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The Pursuit of Legal Rights—and Beyond

Scott L. Cummings

ABSTRACT

Just over thirty years ago, in a seminal trilogy of books, Joel Handler and his collaborators made three foundational contributions to the study of public interest lawyers. The first was theoretical, defining public interest law as a positive externality producing legal activity; the second was organizational, conceptualizing public interest law as an industry with multiple sectors that provided legal services; and the third was practical, examining the conditions under which legal rights activities were likely to succeed or fail. Looking back, Handler's work may be read to support two distinct, and seemingly oppositional, claims: first (optimistically), that public interest lawyers are essential to robust participatory democracy and progressive social change (and thus society should support the field's expansion), and second (pessimistically), that those same lawyers are nonetheless (at best) doomed to fail and (at worst) destined to be co-opted by the very political system they seek to transform. I call this the Paradox of Public Interest Law. In this Essay, I seek to evaluate the Paradox in light of the dramatically different political, economic, and intellectual context within which the public interest law movement now operates. I trace the arc of the movement's change, emphasizing the role of ideological, organizational, and tactical complexity in driving new understandings of the meaning and practice of public interest law: from a coherent definition to a set of competing theories; from a nonprofit-centered view of the industry to one that incorporates a greater role for private sector delivery; and from an emphasis on the pursuit of legal rights in court as the central social change tactic to a broader focus on multiple advocacy strategies coordinated across multiple political domains. Evaluating these changes, I suggest that Handler's optimistic hope for more public interest lawyers has been realized, while some of his pessimism has also been validated—but not entirely for the reasons that he imagined. In the end, Handler's legacy teaches that the pursuit of legal rights—despite the risks—is still worth the fight.

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INTRODUCTION

In 1978, Joel Handler and his collaborators founded the field of sociological inquiry into the organization, status, and impact of public interest lawyers. In a seminal trilogy of books,[1] Handler made three foundational contributions—with enduring consequences for scholarship and practice. The first contribution was *theoretical*: defining public interest law as a positive externality producing legal activity.[2] The second was *organizational*: conceptualizing public interest law as an "industry" with multiple "sectors" that provided legal services.[3] And the third was *practical*: examining the conditions under which legal rights activities, targeted primarily at courts, were likely to succeed or fail.[4] In making each contribution, Handler rigorously applied social science methods to describe and analyze public interest law and to measure its impact. His books were the wellspring of and catalyst for a rich, dynamic, and often-contested body of research on what the "pursuit of legal rights" has wrought for American democracy—and for other nations around the world.[5] The ensuing thirty years have offered conflicting assessments, with some commentators

1. These were: JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978); PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (Burton A. Weisbrod, Joel F. Handler & Neil K. Komesar eds., 1978). As Louise Trubek points out, these books were not simply the product of sheer brilliance and industriousness (which they were), but they also reflected the strength of governmental and philanthropic support for the nascent public interest law enterprise. Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417 (2011). All three books were published under the imprimatur of the University of Wisconsin's Institute for Research on Poverty, started by a grant from the federal Office of Economic Opportunity (which ran the federal legal services program). As the inscription of the books states, the Institute's "primary objective is to foster basic, multidisciplinary research into the nature and causes of poverty and means to combat it." In addition, the Handler trilogy was funded by a $500,000 grant (in 1972) from the Ford Foundation. *Id.* at 419.
2. Joel F. Handler, Betsy Ginsberg & Arthur Snow, *The Public Interest Law Industry*, *in* PUBLIC INTEREST LAW, *supra* note 1, at 42. Burton Weisbrod, co-editor of PUBLIC INTEREST LAW, was the prime intellectual architect of this conception. *See* Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, *in* PUBLIC INTEREST LAW, *supra* note 1, at 4.
3. Handler et al., *supra* note 2, at 49–72.
4. HANDLER, *supra* note 1, at 4–5.
5. *See* Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 1 (2008).

praising public interest lawyers as indispensable to social change[6] and others blaming them for undercutting the democratic process and injuring the very causes they purport to advance.[7]

Handler, for his part, straddled both positions in uneasy equipoise. As a result, his work may be read to support two distinct, and seemingly oppositional, claims: first, that public interest lawyers are essential to robust participatory democracy and progressive social change (and thus society should support the field's expansion), and second, that those same lawyers are nonetheless (at best) doomed to fall short of their goals and (at worst) destined to be co-opted by the very political system they seek to transform. I call this the Paradox of Public Interest Law.

This Essay seeks to evaluate the Paradox in light of the dramatically different political, economic, and intellectual context within which the public interest law movement now operates. It therefore asks two questions. First, how has public interest law changed since Handler's foundational work in terms of scale, substance, and system of delivery? Second, how should we assess its impact—as the realization of Handler's optimistic vision of public interest law's democracy-enhancing role or a validation of his pessimistic warnings of failure and co-optation?

The changes to public interest law have, I suggest, been significant. In the heady days of the Rights Revolution,[8] Handler and other scholars were able to propose a coherent theory of public interest law, designate the nongovernmental (NGO) sector as the primary vehicle for its implementation, and emphasize litigation-based reform targeting courts and regulatory agencies as the main advocacy strategy.[9] Over the decades that followed, however, these three pillars of public interest law—the theoretical, organizational, and practical—were challenged from both inside and outside the movement as descriptively inadequate for understanding what public interest lawyers did and normatively inadequate for justifying why they did it. The seeds of these challenges—the conservative challenge to the meaning of public interest law,[10] the funding

6. *See* NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 1 (1989).
7. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).
8. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).
9. See Trubek, *supra* note 1, for an excellent historical analysis.
10. *See* Scott L. Cummings, *Mobilization Lawyering: Community Economic Development in the Figueroa Corridor*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS 302 (Austin Sarat & Stuart

challenge to the nonprofit public interest law sector,[11] and the scholarly challenge to the notion of law as a positive force for social change[12]—were sewn at the movement's inception, but the intervening period saw them grow more forceful. As the scope of public interest law expanded, it also (perhaps inevitably) grew more complex and contested, such that—as in other domains of political life—it is now a battleground of conflicting claims to justice and competing means to achieve it.[13] I trace the arc of these changes, emphasizing the role of ideological, organizational, and tactical complexity in driving new understandings of the meaning and practice of public interest law: from a coherent definition to a set of competing theories; from a nonprofit-centered view of the industry to one that incorporates a greater role for private sector delivery; and from an emphasis on the pursuit of legal rights in court as the central social change tactic to a broader focus on multiple advocacy strategies coordinated across multiple political domains.[14] In each of these ways, I suggest that contemporary public interest lawyering has moved beyond the founding conception and now can be understood as a diverse set of ideals and practices deeply engaged in the political fight to shape the very meaning of a just society.

How we should assess these changes, of course, is a more difficult question and, to some degree, depends on one's political vantage point. Looking at the record from the point of view of the founding liberal wing of the movement, with which Handler was associated, we may ask which of Handler's competing visions of public interest law—the optimistic or the pessimistic—has prevailed over time. As a result of the public interest law movement, do we have more justice? Or just more lawyers? At bottom, the answers to these questions are ultimately unknowable since it is impossible to prove the counterfactual: that the cause of progressive social justice would be better off in the absence of the public interest law movement. Thus, while it may be true that public interest

A. Scheingold eds., 2006); Michael McCann & Jeffrey Dudas, *Retrenchment . . . and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, *in* CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra*, at 37; Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the "New Public Interest Law,"* 2005 WIS. L. REV. 455.

11. *See* ALAN W. HOUSEMAN, CTR. FOR LAW & SOC. POLICY, CIVIL LEGAL AID IN THE UNITED STATES: AN UPDATE FOR 2009, at 12–13 (2009), *available at* http://www.clasp.org/admin/site/publications/files/0527.pdf.

12. *See* STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (Univ. of Mich. Press 2004) (1974).

13. *See* Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223 (2005).

14. On this last point, see Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1242 (2010).

law has failed to deliver on some of its most ambitious aims, what is not clear is whether the progressive cause (itself contested) is *worse off* as a direct result of public interest law (because it has substituted for more effective political strategies and fueled backlash) or whether public interest law has made progressivism's decline *less bad* than it otherwise would have been (because it has operated in the absence of effective politics and acted as a bulwark against backlash). That is the heart of the debate.

I do not attempt to resolve that debate here, but instead offer a tentative assessment of how well Handler's vision predicted the current state of the field. On the one hand, I suggest that his optimistic vision has been at least partially realized: There are now more public interest lawyers (relative to all lawyers) than there were in the early period, suggesting that the project of public interest law's professionalization has been successful. However, as Handler predicted, the pursuit of funding remains a major challenge.[15] This has contributed to a diversification of organizational models, with greater scope for private sector service delivery within the public interest law system. This diversification has influenced both *how much* public interest law is delivered and *what type*. Although a review of the scope and distribution of public interest law reveals what has been achieved, it also underscores what remains undone—which brings us back to Handler's pessimism. The concerns Handler raised about the limits on public interest law's political impact are still present, though perhaps not entirely for the reasons that Handler suggested (that is, co-optation and bureaucratic intransigence). The success of the conservative movement over the last quarter century has restructured the American political system in ways that have significantly limited the outlets for progressive public interest lawyering.[16] Although professionalization and mainstream political integration may have indeed deradicalized the now "mature" public interest law movement,[17] it also seems that successful countermobilization by its adversaries has contributed at least in part to its failings. This countermobilization has prompted public interest lawyers to adopt new strategies (beyond litigation) in new venues (beyond courts). Whether these new approaches transcend the constraints of the old—or simply reproduce them—will define the next chapter of the public interest law movement's story. In the meantime, Handler's dueling visions continue to

15. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2053–62 (2008).
16. *See* David Luban, Essay, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209 (2003).
17. *See* Trubek, *supra* note 1.

frame our appraisal of what public interest law has achieved—so far. The Paradox persists.

I. THE PARADOX OF PUBLIC INTEREST LAW

To understand the nature and force of the Handler Paradox, it is useful to start by situating his scholarly project on public interest law. Handler's 1978 trilogy sought to answer two sets of questions about the nascent public interest law movement. First, in his book *Lawyers and the Pursuit of Legal Rights* and his chapter *The Public Interest Law Industry*, Handler and his colleagues asked: How is the public interest law field organized, what activities do public interest lawyers undertake, and what does their presence mean for access to justice? This inquiry related to the emerging field of sociology of the legal profession[18] and framed a research agenda that sought to both describe the features and interpret the trajectory of the emerging public interest law industry.[19] Handler's second inquiry related to his effort to connect the study of lawyers with social movement theory and to move from a description of the field toward a theory of social change. Specifically, he asked: How do the existence of public interest lawyers and the use of public interest law strategies affect the overall distribution of power in society? While the first inquiry sought to create a profile of public interest lawyers, the second sought to assess their impact.

