confidence be supposed that the single thrust of a court decision directed at reforming the agency's ways is most likely to elicit an

111. 449 F.2d 1109 (D.C. Cir. 1971).

112. See 10 C.F.R. § 50 (1972). These regulations were subsequently modified. See generally *Calvert Cliff's Coordinating Committee v. AEC and the Requirement of "Balancing" Under NEPA*, 2 ENVIRON. L. REP. 10003 (1972).

113. Compare *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971), cert. denied, 407 U.S. 926 (1972). The Court affirmed the FPC's grant of a construction license after the agency prepared a detailed record responding to the various objections voiced by the court in its earlier opinion.

avoidance response.¹¹⁴ An extensive literature indicates that organizations do not easily depart from established patterns of activity,¹¹⁵ and, in a critical sense, a judicial decision is least likely to accomplish that result. For a court has neither a regular ongoing interplay with agency officials nor control over agency personnel, appropriations, internal rewards, and sanctions—all those mechanisms that most deeply affect the normal bureaucratic existence. As a consequence, the temptation to test the limits of the judicial incursion through an avoidance technique is overwhelming.

Indeed, as an "action-forcing" device, *Calvert Cliffs'* went beyond the bounds of most successful law reform efforts designed to change the administrative system. The case did, after all, necessitate development of a more elaborate procedural system. More frequently, as in *Seeger*, courts rely purely on exhortation in the form of a judicial sermon as a vehicle for instructing an administrative agency in the error of its ways. Such instructions for affirmative administrative action, proclaiming the necessity for new departures in administrative behavior, are frequently met by "avoidance techniques."

An illuminating recent illustration of the avoidance phenomenon, drawn directly from public interest law practice, is the issue of the application of the fairness doctrine to product advertising. The FCC took the first step itself, deciding that the fairness doctrine—which requires that broadcast stations airing a controversial issue of public importance provide contrasting viewpoints—applies to cigarette advertising.¹¹⁶ The rationale was that cigarette smoking raises important public health concerns and, as a consequence, that antismoking messages were required by the fairness doctrine.

For present purposes, however, the key case is *Friends of the Earth v. FCC*.¹¹⁷ Here, public interest groups attempted to get the FCC to apply its cigarette rule to advertisements for large-engine automobiles and leaded gasolines. The FCC refused, and the District of Columbia Circuit Court of Appeals reversed on the grounds that the agency failed to adequately distinguish the pollution hazard raised in *Friends of the Earth* from the cigarette hazard recognized earlier.

After the judicial remand in August 1971, the agency set about implementing the court's order that it determine whether the station, WNBC-TV, was adequately discharging its obligation to afford balanced coverage on

¹¹⁴ See, e.g., Rabin, *Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration*, 118 U. PA. L. REV. 143 (1970).

¹¹⁵ See, e.g., R. DAHL & C. LINDBLOM, *POLITICS, ECONOMICS & WELFARE* 247-51 (1953); R. MERTON, *SOCIAL THEORY AND SOCIAL STRUCTURE*, 195-206 (rev. ed. 1957).

¹¹⁶ WCBS-TV, 8 F.C.C.2d 381 (1967), *aff'd sub nom.* Banzhaf v. FCC, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969).

¹¹⁷ 449 F.2d 1164 (D.C. Cir. 1971).

the pollution issue. Six months later, after repeated urging by the public interest intervenor, the FCC issued an interim memorandum and order, the language of which indicates the pace of the agency proceedings:

We believe that NBC should now advise us of the actions it is currently taking to make available a reasonable opportunity for the preparation of conflicting viewpoints on the use of large engine cars and leaded gasolines. . . . We express no view on whether NBC has in the past or is now meeting its fairness doctrine obligations on the issue in this case. . . . Accordingly, it is ordered, That the National Broadcasting Company, Inc., to the extent it is currently carrying advertisements on Station WNBC-TV for large engine automobiles and leaded gasolines of the type relied upon by Friends of the Earth, advise the Commission within (20) days of release of this Order of its current plans for making available a reasonable opportunity for the presentation of the opposing viewpoint.¹¹⁸

In brief, the FCC restated the D.C. Circuit's remand order: that a determination was required of the extent to which the station was affording balanced coverage of the issue. However, the FCC, operating as a conduit, had shifted that obligation to the regulated party. Shortly thereafter, the parties entered into a settlement.

In addition to delay, the agency effectively managed to give the narrowest possible reading to the D.C. Circuit's holding. The intervenor's request that the holding be extended to the other major commercial stations in the New York area was rebuffed.¹¹⁹ An attempt to modify the order to apply to all auto and gasoline advertisements was similarly refused, despite the interim action of the EPA establishing auto emission standards that small cars, too, were unable to meet.¹²⁰ And subsequent efforts to apply the holding elsewhere were dismissed on the ground of inadequate documentation of the station's failure to provide balance.¹²¹ The latter development is especially salient, since it highlights the resource commitment that was necessary to implement effectively the mandate for change.¹²²

Perhaps most striking, however, was the FCC's response to *Friends of the Earth* some 3 years later when the agency issued its report following extensive hearings on the fairness doctrine.¹²³ The FCC decided that

118. WNBC-TV, 33 F.C.C.2d 648, 651-52 (1972) (emphasis added).

119. The case was eventually resolved by a private settlement between the parties that undercut efforts to achieve an area-wide resolution of the issue. See M. Hodgson, *Friends of the Earth v. FCC*, April 20, 1973, at 29-31 (unpublished externship paper in Stanford Law School Library).

120. See WNBC-TV, 33 F.C.C.2d 648, 650-51 (1972).

121. See, e.g., Sierra Club, 51 F.C.C.2d 569 (1975).

122. If the FCC were to shift the burden of documentation to the licensee, the cost of information would, of course, be substantially diminished. Otherwise, however, if a particularly offensive spot advertisement is viewed and reported to a public interest group, there is no effective means of investigating when, where and how often the message is repeated without the aid of a significant volunteer viewing effort. See *Handling of Public Issues under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 48 F.C.C.2d 1, 18-20 (1974) (establishing rules that shift the burden of providing information on programming to the broadcaster with respect to some fairness doctrine complaints).

