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## Public Interest Law: Facing the Problems of Maturity

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## PUBLIC INTEREST LAW: FACING THE PROBLEMS OF MATURITY

*Louise G. Trubek\**

### I. INTRODUCTION

This article deals with the history and current status of public interest law. It reexamines the seminal work of the 1970s that established public interest law and contrasts the early period with the complexities and challenges today. It is inspired by two symposia. The first is a recent conference honoring the work of Professor Joel Handler that provided an opportunity to look again at his tremendous achievements.<sup>1</sup> High on the list is Handler's brilliant and prescient support for the launching of the public interest law enterprise forty years ago. The second is the Altheimer Symposium at the University of Arkansas at Little Rock William H. Bowen School of Law on reframing public service law.<sup>2</sup> The outstanding papers and discussion at that symposium focused on where the public interest law enterprise is today.

The paper opens with a discussion of the key aspects of the public interest enterprise in the 1970s based on an analysis of three key documents written during that period. It concludes that the institutional innovations started in the 1970s have been successful and public interest law has become a permanent part of the U.S. legal system. The paper then highlights where we are today by focusing on two unfinished projects that still challenge public interest lawyers: inequality in society and the limits of the regulatory process. The paper discusses how lawyers are adapting the 1970s canonical concepts of public interest law in ways that allow them to recommit to the goals and deal with these unfinished projects by forging new tools and practices that are appropriate for today's more complex context.

#### A. The Construction of Public Interest Law Industry

In the late 1960s and early 1970s, young lawyers, leaders of the Bar, and the Ford Foundation created a new institution for the legal profession:

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\* Many thanks to Scott Cummings for his sympathetic comments and to Jennifer Jascoll, a student at Seton Hall Law School, for her outstanding research and editing assistance.

1. UCLA School of Law: Poverty and the Bureaucratic State: A Symposium in Honor of Joel Handler (March 11, 2011).

2. UALR William H. Bowen School of Law Ben J. Altheimer Symposium: Reframing Public Service Law: Innovative Approaches to Integrating Public Service into the Legal Profession (March 31, 2011).

the non-profit law firm. The “public interest firm,” financed by sources other than clients and deemed a “charitable” organization eligible for IRS tax-deduction, set out to advocate on behalf of disadvantaged and underrepresented groups. In so doing, it expanded upon and enhanced earlier civil rights lawyering and poverty legal work.<sup>3</sup> The public interest law enterprise as developed over the past 40 years can be seen as a success within the United States. The enterprise, in addition, is influencing legal professions and social movements throughout the world.<sup>4</sup>

One theory for the success of the enterprise is that the founders made a wise strategic choice by placing public interest law as a cornerstone in state-society relationships.<sup>5</sup> That view can be documented through an analysis of the founding period as presented in a series of books and articles from the 1970s.<sup>6</sup> The imagination of the founders, combined with the amount of monies expended, created a well-thought out vision of how to create a major set of institutions that could expand the roles of lawyers and place them in central positions in the dynamic changes taking place in American society.

The literature highlighted the role of the firms funded by the Ford Foundation in 1970.<sup>7</sup> It presented the firms as expanding a long-standing role of lawyers in poverty and civil rights advocacy who worked in non-profit organizations such as the National Association for the Advancement of Colored People (NAACP) and the American Civil Liberties Union (ACLU).<sup>8</sup> The Ford Foundation, in that period, founded seven firms that represented ethnic minorities such as the Mexican American Legal Defense and the Native American Rights Fund.<sup>9</sup> The literature also highlighted some of the new firms as representing “diffuse interests,” such as the consumer and environmental movements. These firms represented a new constituency. The substantive shift of the legal profession to representing the newly-emerging consumer and environmental sectors was crucial. These areas had

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3. Gordon Harrison & Sanford M. Jaffe, *Public Interest Law Firms: New Voices for New Constituencies*, 58 A.B.A.J. 459–67 (1972).

4. Scott L. Cummings & Louise G. Trubek, *Globalizing Public Interest Law*, 13 UCLA J. INT'L L. & FOREIGN AFF., 1, 55 (2008).

5. See generally STUART A. SCHEINGOLD & AUSTIN SARAT, *SOMETHING TO BELIEVE IN* (Stanford University Press 2004) (discussing “how, why, and to what extent cause lawyering has been able to secure a foothold, however tenuous, within the legal profession’s dominant culture”).

6. See COUNCIL FOR PUB. INTEREST L., *BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA* (1976); BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* (1978); Harrison & Jaffe, *supra* note 3.

7. The Weisbrod book in particular had a wider span and discusses many other aspects of the “public interest law firm industry.”

8. WEISBROD ET AL., *supra* note 6, at 44.

9. See THE FORD FOUND., *MANY ROADS TO JUSTICE* 92 (Mary McClymont & Steven Gloub eds., 2000).

recently developed popular and political constituencies resulting in a new set of court cases and legislative enactments.