These inquiries were inextricably linked, and one could imagine the answers leading to two quite different stories about the public interest law movement. One would be a story about the growth of the public interest law field resulting in a redistribution of power. Here, the causal relationship would be a positive one: More public interest law produces more equality and justice. The other story would be more uncertain or even negative: The growth of public interest law results in the legalization of social struggle, the co-optation of social movements, and the reduction of the possibility for authentic redistributive social change and participatory democracy.[20]

Which story did Handler tell? In different ways, he told both. In *Lawyers and the Pursuit of Legal Rights*, Handler and his colleagues sought to demonstrate that the creation of public interest law career opportunities, with the establishment of public interest law firms and the federal legal services

18. *See generally* LAWYERS IN SOCIETY (Richard L. Abel & Philip S.C. Lewis eds., 1988).
19. *See* Handler et al., *supra* note 2.
20. For an excellent synthesis of this critique, see Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 948–58 (2007).

program, produced "a steady stream of lawyers whose involvement in legal rights activities is long-term."[21] Specifically, their hypothesis was that "it is the *structured* experience (i.e., the legal right activities jobs) that will have the most important predictive effect on continued participation in legal rights activities."[22] Their findings on legal services lawyers confirmed this hypothesis: "Legal Services lawyers who left their jobs went disproportionately into government, other jobs outside of private practice (but not commercial establishments), or public interest jobs; or, if they went into private practice, they did more and a different kind of pro bono work or had lower-status practices."[23] Why did this occur? While Handler and his colleagues acknowledged the possibility that there was something intrinsic to the lawyers who entered legal services in the first instance that caused them to continue pursuing what they termed "alternative career paths," the Handler team suggested that the lawyers' experiences in legal rights activities reinforced preexisting commitments and contributed to sustained reform work over time:

> We think that the legal rights activities experience has an additive effect on widely diffused general reformist tendencies. Our interpretation focuses on lawyers who have been somewhat influenced by the ideology of the times—civil rights, the War on Poverty, Ralph Nader, the environmental and consumer movements, and so forth—and would like to participate in a concrete manner. However, they are from the middle class and have had little or no contact with minorities, the poor, or nontraditional work settings. Unless they have such experiences, their reformist tendencies are not fulfilled, and through fear of the unknown they enter into regular professional career paths . . . . On the other hand, if they have actual work experience in a legal rights organization, the fears of the unknown are removed, and they learn that they can work and function in a formerly strange social milieu. We think that this process is especially true with upper-middle-class lawyers working with the poor and minorities, people with whom they would not be likely to come into contact in law school or in traditional private practice positions.[24]

For these reasons, Handler and his colleagues viewed "structured career opportunities" in public interest law as "the important additive element affecting

21. HANDLER ET AL., *supra* note 1, at 178.
22. *Id.* at 181.
23. *Id.*
24. *Id.* at 182.

career choice."[25] The creation and development of the public interest law industry was therefore important, in part, because of its effects *on the lawyers involved*, permitting them to realize their most altruistic aspirations and spreading reform-oriented lawyers throughout the legal profession in both alternative and conventional practice sites. Legal rights activities, in effect, begat more legal rights activities—in a virtuous cycle. This, of course, had profound implications for access to justice: The sustained commitment of lawyers to serving the public interest meant that they would "continue to work for the poor," thus promoting a more equitable distribution of legal services.[26] In light of the positive "spillover effects" of the public interest law industry,[27] the policy recommendation was clear: "To increase the number of lawyers working on legal rights activities in both the short and long runs . . . the single most important policy recommendation is to increase the number of structured opportunities available for new recruits."[28]

Yet, in *Social Movements and the Legal System*, Handler expressed deep skepticism—and even outright pessimism—that those very same lawyers whose numbers he recommended increasing would actually succeed in deploying legal rights activities to significantly change society. Handler elaborated two main concerns: First, that legal rights strategies could not effectively challenge state power and, second, that public interest law's reliance on external funding would ultimately undercut its radical agenda.

In terms of public interest law's effectiveness, Handler presented decidedly mixed findings after reviewing a series of case studies of legal reform efforts. When it came to the "direct results" of law reform activity—the establishment of "new norms" by courts and their effective implementation[29]—Handler was most skeptical because of the "bureaucratic contingency"—the neglect of and, in some cases, active resistance to legal enforcement by the agencies so charged.[30] In such cases, "if the judicial remedy will not solve the problem and the matter ultimately rests on administration, the group will not achieve direct, tangible results, especially if the administration needed is long-term, discretionary, at the field level, or complex."[31] Such cases, like many in the area of discrimination, were the least likely to succeed through legal channels alone. Handler

25. *Id.* at 183.
26. *Id.* at 189.
27. *Id.*
28. *Id.* at 194.
29. HANDLER, *supra* note 1, at 36.
30. *Id.* at 18–22.
31. *Id.* at 192.

acknowledged, however, that the bureaucratic contingency could be overcome in the right circumstances, either because the desired result could be achieved through a simple injunction (such as stopping the bulldozer in an environmental case), or the formation of alliances with political groups to promote and monitor implementation.[32] Moreover, Handler recognized that, even when law reform did not achieve direct results, it could still advance reformist goals through its "indirect effects": generating publicity that forced adversaries to negotiate a solution and legally naming injustice in a way that empowered marginalized constituencies to act on their own behalf.[33]

Nonetheless, Handler's overall assessment of the public interest law movement as a force for social transformation remained negative due to what he viewed as the long-term deradicalization that would inevitably come with reliance on outside funding. Specifically, he predicted that the constant search for external resources essential to the public interest law movement's success would ultimately co-opt its transformative vision: "It will be the success of obtaining outside funding that will move social-reform groups along the continuum from pluralism to societal corporatism"—a political system marked by self-serving interest-group politics rather than authentic participation by all.[34] With lawyers thus dependent on the state and private sectors for their existence, Handler predicted that they would modify their aims to avoid threatening the status quo that sustained them: "It should come as no surprise, then, that law-reform activity by social-reform groups will not result in any great transformation of American society. Instead, it is, at its most successful level, incremental, gradualist, and moderate. It will not disturb the basic political and economic organization of modern American society."[35] In the end, while Handler was strongly supportive of public interest law as a *professional project*, he viewed it as a deeply flawed *political project* both because the limits of law reform would render it of dubious effectiveness as a vehicle for fundamental social change, and because he predicted that funding pressures would lead to elite domination, which would undermine true pluralism.

And therein lies the Paradox: How could the expansion of public interest law—on its face so closely connected to increasing justice—end up undercutting authentic transformation? Or to pose the question directly to Handler: How

32. *Id.* at 201–02.
33. *Id.* at 209–22.
34. *Id.* at 228.
35. *Id.* at 233.

could someone who was so explicitly supportive of the growth of public interest law as an institutional field be so profoundly pessimistic about its potential to effectuate social change on the ground? Part of the Paradox lies in Handler's conception of the bureaucratic state as deeply resistant to fundamental change—a concept that would take him in other scholarly directions.[36] But its salience for our discussion of public interest law is that the bureaucratic state served as both a repository of and an impediment to law reform: It produced the legal services program but also became hostile to it and opposed to many of the ends that its lawyers—and other public interest lawyers—advanced.

There may have been other reasons for the Paradox as well. The audiences for Handler's two books were likely different. *Lawyers and the Pursuit of Legal Rights* was pitched more toward the policy domain (and thus tilted in favor of pro–public interest law recommendations), while *Social Movements and the Legal System* was explicitly framed as an objective scholarly assessment of public interest law's broader social impact. The books asked different questions that thus yielded distinct findings: Handler could conclude that more public interest law opportunities would produce more public interest–oriented lawyers, while at the same time finding that their expanded presence would not fundamentally transform society. The two studies also focused on different outcomes, with *Lawyers and the Pursuit of Legal Rights* emphasizing the role of lawyers in meeting the legal needs of the poor and *Social Movements and the Legal System* focusing on the broader role of lawyers in enhancing democracy. Yet Handler's scholarly ambivalence toward the public interest law movement—staunchly defending its professional status but ultimately suspicious of its political value—set a tone that presaged, and deeply influenced, the debate over its future.

II. THE DEFINITION OF PUBLIC INTEREST LAW

From an intellectual standpoint, the Handler trilogy was the high water mark of public interest law as a theoretical project. Whereas Handler and his colleagues, alongside other commentators at the time, were explicitly engaged in both defining the category of public interest law and offering a normative defense of its role in American democracy, those who followed generally took the opposite approach: pointing out conceptual contradictions and highlighting political flaws. As a result, the notion that public interest law exists as a

36. *See, e.g.*, JOEL F. HANDLER, DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT (1996).

coherent idea or set of practices has given way to a range of competing definitions. And, in this welter of ideas, the project of defending public interest law as a normatively desirable—and explicitly progressive—component of the democratic political system has been largely abandoned in favor of approaches that pull in opposite directions: one that characterizes liberal public interest law as a simple extension of partisan politics (and thus no more or less valid than other political ideologies) and the other that subsumes public interest law under a broad theory of cause lawyering that does not avoid the problem of conceptual instability. Remarkably, forty years after the invention of public interest law, we no longer have a working definition of what exactly it is.

At the outset of the public interest law movement, proponents asserted its definition in the language of market failure.[37] Handler and his colleagues defined a public interest law "activity as one (1) undertaken by an organization in the voluntary sector, (2) that primarily involves the use of legal tools such as litigation, and (3) that produces significant external benefits if it is successful in bringing about change."[38] This definition, elaborated by Handler's colleague Burton Weisbrod, drew upon economic analysis to explain the concept of "external benefits," which was grounded in both concepts of efficiency—putting productive resources "to their most 'valuable' uses"—and equity—ensuring that the distribution of the resulting goods and services was fair.[39] From this conceptual perspective, activities that promoted the "public interest" bestowed "significant external efficiency or equity benefits—benefits that are not reaped by the organization or its members."[40]

Efficiency benefits were defined as those that overcame collective action problems in allocating productive resources. For example, it was inefficient to allow a company to pollute simply because community residents, who would prefer clean air, were not organized to prevent it. This was a classic market failure—a negative externality that did not maximize total welfare—that could be remedied by public interest law, which could validate community preferences by enjoining the pollution. Equity benefits were those that redistributed goods and services to constituencies whose members were not direct parties to a

37. *See* Weisbrod, *supra* note 2, at 10–12; *see also* Trubek, *supra* note 1. Although this definition was confidently asserted, its proponents nonetheless recognized its contingency: "It is not our hope—at least not realistically—that we can succeed here in defining the 'public interest' in a manner that will resolve the matter and end debate." Weisbrod, *supra* note 2, at 4.