123. See *Handling of Public Issues under the Public Interest Standards of the Communications Act*, *supra* note 122.

it was a mistake to have ventured into the field of product advertising in the first instance via the cigarette case. The agency argued that product advertisements do not generally make claims about the underlying health or safety concerns related to the product. Hence, the Fairness Report states that in the future the fairness doctrine was to be applied to product advertising only where the message is "devoted in an obvious and meaningful way to the discussion of public issues."¹²⁴ In other words, the eventual agency response to the apparent extension of the law secured in *Friends of the Earth* was virtual abandonment of an affirmative regulatory role.¹²⁵

Friends of the Earth again demonstrates the very difficult task of achieving reform through the judicial system—making doctrinal change "take hold." In the first instance, as the example emphasizes, the question is one of implementation, an issue that is inextricably tied to the resources available to the law reform litigator.¹²⁶ The conclusion to be drawn, however, is not that law reform litigation, when directed at changing administrative behavior, is generally useless. Rather, I would suggest that litigation, to be effective on this score, usually involves a greater investment than winning "the big case."¹²⁷ It involves effective followup through con-

^{124.} *Id.* at 26.

^{125.} For an instance of analogous behavior on the part of the FCC, although not at the behest of public interest lawyers, consider the much-publicized WHDH controversy over license renewal standards. The 1970 Policy Statement on License Renewals was adopted to alleviate the sharp expression of concern by the broadcast industry after the agency's WHDH decision appeared to cast doubt on the virtually automatic license renewal policy adhered to in preceding years. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971); *Goldin, 'Spare the Golden Goose'—The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014 (1970); *Jaffe, WHDH: The FCC and Broadcasting License Renewals*, 82 HARV. L. REV. 1693 (1969).

^{126.} Compare the extensive litigation undertaken by the Sierra Club in its attempt to require the EPA to promulgate regulations under the Clean Air Act, 42 U.S.C. §§ 1857–57(1) (1970), that would prevent diminution of air quality on a nationwide basis. Using public interest lawyers, the Sierra Club won an injunction disapproving state implementation plans and requiring the Environmental Protection Agency to issue regulations safeguarding against "significant deterioration." *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972), *aff'd without opinion by an equally divided Court sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

Almost 1½ years passed before the EPA issued the final regulations required by the court orders. 39 FED. REG. 42570 (1974). Those regulations, issued in November 1974, were wholly at odds with the Sierra Club's reading of both the Act and the subsequent district court opinion. Consequently, the Club instituted a new action challenging the adequacy of the regulations. But the regulations were also attacked by numerous energy producers, users and trade groups such as the American Petroleum Institute. The latter challenges were launched in the Fifth, Sixth, Seventh, Ninth and Tenth Circuit Courts of Appeal. Because any one of these actions could play a determinative role in the eventual posture of the case before the Supreme Court, the Sierra Club soon found itself staggering under the burden of intervening and contesting the regulations in a number of forums throughout the country. Eventually the cases were consolidated in the D.C. Circuit Court of Appeals, but only after a substantial commitment of resources by the public interest lawyers handling the case. Even at that point in the controversy, the parties were yet to have a definitive judicial opinion on the merits of the case.

The resource problem in achieving effective implementation is further aggravated where the public interest firm is attempting to monitor extremely decentralized agencies such as the Forest Service. *See text at note 130 infra.*

^{127.} Many of the celebrated public interest cases are notable for a legal principle that was, in fact, ancillary to the outcome sought in the case. *Scenic Hudson I* and *Church of Christ I*, see notes 56–61

tinuous monitoring of the agency decisionmaking process. And even then, as the *Friends of the Earth* controversy illustrates, the public interest advocate must be prepared for the sometimes bitter fruits of his success: if the agency is really pushed to comply with a reform mandate, more effective institutional actors than the courts may simply remove the issue from the administrative forum.¹²⁸

Where the reformer's initial strategy is to work directly in the administrative forum rather than to come armed with a judicial order, the same difficulties arise.¹²⁹ Consider, for instance, efforts to persuade the Forest Service that it has been unduly solicitous of lumbering interests in administering the Multiple-Use Sustained-Yield Act.¹³⁰ The agency has a highly decentralized system whereby timber contracts are let at the district level. Similarly, the internal appeals structure begins with written protest at the district level, followed by review at the regional level and, finally, consideration by the Chief of the Forest Service. The threshold problem of securing access, then, is seriously complicated by the decentralization of decisionmaking authority. But the most intractable problem is the breadth of discretion vested in the administrative officers. Because the enabling act and agency regulations are devoid of any real commitment, either to development or conservation, litigation is a highly problematic means of effecting a change in official perspective. Unless the reformer's presence is constantly felt, the likelihood of having any real impact on the system is virtually nil.

supra and accompanying text, are examples of an ancillary principle of major import that was conceptually unrelated to the outcome in the controversy itself. In both cases, the courts of appeal remanded for further proceedings that involved years of litigative effort prior to final determination. Indeed, in *Scenic Hudson* the decision on the merits, after reconsideration, was against the public interest intervenor's position. It is a fair generalization that over the first half-decade of public interest law the major "victories" attributed to the movement were procedural—that is, directed in various ways at making an administrative official redefine his decisionmaking perspective to take account of values he had previously slighted. While many an administrative decision may have been decisively reversed along the way, substantive outcomes decidedly took second place to the establishment of procedural safeguards. Such safeguards may be largely meaningless without effective implementation efforts.

128. That result also followed the decision in *United States v. Seeger*, 380 U.S. 163 (1965), although the Viet Nam War, in itself, played a major role. Despite local board obliviousness to *Seeger*, the administrative appellate system paid sufficient attention to the new standard to create a serious backlog of cases. Congress reacted by "streamlining" the administrative system—eliminating the appellate forum where the cases were given serious attention—and narrowing the language of the exemption. See Rabin, *supra* note 110, at 642–43.

Perhaps the most widely publicized example of the same phenomenon is the *Alaska Pipeline* case. *Wilderness Society v. Morton*, 479 F.2d 842 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973). After two unsuccessful efforts to meet the legal standards imposed by the D.C. Circuit Court of Appeals, the Secretary of the Interior was relieved of his obligations by federal legislation specifically authorizing the project and limiting judicial review. See *Trans-Alaskan Pipeline Authorization Act*, 43 U.S.C. 1651 (Supp. III 1973); Dominick & Brody, *supra* note 6.