The key documents that express and created that vision and strategy are the Public Interest Law: An Economic and Institutional Analysis, (Weisbrod); “The Public Interest Law Firm: New Voices for New Constituencies,” (Harrison and Jaffe); and Balancing the Scales of Justice: Financing Public Interest Law in America (Balancing). This literature primarily financed by the Ford Foundation, developed the narrative of and justification for “public interest law.”<sup>10</sup> These documents created an institutional and economic analysis,<sup>11</sup> presented the strategies of the firms funded by the Ford Foundation,<sup>12</sup> and advocated a funding strategy.<sup>13</sup>

The Weisbrod project and book received \$500,000 in financial support—an astounding sum of money in 1972.<sup>14</sup> These funds supported the preparation of a collection of essays by different authors presenting important theoretical and institutional rationales for how public interest law fits into the U.S. liberal legal profession and political economy. The money also supported an empirical survey of lawyers and firms that yielded substantial data based on interviews of public interest lawyers, produced several chapters in the book, and led to a separate publication.<sup>15</sup> Gordon Harrison and Sanford M. Jaffe were the program officers at the Ford Foundation who supervised and funded the original public interest law firms. Their article documents the project and cases of the firms. The Council for Public Interest Law was an association of the firms.<sup>16</sup>

These key documents provide a well-developed vision and strategy, a new institutional form for practicing law, an expanded professional role for lawyers, a business plan for the financing of these firms and lawyers, and a theoretical and institutional justification for the firms.

### 1. *Creation of a New Institutional Form: The Public Interest Law Firm*

The initiation of a distinctive new institution—“the public interest law firm”—is one component of the new strategy. Within ten years, ninety tax-

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10. Balancing was also funded with monies from the Rockefeller Foundation and the Edna McConnell Clark Foundation.

11. See WEISBROD ET AL., *supra* note 6.

12. See Harrison & Jaffe, *supra* note 3.

13. See BALANCING THE SCALES OF JUSTICE, *supra* note 6.

14. Grant #0730021 Multidisciplinary Study of the Economic and Social Consequences of Public Interest Law Activities 1972-1977 ( On file in the Ford Foundation Archives).

15. See JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978); see also Scott L. Cummings, *The Future of Public Interest Law*, 33 U. ARK. LITTLE ROCK L. REV. (Forthcoming Aug. 2011).

16. The Council for Public Interest Law is now the Alliance for Justice.

exempt public interest law firms were created by lawyers.<sup>17</sup> These firms utilized full-time lawyers advocating for disadvantaged individuals and groups. They were funded by non-client sources. The lawyers provided legal representation, primarily at the national level, for constituencies concerned with areas such as environmental improvement, consumer fairness, anti-poverty initiatives and women's rights.

Other new institutions also captured the *zeitgeist* by providing representation to these constituencies. Law school clinics, law firm pro bono programs, and hybrid private-public law firms were flourishing. Congress passed the Legal Services Corporation Act, which established the Legal Services Corporation (LSC).<sup>18</sup> Under its auspices, a plethora of neighborhood legal service offices and legal service backup centers were founded. While the Weisbrod book counts all these lawyers and firms as part of the public interest industry, *Balancing* is somewhat ambiguous about what should be counted as part of the public interest name.<sup>19</sup> The report probably tended towards the narrower definition because it had as one agenda "branding" the tax-exempt foundation-funded firms as separate and distinct for purposes of fundraising and academic and professional legitimacy.<sup>20</sup>

## 2. *A New Role: The Public Interest Lawyer*

Young lawyers were instrumental in the founding of the firms. Stuart A. Scheingold and Austin Sarat in their recent book, place public interest lawyering as a crucial addition to the legal professionalism project.<sup>21</sup> The lawyers believed that well-trained, knowledgeable, and dedicated lawyers could positively and substantially affect public policy on key issues such as environmental protection and poverty reduction. They viewed themselves as expanding the vision of the independent professional fighting for due process and protecting the "little guy."

## 3. *Financing the Lawyers and Firms: A Business Plan*

Balancing stressed the need for a sustainability plan and implementation. Traditionally, lawyers were funded by clients or the government. Non-

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17. See *BALANCING THE SCALES OF JUSTICE*, *supra* note 6.

18. Legal Services Corporation Act, 42 U.S.C. § 2996-29961 (1977).

19. See Harrison & Jaffe, *supra* note 3; *BALANCING THE SCALES OF JUSTICE*, *supra* note 6. Law School clinics were just forming and they were not substantially discussed in this literature. See Harrison & Jaffe, *supra* note 3.

20. See *BALANCING THE SCALES OF JUSTICE*, *supra* note 6; Harrison & Jaffe, *supra* note 3; WEISBROD ET AL., *supra* note 6.

21. Scheingold and Sarat use the phrase "cause lawyering" to refer to what I have termed "public interest lawyers." See SCHEINGOLD & SARAT, *supra* note 5, at 39-44.

profit models were few and far between. While the literature stressed early non-profit models such as the NAACP and legal aid offices, the amount of money that would be required to sustain the large number of Ford Foundation-funded firms was substantially greater than the resources devoted to these precursor institutions. Furthermore, the lawyers considered themselves to be important professionals and wanted a plan that allowed them to earn an adequate income.