38. Handler et al., *supra* note 2, at 42.

39. Weisbrod, *supra* note 2, at 4–5.

40. *Id.* at 20.

lawsuit or involved in the organization that brought it. Thus, lawsuits that struck down discrimination in schools, housing, and workplaces had the effect of opening those institutions to a broad class of people formerly excluded. Taken together, public interest law was defined as a positive externality producing activity—although, as Handler's collaborator Burton Weisbrod acknowledged, what constituted a positive externality was ultimately a complicated question that depended on how differently situated individuals perceived and experienced the costs and benefits:

> As we have noted, it is quite likely that some persons will be made worse off by any activity even if it brings about great benefits to others. Given the difficulty, however, of identifying and measuring all the external effects—both "real" effects, involving allocational efficiency, and "pecuniary" effects, involving redistributions of income and wealth—it is not possible to determine in advance whether an activity that would produce large external gross benefits for some people would or would not produce large, or even positive, net benefits when all the unfavorable as well as favorable external effects are considered. Therefore, we define a public interest activity as one that, if it is successful, will bring about significant external gross benefits to some persons; that is, the activity provides more complete representation for some interest that is underrepresented in the sense that the interest has not been fully transmitted through either the private market or governmental channels.[41]

It was this process-oriented approach, premised on redressing underrepresentation, that informed other definitional efforts. For Gordon Harrison and Sanford Jaffe, the Ford Foundation program officers who designed and executed the foundation's initial public interest law funding initiative (and were some of the first to use the term),[42] public interest law was "the representation of the underrepresented in American society."[43] This included both the provision of lawyers to "poor or otherwise deprived individuals who are unable to hire counsel," as well as legal actions in the defense of "broad collective interests"—such as on behalf of "consumer protection and environmental quality"—"for the benefit of large classes of people" who could not individually afford the cost of

41. *Id.*

42. Trubek, *supra* note 1, at 3; *see also* Charles R. Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 118, 119 (1974) ("Five years ago, the term 'public interest law' had not been coined.").

43. Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A. J. 459, 459 (1972).

mounting lawsuits and who could not easily organize collectively to advance their political interests.[44] The Council for Public Interest Law, the trade group of organizations funded by Ford, defined public interest law in similar process-based terms:

> Public interest law is the name that has been given to efforts to provide legal representation to interests that historically have been unrepresented and underrepresented in the legal process. These include not only the poor and the disadvantaged but ordinary citizens who, because they cannot afford lawyers to represent them, have lacked access to courts, administrative agencies, and other legal forums in which basic policy decisions affecting their interests are made. Public interest lawyers have tried to provide systematic representation to these excluded individuals and groups in order to assure that their interests are understood and acknowledged by decision-makers.[45]

Later commentators adopted this view.[46]

This definition came under attack from two directions. Beginning in the 1970s and gaining momentum in the 1980s, the emergent conservative movement took issue with both the efficiency and equity rationales for public interest law.[47] In terms of efficiency, conservatives argued that it was not obvious that regulation benefited society at large, rather than simply making distributional choices. Thus, environmental regulation could have the effect of reducing jobs, or consumer regulation could increase prices. Without aggregating individual preferences for a clean environment and jobs, for consumer safety and low prices, it was not clear ex ante what the optimal social welfare function was. The concept of equity was also indeterminate. Who qualified as an underrepresented group? Conservatives argued that the concept of underrepresentation was politically contingent and changed over time. Whose interests were more underrepresented? Criminal defendants or crime victims; environmentalists (backed by powerful groups like the Natural Resources Defense Council and Sierra Club) or small business owners; minorities who benefited from affirmative action or poor whites who received no preferences? Whether one agreed with the conservative framing, it highlighted a fundamental tension in equity conceptions of public interest law: On contested issues of public policy,

44. *Id.*
45. COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 3 (1976).
46. *See* ARON, *supra* note 6, at 3.
47. For an excellent history of this movement, see Southworth, *supra* note 13.

one group's benefit could be construed as another's burden. From this vantage point, one could view the Handler team's original effort to base public interest law's definition upon neutral principles—a move necessary to gain broad political legitimacy for the nascent field—as leaving it vulnerable to conservative revision.

As conservatives challenged the meaning of public interest law from the right, critics on the left challenged its practice and offered new theories to supplant what many viewed as the outmoded and politically ineffective model of litigation-centered reform embodied in the conventional definition of public interest law. Beginning in the 1980s, new theories emerged with an array of new labels: community lawyering,[48] critical lawyering,[49] facilitative lawyering,[50] political lawyering,[51] progressive lawyering,[52] rebellious lawyering,[53] third-dimensional lawyering,[54] law and organizing,[55] and legal pragmatism[56]—to name some of the most prominent. Although these theories varied considerably, they were largely powered by the same concerns that Handler had identified in *Social Movements and the Legal System*: that rights-based efforts, by themselves, were inadequate to the task of radical social transformation. Specifically, they all rested upon a progressive discomfort with lawyer-led strategies that undercut genuine participatory democracy and risked inflicting a double-marginalization on clients: disempowered by society and then by the very lawyers who purported to act on their behalf. This concern over "lawyer domination" was the foundation for the most powerful left critique of public interest law[57]—one that resonated with

48. Karen Tokarz, Nancy L. Cook, Susan Brooks & Brenda Bratton Blom, *Conversations on "Community Lawyering": The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008).

49. Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201 (Austin Sarat & Stuart Scheingold eds., 1998).

50. Richard D. Marsico, *Working for Social Change and Preserving Client Autonomy: Is There a Role for "Facilitative" Lawyering?*, 1 CLINICAL L. REV. 639 (1995).

51. Martha Minow, *Political Lawyering: An Introduction*, 31 HARV. C.R.-C.L. L. REV. 287 (1996).

52. *Creating Models for Progressive Lawyering in the 21st Century*, 9 J.L. & POL'Y 297 (2001).

53. GERALD P. LÓPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992).

54. Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

55. Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); *see also* Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443 (2001).

56. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127 (2004).

57. *See, e.g.*, Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals*

the right-wing attack on public interest law as democratically unaccountable.[58] Notably, the new left theories generally referred to the way that effective lawyering for social change *should* be performed. This normative orientation meant that they explicitly excluded, or at least deemphasized, forms of lawyering long associated with public interest law—such as top-down impact litigation—that were considered inconsistent with its most politically ambitious aims.[59] The turn toward normativity also underscored the left's dissatisfaction with the conventional process-oriented definition of public interest law, which lacked an explicit commitment to progressive principles tied to a transformative political agenda.

In the wake of this retreat from public interest law, the label lost academic appeal. Scholars with renewed empirical interest in activist lawyering strategies—for whom the normative orientation of new progressive theories limited their application—searched for an alternative concept that could anchor social science research. "Cause lawyering" emerged in the 1990s as the most prominent scholarly effort in this regard, transforming the field of empirical research on public interest law by distinguishing legal advocacy on the basis of *lawyer motivation* rather than a particular conception of the good society or a specific political agenda.[60] In so doing, the cause lawyering project sought to sidestep the politics of terminology. Thus, instead of debating the imponderable question—just what *is* the public interest?—the cause lawyering project asked: Does the lawyer pursue ends that transcend client service?[61]

This focus on service to cause offered a big-tent approach that encompassed lawyers from the left and the right. Yet the shift to cause lawyering raised its own tensions. A key issue was just how ample the notion of "cause" was. Did plaintiffs' lawyers who believed that they were on the side of the people against corporate greed qualify as cause lawyers? Did corporate law firm lawyers who

and Client Interests in School Desegregation Litigation, 85 YALE L.J. 470 (1976); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990).

58. Kevin C. McMunigal, Essay, *Of Causes and Clients: Two Tales of* Roe v. Wade, 47 HASTINGS L.J. 779 (1996).

59. Handler, for his part, became a critic of the very lawyer domination critique to which his work on public interest law had contributed, offering a searing indictment in his now legendary 1992 Law and Society Association Presidential Address, reprinted as Joel F. Handler, *Postmodernism, Protest, and the New Social Movements*, 26 LAW & SOC'Y REV. 697 (1992).

60. *See* Austin Sarat & Stuart Scheingold, *Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in* CAUSE LAWYERING, *supra* note 49, at 3, 3–4.

61. *See id.*

believed that their work advanced a beneficial version of market capitalism—or of legal professionalism—also qualify? The expansiveness of the concept ran the risk of cause lawyering being the exception that swallowed the rule.

The cause lawyering concept also shifted the discussion away from the political legitimacy of particular legal advocacy groups, suggesting their moral equivalence. Yet this raised difficult questions. Should groups that promote deregulation and are supported by corporations that benefit from the legal positions espoused be placed in the same category as groups that promote regulation to benefit the poor? If yes, then the concept potentially extended to any lawyer whose work was animated by any personal or political conviction—no matter who it ultimately served. If not, then cause lawyering had to rely on an implicit political theory of the good society that it purported to reject as a basis of defining legal advocacy.

Despite these attacks, public interest law as a rubric for a distinctive, equality-enhancing form of lawyering has shown great resilience. Although it is unavoidably contested, public interest law remains the term of choice for U.S. practitioners and has taken root in emerging democracies around the world (although it is often controversial there, too, with some viewing it as a product of American imperialism[62]). It retains its power not because there is an Archimedean point by which we may judge the public interest across the divisions of politics and culture, but rather because it claims a higher political ground, asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms. In the end, the term "public interest law" has continued power precisely because the contest over its meaning reveals the important political choices at stake. A label at the center of so much fighting must be worth fighting for.