129. Indeed, the doctrine of exhaustion of administrative remedies usually creates no option but to challenge administrative action through agency proceedings in the first instance. "Strategy," here, refers to a broader commitment to downplay judicial review, concentrating reform efforts on working inside the administrative arena.

130. 16 U.S.C. §§ 528–31 (1970). See notes 95–97 *supra* and accompanying text.

Having emphasized the problematic nature of effectively implementing and monitoring law reform efforts, it is essential to discuss three qualifications. For successful reform does not always require dramatic changes in agency perspective or administrative patterns of behavior.¹³¹ First of all, some controversies can be resolved by an order that is largely self-implementing, so that the question of effective followup is not involved. Secondly, some conflicts are of such singular significance that a successful outcome has major systemwide consequences irrespective of its precedential nature. Finally, many public interest cases have generated substantial transaction costs—unavoidable decisionmaking costs imposed either on the agency or the opposing party as a price of getting the project approved—that frequently set in motion forces impelling compromise. Hence, reform may be effected even though no clear victory is recorded in formal proceedings. Each of these qualifications requires some elaboration.

Litigation: the self-implementing order. Public interest law is not exclusively devoted to “turning around” administrative agencies. Many of the cases handled by public interest advocates do not involve agency decisions at all. A good example is Title VII employment discrimination litigation, an area of increasing interest because of the statutory award of attorney’s fees in successful efforts.¹³² The litigation is brought against private companies or government agencies in their capacity as employers for failure to maintain nondiscriminatory hiring policies regarding women or minorities. Typical relief involves monetary damages to employees victimized by past discriminatory actions and injunctive relief in the form of a prospective hiring policy that eliminates the consequences of past illegality and reflects a commitment to nondiscriminatory employment practices. The judicial decree is directed at the discriminating employer; hence, the successful plaintiff is not dependent on further action by an intermediate party—an agency official heeding a court order.

As a consequence, the judicial order in Title VII cases is sometimes self-implementing in character. Where a back-pay award is involved, for example, the court’s jurisdiction is generally adequate without the assistance of executive or administrative officers to ensure that its order is re-

131. Indeed, important areas of reform, such as Title VII employment discrimination and corporate responsibility litigation, *see notes 132–39 infra* and accompanying text, do not even involve an administrative agency. But, as will be indicated, the absence of an agency does not always eliminate the implementation problem. *See* text accompanying note 133 *infra*.

132. *See Civil Rights Act of 1964*, Tit. VII, 42 U.S.C. § 2000e–5(k) (1970). As pointed out earlier, *see* text accompanying note 39 *supra*, employment discrimination litigation has become the LDF’s major area of involvement in recent years. In 1975, the LDF had an active docket of about 200 employment discrimination cases. A variety of other public interest firms handle much smaller case-loads of Title VII and related cases: the NAACP, the Legal Action Center of New York City, Public Advocates, the Center for Law in the Public Interest, the Mexican American Legal Defense Fund and the Women’s Law Fund, among others.

spected. Similarly, where the court imposes an immediate, short-term quota on a public agency about to fill a specified number of positions, the order may be virtually self-executing. As a consequence, the public interest advocate's victory takes hold without any further resource commitment from the firm; indeed, the same is true without even the necessity of trial when it is possible to negotiate a court-approved informal settlement with a Title VII violator.¹³³

However, the strongest of caveats must be entered. A major Title VII case frequently results in judicially established hiring guidelines that extend far into the future. In addition, the court may strike down tests and specifications that form the crux of company hiring policy with only general judicial guidance as to the appropriate criteria to be adopted for future use. In such circumstances, it is not at all clear that the public interest firm can secure its *prima facie* victory without continued long-term monitoring of the employer's response to the judicial order.

More generally, given the discrete, somewhat random incidence of Title VII litigation, are these cases "law reform efforts" other than in the circular sense that they are brought by public interest lawyers? I would suggest so. Title VII on the books is no more effective than a legislative directive to the Federal Trade Commission (FTC) to enforce the Truth in Lending Act.¹³⁴ Just as the results of changing the FTC's mandate must be judged—from a law reform perspective—by agency enforcement policy, so too Title VII's capacity to reform hiring practices in both the private and public sectors must be measured by the cumulative impact of lawsuits brought pursuant to the legislation. The force of this point is not diminished by the fact that this impact occurs through the aggregate effect of continuous litigation rather than by virtue of a single dramatic case.

Obviously, however, the public interest lawyers' limited resources suggest that achieving reform through cumulative litigation, as in Title VII cases, will continue to be unusual.¹³⁵ Instead, a variety of litigative efforts have been directed at achieving *singularly* effective self-implementing orders. Consider, for instance, the recent much-publicized stockholder's derivative suit against Northrop Corp.¹³⁶ The corporation initially pleaded guilty to criminal charges arising out of illegal contributions to the 1972 Nixon reelection campaign. A civil suit was filed by a minority stockholder,

^{133.} There are obvious trade-offs, however, in reform efforts such as Title VII cases that avoid the administrative process. While adjudication against private parties has a more immediate impact on a case-by-case basis, the absence of a government intermediary—*i.e.*, a potentially aggressive regulatory agency—means that private behavior is changed only to the extent that the threat of litigation has a general deterrent effect.

^{134.} 15 U.S.C. §§ 1601–13, 1631–44, *et seq.* (1974).

^{135.} Again, it is of considerable import that attorneys' fees are statutorily prescribed for successful Title VII cases. See note 132 *supra* and accompanying text.

