ON THE FRONTIERS OF PUBLIC INTEREST LAW: THE NEW JERSEY STATE DEPARTMENT OF THE PUBLIC ADVOCATE—THE PUBLIC INTEREST ADVOCACY DIVISION

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I. INTRODUCTION

On May 13, 1974, Governor Brendan Byrne signed into law a bill which created a new cabinet level department, the Department of the Public Advocate.[1] It began as a rather curious experiment—a state funded public interest law firm.[2] Governor Byrne viewed creation of the department as part of his campaign promise to operate a "government under glass,"[3] and hoped that its establishment would reinforce the image of an honest, sensitive, and responsible government.[4] The department was given a broad legislative mandate, largely left to its own devices to define the "public interest,"[5] and to bring law suits on its behalf.[6] In order to understand the Department of the Public

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[1] *See* Department of the Public Advocate Act of 1974, ch. 27, § 2, 1974 N.J. Laws 67, 67 (codified at N.J. STAT. ANN. § 52:27E-2 (West Cum. Supp. 1982-1982)). *See generally* N.J. STAT. ANN. §§ 52:27E-1 to -47 (West Cum. Supp. 1982-1983).

[2] *See, e.g.*, S. Van Ness, New Jersey Department of The Public Advocate: The First Eighteen Months June 14, 1974-Dec. 31, 1975.

[3] Penn, *Advocate From Within*, TRIAL 20, 23 (1976); New Jersey Pioneers in Governmental Responsibility, Plain Dealer, Aug. 7, 1974, at B5, col. 1.

[4] *Public Hearing on S. 1409 Before the Senate State Government and Federal and Interstate Relations Comm.*, 198th Leg., 1st Sess. 3 (1974) [hereinafter cited as *Senate Hearing*].

[5] *See infra* note 6 and text accompanying note 45.

[6] N.J. STAT. ANN. § 52:27E-31 (West Cum. Supp. 1982-1983). That section provides:

> The Public Advocate shall have sole discretion to represent or refrain from representing the public interest in any proceeding. He shall consider in exercising his discretion the importance and the extent of the public interest involved and whether that interest would be adequately represented without the action of the department. If the Public Advocate determines that there are inconsistent public interests involved in a particular matter, he may choose to represent one such interest based on the considerations in this section, to represent no interest in that matter, or to represent one such interest through the Division of Public Interest Advocacy and another or others through other divisions of the department or through outside counsel engaged on a case basis.

Id.; *see* Van Ness v. Borough of Deal, 139 N.J. Super. 83, 94, 352 A.2d 599, 605 (Ch. Div. 1975)

Advocate, it is necessary to probe the meaning of "public interest" and to identify the political theories underlying this type of advocacy.

II. Overview

The public interest is an amorphous concept which is not easily defined.[7] Indeed, scholars have failed to describe its contours adequately. Some commentators view policy decisions as promoting public interests if they serve the whole public, rather than the ends of some special interest.[8] Others define the public interest in terms of a general consensus of fundamental principles.[9] The public interest has also been cast as a nearly metaphysical balancing of the heterogeneous interests in society.[10] Philosophical idealists, such as John Rawls, reject the notion of summing up society's interests in order to derive the public interest. Rawls argued for policy intervention on behalf of the least advantaged to the extent that everyone will benefit.[11] The participation of a wider public comports with both the notions of fairness and the integrity of the truth-seeking process. Contemporary public policy analysts argue that decision-makers must "give up the delusion that they can serve the public equally well," thereby rejecting the idea that there is in fact a single, indissoluble social good.[12] In a complex

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(suggesting broad delegation of power necessary to effectuate purpose of Act), *rev'd on other grounds*, 145 N.J. Super. 368, 387 A.2d 1191 (App. Div. 1976), *rev'd in part on other grounds*, 78 N.J. 174, 393 A.2d 571 (1978).

[7] *See* V. Held, The Public Interest and Individual Interests (1970); *cf.* Vasquez v. Glassboro Serv. Ass'n, 83 N.J. 86, 98, 415 A.2d 1156, 1162 (1980) ("Public policy eludes precise definition and may have diverse meanings in different contexts"); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 403, 161 A.2d 69, 94 (1960) ("public policy is a term not easily defined").