Toward this end, we may fairly ask whether the original definition of public interest law propounded by Handler and others, perhaps lacking the courage of its progressive political convictions, has lead to a conceptual dead end—or whether it still offers a meaningful foundation for understanding the field. As the critiques of public interest law have made clear, it is not possible to define "external benefits" or "underrepresentation" in an absolute sense that is applicable across different contexts and over time. But this does not necessarily

62. *See* Cummings & Trubek, *supra* note 5, at 10–11. As the notion of public interest law gained currency in other countries—powered by U.S. foundations like Ford and the Open Society Institute—it became, in some places, a framework to mobilize new forms of rights-oriented politics, while it provoked backlash in others where lawyers disfavored its imperialistic overtones or viewed it as inviting politically (and even physically) dangerous repression.

lead to the extreme relativistic point—that the "public interest" in public interest law is simply in the eye of the beholder—that some conservative critiques of public interest law would suggest. In this vein, it is worth recalling that a key force behind the early mobilization of conservative public interest law organizations was the Chamber of Commerce, which—urged on by soon-to-be-Justice Louis Powell—sought to counter the rising influence of liberal groups in court by promoting conservative counterparts that would appropriate the form and label of public interest law.[63] The manipulation of terms for the advantage of powerful groups does not mean that such terms apply equally by virtue of mere invocation. Rather, it should cause us to scrutinize the labels more carefully.

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

The first type of disadvantage is basic market inequality, in which individuals, despite suffering a legal harm, are blocked from legal redress because they are too poor to pay for a lawyer (and there are no viable contingency or fee-shifting arrangements available). Public interest law responds to this type of disadvantage by providing no-cost or low-cost services to expand the entry of the poor into the legal system on an individual, case-by-case basis. Call this the *access dimension* of public interest law. Note that this dimension is the least controversial because it tracks the procedural justification for public interest

63. *See* Southworth, *supra* note 13, at 1241–42.

law—facilitating representation as a means of achieving the equal opportunity to present claims—rather than advancing a substantive conception of the good by preferring some types of claims over others.

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

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

From this vantage point, public interest law would as a general matter include groups seeking to use legal means to challenge corporate or governmental policies and practices. This definition would encompass activities on both sides of the political spectrum that legitimately advance disadvantaged interests, but

exclude lawyering on behalf of existing structures of power. It does not, in the end, suggest that all claims asserted by less powerful groups necessarily advance a normative conception of the public interest to which all segments of society should subscribe. Rather, it asserts that the public interest is served when constituencies that genuinely face greater barriers to influencing political decisionmaking because of their less powerful status gain meaningful avenues to assert their claims through law.

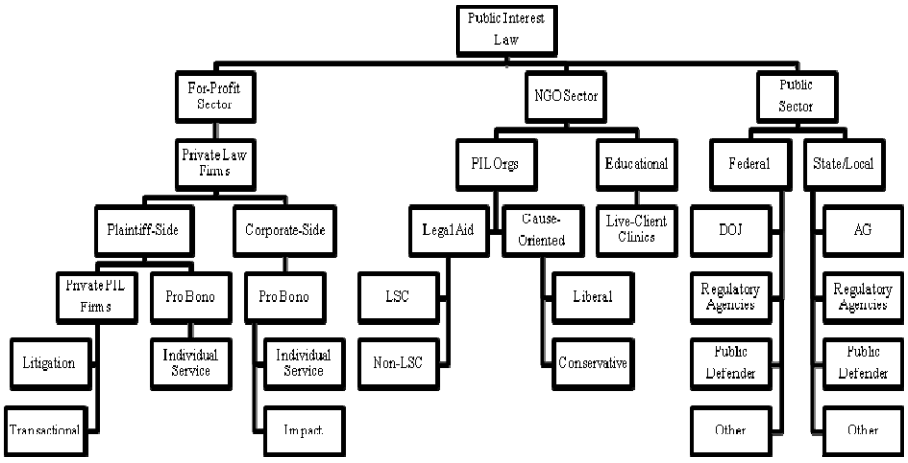
Building on Handler's definition in this way does not avoid the boundary questions that inevitably and inescapably arise. To the contrary, it asks hard political questions. Where should we locate certain plaintiff-side lawyers, who might use law on behalf of individuals (accident victims, consumers,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

III. THE LOCATION OF PUBLIC INTEREST LAW

Handler's study was important not just for how it defined public interest law but also for where it looked to identify its practice. A key move was to conceptualize public interest law as an "activity" rather than an organizational objective, one that "involve[d] the use of legal tools and ha[d] a high ratio of

potential external benefits to potential total benefits."[64] An important implication of this move was to understand public interest law as a service provided across different practice sites by lawyers who may or may not be ideologically committed to the representation's ultimate objectives. Indeed, Handler noted that although public interest law activity occurred primarily in the voluntary sector (which he termed the "core"), it had analogues in the for-profit and public sectors that invited careful study.[65] Understood in this way, public interest law could be found across distinct sectors of the bar: in NGOs, in private law firms—both in the pro bono departments of large corporate firms and in the access- or policy-oriented activities of small firms or solo practitioners—and in governmental agencies. Taken together, these three sectors form the contemporary public interest law industry, as depicted in Figure 1.

FIGURE 1. Organizational Chart of the Public Interest Law Industry



To date (following Handler's lead), much of the empirical research on the industry has focused on the organization and practice of public interest law in the NGO—or what Handler called the voluntary—sector, where legal aid

64. Handler et al., *supra* note 2, at 42.
65. *See id.* at 49.

organizations and groups like the American Civil Liberties Union and the NAACP Legal Defense and Educational Fund (LDF) reside. Similarly, the canonical critiques of public interest law, going back to Stuart Scheingold's "myth of rights"[66] and Derrick Bell's critique of LDF lawyers as "serving two masters,"[67] focus on lawyers in the NGO arena. As I suggest in this Part, Handler's aspiration for the NGO sector—that it would grow and become embedded as a crucial element of the legal profession—has come to fruition. Yet there have also been organizational diversification and expansion in ways that were not clearly anticipated in the early period—particularly the growth of the private side of public interest law, in the form of organized corporate pro bono programs and private public interest law firms.

Because of the historical centrality of NGOs within the movement, we know a great deal about the features of that sector of public interest law and how it has changed since Handler's study. Although precise historical comparisons are not possible, the available data point to significant growth in both the number and size of public interest law groups over the movement's lifespan. Using data collected in 1975, Handler and his colleagues estimated there to be 576 lawyer positions in eighty-six public interest law organizations nationwide (excluding legal aid organizations), with an average of approximately seven attorneys per group.[68] In addition, Earl Johnson reported that in 1972 there were 2660 legal aid staff attorneys.[69] Taken together, these public interest lawyers

66. SCHEINGOLD, *supra* note 12, at 5–6.

67. Bell, *supra* note 57.

68. Handler et al., *supra* note 2, at 51. *The Public Interest Law Industry* did not purport to identify all public interest law organizations in 1975, and thus we do not know the total universe of such organizations. However, this research did build upon an exhaustive study by the Council for Public Interest Law, which found ninety-two public interest law firms in 1976. COUNCIL FOR PUB. INTEREST LAW, *supra* note 45, at 81. Based on this data and their own research, Handler and his colleagues stated that there were "probably fewer than 100 firms in the core of the [public interest law] industry." Handler et al., *supra* note 2, at 50. Assuming this is accurate, the difference between the number of public interest lawyers in 1975 reported here and the actual number would be quite small and would not materially change my analysis.

69. EARL JOHNSON, JR., JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE OEO LEGAL SERVICES PROGRAM 188 (1974). According to Earl Johnson, "In 1965, staffs of all legal aid societies in the country made up the equivalent of 400 full-time lawyers. By June 30, 1968, OEO had augmented this by 2000 positions, and in 1972 there were 2660 staff attorneys." *Id.* Although the passage is ambiguous, I interpret it to read that there were 2660 staff attorneys systemwide (including programs that received federal funding and those that did not). As I suggest in notes 70 and 73, *infra*, even if the total figure is larger (2660 staff attorneys in federally funded programs plus 400 in programs without federal funding, for a total of 3060 legal aid attorneys), the overall analysis of the scale and growth of public interest lawyers still holds.

represented approximately 0.8 percent of the total bar at the time.[70] According to Laura Beth Nielsen and Catherine Albiston's 2004 survey data, there were slightly more than one thousand public interest organizations (including legal aid organizations funded by the Legal Services Corporation (LSC) as well as non-LSC funded legal aid groups) with an average of thirteen lawyers per group, for an estimated total of 13,715 attorneys in the field[71]—approximately 1.3 percent of the total bar.[72] Although the 1975 and 2004 data are not directly comparable—and it is clear that public interest lawyers remain a tiny fraction of the overall bar—it does seem likely that significant growth occurred, with these figures suggesting that the size of the public interest sector (relative to the total bar) grew by about two-thirds during this period.[73]

Organizations in the educational sector—specifically, law school clinics—have also emerged as important contributors of public interest law services. Although law school clinics did not factor into early analyses of the public interest law industry, they were formed in tandem with the first wave of public interest NGOs and were explicitly designed to promote lawyering for social justice.[74] Over time, in-house law school clinics that represent live clients

70. To arrive at this figure, I used the total size of the bar in 1975, which American Bar Association (ABA) records put at 404,772 lawyers. *See* Am. Bar Ass'n, Total National Lawyer Counts 1878–2011, *at* http://www.americanbar.org/groups/departments_offices/market_research/resources.html. I then divided the number of public interest lawyers—taken by combining Handler's 1975 data and Johnson's from 1972—by the total bar: (576 + 2660) / 404,772 = 0.008 (0.8 percent). Taking the higher estimate of total legal aid attorneys (3060) from Johnson puts public interest lawyers at 0.9 percent of the total bar.

71. Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591, 1618 n.85 (2006). The Legal Services Corporation (LSC) reported that in 2002, there were 3845 lawyers in LSC funded programs and an estimated 2736 lawyers in non–LSC funded legal aid programs. LEGAL SERVS. CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 15 (2d ed. 2007), *available at* http://www.lsc.gov/justicegap.pdf. Deborah Rhode's 2008 study of prominent public interest law organizations also found significant growth in lawyer staff between 1975 and 2007, from 478 to 855. Rhode, *supra* note 15, at 2034 tbl.1.

72. Am. Bar Ass'n, *supra* note 70 (reporting 1,084,504 total lawyers). Laura Beth Nielsen and Catherine Albiston's sample did include conservative public interest law groups. Nielsen & Albiston, *supra* note 71, at 1603. Handler's sample also included some conservative public interest groups, such as the Pacific Legal Foundation, *see* Handler et al., *supra* note 2, at 77, although it may have undercounted the number of such groups in existence at the time. *See* Southworth, *supra* note 13, at 1277 (reporting that there were ten conservative public interest law groups by 1975).

73. If we use the higher estimate of legal aid lawyers from Johnson's 1972 study, the growth rate is still approximately 45 percent.