^{136.} See Springer v. Jones, No. CV-74-1455-F6 (S.D. Cal. May 24, 1974).

represented by a public interest law firm. Pretrial discovery unearthed the fact that Northrop had established, a decade earlier, a political slush fund through which corporate monies could be funneled into various political campaigns. A court-approved settlement of the case involved a variety of sanctions and safeguards: (1) the structure of authority in the corporation was revised by adding new independent members to the Board of Directors and by shifting authority within the major committees of the Board; (2) a flow of information about past transgressions was secured by establishing ground rules for an independent continuing investigation of Northrop activities followed by full disclosure in the proxy materials; and (3) partial restitution to the corporation from the policymaking group was required.¹³⁷

While the SEC followed up the public interest effort against Northrop with administrative action,¹³⁸ the salience of the case in no way turns on agency involvement. Indeed, prior to the Northrop civil suit, the SEC had already indicated its concern about illicit corporate involvement in political campaigns with a series of criminal actions.¹³⁹ Rather, public interest participation was justified on the grounds that the lawsuit would generate information and publicity that would be, in and of itself, a significant contribution to the contemporaneous public dialogue about the proper relationships between corporations and elected officials in political campaigns. A single successful lawsuit was considered likely to yield a high payoff in the area of public affairs.

Moreover, the judicial decree, while requiring some monitoring, substantially insured that whatever specific deterrence value reformers might hope to achieve would be effectuated by the court's formal acceptance of the settlement agreement. Again, in other words, because the court order was largely self-implementing, the immediate impact of the litigation effort seemed clear.

A distinctive characteristic of the self-implementing order cases just discussed is the absence of intervening administrative action; the judicial decree operates "directly" against the law reform advocate's opponent. This distinction needs refinement, however, for some instances of judicial review of administrative action also yield immediate results.

The likelihood of real policy change increases to the extent that the relief in question is prohibitory in nature—that is, requires an administrator to *refrain* from taking action—as opposed to designating an affirma-

137. *Bus. WEEK*, Feb. 24, 1975, at 60.

138. See *N.Y. Times*, April 17, 1975, at 1, col. 1. The SEC suit was based on failure to make proper disclosure in reports to stockholders and the government.

139. *Id.* Similar suits had been filed against Gulf Oil, United Brands and Phillips Petroleum, among others.

tive course of official conduct. But the nature of the judicial review function is such that only rarely is an *absolute* prohibitory order addressed to an administrative agency. A case like *Church of Christ II*,¹⁴⁰ where the D.C. Circuit summarily revoked a broadcast license, raises eyebrows because of its uniqueness. When agency process is deficient, whatever the reason, the ordinary judicial course is to remand for reconsideration. Hence most orders that are prohibitory in form are, like *Church of Christ I*¹⁴¹ and *Scenic Hudson I*,¹⁴² really exercises of the *checking* power—the power to require reconsideration rather than reversal of administrative policy. In such cases administrative avoidance techniques have free play.

The absolute prohibitory order is in fact really an idealized model, apart from aberrant cases like *Church of Christ II*. More realistically, the law reform advocate's real objective is to come sufficiently close to absolute prohibition to put an insurmountable burden on the administrator.

The celebrated environmental case, *Citizens to Preserve Overton Park, Inc. v. Volpe*,¹⁴³ is a useful illustration. Under Section 4(f) of the Department of Transportation Act, the Secretary is authorized to approve federal funds for building a segment of interstate highway through parkland only if "no feasible and prudent alternative to the use of such land" exists.¹⁴⁴ Because the Secretary had failed to explain his approval of the project, the Court remanded to the district court for further proceedings, to insure that the statutory standard had been met. After a full plenary hearing, the district court in turn decided that the Secretary had only considered design questions and consequently remanded to the Secretary for redetermination of the feasibility of alternative routes.¹⁴⁵ The Secretary, presumably in exasperation, finally held that he could not make a conclusive finding of "no alternative feasible route."¹⁴⁶

The case is a more realistic instance of the efficacy of reform litigation in the administrative arena than *Church of Christ*. Note that "the big case," *Overton Park*, was not self-implementing; further proceedings in the district court and before the agency were required. On the other hand, the burden placed on the administrator to justify his decision was so substantial that the judicial decree *approached* an absolute prohibitory order. The Court *almost* said "do not approve this project." Consequently, while not self-implementing, the Court decision did not require long-term extensive

^{140.} 425 F.2d 543 (D.C. Cir. 1969).

^{141.} 359 F.2d 994 (D.C. Cir. 1966).

^{142.} 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

^{143.} 401 U.S. 402 (1971).

^{144.} 49 U.S.C. § 1653(f) (1970).

^{145.} *Citizens to Preserve Overton Park, Inc. v. Volpe*, 335 F. Supp. 873 (W.D. Tenn. 1972).

^{146.} The text of the Secretary's opinion is found in *Citizens to Preserve Overton Park, Inc. v. Brinegar*, 494 F.2d 1212, 1213-14 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975), where the court approved his action.

monitoring to insure a final disposition consistent with the judicial edict. Nevertheless, for the decision to have a long-range effect on Departmental policy regarding use of interstate funds for purchase of park land, monitoring of future Section 4(f) cases would be required.

Thus, we come back full circle to the general proposition that administrative perspectives are not easily changed through litigation, at least not without an intensive commitment to assume the role of watchdog over agency practices. The qualification just discussed can be stated in more familiar terms emphasizing the concept of "administrative discretion." The broader the grant of discretion, the more likely the need for monitoring agency actions and the wider the play of administrative avoidance techniques. Conversely, where either statute or judicial order define the administrative mandate with a high degree of precision, the prospect for real change in official behavior is enhanced.

If the agency as intermediary is removed from the scene altogether, the efficacy of litigation turns on the ability to secure relief that cannot be directly ignored by the opposition. Even here, however, as employment discrimination and corporate responsibility cases demonstrate, it is most common to seek injunctive relief. The nature of most law reform efforts is, obviously, to change the status quo by forcing affirmative action. Frequently, the relief sought involves a timetable extending into the future. As a consequence, even in the absence of a third-party administrator, the public interest lawyer often needs long-term staying power to insure meaningful implementation of his success in the courthouse.

Litigation as a pedagogical tool. It is not merely the self-implementing character of the judicial order that suggests the efficacy of litigation as a tool of law reform. In *Northrop*, for example, the issue was political campaign corruption, and in Title VII litigation the evil is employment discrimination. These practices challenge our ideological commitments to a democratic electoral process and equality of opportunity, two central concerns in American society. Consequently, while the self-implementing order is characteristic of successful law reform through litigation, it is by no means a sufficient condition. Trivial cases would not be worth pursuing simply because they produced immediate results.