As part of their business plan, the lawyers developed networks through the Council on Public Interest Law, a Washington-based “trade association” for public interest law firms. The Council proved to be an effective way to advocate for the institutions and the public interest law “brand.” One of the Council’s missions was the development and dissemination of a financing blue print for the firms. One of the early successes was the IRS decision to grant charitable tax-deduction status for contributions. The IRS ruled that the definition of public interest law included all “underrepresented interests” and allowed these interests to be “tax-deductible.”<sup>22</sup> In so doing, the IRS expanded the “industry” to quite a large number while simultaneously branding a new institution as “public interest law.”

The ability to receive tax deductible contributions proved to be a substantial achievement and allowed the firms to receive both foundation and individual donations. The Council anticipated a need for financing from sources other than foundations. The Council was particularly interested in large law firm support. It also assumed that government assistance would be available, either encouraging statutory “private attorney general” type class actions or through direct financing for some groups such as those who represented the poor. As part of the funding strategy, the Council and the Weisbrod book expanded the definition of the “industry” to a large number of lawyers and institutions. This tactic allowed the proponents to present the amount of money to be raised as reasonable for the value provided to the nation.

#### 4. *Economic, Institutional, and Regulatory Justification: Putting the Industry in Context*

The Ford Foundation funded the Weisbrod book specifically to create a theoretical justification for its commitment to these firms.<sup>23</sup> The book, a substantial project with many chapters, promoted public interest law firms by making three points. First, the book drew upon “market failure” eco-

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22. Ann Southworth, *Conservative Lawyers and the Contest Over the Meaning of “Public Interest Law,”* 52 UCLA L. REV. 1223, 1231, 1249 (2005).

23. Memorandum from Christopher F. Edley to Whitney North Seymour (June 19, 1972) (on file in the Ford Foundation Archives).

conomic literature as a justification for the development of non-profit firms. The firms, through their advocacy, filled in the gap between profit-making businesses and government intervention. Second, the chapters created the concept of a "public interest industry" and examined alternative institutions that might fill the gap such as private law firms and government-based advocacy institutions. It then demonstrated the unique role that the non-profit public interest law firms were playing within that context.<sup>24</sup> Third, the book stressed that the firms created a new process for regulation at the administrative agency level and the court level. At the agency level, these firms participated in the rule-making process. At the court level, these firms participated via class actions and other lawsuits. The Weisbrod book took the view that these interventions resulted in more "balanced" results and better public policies. The advocacy by these non-profit law firms on behalf of underrepresented groups resulted in a more participatory and accountable administrative process.<sup>25</sup> The book included many case studies describing how the firms advocated for different voices in specific policy sectors. The chapters documented that these interventions in the administrative and regulatory process produced better public policy.

#### B. Challenges at the Time

Responses to the new public interest industry quickly appeared during the founding decade. Several liberal academics critiqued the viability, effectiveness, and equity of the new firms. Richard Stewart wrote The Reformation of American Administrative Law, a significant article in which he presented a chronology of administrative law.<sup>26</sup> He argued that the process was failing, saw public interest law as an effort to halt the decline of administrative process, and concluded that this innovation could not solve the problems he diagnosed.<sup>27</sup> Stewart criticized the public interest representation model as self-appointed and unaccountable.<sup>28</sup> He stated that the results would be compromises that did not secure the public good.<sup>29</sup> In an important book review of *Balancing*, David Trubek, while largely supportive of public interest firms, criticized them for a utopian financial plan, inadequate politi-

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24. See WEISBROD ET AL., *supra* note 6, at 25-26.

25. *Id.*; see also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) (laying out, in detail, the administrative agency public interest representation mode).

26. See Stewart, *supra* note 25, at 1669.

27. *Id.*

28. *Id.* at 1671, 1770.

29. *Id.*

cal understanding, and excessive reliance on professional values and skills.<sup>30</sup> Trubek questioned the funding plan presented in the Balancing report for its unrealistic reliance on funding from foundations and the Bar.<sup>31</sup> Trubek also predicted that reliance on lawyers in independent law firms would undercut social movement advocacy since the firms would decrease potential participatory actions.<sup>32</sup> He noted that, paradoxically, the firms also could be described as too political: the clients did not pay for the services allowing the lawyers to pursue their own political agendas.<sup>33</sup>

In the same period, the first “conservative” public interest law firms appeared.<sup>34</sup> Conservative and libertarian groups realized the power of the “public interest” brand. They set up their own firms.<sup>35</sup> The IRS permitted these firms to qualify as nonprofit tax exempt entities allowing them to use the “public interest law firm” name.<sup>36</sup> These conservative firms challenged the progressive tenor of the public interest brand.