74. *See* Margaret Martin Barry, Jon C. Dubin & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 30 (2000).

have become significant providers of public interest law services in their own right. In 2008, the Center for the Study of Applied Legal Education (CSALE), directed by David Santacroce, reported the results of its comprehensive survey of U.S. clinical programs, which found that there were 809 in-house, live-client clinics among the 131 respondent law schools.[75] There are no data on how

TABLE 1. Public Interest Law-Oriented Live-Client Clinics in U.S. Law Schools by Type

Type	Number	Percent
Criminal Defense	63	7.8
Civil Litigation/General Civil Clinic	60	7.4
Children and the Law	44	5.4
Immigration	43	5.3
Community/Economic Development	38	4.7
Family Law	34	4.2
Domestic Violence	33	4.1
Environmental	27	3.3
Housing	20	2.5
Human Rights	20	2.5
Asylum/Refugee	19	2.4
Criminal Prosecution	19	2.3
Disability Law	19	2.3
Health Law	19	2.3
Innocence	19	2.3
Civil and Criminal Litigation/General Litigation	18	2.2
Employment Law	17	2.1
Death Penalty	15	1.9
Civil Rights	11	1.4
Prisoners Rights	11	1.4
Consumer Law	7	0.9
Indian Law	7	0.9
Total	**563**	**69.6%**

75. DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007–2008 SURVEY 8 (2008).

much of the services provided through these live-client clinics could be deemed public interest law activity. However, we can make some general estimates based on the CSALE study, which gives the distribution of different types of live-client clinical courses in terms of the total number reported and as a percentage of all clinics.[76] Table 1, adapted from the CSALE study, lists those clinics that may be most closely identified with public interest law categories.[77]

As the data in Table 1 reveal, most live-client clinics (nearly 70 percent) are focused on issue areas that correspond closely with public interest practice. How much lawyer effort is devoted to actual casework with such clients? The CSALE study does not answer that question directly, although it provides data from which we might make rough estimates. One estimate can be derived from the study's own estimates of "hours of legal services delivered by clinics," which are 1.8 million hours per year for civil clinics and 600,000 hours per year for criminal clinics, for a total of 2.4 million hours.[78] Using the proportion of public interest law-oriented clinics in Table 1 yields a total of 1,575,600 annual clinic hours devoted to public interest legal services, or approximately 788 full-time equivalent (FTE) lawyers.[79] Because this figure likely includes student hours, we may also estimate the number of clinical teacher hours devoted to public interest case work more directly using CSALE's staffing results,[80] which yield a total of 1151 staff (including tenure track, clinical tenure track, contract instructors, adjuncts, staff attorneys, fellows, and others) teaching in

76. *See id.* § B, Questions 1 & 2.

77. In this list, I include Civil Litigation/General Civil Clinic, as well as Civil and Criminal Litigation/General Litigation clinics, which are typically focused on legal services provision to poor clients. I exclude the following types of clinics, which on their face have the most tenuous connection to traditional public interest law categories: Administrative Law, Appellate, Bankruptcy, Constitutional Law, Intellectual Property, Legislative, Mediation/ADR, Other, Tax, Transactional, Securities, and Wills/Trusts/Estates. In so doing, I realize that these choices may be contested and that some excluded clinics may, in fact, have strong public interest components in practice (most clinics do, in fact, operate on a free legal services model). However, for the purposes of this exercise, I conservatively choose to limit inclusion to the most familiar public interest categories.

78. SANTACROCE & KUEHN, *supra* note 75, at 19.

79. To arrive at this figure, I first multiplied the total number of civil clinic hours by the percentage of public interest-oriented civil clinics from Table 1, which include all those listed except criminal defense, criminal prosecution, innocence, and death penalty (for "civil and criminal litigation/general litigation" clinics, I estimated that half were devoted to civil matters): 1,800,000 hours x 54.2% = 975,600 hours. To that I added all of the criminal clinic hours (since all criminal clinics in the study are included in the Table 1 list) for a total of 975,600 civil hours + 600,000 criminal hours = 1,575,600 total hours. Dividing the total hours by a 2000 hour work year gives the estimate of 788 FTE lawyers.

80. SANTACROCE & KUEHN, *supra* note 75, at 27.

public interest oriented-clinics.[81] Without more research on service provision within law school clinics, we cannot say precisely how much time clinical staff spend on serving clients as opposed to teaching, administrative work, and scholarship. But, as a rough estimate, if live-client clinical staff spent on average one-quarter of their time working on cases, it would equate to approximately 288 FTE lawyers working primarily on public interest-oriented cases each year.[82]

The development of public interest law within the for-profit private sector has also received relatively less attention than its NGO counterpart. This sector may be understood, following John Heinz and Edward Laumann,[83] as encompassing a corporate and noncorporate hemisphere (in terms of client base). On the corporate side, there has been important recent work on the institutionalization of pro bono programs in large corporate law firms,[84] and the advent of *The American Lawyer* pro bono ranking system in 1994 has offered a wealth of data on large firm pro bono performance over time, which may be compared with the data available from the historical record.

81. I made this estimate based on the CSALE study's staffing figures, which indicate that the survey was distributed by 70 responding schools to 754 members of its clinical staff, for a ratio of 10.77 staff for each school. *Id.* Using this ratio, we can estimate the total number of clinical staff for all 188 ABA-accredited law schools at 2025. Of these, 76.8 percent taught in-house, live-client clinics exclusively, while 9.7 percent taught such clinics in addition to running field placement programs. *Id.* Assuming that staff teaching both live-client and field placement programs devoted one-half of their time to the former, I estimated the total percentage of live-client clinical staff to be 76.8% + 9.7% / 2 = 81.7%. Multiplying this percentage by total staff (2025) yields 1654 total live-client clinical staff. I then multiplied the total number of live-client clinical staff (1654) by my estimate of the percentage of public interest-oriented clinics (69.6 percent), for a total of 1151 staff teaching public interested-oriented clinics.

82. I estimated FTE lawyers based on the assumption that clinical staff devote one-quarter of their annual work hours (.25 x 2000 hours = 500 hours) to case work, yielding a total of: (1151 staff x 500 hours) / 2000 hours = 288 FTE lawyers devoted to public interest law practice in the law school clinical context.

83. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (Nw. Univ. Press rev. ed. 1994) (1982).

84. *See* Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004); Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, *in* 12 SOCIOLOGY OF CRIME, LAW AND DEVIANCE 145 (Rebecca L. Sandefur ed., 2009); Robert Granfield & Lynn Mather, *Pro Bono, the Public Good, and the Legal Profession: An Introduction*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST 1 (Robert Granfield & Lynn Mather eds., 2009); Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435 (2009); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 LAW & SOC'Y REV. 79 (2007).

TABLE 2. Annual Pro Bono Activity (Circa 1975)

Source	Avg. Pro Bono Hours per Lawyer	Estimate of Total Pro Bono Hours	Estimated Number of Full-Time Equivalent Pro Bono Lawyers
Handler	125	38,132,000	19,066
Darby	30	9,151,680	4576

Table 2 shows pro bono data from two 1970s sources: the Handler study[85] and a study of law firm timekeeping practices conducted by a consulting firm and published in an American Bar Foundation journal in 1978 (referred to in the table by the author's last name, Darby).[86] Handler and his colleagues asked a nationwide sample of lawyers stratified by practice site how much pro bono work they did both during and after billable hours. With respect to pro bono work on the law firm clock, the Handler team reported that "about three-fifths of the lawyers responding to our survey spent less than 5 percent of their billable hours doing pro bono work—and almost half of these spent no time at all. The average for the entire bar was 6.4% of billable hours per lawyer."[87] With respect to nonbillable pro bono, the study indicated that

> 62% of the bar reported doing pro bono work during nonbillable hours. Among those doing such work, more than 90% spent 2 hours or fewer per week, and 70% spent 1 hour or less per week. The average effort for these lawyers amounted to 47 hours per year. Including those lawyers who did no pro bono work in nonbillable hours would bring the average to 27 hours—about one-half hour per week.[88]

Although these figures were reported with a palpable sense of indignation, they in fact represented a very high quantity of overall pro bono activity. As shown in Table 2, focusing only on average annual billable pro bono hours per lawyer, which Handler estimated at 125 hours,[89] would produce approximately thirty-eight million total pro bono hours per year, or roughly 19,000 FTE lawyers

85. HANDLER ET AL., *supra* note 1, at 92–94.
86. D.W. Darby, Jr., *It's About Time: A Survey of Lawyers' Timekeeping Practices*, LEGAL ECON., Fall 1978, at 39, 39.
87. HANDLER ET AL., *supra* note 1, at 92.
88. *Id.* at 93–94.
89. *Id.* at 94.

engaged solely in pro bono work.[90] By way of comparison, this would have amounted to over five times as many FTE pro bono lawyers as there were lawyers in the NGO public interest law sector at the time. The Darby study asked a slightly different question—how many hours did lawyers devote to charitable, community, or civic endeavors?—and got a much lower number: thirty hours per lawyer per year, resulting in approximately 4500 FTE pro bono lawyers.[91]

TABLE 3. Annual Pro Bono Activity (Circa 2010)

Source	Avg. Pro Bono Hours per Lawyer	Estimate of Total Pro Bono Hours	Estimated Number of Full-Time Equivalent Pro Bono Lawyers
Am Law (Large Firms)	50	5,567,231	2784
ABA (Private Practice)	41	35,812,926	17,906

The contemporary data are presented in Table 3. It is not precisely comparable and so is only suggestive of trends. It shows data from two sources: The first is the pro bono activity from *Am Law* 200 firms as reported in 2009,[92] and the second is the 2009 American Bar Association (ABA) report of findings from a nationwide survey of lawyers.[93] Both sources report much lower average pro

90. This number comes from multiplying the average hours per attorney by the estimated total number of private practice lawyers in 1975, when the Handler data was collected. The estimate of private practice lawyers is the average of those lawyers reported in the 1980 and 1971 Lawyer Statistical Reports (370,111 + 240,000 / 2 = 305,056). CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995, at 7 (1999).

91. Darby, *supra* note 86, at 43. Because the Darby figure is a median and Handler's a mean, the two are not directly comparable.

92. AM LAW 2009 PRO BONO SURVEY (on file with author). The *Am Law* 200 firms are the nation's 200 top grossing firms by revenue. For an excellent analysis of recent pro bono trends among the *Am Law* 200 firms, see Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 84, at 135.