Turning the analysis around, it seems clear that under some circumstances a successful outcome in an indisputably important case may have a very real impact on the political system even if it is not self-implementing. The classic example is, of course, *Brown v. Board of Education*.¹⁴⁷ Only those who measure impact in the narrowest terms would argue that the case was a failure from a law reform perspective because of the timelag

^{147.} 347 U.S. 483 (1954).

in achieving substantial change in the racial composition of classrooms throughout the South. *Brown*, with its incredible social and psychological impact on society, may be *sui generis*, but it is also highly suggestive. *Brown* teaches us that, despite its vulnerability to various administrative avoidance responses, the "big case" may have major law reform implications because of its educational value.

Returning to the earlier discussion of establishing priorities in public interest practice, it was suggested that some cases have or take on such importance as symbolic struggles that what appears superficially to be an inordinate resource commitment is allocated to pursuing the matter.¹⁴⁸ Quite clearly, it is an impossible task to measure the value of pursuing *Mineral King*, either to society or, less ambitiously, to the Sierra Club. But for the same reasons that the value of involvement in the case cannot be easily measured in dollar terms, its impact does not turn exclusively on whether the Forest Service is more responsive to hiking and backpacking interests as a result of the ultimate judicial determination. Occasional cases resist easy quantification, because they force individual self-examination, mobilize organizational activity, and trigger political reaction. From a long-range perspective, such cases demonstrate again that, whatever its limitations, the judicial forum plays a creative role in the process of law reform.

Still other cases produce "ancillary" results that have important significance as legal principles irrespective of the outcome in the particular case.¹⁴⁹ *Church of Christ*, for example, was a relatively insignificant case on the merits. The station's broadcast practices represented a particularly crude brand of racial bigotry that continued to surface in the Deep South during the decade immediately after the *Brown* decision. Issues of appropriate community service to racial minorities have not disappeared from the FCC's agenda, but *Church of Christ* is not particularly relevant to the solution of more subtle contemporary questions of localism as a programming objective. Rather, *Church of Christ* enunciated a principle of broad intervention in administrative and judicial proceedings that had real impact on existing access standards at other agencies, as well as the FCC.

Similarly, *Overton Park* has been most influential in a procedural sense, forcing agencies to prepare a more elaborate rationale for decisions made in the absence of a statutory requirement of formal findings of fact.¹⁵⁰ Whether Section 4(f) cases are now being carefully scrutinized by the Secretary of Transportation is arguably of secondary importance.

In summary, then, one cannot evaluate reform activity exclusively in

148. See text accompanying notes 87-93 *supra*.

149. See note 127 *supra*.

150. See, e.g., *Camp v. Pitts*, 411 U.S. 138 (1973) (certification of national banks by the Comptroller of the Currency).

terms of the ability to get results in the immediate case, let alone of the ability to effect overall long-term change in an agency's policy orientation. Public interest law reform activity has sometimes had more subtle effects: using litigation either as an educational vehicle or as a means of establishing procedural bulwarks that have major significance in later cases.

Litigation as a strategic device. Litigation used strategically as a checking device constitutes a third, and final, qualification to the proposition that agencies usually have the resourcefulness to deflect the thrust of law reform activity. In a wide variety of cases, ranging from highway approval to power plant licensing, public interest law firms have used procedural safeguards—either incorporated in statutes like NEPA and the Administrative Procedure Act or established through court-created standards—to delay and upset administrative decisions.¹⁵¹ Irrespective of the final outcome, delay imposes costs that must be taken into account by the developer in determining whether a project is worth undertaking.¹⁵² As a consequence, at a variety of decision points the developer is encouraged to seek compromise, to ask what modifications warrant adoption. Moreover, like the parties to the conflict, an agency with a crowded docket and a propensity to avoid controversy is motivated to look for the compromise solution.

Most importantly, once the procedural standards become a requisite of the system, the fixed costs of project approval rise accordingly. Thus, when standards for intervening in FCC proceedings are liberalized, renewal applicants recognize in advance that certain practices (for example, total insensitivity to a substantial ethnic minority's programming concerns) will almost certainly raise the cost of license renewal, *even if the final outcome continues to be beyond doubt.*¹⁵³ Similarly, the fact that environmentally

151. For a sampling of the many cases in this area see F. ANDERSON, *supra* note 100.

152. Critics of the public interest law movement have condemned the firms for the added costs that have been imposed on the projects they oppose. See, e.g., Murphy, *The National Environmental Policy Act and the Licensing Process: Environmental Magna Carta or Agency Coup De Grace?*, 72 COLUM. L. REV. 963 (1972); Stewart, *supra* note 75, at 1170–76.

This is, perhaps, an appropriate point at which to reiterate more explicitly an earlier disclaimer. I have no basis for reaching an objective conclusion about whether the benefits of public interest law reform activity exceed its costs and, concomitantly, I intend no judgment on whether public interest advocacy is "desirable." Rather my concern is to shed light on the nature of the enterprise—particularly, its potential impact on the legal system. See text accompanying notes 6–8 *supra*.

153. An especially revealing example is the recent renewal challenge to New York City television station WPIX's license. Although not brought by a public interest intervenor, the 6-year challenge to WPIX finally resulted in a costly settlement: accepting an opposition member on the Board of Directors, paying its challenger's accumulated legal fees, and providing a cash fund for community service programming. The station regarded the settlement as preferable to continued, protracted litigation, despite the fact that in the last round the FCC administrative law judge had decided in favor of renewing WPIX's license! Said the station's president: "Our settlement agreement with (the challenger) is, frankly, a straight economic decision. . . . The litigation might have dragged on several more years, and we would have wound up paying as much in legal costs as we will be paying here." N.Y. Times, April 1, 1975, at 70, col. 4. For a similar case involving a challenge by a public interest law firm, see Wall Street Journal, July 11, 1975, at 30, col. 1 (challenge to renewal of broadcast license after station abandoned its straight classical music format).

related projects require NEPA statements means that the developer is obliged to assume the costs of providing information and notwithstanding delay in order to secure the issuance of a permit or license.¹⁵⁴

The cases, of course, are legion and the point is a fairly obvious one: the need to generate information and comply with exacting procedural requirements imposes unavoidable costs. What requires special emphasis is the corollary: however "industry-oriented" the agency, the lurking threat of public interest participation triggers processes that have a life of their own. As these processes become regularized, the cost of "doing business" with the agency rises, and the willingness to accommodate discordant interests—whether the project involves building a power plant, ski resort or interstate highway—may be altered as dramatically as if top agency personnel had suddenly taken on a new perception of their role.