[8] *See, e.g.*, M. Meyerson & E. Banfield, Politics, Planning and the Public Interest: The Case of Public Housing in Chicago 322 (1955). If something serves a special interest, it furthers the ends of some part of the public at the expense of the others. *Id.* The authors note that the differences between views regarding the nature of the public interest depend upon what is meant by "the ends of the whole public." *Id.* at 323.

[9] *See, e.g.*, Downs, *The Public Interest: Its Meaning in a Democracy*, 29 Soc. Research 1, 5 (1962).

[10] F. Marks, The Lawyer, the Public, and Professional Responsibility 51 (1972). The authors suggest that the definition of public policy is that "resulting from the sum total of all interests in the community—possibly all of them actually private interests—which are balanced for the common good." *Id.*

[11] J. Rawls, A Theory of Justice 60 (1971).

[12] Fainstein & Fainstein, *City Planning and Political Values*, 6 Urb. Aff. Q. 362 (1971).

society with diverse and often conflicting interests,[13] any determination of the public interest is apt to be of a highly contentious nature.

The philosophical underpinnings of public interest legal advocacy emanate from the early period of 20th century liberal progressive reform.[14] Philosophically, public interest advocacy rests on the presumption that the underprivileged, a significant segment of the community, are not adequately represented in traditional political and legal forums.[15] To the extent that the political and legal processes inadequately represent the underprivileged in a pluralist democratic society, public interest advocacy seeks to compensate for this imperfection.[16]

In addition to serving as a voice for the underprivileged and unrepresented, public interest advocacy provides an antidote to a second flaw in the pluralist democratic process. In a pluralist democratic society, organizations with specialized interests, narrow goals, and sufficient resources are more effective in influencing the political process and compelling favorable government action than those organizations which lack such characteristics.[17] Public interest advocates,

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Significantly, New Jersey's first Commissioner of the Public Advocate Department expressed his perception of his role in a way that was consistent with this philosophical view. Stanley C. Van Ness stated in a New York Times interview that " '[t]here is no monolithic interest.' " Goldstein, *Public Advocate, The People's Defender*, N.Y. Times, Nov. 14, 1976, at 1, col. 1. His test for public interest was whether the interest seemed significant, and whether it would be adequately represented if the Public Advocate did not choose to represent it. *Id.*

[13] The Act recognizes that there may be conflicting interests worthy of representation by the Public Advocate. *See* N.J. STAT. ANN. § 52:27E-31 (West. Cum. Supp. 1982-1983) (upon finding of inconsistent public interests, Public Advocate may represent one, none, or seek outside counsel to represent conflicting public interest).

[14] *See generally* Selznick, *Social Advocacy and the Legal Profession in the United States*, JURID. REV. 113 (1974) (tracing history of social advocacy in the United States); *see also infra* notes 28 & 29.

[15] *See* Halpern, *Public Interest Law: Its Past and Future*, 58 JUDICATURE 118, 119 (1974); *cf.* Statement Accompanying S. 1409, 198th Leg., 1st Sess. (1974) (Public Advocate empowered to bring suits on behalf of public interest "to ensure that important perspectives . . . which would otherwise be unrepresented, will be brought to the attention of appropriate administrative agencies and courts"); Letter from Joseph H. Rodriguez, Public Advocate, to Governor Kean (May 1, 1982) (accompanying 1981 N.J. DEP'T OF THE PUBLIC ADVOCATE ANNUAL REPORT) (noting "gains in providing representation for the unrepresented and the underrepresented").

[16] *See* B. WEISBROD, PUBLIC INTEREST LAW 4-29 (1978). *See generally* Note, *The Department of Public Advocate—Public Interest Representation and Administrative Oversight*, 30 RUTGERS L. REV. 386, 392-97 (1977). Indeed, political scientist E. Schaatschneider once observed that "the flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper class accent." E. SCHAATSCHNEIDER, THE SEMISOVEREIGN PEOPLE 35 (1960).