93. AM. BAR ASS'N, SUPPORTING JUSTICE II: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 13 (2009). Note that the average pro bono hours figure reported by the ABA is for "Tier 1" work—that which meets the definition of subsection (a) of ABA Model Rule 6.1, which states that a lawyer should render a "substantial majority" of pro bono services each year to "(1) persons of limited means or (2) charitable, religious, civil, community,

bono hours per attorney than Handler, though higher than Darby.[94] The discrepancy between the earlier sources makes it impossible to draw precise historical conclusions. Comparing the current pro bono figures with Handler's data suggests a decline in overall pro bono while comparing them with Darby's data suggests an increase.

One possible trend that can be identified from the data is the growing influence of the large firm sector in the overall provision of pro bono services. In *The Public Interest Law Industry*, Handler and his colleagues showed the percentage of private practice lawyers in various practice sites who contributed different levels of pro bono service.[95] Extrapolating from Handler's data reveals that lawyers in "large urban firms," who represented 8 percent of all private practice lawyers who responded to the survey, provided 6 percent of estimated annual total pro bono hours.[96] Again, there are no perfect current analogues to

governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means." MODEL RULES OF PROF'L CONDUCT R. 6.1(a). Because lawyers do pro bono work on behalf of other types of clients, such as civil rights organizations, the Tier 1 average underestimates the total number of hours. *Cf.* AM BAR ASS'N, SUPPORTING JUSTICE: A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 13 (2005) [hereinafter AM. BAR ASS'N, SUPPORTING JUSTICE I] (finding that lawyers provided, on average, 29 hours of Tier 1 services per year and an additional 38 hours on behalf of "other non-profits, civil rights and activities to improve the legal profession"). Note also that the report does not break down hourly contributions by practice site, and therefore the 41 hour average is for all lawyers, including corporate counsel and government lawyers.

94. To arrive at the average for *Am Law* firms, I took the total number of pro bono hours for all *Am Law* firms (5,567,231) and divided by the total number of lawyers at those firms (111,377). AM LAW 2009 PRO BONO SURVEY, *supra* note 92. To arrive at the ABA average for all private practice lawyers, I multiplied the average pro bono hours per lawyer (41) by the total number of private practice lawyers (873,486), which I estimated based on the ABA 2008 LAWYER DEMOGRAPHICS (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/Lawyer_Demographics.authcheckdam.pdf.

95. Handler et al., *supra* note 2, at 66 tbl.4.18.

96. *Id.* To get the percentage of large urban firm lawyers relative to total private practice bar respondents, I divided the number of large urban firm respondents (N=71) by all private practice lawyer respondents (N=880), which equals 8 percent. Note that this figure does not represent the actual percentage of large urban firm lawyers relative to the total private practice bar, but rather the percentage of respondents; thus, the figure could be distorted by different response rates across practice sites. By way of comparison, the Lawyer Statistical Report indicated that large firm (101 or more) lawyers constituted 3.5 percent of the private practice bar in 1980. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 6–8 (2004). To get the percentage of pro bono hours contributed by lawyers in large urban firms, I assigned a single value to each "percent of time" range—0 (for 0), 3 (for 1–5), 8 (for 6–10), and 15 (for over 10) and then used those values to calculate the total hours of pro bono service contributed by all lawyers within each practice site ("large urban firms," "lawyers in other firms," and "lawyers in solo practice") assuming a work year of 2000 hours. I then calculated the percentage of all hours

Handler's pro bono data, so any effort to draw comparisons across time can only be suggestive. Combining the current *Am Law* and ABA data from Table 3 shows that *Am Law* firm lawyers (the contemporary version of Handler's large urban firm lawyers), accounted for roughly 13 percent of total private practice lawyers,[97] yet contributed 16 percent of private practice pro bono work.[98] In terms of the historical trajectory, this suggests that the large firm sector may be contributing a bigger share of overall pro bono service. This could both be because there are more lawyers in the large firm sector, which increased seven times between 1980 and 2000,[99] and because those lawyers are doing more pro bono work on average than their counterparts in other practice sites.[100]

We would expect the location of pro bono activity (in large firms versus small firms or solo practices) to influence not only the quantity of services provided, but also their quality—both in terms of the type of cases accepted and the effectiveness of the representation. Handler asked all surveyed lawyers to indicate the types of organizations on behalf of which they performed pro bono service. The results showed that a substantial portion of the organizations were not engaged in antipoverty work or what Handler termed "aggressive" legal rights activities.[101] Specifically, churches were the most frequently cited organization (16.6 percent); "community groups (nonpolitical)" and "United Fund and similar charities" were cited by 9.8 percent and 8.9 percent of lawyers, respectively.[102] Approximately 15 percent of lawyers cited legal aid or defender organizations as pro bono organizations, while fewer cited "change oriented"

contributed by lawyers in large urban firms, which equals 6.4 percent. *See* HANDLER PRO BONO HOURS ESTIMATOR (on file with author).

97. I made this estimate by dividing the total number of *Am Law* 200 firm lawyers (111,377) by the total number of private practice lawyers (873,486) estimated above in note 94: 111,377 / 873,486 = 12.8%.

98. This figure is the ratio of estimated total pro bono hours provided by lawyers in *Am Law* 200 firms to estimated total pro bono hours provided by all private practice lawyers (according to the ABA survey): 5,567,231 / 35,812,926 = 15.5%.

99. CARSON, *supra* note 96, at 8 tbl.8.

100. RONIT DINOVITZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS 37 tbl.4.3 (2004). Rebecca Sandefur, a member of the After the JD (AJD) research team, stated that "[a]mong respondents to the AJD, 49 percent of total pro bono hours served by private practice lawyers came from lawyers in firms with more than 250 attorneys." Rebecca L. Sandefur, *Lawyers' Pro Bono Service and Market-Reliant Legal Aid*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 84, at 95, 101.

101. HANDLER ET AL., *supra* note 1, at 95–96 & tbl.5.2.

102. *Id.*

organizations, such as civil rights and civil liberties groups (7.8 percent), ethnic groups (4.3 percent), and environmental groups (2.8 percent).[103]

An important contemporary question is whether the increasing importance of large law firms within the pro bono system has made pro bono activity more or less "aggressive." One feature of pro bono's institutionalization over the past two decades has been a rapid growth in organized pro bono programs headed by designated pro bono counsel. My research with Deborah Rhode showed that the number of such counsel positions has increased dramatically, from five in 1993 to ninety-one in 2008.[104] In these firms, the provision of large firm pro bono is shaped by both economic and professional factors that influence the types of cases ultimately accepted. In terms of economic factors, our survey identified the main areas of actual or positional conflicts in which firms decline pro bono representation, with employment and labor cited as the most frequent conflict areas.[105] Yet the portfolio of pro bono cases was also influenced by other professional concerns. Ultimately, we found that those with the most power—the partners—shaped the pro bono case docket around the professional needs of the firm. Indeed, when asked what was important in determining the objectives and types of pro bono cases the firms selected, recruitment and professional development were among the most important factors cited.[106] We thus would expect firms to favor cases that provide strong professional development opportunities and allow the firms to publicize high-profile pro bono efforts to potential associate recruits.

Table 4 shows results from a 2011 survey of law firm pro bono counsel who were members of the Association of Pro Bono Counsel (APBCO), an organization formed in 2006 "[t]o support law firm pro bono counsel in enhancing their individual potential and performance."[107] The APBCO firms are, in general, among the largest and highest performing pro bono law firms, consistently ranking in the top tier of the *Am Law* pro bono scorecard.[108] The survey was sent to eighty APBCO firm counsel, forty-two (53 percent) of whom responded to a question asking whether the U.S. offices of their firm have handled pro bono cases in designated issues areas over the past five years. Table 4 reports

103. *Id.*
104. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2373 fig.1 (2010).
105. *Id.* at 2393.
106. *Id.* at 2386 & tbl.5, 2392 & tbl.7.
107. *About APBCO*, ASS'N OF PRO BONO COUNSEL, http://www.probonocounsel.org/about (last visited Dec. 27, 2011). I conducted this survey with Robert Granfield.
108. Cummings & Rhode, *supra* note 104, at 2363 tbl.1, 2364.

the percentage of respondents who indicated that their firms handled pro bono cases in those designated issue areas.

TABLE 4. Pro Bono Practice Areas in Association of Pro Bono Counsel Member Firms

Issue Area	Percentage of Firms (N=42)
Immigration	100
Children/Youth Issues	100
Arts/Cultural Issues	98
Civil Liberties	98
Community/Economic Development	98
Family	98
Civil Rights	95
Housing	95
Human Rights	95
LGBT Issues	95
Criminal	93
Elder Law	93
Homelessness	93
Public Benefits	93
Employment	88
Disability Rights	86
Education	86
Women's Rights	86
Voting Rights	83
Health	81
Election Law	76
Animal Issues	69
Consumer Protection	69
Media/Technology	69
Environmental Protection	62
Labor	52
Reproductive Issues	36
Indian Law	26
Other Issues	26

As the table indicates, most responding firms handle cases across all areas; nonetheless, some patterns emerge. Consistent with the conflicts analysis, consumer protection, environmental protection, and labor cases are relatively disfavored, although a majority of firms practice in these areas. The most popular practice areas, identified by more than 90 percent of firms, are immigration, children/youth issues, arts/cultural issues, civil liberties, community/economic development, family, civil rights, housing, human rights, LGBT issues, criminal, elder law, homelessness, and public benefits.

It is difficult to draw comparisons with Handler's typology of aggressive legal rights activities, though it is suggestive to contrast these data with what Handler reported for pro bono departments of large law firms. Handler's study identified twenty-four "organized pro bono departments," generally found in large urban firms and commonly organized around either a central committee structure or a release-time program.[109] One important finding was that lawyers in these programs were more likely to represent "change-oriented organizations" and legal services and defender groups, compared either to large urban firm lawyers not in such programs or to private practice lawyers in general.[110] A notable feature of contemporary organized pro bono programs is the high proportion engaged in practice areas associated with what Handler would have called "aggressive rights," such as civil rights, civil liberties, and identity issue areas (immigration, LGBT, women's rights). It could be that firms in these areas are taking on more individualized, less transformative cases.[111] Nonetheless, the high number of firms practicing in these areas seems to be a sign of progress by this metric.

109. HANDLER ET AL., *supra* note 1, at 123.

110. *Id.* at 125 tbl.6.13.