### C. Unfinished Projects: Inequality in Society and Limits of the Regulatory Process

In 1989, the Alliance for Justice, successor to the Council for Public Interest Law, published an update on the state of the public interest law industry.<sup>37</sup> The Alliance presented a picture of a maturing and institutionalized sector. In addition to discussing the canonical non-governmental organizations (NGOs) and the private public-interest law firms, the report included law school clinics and emphasized the close relationship between the spread of clinics, the political climate of the 1960s, and the rise of inaugural public interest law firms.<sup>38</sup>

The public interest law brand has spread around the world.<sup>39</sup> There are many analyses of the relationship between the United States enterprise and social justice lawyers around the world; the role of the Ford Foundation is one clear link.<sup>40</sup> The globalization of the public interest role of lawyers bolstered the view that the enterprise was a success. Scheingold and Sarat ed-

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30. David M. Trubek, *Council for Public Interest Law: Balancing the Scales of Justice: Financing Public Interest Law in America*, 1977 WIS. L. REV. 303 (1977) (book review).

31. *Id.*

32. *Id.*

33. *Id.*

34. Southworth, *supra* note 22, at 1224.

35. *Id.*

36. *Id.* at 1249.

37. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 6–20 (1989).

38. *Id.* at 1–5.

39. See Cummings & Trubek, *supra* note 4.

40. THE FORD FOUND., *supra* note 9, at 1–5.



ited a series of books on “cause lawyering” in the 1990s and 2000s that highlighted public interest law. These books discussed the concept and practice as crucial elements in the creation and maintenance of democratic liberal legalist societies.<sup>41</sup>

Although the institutional project can be deemed a success, two goals for public interest law envisioned in the 1970s have not fully been met and the sector faces two unfinished projects. First, income and resource inequalities within American society are increasing. Such inequalities are evident in the growing number of poor people, the increasing plight of the middle class, and the lack of legal resources for poor and moderate income people. Second, the regulatory process still has limited success in problem-solving for the public good. The recent recession, replete with the failures in the housing and financial markets and the contentious health care reform debate, indicate the continuing limits of administrative processes.

### 1. *Income and Resource Inequalities: The Poor and Middle Class*

Reducing poverty and creating a more equitable society were integral goals of the public interest founding decade. The Balancing report and the Weisbrod book list empowering the powerless and helping the poor as accomplishments of public interest law actions.<sup>42</sup> The book contains an elaborate economic analysis of the distributional effects of public interest law activities.<sup>43</sup> This analysis states that effects vary with income and makes clear that authors were concerned with the distributional effects. The book also contains a chapter on the survey of public interest law practitioners that documents the substantial resources dedicated to advocacy for the poor.<sup>44</sup>

Today, the situation for the poor and moderate income people is grim. In September 2010, the U.S. Census Bureau reported that the number of people living in poverty increased for the third consecutive year, from 39.8 million people in 2008 to 43.6 million people in 2009.<sup>45</sup> This estimate—43.6 million people or 14.3% of the American population—was the highest in 51

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41. See Cummings, *supra* note 15.

42. See BALANCING THE SCALES OF JUSTICE, *supra* note 6; WEISBROD ET AL., *supra* note 6.

43. See WEISBROD ET AL., *supra* note 6.

44. *Id.* at 42.

45. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, at 14 (Sept. 2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>. Note: The Census Bureau follows the Office of Management and Budget's Statistical Policy Directive No. 14 to calculate its poverty thresholds. Poverty thresholds determine official poverty population statistics. These differ from the Department of Health and Human Services's poverty guidelines, which determine financial eligibility for federal programs and other administrative purposes.

years of data collection.<sup>46</sup> The Bureau further noted that the increase in the overall poverty rate was “larger than the increase in the poverty rate during the November 1973 to March 1975 recession” but “smaller than the increase in the poverty rates associated with the January 1980 to July 1980 and July 1981 to November 1982 combined recessions.”<sup>47</sup>

In a recent op-ed piece, *New York Times* writer Bob Herbert noted that disabled or elderly low-income people are losing access to medical, rehabilitative, or other health services through budget cuts or increased service fees.<sup>48</sup> “Look out the window[,]” Herbert observed. “More and more Americans are being left behind in an economy that is being divided ever more starkly between the haves and the have-nots.”<sup>49</sup> In July, Edward Luce of the *Financial Times* discussed how middle class America is suffering at the hands of the “median wage stagnation”—also known as the “Great Stagnation”—in which “the annual incomes of the bottom 90 per cent of US families have been essentially flat since 1973 – having risen by only 10 per cent in real terms over the past 37 years.”<sup>50</sup> In comparison, the incomes of the top 1% have tripled in the same amount of time.<sup>51</sup> Luce noted that a majority of Americans now “expect their children to be worse off than they are.”<sup>52</sup> Some blame the stagnation on globalization while others point to the “conservative backlash” and the decline of unions starting with the Reagan era.<sup>53</sup> Less than 10% of private sector workers belong to a union.<sup>54</sup>

While public interest lawyers have continued to do anti-poverty work and the absolute number of poverty lawyers has increased, the percentage of lawyers in the overall public interest sector doing poverty work has declined. In the 1970s, almost-two thirds of all the lawyers in the public interest sector broadly defined worked on poverty issues. Today, using the same definitions, the percentage of poverty lawyers has fallen below 50% of the total, while the absolute number of people in poverty and the percentage of the population below the poverty line have increased.<sup>55</sup>

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46. *Id.*

47. *Id.*

48. See Bob Herbert, Op-Ed., “A Terrible Divide,” *N.Y. TIMES*, Feb. 7, 2011, at A27, available at <http://www.nytimes.com/2011/02/08/opinion/08herbert.html>.