Furthermore, conditions in the external political environment cannot be held constant while an agency moves at its deliberate pace. Delay, then, introduces an additional element of uncertainty into the planning process. As a single example, consider the *Century Freeway* case,¹⁵⁵ involving a proposed addition to the interstate system that would link the Los Angeles International Airport to Orange County. In 1963, when the first public hearing on the project was held, state and local officials were overwhelmingly enthusiastic; its eventual construction appeared to be a foregone conclusion. In the intervening years, as appeals to the federal courts have resulted in remand for preparation of an adequate impact statement and holding of a corridor hearing, the political climate has changed dramatically. Enthusiasm for the passenger car has been shaken by the energy crisis, and key conservative public officials who backed the project, Mayor Yorty and Governor Reagan, have been replaced by political leaders of another stripe, Mayor Bradley and Governor Brown, both of whom oppose the project. While the freeway may still be built, its future is in doubt. Almost certainly, a compromise that revivifies the project will require a public transportation corridor, or some other major accommodation to mass transport that was entirely ignored in the original conception. Hence, delay breeds uncertainty as well as expense. The consequences of reform activity in such circumstances may be unpredictable but they are real.

D. *The Long-Term Viability of Public Interest Law*

I have argued that the goal of advancing or protecting the rights of clearly defined minorities, whether oppressed or potentially oppressed

^{154.} See Cramton & Berg, *On Leading a Horse to Water: NEPA and the Federal Bureaucracy*, 71 MICH. L. REV. 511 (1973).

^{155.} Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd sub nom.* Keith v. California Hwy. Comm., 506 F.2d 696 (9th Cir. 1974) (en banc), *cert. denied*, 420 U.S. 908 (1975).

groups, provided a powerful impetus to supportive activity in early law reform efforts—specifically, the broad-based contribution of funds and professional services.¹⁵⁶ Is a litigation-oriented movement founded on the professed objective of securing and maintaining effective access to the administrative system similarly viable?

Take first the case of the generalist public interest firm. To be concrete, let us hypothesize a public interest firm with six attorneys, specializing respectively in communications, consumer protection, land use, employment discrimination, power plant siting, and occupational safety litigation.¹⁵⁷ Putting aside foundation funding, how would such a firm create and maintain a constituency for support of its litigation? How would it define its image other than in terms of representing the “traditionally unrepresented,” a constituency that is so labelled precisely because its members have not regarded the benefits of organized activity as outweighing the related costs.¹⁵⁸

Realistically, the prognosis for broad-based constituency support of such a firm is highly uncertain. Litigation, as we have seen, has traditionally been one among a variety of access strategies, such as lobbying, educating and protesting, pursued by law reform organizations. Both the ACLU and the LDF developed a secure funding base for litigation activity only after a lengthy effort created broad-based name recognition and personalized membership identification with organizational achievements, overcoming the lack of public awareness of reform through the courts.¹⁵⁹

In that classical tradition, Consumers Union and the National Organization for Women have, on a modest scale, established litigation offices, and perhaps the AFL-CIO, or a member union, similarly might support lawyers specializing in occupational safety litigation. After establishing a successful track record, the litigation side of the reform organization might attain a sufficiently independent status to blur the membership constituency's identification of parent and child organizations, or the parent might simply come to regard litigation as an indispensable element of its overall program.

156. See notes 49–52 *supra* and accompanying text.

157. Specialization within a public interest firm is never so neatly compartmentalized. In fact, it is invariably the case that some of the attorneys avoid specializing altogether—both for the firm's sake and to satisfy personal proclivities. But for present purposes the oversimplification in the text is harmless.

158. Some of the constituents, so-called “free riders,” would not be willing to contribute a proportionate share towards the cost of a collective good because they would be able to share the benefits in any event if the other members of the class contributed an adequate amount. Other constituents might be unwilling to contribute, knowing that free riders would share in any ultimate benefits received. See generally M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

159. The LDF, of course, is a litigation office and not a multistrategy membership organization. But the relevant public almost certainly perceives a more intimate relationship between the LDF and the NAACP than in fact exists, and the LDF undoubtedly is the beneficiary of this perception.

But the generalist public interest law firm has no comparable constituency. As earlier pointed out, its very *raison d'être* is that its supporters are unable to pool resources efficiently for implementation of commonly held reform objectives. By definition, it represents a diverse mix of constituencies, often with very little in common. Thus, presenting an image that lacks sharp definition, the generalist public interest firm seems fated to maintain a low profile. Its victories ordinarily will be credited to the citizens group, frequently little more than a paper organization, that it represents.¹⁶⁰

As we have seen, however, public interest practice is diverse: some firms are highly specialized, particularly in the environmental area. Even if broad-based public support of generalist public interest firms is doubtful, do not the environmentalists, with their clear substantive focus conform to the existing tradition of law reform activity?

In fact, one such environmental firm, the Sierra Club Legal Defense Fund, is quite similar in structure to the traditional ACLU-LDF model. The SCLDF staff handles some cases itself and also supervises a nationwide litigation program carried on by the Sierra Club through volunteer and retained attorneys. Most litigation is generated by local chapters and handled by local volunteer attorneys after approval by the national office. Major cases are handled by private attorneys on a retainer basis or by the SCLDF staff. The staff also takes principal responsibility for a limited number of cases litigated out of the home office.

Note, then, that the SCLDF's structure bears a striking similarity to the traditional mix of staff-volunteer cooperative effort we encountered earlier in considering the ACLU and the LDF. Similarly, SCLDF representation is almost exclusively for its "parent" client, the Sierra Club, an organization that employs a diversified reform strategy directed toward educating, lobbying, publicizing, and, only more recently, litigating in the name of environmental protection.¹⁶¹

Another firm, the Environmental Defense Fund (EDF) has developed its own membership base that supplies about one-half of its funding. Established by scientists concerned about the environment, the organization has continued to hire staff scientists, along with lawyers, for each of its

^{160.} This point can be overstated, however. Some of the public interest firms have achieved a degree of media attention and name recognition in their own right. For a recent example, see Hill, *Public Interest Law Firm on a Winning Streak Shakes Up California*, Wall Street Journal, Oct. 16, 1975, at 1, col. 1.