111. The ABA's 2005 pro bono survey, by way of comparison, found that for all attorneys reporting "Tier 1" pro bono service (for persons of limited means or organizations that work on their behalf), the distribution of practice areas was: family (34 percent), business/corporate (31 percent), consumer (26 percent), estates/probate (22 percent), elder (19 percent), housing/evictions (19 percent), criminal (18 percent), civil rights (16 percent), and public benefits (12 percent). AM. BAR ASS'N, SUPPORTING JUSTICE I, *supra* note 93, at 15. The After the JD II study showed that "[t]wo-fifths (41%) of all pro bono hours were spent serving poor or low-income individuals, while about one-fifth (22%) were spent serving charitable organizations, and 23% were devoted to other causes." RONIT DINOVITZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 37 (2009).

Returning to the organizational chart of the public interest law industry (Figure 1), we see that the other hemisphere of private law firm practice is made of firms and solo practitioners that generally represent individual clients (often, but not always, plaintiffs), relying on attorney's fees to underwrite their services. Many of these lawyers provide some type of pro bono service, although the research suggests that it tends to be different from the pro bono dispensed through large law firms: more likely to go to "friends, family, and existing clients" and to involve reduced rate (or "low bono") services to regular clients who are or become unable to pay.[112]

A subset of for-profit firms espouse core missions that go beyond the mere delivery of pro bono service to advance a broader vision of the public good. These "private public interest law firms" are distinguished by an organizational commitment to promoting a political cause. They do not operate in the sole pursuit of either profit or principle, but rather seek to balance the two in advancing a double bottom-line of economic return and social impact. Although inconsistent definitions make strict historical comparisons impossible, the available data suggest that the private public interest law sector has grown significantly over the last forty years.[113] The earliest data on private public interest law firms is from the mid-1970s, when the existence of a handful of such firms prompted scholarly inquiry into their form and function. The Council for Public Interest Law identified forty-four firms that devoted over half of their work to public interest practice, and it found that these firms collectively employed a total of 160 lawyers.[114] Nearly all of the firms were established after 1969, suggesting the influence of the public interest law movement and of the advent of attorney's fee statutes. About two-thirds of these firms employed four or fewer attorneys; low pay was standard, with 60 percent of lawyers in these firms earning no more than $20,000—the starting salary for first-year law firm associates at the time.[115] The firms relied on varying economic arrangements to promote stability, such as establishing ongoing cooperative relationships with nonprofit public interest law groups, taking advantage of

112. Leslie C. Levin, *Pro Bono and Low Bono in the Solo and Small Law Firm Context*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 84, at 155, 156.

113. *See* Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 84, at 183, 192–94.

114. COUNCIL FOR PUB. INTEREST LAW, *supra* note 45, at 136.

115. *Id.* at 137. Adjusted for inflation based on the Consumer Price Index, $20,000 in 1975 (when the survey was conducted) was worth approximately $80,000 in 2010 dollars.

federal programs subsidizing the cost of public participation in regulatory agencies, participating in prepaid legal services plans, and relying on non–public interest law cases to supplement their income.[116]

This picture looked quite similar to the one painted by Handler and his colleagues in their analysis of "mixed firms,"[117] the results of which are summarized in Table 5.

TABLE 5. Profile of "Mixed" Public Interest Law Firms in 1975[118]

Total Number of Mixed Firms ("Best Estimate")	66
Percent "Non-Commercial" (i.e., Public Interest Law) Practice	64%
Average Mixed Firm Size	4
Estimate of Total Mixed Firm Lawyers	258

In the Handler study, the researchers estimated that there were sixty-six mixed firms in the public interest law industry[119] and reported findings based on data from a subset of these firms. The study attributed the scarcity of such firms to the inherent limits of the model, which required clients to pay and lawyers to subsidize their mission-driven work with commercial cases (so-called "regular work").[120] It also found that most mixed firms were quite small (with an average of four lawyers),[121] were located in the Northeast and Washington, D.C., and paid relatively low salaries (firm lawyers made "only 54% as much as their age-matched counterparts in regular private practice").[122]

116. *Id.* at 138–40.
117. *See* HANDLER ET AL., *supra* note 1, at 112–16; Handler et al., *supra* note 2, at 60–65.
118. The figures in the table come from Handler et al., *supra* note 2, at 61. Handler and his colleagues used the same data to report on mixed firms in HANDLER ET AL., *supra* note 1, at 112–16.
119. Handler et al., *supra* note 2, at 61.
120. HANDLER ET AL., *supra* note 1, at 113.
121. Handler et al., *supra* note 2, at 61.
122. HANDLER ET AL., *supra* note 1, at 113, 116.

TABLE 6. Practice Areas of Mixed Firms in 1975[123]

Types of Cases	Percentage of Firms
Consumer Protection	16.0
Environmental	16.0
Housing, Urban Renewal	7.6
Civil Rights	7.6
Employment	6.9
Criminal	6.1
Civil Liberties	5.3
Welfare	3.8
Race Discrimination, Voting Rights	3.8

As Table 6 shows, the most common public interest practice areas of mixed firms were consumer protection, environmental law, housing, civil rights, employment, criminal law, and civil liberties.[124] The study also concluded that the firms' "regular work" was primarily on behalf of individuals and small businesses that could not pay large fees.[125] Personal injury law was the most common "regular work" practice area, followed by labor and general commercial law.[126]

There is evidence that the field has grown since these early studies. My recent compilation of self-identified private public interest law firms drawn from the Harvard Law School Private Public Interest Firm Guide, the PSLawNet online database, and the National Lawyers Guild Directory lists 671 firms.[127] Of these, most (66 percent) are located outside of the Northeast. California alone is home to 222 firms, which is more than in New York, Massachusetts, and Washington, D.C., collectively (187). The mean size for all firms was approximately seven lawyers, with a median of three. The total number of lawyers in all firms was 4917; if we assume, following Handler's earlier metric, that these firms devoted at least half of their work to public interest practice, that would equate to at least half of those lawyers—2459—engaged in public interest work.

123. A number of other practice areas were listed by less than 2.5 percent of firms. These included: education, Indian affairs, sex discrimination, antitrust, prisoner rights, poverty, health and mental health, constitutional rights, law reform, general indigent work, community organization, Title VII employment discrimination, and land use planning. *Id.* at 114 tbl.6.2.

124. *Id.* at 113.

125. *Id.* at 114.

126. *Id.* at 113–14.

127. PRIVATE PUBLIC INTEREST LAW FIRM DATABASE (on file with author).

TABLE 7. Practice Areas of Private Public Interest Law Firms in 2010

Types of Cases	Percentage of Firms
Employment	33.1
Criminal	22.1
Civil Rights	20.7
Family	16.7
Labor	16.2
Immigration	10.9
Community Economic Development/Nonprofit Organizations	7.3
Consumer	6.0
Housing	5.7
Environmental Protection	4.8
Civil Liberties	3.4

The practice areas that private public interest law firms engage in have also changed in importance over time. Table 7 shows the percentage of firms that self-identified as working in various practice areas.[128] Civil rights, criminal, and employment law have become more popular areas of practice, while environmental and consumer protection have fallen relative to the Handler study. This may be due to the influence of fee-shifting statutes, which make civil rights and employment cases economically viable for private practitioners, and the availability of federal funding for private lawyers engaged in indigent criminal defense. Compared to Handler's study, other areas of practice have also gained in importance, particularly family, labor, immigration, and community economic development/nonprofit organizations.

Overall, it is not possible based on current data to provide a definitive portrait of the quantity and quality of services provided across different sectors of the public interest law industry. And we currently lack good data about public interest law activity in the government sphere. However, based on my estimates of lawyers in the NGO and for-profit sectors identified in Figure 1 (public

128. The data was collected from 2008 to 2011 by looking at self-identified areas of practice. To gather this information, I looked first at the practice areas listed on the firms' websites and, if none existed, went next to the best available alternative resource—the Martindale-Hubbell online national database of lawyers—followed by the resource guides from which the firms were drawn (the Harvard Law School Private Public Interest Firm Guide, the PSLawNet online database, and the National Lawyers Guild Directory).

interest law organizations and law school clinics on the NGO side; private practice pro bono and private public interest law firms on the for-profit side), one important observation is the significant role played by the for-profit sector, in comparison to its NGO counterpart, in the contemporary provision of public interest law services. Looking only at the NGO and for-profit sectors, the above estimates suggest that whereas 41 percent of lawyers engaged in public interest law activity are in the NGO sector (40 percent in public interest law NGOs and 1 percent in law school clinics), 59 percent are in the for-profit sector (52 percent through pro bono work in private practice and 7 percent in private public interest law firms).[129]

IV. THE PRACTICE OF PUBLIC INTEREST LAW

Handler's pessimistic assessment of the future of public interest law rested on two claims: that the pursuit of funding would co-opt public interest law organizations and that litigation-centered rights activities would not succeed in transformative practice on the ground. I suggest that Handler may have been right in both respects, but for slightly different reasons than those he proposed.

Consider Handler's concern with external funding (philanthropy and governmental) for NGOs. His focus on the potential for co-optation, while prescient, obscures what has emerged as a distinct funding issue: the practical consequences of reliance on private sector service delivery. To the extent that public interest law is distributed through private sector entities—large firm pro bono programs and private public interest law firms—what impact does that have on the amount and type of services provided? Here, my observations are necessarily tentative, drawing inferences from the structural differences across public interest law sectors.

As my analysis thus far has highlighted, the organizational structure of public interest law in the United States is characterized by a hybrid delivery system (NGO, for-profit, and public) funded by different combinations of philanthropic, governmental, and private sources. We would expect these different sources to impose distinct types of limitations on public interest practice across sectors. The most familiar example is the federally funded legal services program, which has been legally restricted from taking cases on behalf of politically

129. These percentages are based on the estimates of lawyers in Section III: public interest law NGOs (13,715), FTE lawyers in law school clinics (288), FTE private practice pro bono lawyers (17,906), and lawyers engaged in public interest practice in private law firms (2459).

disfavored groups (such as undocumented immigrants or prisoners), or taking cases that too aggressively challenge state power.[130] Yet this is just the most visible example of a broader phenomenon that Handler identified: Funding constrains practice.

As we move from one type of payment source to another, we would expect to see changes in the quantity and quality of services provided.[131] The nature of a philanthropy-based system would be affected by restrictions imposed by the donor. State-funded systems, like the Legal Services Corporation, are shaped by the ideology of those in power. And market-based systems are influenced by the nature of the payment mechanism, which could be through a cross-subsidy from paying clients, a contingent fee or fee-shift system, or a voucher system like Judicare.[132] Overall, the nature of the payor would be expected to shape systemic goals and lawyer roles. In a philanthropic system, depending on the political agenda of the funding source, the systemic goals could range from a more radical vision of social transformation to a narrower vision of individual uplift. Similarly, a state-funded system might emphasize social reform, access to justice, or good governance depending on the political ideology of power holders. One would predict a market-based system to be guided by the twin goals of earning a return while advancing a cause—doing well while doing good.