49. *Id.*

50. Edward Luce, *The Crisis of Middle-Class America*, *FINANCIAL TIMES*, July 30, 2010, available at <http://www.ft.com/cms/s/2/1a8a5cb2-9ab2-11df-87e6-00144feab49a.html#axzz1DyL37700>.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. In the mid-1970s, roughly twice as many lawyers worked for OEO/non-OEO Legal Services (1125) as NGO PILs (575). Today, the number of lawyers providing legal aid through Legal Services Corporation (3845) and non-Legal Services Corporation entities

## 2. *The Limits of the Regulatory Process: The Need for Expanded Participation and Problem Solving*

Reform of the regulatory process was one of the goals of the public interest law enterprise. In the period of the 1960s and 1970s there was an explosion of national legislation for consumer protection and environmental betterment. The War on Poverty provided a rich framework of laws that could substantially reduce inequality. The founding public interest lawyers believed that successful implementation of these laws would occur only through participation of under-organized groups at the agency and community level.

Today the financial and housing markets are in severe difficulty, based in part on inadequate regulatory oversight. The new health care legislation is mired in controversy over the role and breadth of government agencies in charge of the reforms. Richard Stewart in a recent article refers to the situation as “regulatory administrative fatigue.”<sup>56</sup> He states that the traditional method of “command and control” regulation is no longer viable due to increased complexity and rapid growth of technology.<sup>57</sup> In addition to complexity and technology, there is contestation at the national level on the value of government invention. He states that “participatory interest group approach” model for regulation can no longer be relied on as effective or efficient to meet the regulatory and political demands of the current time.<sup>58</sup>

### D. Redesigning Public Interest Law of the 1970s: Looking Around and Ahead

Some lawyers, non-profit organizations, and law schools, faced with increasing inequality and dysfunctional regulation, are developing innovative practices and institutions. These innovations are in many practice loca-

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(2736) almost matches the number of lawyers working for NGO PILs (7119), while overall the number of all lawyers participating in the NGO sector has risen from 0.3% to 1.4%. For data, see Scott Cummings, Power Point Presentation as a member of the panel on Public Interest Lawyers and Social Change, at Poverty and the Bureaucratic State: A Symposium in Honor of Joel Handler (March 11, 2011); see also Joel F. Handler, Betsy Ginsberg & Arthur Snow, *The Public Interest Law Industry*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 60–65 (Burton Weisbrod ed., 1978); JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD S. ERLANGER, *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978); Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006); LEGAL SERVS. CORP., *DOCUMENTING THE JUSTICE GAP IN AMERICA* (2d ed. 2007).

56. Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437 (2003).

57. *Id.* at 446.

58. *Id.* at 445.

tions, from law schools and private firms to hospitals. They redesign the original concepts of non-profit law firms, appropriate lawyer roles, financial sustainability and the proper functioning of US liberal legalism. The reconstruction can be summed up as increased collaboration, new lawyer roles, additional sources of funding, and recognition of fragility in the enterprise. The lawyers continue the public interest law vision through responding creatively to the current limitations and opportunities.

Interestingly, these innovations can be seen to incorporate responses to the critiques from the founding decade. Conservative push-back resulted in courts that have a more limited view of the role of government. Advocates today have developed a more comprehensive view of routes out of inequality. They view government as only one source of funding for the poor and are open to exploring other routes such as public-private partnerships and corporate social responsibility.<sup>59</sup> The move to collaboration and away from the lawyer as the heroic figure is another shift. The emphasis on working with community groups in tight alliances demonstrates that the continued need for strong social movement alliances. The search for new sources of funding shows that the sustainability problem would, in fact, haunt the firms. Finally, the clarity and simplicity of the founding vision proved to be utopian. The complexity of U.S. politics and its economy under the duress of globalization has rendered a single, simple vision of democratic participation untenable.

### *1. From the Independent Public Interest Law Firms to Collaborative Practices*

One accomplishment of the founding generation was the creation of the free standing public interest law firm. A major focus now is creating collaborative groups and networks across types of public interest groups, law schools, professions, and community groups. Access to Justice Commissions and patient partnerships are examples of these collaborations. This is a major institutional realignment.