[17] *See* E. SCHAATSCHNEIDER, *supra* note 16, at 35; B. WEISBROD, *supra* note 16, at 154-56.

therefore, seek to shape the more amorphous community interest, which might otherwise be unarticulated, into a form that is suitable to the political process. In sum, public interest advocacy attempts to cure these flaws by "providing representation for the unrepresented and underrepresented and in making government more accountable to its citizens."[18]

Public interest law is founded on another circumstance peculiar to the American legal process. Social commentators have long noted the powerful position held by lawyers in this society.[19] Alexis DeTocqueville suggested that lawyers were a "political upper class," adding that "there is hardly a political question in the United States which does not sooner or later turn into a judicial one."[20] He noted that the influence of attorneys in America was so pervasive that it formed a power which was "little dreaded and hardly noticed."[21] Thus, lawyers are able to make public policy and define the public interest to some degree because of this special role. But, the lawyer's ability to shape the public interest is to some extent based upon the adversarial legal system. Attorneys may perceive their public interest roles to be the advancement of the single side of a controversy. They presume that their client's opponent will be similarly represented by some other competent member of the bar. Accordingly, standards of due process[22] and the vindication of public interest will be achieved through the adversarial process.[23] The theory of public interest advocacy, therefore, is rooted in our legal tradition and historical legal practice. Its purpose is to correct the flaws in the democratic pluralist

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[18] B. WEISBROD, *supra* note 16, at 29; Letter from Joseph H. Rodriguez, Public Advocate, to Governor Kean (May 1, 1982) (accompanying 1981 N.J. DEP'T OF THE PUBLIC ADVOCATE ANNUAL REPORT); Letter from Stanley C. Van Ness, Public Advocate, to Governor Kean (Apr. 1, 1982) (accompanying 1980 N.J. DEP'T OF THE PUBLIC ADVOCATE ANNUAL REPORT).

[19] *See, e.g.*, A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 247 (J.P. Mayer & M. Lehrer eds. 1966).

[20] *Id.*

[21] *Id.* at 247-48. *See generally* M. GREEN, THE OTHER GOVERNMENT: THE UNSEEN POWER OF WASHINGTON LAWYERS (1975).

[22] The Federal Constitution provides that no person shall "be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. v. It further provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. xiv.

[23] *See* F. MARKS, *supra* note 10, at 9-10 (1975); Stein, *Public Interest Law: A Balancing Act*, TRIAL 12, 12-13 (1976) (noting attorney's role in promoting public interest but recognizing that system does not work).

system and to extend notions of fundamental fairness and due process of law beyond the judicial process.[24] These goals, however, are not always accomplished through the traditional legal system. Thus, it is obligatory to institute a method to articulate and vindicate the interests of the traditionally unrepresented and underrepresented interests of a community to maintain standards of fundamental fairness.[25]

This need to provide representation for the unrepresented did not go unnoticed. In the 1960's, federally funded Legal Services Programs began to emerge across the country.[26] The American Bar Association, rather than opposing these projects, took a leadership role.[27] By the early 1970's, there were hundreds of legal services offices with an annual national budget in excess of seventy million dollars.[28] In effect, the public interest law movement appeared to develop its own momentum through the synergistic effects of a variety of legal, political, and economic forces.[29] Despite persistent problems with funding, the

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[24] Furthermore, a functional rationale justifies the establishment of public interest advocacy. *See* Halpern, *supra* note 15, at 120 (suggesting public interest bar can be effective counterweight against more powerful corporate bar).

[25] *See* Selznick, *supra* note 14, at 120; Stein, *supra* note 23, at 12-13.

[26] The Economic Opportunity Act Amendments of 1967, Pub. L. No. 90-222, § 222, 81 Stat. 672, 698-99 (repealed 1974), authorized the funding and development of a legal services program under the supervision of the Director of the Office of Economic Opportunity. *See also* Selznick, *supra* note 14, at 3.

[27] *See, e.g.*, Marshall, *Financing Public Interest Law Practice: The Role of the Organized Bar*, 61 A.B.A. J. 1487 (1975) (wherein Justice Thurgood Marshall takes position "that institutionalization of the public interest bar is necessary to establish a constant presence for the points of view of underrepresented persons in society and in administrative, judicial and other legal proceedings"); *see also* AMERICAN BAR ASS'N & FORD FOUNDATION, PUBLIC INTEREST LAW: FIVE YEARS LATER 1976 (joint publication written to aid the public's understanding "of the need for access to adequate legal representation") [hereinafter cited as PUBLIC INTEREST LAW].