We can consider how the payment source might affect different aspects of public interest practice—such as case selection, client accountability, and professional role. With respect to the factors bearing on case selection, under philanthropy, the major determinants would be how much charity was available and what strings were attached; in a state system, case priorities would be shaped by political preferences; and in the private market, the constraints would be economic, with the need to fund ongoing operations and avoid conflicts with core paying clients being the key considerations. With respect to client accountability,

130. *See* Cummings, *supra* note 84, at 22 ("The final blow [to the LSC] came with the imposition of congressional restrictions in 1996 banning LSC-funded organizations from redistricting challenges, lobbying, class action lawsuits, representing most aliens, political advocacy, collecting attorney's fees, abortion litigation, prisoner representation, welfare reform activities, and defending public housing tenants evicted for drugs. Most drastically, this legislation prohibited lawyers in LSC-funded organizations from using non-LSC funds to engage in any of the banned activities." (footnotes omitted)). The LSC restrictions are contained in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 (H.R. 3019), § 504(a).

131. *See* Richard L. Abel, *State, Market, Philanthropy, and Self-Help as Legal Services Delivery Mechanisms*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 84, at 295.

132. Judicare subsidizes legal services by providing vouchers to private lawyers who represent poor clients. *See* SAMUEL J. BRAKEL, JUDICARE: PUBLIC FUNDS, PRIVATE LAWYERS, AND POOR PEOPLE (1974).

the intuition is that systems in which payment is decoupled from service would create greater scope for lawyer discretion than in systems where lawyers derived their fees from clients more directly. Finally, to the degree that payment in a market-based system is contingent on case performance within traditional legal venues, we would expect more traditional client-centered professional roles and the deployment of conventional legal tactics. What this suggests, albeit tentatively, is that how services are distributed across the private for-profit, voluntary, and public sectors—that is, how much and what type of public interest law activity is located in each—may significantly affect the nature and quality of legal representation.

The consequences of this distribution go to the fundamental question of what it means to have effective access to justice in our society. In terms of responses to the justice gap, the private market is generally viewed warily as a potential source of leverage—as a *supplement* to but ultimately as an unworthy *substitute* for staffed public interest law offices with committed, full-time attorneys whose job is to advocate for their designated causes and clients. Two reasons are generally given in support of this view. One relates to *expertise* or *quality*: Full-time lawyers dedicated to particular causes or clients will be qualitatively better at what they do than private lawyers who engage in such work part-time and ad hoc either through pro bono service or via a voucher system like Judicare.

The second argument against market-based public interest law delivery relates to what I would call *substantive access*, which refers to the types of cases or matters that may be brought from within a particular practice location. More directly, the concern is that market-based public interest law delivery will be likely to insufficiently attend to—or even ignore altogether—certain categories of cases that just do not make economic sense for for-profit firms to undertake—either because they invite controversy or recriminations from paying clients, or because they do not promise enough attorney's fees. It is the concern about substantive access, for instance, that is raised with respect to the impact of conflicts on large firm pro bono work discussed above. The important question is whether what gets left out of the pro bono system (or other public interest law sectors) gets picked up elsewhere and, if not, what the industry-wide gaps are. In the access debate, therefore, it is not enough to say that we need more services. We of course do, but that formulation begs the question of what type of "more" we need and where it should be targeted.

As Handler emphasized, more public interest law would not necessarily lead to more justice, which leads us back to his critique of the transformative potential of legal rights strategies. In Handler's account, the canonical impact litigation campaign might achieve indirect effects, but was often thwarted from

implementing legal rules on the ground because of the bureaucratic contingency. Rather than join this debate directly, I would refocus it by asking how well it describes what contemporary public interest lawyers do.

Impact litigation remains a central strategy of reformers, as the movements for marriage equality or against the War on Terror underscore. However, these movements also highlight a new reality: Public interest lawyers self-consciously deploy alternative advocacy approaches and explicitly view themselves as social change agents in coordination with other activist groups and political strategies. In this sense, they have moved beyond the pursuit of legal rights to the pragmatic and multidimensional pursuit of social change. In this approach, lawyers engage in "advocacy across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)."[133] Lawyering, in this view, is a constant struggle, fought with different tools in different places based on a careful calculation of which strategy is most likely to shift power in a group's favor at a particular moment in time. It is undertaken not with an eye toward complete victory, but rather toward a series of ongoing battles in which losses must be reversed and success must be maintained and defended from new and different attacks.

Handler's research prefigured this model, with its analysis of the limits on direct litigation success and the possibility of indirect effects—like favorable publicity and consciousness raising—advancing movement goals. Yet there are other explanations, beyond Handler's emphasis on the bureaucratic contingency, for the shift toward multidimensionality among progressive public interest lawyers. In particular, the degree to which the conservative movement has succeeded in narrowing judicial and political avenues that were once viewed as receptive to liberal rights claims—and responding to every progressive move with a legal or political countermove—has forced progressive public interest lawyers to recalibrate their strategies so that they may target their limited advocacy resources to influence the decisionmaking bodies most open to their claims and most likely to defend them against inevitable attack.

My research on the marriage equality (with Douglas NeJaime) and low-wage worker organizing movements supports this story, showing that lawyers target change in the venues they view as most likely to be sympathetic to their

133. Cummings & NeJaime, *supra* note 14, at 1242.

claims and least susceptible to reversal.[134] Thus, in the marriage equality movement in California, lawyers for two decades shunned the courts in favor of an incremental legislative strategy out of concern that any state court victory could not be protected from reversal by state referendum (they were correct, as seen in the passage of Proposition 8) and that any federal lawsuit faced a difficult audience in the Supreme Court (a concern that will soon be tested by *Perry v. Schwarzenegger*).[135] In the low-wage work context, lawyers and activists have also adopted local strategies to advance worker organizing and improve conditions in the face of what they perceive to be a hostile federal judicial and legislative climate.[136] As these cases show, liberal public interest lawyers are turning to multidimensional strategies, at least in part, out of a deep appreciation of the political obstacles to impact litigation that point to other advocacy channels as potentially more effective in advancing their causes.

This conclusion is consistent with Rhode's recent empirical study of prominent public interest law organizations, which shows that their leaders generally recognize the need to "think more strategically and to pursue multiple approaches."[137] Litigation remains important, but it is used strategically in tandem with other initiatives.[138] This study revealed that some 90 percent of leading public interest law organizations bring impact cases, and nearly half devote at least 50 percent of their efforts to such work.[139] Yet impact cases are brought "with a more realistic vision of how they will serve long-term goals."[140] As Rhode notes: "Objectives apart from winning can be critical, such as making a public record, attracting public attention, or imposing sufficient costs and delays that will force defendants to adopt more socially responsible practices."[141] What seems clear is that the current cohort of public interest lawyers has adopted a sophisticated framework for leveraging legal rights to advance their causes—internalizing the lessons Handler taught thirty years ago. Whether this

134. *See generally* Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CALIF. L. REV. 1927 (2007); Cummings & NeJaime, *supra* note 14.
135. *See* Cummings & NeJaime, *supra* note 14.
136. *See* Cummings, *supra* note 134.
137. Rhode, *supra* note 15, at 2046.
138. The typical effort devoted to litigation fell from 60 percent of total workload in 1975 to 51 percent in 2007. *Id.* at 2047 tbl.2, 2048. During the same period, the typical amount of legislative work increased from 7 percent to 17 percent, and research, reports, education, and media activities grew from 12 percent to 26 percent of total workload. *Id.*
139. *Id.* at 2048.
140. *Id.* at 2046.
141. *Id.* at 2046–47.

approach produces more justice in the long term is an empirical question—one that will occupy the next generation of public interest law scholars inspired by Handler's example.

CONCLUSION

Joel Handler was one of public interest law's greatest advocates and harshest critics. He strongly believed in the need for a robust public interest law sector and argued in favor of its growth, all the while warning that public interest law would not result in fundamental change. His contributions to the sociology of the profession and of social movements were foundational and his predictions of the future prescient, if inevitably incomplete. As I have suggested in this Essay, public interest law has grown and diversified, both institutionally and tactically. It has not transformed society, but it has—in partnership with other political movements—anchored a base for social struggle, which has achieved episodic victories against powerful opposition.

In the end, I would look at Handler's Paradox as a product of its time and suggest that its critical view of what public interest law could achieve was, in part, the result of where Handler and others set the benchmark of success for the neophyte movement. In a political moment in which radical progressive social transformation seemed possible, and in an intellectual moment in which the limitations of court-led social change strategies were not fully appreciated, it was understandable that a radical vision of the just society would be used as the metric of success against which public interest law's achievements would be judged. However, in retrospect, it seems unfair to measure public interest law's impact by the gap between where we are and where we would ultimately like to be, rather than by the distance between where we are and where we started—a distance traveled in the face of implacable political opposition triggered not simply by public interest law but by the collective efforts of progressive political movements. Particularly if we begin from the premise that courts are constrained in their ability to produce change, we might ask whether public interest lawyers have effectively leveraged the judiciary's power to advance progressive causes—incrementally, but forward nonetheless—rather than judging success on the basis of fully and faithfully implemented judicial decisions.

From this point of view, we may think of the public interest law movement of Handler's era as the idealistic upstart, doomed to claim more than

it could ever deliver. We might, then, look at the mature movement more forgivingly:[142] older, perhaps wiser, more pragmatic, more circumspect about what it can achieve through law, and more sophisticated in understanding how combining law with other tactics of political struggle can nonetheless advance the cause of justice. Viewing public interest law in this way does not avoid the tension Handler identified between legal rights and social justice, but it may nonetheless buttress the conclusion that the pursuit of legal rights—despite the risks—is still worth the fight.

So what is Handler's legacy? Though the journey may be arduous and the odds of success long, the battle must be joined—and continuously rejoined. What Handler left was not pessimism, but rather a realistic analysis of the power of those forces resisting change and the need for sustained, enduring struggle to achieve it. Even in the face of reversals, Handler saw public interest law as a crucial "additive element" in the struggle for a better and more just society—and for that, all of us who care deeply about that goal are forever in his debt.

142. On the tradeoffs of maturity at public interest law's midlife moment, see Rhode, *supra* note 15; Trubek, *supra* note 1.