Collaborations can provide a broad-based attack on poverty and inequality. A major new collaborative institution is the Access to Justice Commissions (ATJ). The Commissions consist of a wide group of stakeholders: legal services, legal aid, pro bono programs, law school clinics, court representatives, and community organizations. ATJs now exist in many states. The Commissions work to increase funding for lawyers but they also support new techniques for assisting clients, such as limited scope representa-

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59. Ezra Rosser, *Offsetting and the Consumption of Social Responsibility* (2011) (on file with author).

tion and court-assisted programs.<sup>60</sup> The Arkansas Access to Justice Commission is one outstanding example. Like Commissions in many places, it is providing initiatives for collaborative fundraising and sophisticated use of technology that encourages both lawyer pro bono work and clients access to legal information.<sup>61</sup> The ABA plays a major role in coordinating the ATJs and encouraging their expansion.<sup>62</sup> The Department of Justice created an Office on Access to Justice in March 2010; an early initiative of this Office is support for the state Commissions.<sup>63</sup>

Collaborations can also lead policy development. The early model in health was a single public interest law firm representing an underrepresented group such as low-income health patients at events like a Medicaid rulemaking hearing. Now lawyers are part of collaborations among patients and doctors.<sup>64</sup> One example is the Center for Patient Partnership (CPP) at the University of Wisconsin.<sup>65</sup> It is a medical-legal partnership that combines legal, medical, and health professions. The law school clinic and pro bono attorneys provide the legal expertise. CPP is a major actor in representing the interests of patients in the health care institutions at the state and national level. This kind of partnership can develop guidelines for improved patient care and discuss the implementation of the guidelines with institutions such as hospitals or regulatory agencies. They participate in designing of governance systems for clinical trials to ensure that there is equitable participation of all types of patients. This type of participation places the voices of the patients at both the policymaking and implementation level.<sup>66</sup>

## 2. *Different Roles for Lawyers: From the Independent Public Interest Professional to Collaborator and Facilitator*

Participation in collaboratives requires the public interest lawyers to work with a variety of people from different professions and disciplinary backgrounds. These collaborations also require lawyers from different practice sites to work together. The ATJs, for example, require these groups to

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60. See Management Information Exchange Journal, Volume 23 No.1 2008.

61. ARK. ACCESS TO JUSTICE COMM'N, ARK. ACCESS TO JUSTICE REPORT (Mar. 24, 2011).

62. AMERICAN BAR ASSOCIATION, <http://www.americanbar.org> (last visited Aug. 3, 2011).

63. See *USDOJ: Access to Justice: About the Initiative*, U.S. DEPT. JUSTICE, <http://www.justice.gov/atj/about-atj.html> (last visited Apr. 28, 2011).

64. There are a wide variety of medical-legal partnerships. See Marsha M. Mansfield & Louise G. Trubek, *New Roles to Solve Old Problems: Lawyering for Ordinary People*, \_\_\_ N.Y. L.J. (forthcoming 2011); see also ARK. ACCESS TO JUSTICE COMM'N, *supra* note 61.

65. See Mansfield & Trubek, *supra* note 64.

66. For a discussion of new participation models see Louise G. Trubek, et al., *Improving Cancer Outcomes Through Strong Networks and Regulatory Frameworks: Lessons from the United States and the European Union*, 14 J. HEALTH CARE L. & POL'Y (2011).

work together on a daily basis. The relationship between pro bono lawyers, legal clinics, and NGO-based lawyers has not always been smooth or efficient.<sup>67</sup> Multi-professional collaboration requires a new set of skills to enable successful interaction with people from different educational, training, and ethical backgrounds.<sup>68</sup>

A second new role is facilitator. The lawyers in the collaborations provide knowledge that is unique. They are familiar with private law and government regulatory processes. They can analyze alternative regulatory and governance strategies. The command-and-control regulatory approach is now being challenged by proponents of alternative regulatory processes such as meta-regulation and democratic experimentalism.<sup>69</sup> These new regulatory processes continue to require participation of the affected constituency. This is particularly important today where there are alternative advocacy tools to assist disadvantaged people. Lawyers are serving as facilitators in these stakeholder public-private processes.<sup>70</sup>

### 3. *Continued Search for Compensation*

Financing public interest lawyers continues to be a challenge. Deborah Rhode documents the continuing challenges, indicating that expenses and needs “never stop escalating and few [firms] had relatively secure<sup>71</sup> sources of income.”<sup>72</sup> The costs of law schools have increased so that graduates enter the field with significant debt. Several new programs and approaches are now assisting lawyers. For example, loan forgiveness is a major source of financing for recent law school graduates who pursue a public service career.<sup>73</sup> First, there are twenty-three state-based and over one hundred law

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67. See generally Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

68. See Mansfield & Trubek, *supra* note 64.

69. See Wendy A. Bach, *Governance, Accountability and the New Poverty Agenda*, 2010 WIS. L. REV. 239 (2010); Lisa T. Alexander, *Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737 (2010).

70. See Scott L. Cummings, *Law in the Labor Movement's Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927, 1930 (noting the contributions of a “sophisticated team of labor activists and lawyers[.]”).