^{161.} The SCLDF was established as an independent entity principally to impose order on a chaotic decentralized network of litigation generated and pursued by local chapters in the name of the Sierra Club. The preexisting situation was fraught with danger for the national organization. Intra-organizational relations were severely strained by demands for financial assistance, and the popular image of the Club was threatened by involvement in ill-advised lawsuits. In fact, then, the Sierra Club-SCLDF history is the reverse of the ACLU and LDF. The latter organizations established extensive volunteer and cooperating relationships as they grew, rather than hiring staff to gain control of a large-scale, widespread litigation program.

offices. In theory at least, the partnership of professionals in science and law enhances the capacity of each. But the scientists do not limit themselves to litigation-related work; rather, they engage in the entire range of reform activities discussed earlier. The extent to which the organization's unique structure accounts for its relative success in establishing a solid membership base is very difficult to determine. Like the SCLDF, however, it appears that the EDF has built a sufficiently stable constituency to ensure its viability for the present.

The other firms with extensive environmental practice more closely resemble the law office model discussed earlier.¹⁶² Consequently, we are brought back to the limitations of that structural form. Like the diversified public interest law firm, the environmental litigation office invariably suffers from low visibility. If it represents the Sierra Club or the Friends of the Earth, environmental enthusiasts almost certainly identify the action with the moving party rather than the attorney group. Moreover, even name identification, as when the NRDC or the EDF uses its membership base for plaintiff status, is equivocal in nature. Major environmental litigation moves very slowly and is finally resolved over an extended time period; many major "victories" involve complex procedural determinations that are largely unintelligible to any but the best informed, and much of the most important work results from compromises that involve second-best outcomes which may appear to be "defeats" on the surface. Thus, the prospect of generating membership support for reform activity based on the law office model is problematic at best.¹⁶³

Alternative forms of support are equally speculative. Organized bar associations have been far more disposed to praise public interest law than to underwrite it.¹⁶⁴ Private firms are unlikely to move far beyond their traditional limited commitment to *pro bono* work. And court-awarded attorney's fees will probably only support a highly specialized, conservative practice, so long as they are limited to successful ventures in statutorily prescribed areas.¹⁶⁵

162. See text accompanying note 157 *supra*. The NRDC is also a membership organization but on a considerably smaller scale than either the Sierra Club or the EDF.

163. Building and maintaining a self-sustaining membership base through mass mailings, publicity and other techniques is also exceedingly expensive.

164. At the 1975 Annual Meeting of the American Bar Association, a resolution was adopted stating that it is "a basic professional responsibility" of each practicing lawyer to "provide public interest legal services." N.Y. Times, Aug. 17, 1975, § 1, at 1, col. 6. But only a handful of local bar associations have actually taken organized action to finance public interest law practice. Cf. Tucker, *Pro Bono Publico or Pro Bono Organized Bar?* 60 A.B.A.J. 916, 919 (1974) (proposing a tax on attorneys that would require lawyers to devote a percentage of time or income to public service work).

165. Among the most important statutory grants of discretion to award attorney's fees to the public interest lawyer are the Civil Rights Act of 1964, Tit. VII, 42 U.S.C. § 2000e-5(k) (1970), the Clean Air Act, 42 U.S.C. § 1857h-2(d) (1970), and the Noise Control Act of 1972, 42 U.S.C. § 4911(d) (Supp. III, 1973).

Another related avenue of potential compensation is the award of attorney's fees by agencies to

For a brief time, the prospect of receiving court-awarded fees in certain kinds of nonstatutory cases appeared to be promising. Arguing that lawyers serving as "private attorneys general" ought to be compensated for their services, a handful of public interest lawyers were granted fee awards despite the general American rule that a winning party bears its own attorney's fees.¹⁶⁶ The Supreme Court, however, rejected the private attorney general rationale in *Alyeska Pipeline Service Co. v. Wilderness Society*.¹⁶⁷ Adhering to the traditional equitable exceptions to the American rule,¹⁶⁸ the Court nevertheless held that acceptance of the private attorney general concept would be inconsistent with federal statutory law¹⁶⁹ and would invade the province of Congress.¹⁷⁰

Irrespective of Congress' inclination to create new types of fee-generating cases, a limited potential for nonstatutory awards survives the *Alyeska* case. Under the traditional "common benefit" exception, for example, attorney's fees are available in shareholders' derivative suits, such as *Northrop*.¹⁷¹ The rationale for the common benefit exception is that the defendant who is assessed for the plaintiff's fees in fact derives tangible benefit from the plaintiff's legal action. Consider the shareholders derivative suit. The corporation

participants in administrative proceedings. The Federal Trade Commission has recently been given such power by explicit act of Congress where the claimant is one: "(A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceedings and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings." 15 U.S.C. 57a(h)(1) (Supp. III, 1973).

The Nuclear Regulatory Commission is currently studying the question of whether it has the power to award fees, and if so, whether it ought to exercise it. See *Consumer Power Co. No. 50-155* (AEC Nov. 10, 1974), 39 Fed. Reg. 41291 (1974); NUCLEAR REGULATORY COMM'N, POLICY ISSUES RAISED BY INTERVENOR REQUESTS FOR FINANCIAL ASSISTANCE IN NRC PROCEEDINGS (1975) (prepared by Boasberg, Hewes, Klores & Kass, Attorneys-at-Law). In *Greene County Planning Board v. FPC*, 455 F.2d 412 (2d Cir.), cert. denied, 409 U.S. 849 (1972), the court held that the FPC did not have the power either to order a party to pay fees or to do so itself.

Recently, in *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975), the D.C. Circuit Court of Appeals affirmed the FCC's denial of power to award attorney's fees to an intervenor in a license renewal controversy settled prior to hearing. See generally, Note, *Federal Agency Assistance to Impecunious Intervenors*, 88 HARV. L. REV. 1815 (1975).

166. See, e.g., *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C. Cir. 1974) (en banc), *rev'd sub nom. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *La Raza Unida v. Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972), *aff'd*, 488 F.2d 559 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974). Cf. *Newman v. Piggle Park Enterprises, Inc.*, 390 U.S. 400 (1968).