71. Deborah L. Rhode “Public Interest Law: The Movement at Midlife” 60 Stan.LRev.2027,2056 (2008).

72. Equal Justice Works provides an overview of some loan repayment assistance programs and links for further information. See EQUAL JUSTICE WORKS, <http://www.equaljusticeworks.org> (last visited Apr. 29, 2010).

73. Equal Justice Works provides an overview of some loan repayment assistance programs and links for further information. See EQUAL JUSTICE WORKS, <http://www.equaljusticeworks.org/> (last visited Apr. 29, 2011).

school-based Loan Repayment Assistance Programs (LRAPs).<sup>74</sup> Second, there is the John R. Justice Student Loan Repayment Program (JRJ), which provides loan repayment assistance for state and federal public defenders as well as state prosecutors who agree to remain in their position for three or more years.<sup>75</sup> Third, there is the Civil Legal Assistance Attorney Student Loan Repayment Program (CLAARP), though these awards are limited to a first-come/first-served basis.<sup>76</sup> Fourth, as part of the College Cost Reduction and Access Act of 2007, there is a federal public service loan forgiveness program, though it is not specifically for lawyers.<sup>77</sup>

Drawing upon a recent study, Scott Cummings questions the success rate of LRAPs and scholarship programs in attracting law school graduates to public interest jobs.<sup>78</sup> Fellowship programs, such as the Skadden Fellowship and the Equal Justice Works Fellowship, provide salaries and loan assistance to graduates who want to pursue public interest jobs, though Cum-

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74. *State LRAP Programs and Contacts*, EQUAL JUSTICE WORKS, available at <http://www.equaljusticeworks.org/resources/student-debt-relief/state-based-lrap-programs-contacts> (last visited Apr. 29, 2011); *List of Law School LRAPs*, EQUAL JUSTICE WORKS, available at <http://www.equaljusticeworks.org/resources/student-debt-relief/law-school-lraps/list-law-school-lraps>. The twenty-three state-based LRAPs are located in Arizona, District of Columbia, Florida, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, Vermont, and Washington.

75. John R. Justice, *Student Loan Repayment Program (JRJ)*, EQUAL JUSTICE WORKS, <http://www.equaljusticeworks.org/resources/student-debt-relief/John-R-Justice-Student-Loan-Repayment-Program> (last visited Apr. 29, 2011). A JRJ recipient is limited to \$60,000 in total assistance from the program and cannot receive more than \$10,000 in a calendar year.

76. See Civil Legal Assistance Attorney Student Loan Repayment Program (CLAARP), EQUAL JUSTICE WORKS, <http://www.equaljusticeworks.org/resources/student-debt-relief/civil-legal-assistance-attorney-student-loan-repayment-program> (last visited Apr. 29, 2011); *Civil Legal Assistance Attorney Student Loan Repayment Program*, U.S. DEPT. OF EDUCATION, <http://studentaid.ed.gov/PORTALSWebApp/students/english/CLAARP.jsp> (last visited Apr. 29, 2011). CLAARP recipients must be licensed to practice law and “employed full-time as a civil legal assistance attorney by either [a] nonprofit organization that provides legal assistance, without a fee, on civil matters to low-income individuals without a fee; or [a] protection and advocacy system or client assistance program that provides legal assistance on civil matters to clients and receives funding under” specific sections of the U.S. Code. *Civil Legal Assistance Attorney Student Loan Repayment Program*, U.S. DEPT. OF EDUCATION, <http://studentaid.ed.gov/PORTALSWebApp/students/english/CLAARP.jsp> (last visited Apr. 29, 2011) (lists the specific sections of the U.S. Code).

77. *Loan Forgiveness for Public Service Employees*, U.S. DEPT. OF EDUCATION, <http://studentaid.ed.gov/students/attachments/siteresources/LoanForgivenessv4.pdf> (last visited Apr. 29, 2011).

78. Scott L. Cummings, *The Future of Public Interest Law*, 33 U. ARK. LITTLE ROCK L. REV. (forthcoming Aug. 2011) (citing Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1 (2009) available at <http://www.aeaweb.org/aej-applied/accepted/2007-0005.pdf>).

mings notes that there are no studies on the impact of such programs.<sup>79</sup> Despite the debt relief of LRAPs, graduates are less likely to enter public interest jobs due to the burden of law school debt.<sup>80</sup> With respect to scholarship programs, Cummings points out that they “require only a ‘moral’ repayment obligation” and graduates can later decide to move into the private sector without any penalty.<sup>81</sup> Nonetheless, these LRAP and fellowship programs allow new lawyers to enter into public interest law.