167. 421 U.S. 240 (1975).

168. For a general treatment see *Dawson, Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849 (1975).

169. 28 U.S.C. § 1923(a) (1970) provides that "attorney's and proctor's docket fees in courts of the United States may be taxed as costs as follows" The statute makes no reference to attorney's fees generally. The Court recited at length from similar language in earlier versions of the provision, drawing the general conclusion that the negative pregnant in the statute indicated an intent to proscribe attorney's fee awards.

The Court also indicated its approval of the D.C. Circuit's refusal to award fees against the United States, citing 28 U.S.C. § 2412 (1970) that does explicitly bar awards of "fees and expenses of attorneys" other than court costs.

170. As indicated above, Congress has explicitly provided for attorney's fee awards in a limited number of areas (most importantly for present purposes, Title VII employment discrimination cases). See note 165 *supra*.

171. See notes 136 & 137 *supra*.

is nominally the defendant, but in reality the corporate body is being purged of the unhealthy influence resulting from the malfeasance of top management officials.

A liberal view of the common benefit exception would dictate that whenever the benefits of the litigative enterprise redound to the defendant, it is only equitable that the plaintiff, whose suit benefits the common pool—a larger class formally identified with the defendant's interest—should be reimbursed. Given a liberal construction then, the common benefit exception could cover a good deal of the territory staked out until recently under the private attorney general rationale.

But the *Alyeska* decision suggests that the Court will not be receptive to relatively novel approaches in the attorney's fee area for the present. And the state courts, while not bound by *Alyeska*, are likely to be influenced by it.¹⁷² Thus, attorney's fees appear to afford only a limited avenue of support for public interest lawyers in the near future—limited, essentially to the statutory areas such as Title VII that have been pursued until now.¹⁷³

The phenomenon that made public interest law possible was the commitment of a handful of private foundations, particularly the Ford Foundation, to the new enterprise. Because of the dubious prospects for securing alternative sources of funds, the foundations may well have created a creature that cannot retain its existing character without continuing parental support. This is not to suggest that public interest law practice would disappear with the termination of foundation funding.¹⁷⁴ Some degree of

¹⁷². Even if the Supreme Court were to accept an expansive reading of the common benefit exception, where a state is the defendant there is a serious question whether the eleventh amendment bars federal courts from awarding litigants attorney's fees. See *Edelman v. Jordan*, 415 U.S. 651 (1974); Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875 (1975).

¹⁷³. The economics of attorney's fee support for law reform litigation deserves much more systematic attention than it has received until now. In Title VII cases, for example, where the expense of preparing for trial is frequently of considerable magnitude, can law reform litigation pay its own way? Does its profitability necessitate taking only certain kinds of "winning" cases? Does its profitability turn on how the courts determine fees? Compare attorney's fee support with membership or foundation subsidization. Do the latter afford a distinctively greater degree of freedom to develop programmatic litigation? To control ongoing litigation? To determine priorities generally?

Consider, also, the role played by the Internal Revenue Service. For some time it was unclear whether a public interest law firm could accept a fee award and continue to qualify for § 501(c)(3) status. INT. REV. CODE OF 1954, § 501(c)(3). The IRS took 20 months to respond to the initial petition by a public interest law firm for a favorable ruling on the issue. Finally, in October 1974, two firms were allowed to accept awards up to a ceiling of "50% of total costs of legal functions." The ceiling was to be calculated "over a five year period," in effect allowing a 4-year carryback period at present. These individual rulings were later publicly issued. See 1975 INT. REV. BULL. No. 10, at 46. Even with these rulings, public interest law firms must, at a minimum, find other sources of funds equal to one-half their operating budgets after the carryback period expires.

¹⁷⁴. Termination or continuity at present levels of support are not the exclusive options of course. Foundations might continue support for the public interest law movement at reduced levels, form a consortium to create a fund affording long-term support, collaborate with other sources—such as government or the private bar—to afford joint support, or adopt some other novel approach.

The entire range of funding possibilities is currently being explored by an organization established for the purpose of securing a viable long-term financial base for public interest law, the Council for Public Interest Law. See N.Y. Times, March 19, 1975, at 11, col. 1.

channeled, directive law reform activity might still be possible.¹⁷⁵ A number of large environmental reform organizations, such as the Friends of the Earth and the Izaac Walton League, have well-defined environmental objectives and have already developed working relationships with the environmental law firms that resemble retainer agreements between major corporations and large corporate law firms. But the environmental client does not pay the bill at present, and the unanswered question is whether these organizations would remain as enthusiastic about litigation-oriented law reform if legal representation were not foundation-subsidized.

In addition, as we have seen, a client-supported practice has been maintained on a modest level from the inception of the public interest law movement. Undoubtedly, some of the presently subsidized firms would be able to generate fees from a combination of clients and court awards, particularly after a wholesale reassessment of their priorities.¹⁷⁶ The essential point is, however, that if public interest law must compete in the professional skills market without subsidization, the organizational form is likely to shrink drastically in size and to undergo a substantial shift in *modus operandi* toward a more traditional style of small firm practice.

175. The scope of this Article continues to be limited to nongovernmental litigation organizations. A growing number of states and municipalities are establishing consumer protection units, environmental offices, ombudsmen, and a variety of other mechanisms for representing "interests" similar to those undertaken by the public interest law firms. At the federal level, the Legal Services Corporation was recently established, and a bill setting up an Office of Consumer Protection seems likely to be enacted. Whether the withering of nongovernmental firms would diminish or increase the impetus for government to act is an open question. Similar uncertainty surrounds the degree of independence likely to be demonstrated by these agencies, *see Rabin, supra* note 70, and the type of practice (service orientation versus test case approach) likely to be undertaken, *see Cahn & Cahn, supra* note 5; Hazard, *supra* note 51.

176. A firm that provided a full range of client services (including lobbying, for example) or relied on fees received apart from court awards, or even primarily on court-awarded fees, would no longer qualify for § 501(c)(3) treatment under the existing IRS guidelines. *See note 173 supra.* Since contributors would not be entitled to a tax deduction, the direct subsidy option would be largely foreclosed by reliance on fees.