Another major change in compensation has been the tremendous growth in pro bono. The adoption of pro bono programs by law schools and the bar is a major success story. More than a quarter of the full-time lawyers who provide civil legal assistance do so pro bono.<sup>82</sup> Pro bono service has become an important aspect of both corporate law firm practice and the provision of public interest law services for civil legal services.<sup>83</sup>

In addition, many law firms also have split public-interest/law-firm summer programs in which law students spend the first half of the summer at the firm and the second half at a public interest organization.<sup>84</sup> The students receive full summer associate pay.<sup>85</sup> Firms are said to offer this opportunity

[f]irst . . . to make a pro bono contribution and allow a summer associate to experience this rewarding and educational aspect of the practice of law [. . . second, to] serve[] as a tangible demonstration of the firm’s commitment to associate involvement in pro bono work . . . [and third, as] a means of reaching students with more information that distinguishes the firm.<sup>86</sup>

In the recent recession, young associates have been working in public interest firms paid for by their employer for short periods. This is proving a boon for both the firms and the lawyers.<sup>87</sup>

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79. *Id.*

80. *Id.*

81. *Id.*

82. Rebecca L. Sandefur, *Lawyers’ Pro Bono Services and American-Style Civil Legal Assistance*, 41 *LAW & SOC’Y REV.* 79, 80 (2007).

83. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *FORDHAM L. REV.* 2357, 2359 (2010).

84. *What Are Firm Sponsored Split Public Interest Summers?*, YALE LAW SCHOOL CAREER DEVELOPMENT OFFICE, [http://www.law.yale.edu/documents/pdf/CDO\\_Public/what\\_are\\_firm\\_sponsored\\_summers.pdf](http://www.law.yale.edu/documents/pdf/CDO_Public/what_are_firm_sponsored_summers.pdf) (last visited Apr. 29, 2011).

85. *Id.*

86. *Id.*

87. *Id.*



4. *From a Participant in the U.S. Legalist Democracy to a Participant Around the World*

The 1970s public interest lawyers had a clear vision. They viewed themselves as reformist participants in a flawed but fixable democratic, market-based polity. They utilized respectable economic theories to support their claim for the participation of diffuse and subordinated groups in government decision-making. This participation was the route toward a more equitable and efficient national political economy. They expanded on the older concept of the lawyer as statesmen. The new concept was the lawyer as a key actor in the emerging new economic protections for the consumers and environment and as the protector of the economically impoverished and victims of racial and gender discrimination.

This clear vision is much harder to achieve today. Within the United States there is little agreement on a single overarching theory of how to achieve equality and equity. Despite substantial economic growth, inequality has grown, and the gap between rich and poor continues. Trying to solve these problems through better interest-group representation in administrative agencies seems naïve. The clear line between public action and private initiatives is eroding. Moreover, the public interest lawyers face a world where the clear demarcations of the nation-state are hard to see. Internationalization has affected domestic practice.<sup>88</sup> Poverty lawyers face immigration as a crucial element in U.S. poverty.<sup>89</sup> They also see the outsourcing of jobs to other countries. Both these challenges require knowledge of foreign laws and treaties and transnational links and networks.<sup>90</sup>

There are examples of how U.S. lawyers are using international laws and networks as opportunities to assist American workers. Beth Lyon documents how US anti-poverty activists use international strategies to benefit immigrant worker movements in the United States. These include “‘broadcasting’ domestic violations to international entities, . . . international law formation, and . . . importing international standards into domestic advocacy.”<sup>91</sup> The emergence of human rights, including economic and social rights in the global arena, allows a greater range of tools that can be

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88. Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L. J. 891, 891 (2008).

89. 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, 411-12 (1995).

90. See generally Ruth Buchanan & Rusby Chaparro, *International Institutions and Transnational Advocacy: The Case of the North American Agreement on Labor Cooperation*, 13 U.C.L.A. J. INT'L L. & FOREIGN AFF., 129, 130 (2008).

91. Beth Lyon, *Changing Tactics: Globalization and the U.S. Immigrant Worker Rights Movement*, 13 U.C.L.A. J. INT'L L. & FOREIGN AFF., 161, 161 (2008).

employed within the United States.<sup>92</sup> Buchanan and Chaparro discuss the effects of the North American Free Trade Agreement (NAFTA) on labor rights. They argue that the transnational legal institutions created by NAFTA have stimulated the emergence of a nascent transnational network that works to protect labor rights.<sup>93</sup> While promising, all these initiatives seem very fragile and preliminary. This is due in part to the newness of globalization and the difficulties of figuring out how to govern in a global world.

### III. CONCLUSION

Students entering law school today realize that the path to social justice will be tangled and rocky. The projects of reducing inequality and empowering the unorganized are once again major challenges, but the impressive forty-year history of the public interest law enterprise serves as a signal that a meaningful life in the law can be a realistic goal. The founding lawyers legitimated the formation of non-profit law firms by building on the older models of the ACLU and the NAACP. Despite the continued financial struggles for many public interest lawyers and firms, jobs exist and are an influential sector of the U.S. profession. Social justice lawyers exist around the world.<sup>94</sup> The survival and growth of the sector for so many decades is an encouragement to law students and new lawyers. The true success of the public interest law enterprise is demonstrated by its ability to motivate lawyers to adapt and revise the practice to meet today's challenges with today's tools.

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92. Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 13–14 (2010).

93. Buchanan & Chaparro, *supra* note 88, at 129.

94. Cummings & Trubek, *supra* note 4, at 4.