[28] *See* Selznick, *supra* note 14, at 118.

[29] For example, in Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court held that the indigent criminal defendant has a fundamental right to counsel for "[t]he right to be heard would be . . . of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 344-45 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)). In 1963, the United States Supreme Court provided its imprimatur for legal defense funding in the case of NAACP v. Button, 371 U.S. 415 (1963). In that case, the Supreme Court rejected Virginia's attempt to employ its barratry statute to prevent the NAACP Legal Defense Fund Attorneys from seeking out and providing assistance to clients of political importance. *Id.* at 444.

Affirmative government programming of such activities added to this phenomenon. The Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2995 (1976), authorized a number of government programs as part of its "War on Poverty." While initially there were no provisions for legal services for the poor, such legal service programs were discussed. *See* Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964). It was argued that government sponsored legal services ought to be formed for the purposes of making basic legal

movement established some credibility and respect among the more conventional bar.[30] Justice Marshall wrote the following about these developments:

> These [public interest] lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, they have made our legal process work better. They have broadened the flow of information to decision-makers. They have made it possible for administrators, legislators, and judges to assess the impact of their decisions in terms of all affected interests. And, by helping to open the doors of our legal

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services available to the indigent, eliminating social biases against the poor in the law, and providing legal representation for the indigent in quasi-legal forums such as administrative agencies and school systems. *Id.* at 1334-36. Congress recognized this need and amended the Act to provide legal services. *See supra* note 26. Congress made the following findings:

> (1) there is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances;
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> (2) there is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program;
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> (3) providing legal assistance to those who face an economic barrier to adequate legal counsel will serve best the ends of justice and assist in improving opportunities for low-income persons consistent with the purposes of this chapter;
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> (4) for many of our citizens, the availability of legal services has reaffirmed faith in our government of laws;
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> (5) to preserve its strength, the legal services program must be kept free from the influence of or use by it of political pressures; and
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> (6) attorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the high standards of the legal profession.

42 U.S.C. § 2996 (1976 & Supp. IV 1980). Accordingly, it enacted the Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378.

In addition to judicial support and affirmative Federal Government programming, Ralph Nader's representation of the citizen interest in the determination of safety standards for General Motors vehicles highlighted the need for public interest lawyers. Halpern, *supra* note 15, at 120 (citing Nader v. Volpe, 320 F. Supp. 266 (D.D.C. 1970)). Nader also undertook a study of the Federal Trade Commission which revealed "a total failure by the agency to serve the public interest." Halpern, *supra* note 15, at 123. The Nader investigation engendered a complete reorganization of the agency. *Id.*; *see also* B. WEISBROD, *supra* note 16, at 415-22. Nader founded his own legal group which soon established chapters across the country. *Id.* at 396-97. Law schools followed this trend with programs providing students with clinical education. Halpern, *supra* note 15, at 120. Other public interest law centers such as The Center for Law and Social Policy, the Center for Law in the Public Interest, the Natural Resources Defense Council, and the Environmental Defense Fund were formed, while established groups such as the Sierra Club became more legally active. *Id.* at 120-21.

[30] *See supra* note 27 and accompanying text. *See generally* B. WEISBROD, *supra* note 16, at 48.

system, they have moved us a little closer to the ideal of equal justice for all.[31]

III. Public Interest Advocacy in New Jersey

It was with this philosophical and legal foundation that Governor Brendan Byrne embarked on his novel experiment to institutionalize public interest advocacy in New Jersey. At the time, there was a national legitimacy crisis due to events surrounding the Viet Nam War and the infamous Watergate scandal in Washington. The Byrne Administration sponsored the legislation in an effort to alleviate New Jersey citizens' increased lack of faith in their government.[32] Some mechanism was sought to ensure that the government be more accountable to the public.[33] The DPA was conceived to be a combination public defender, ombudsman,[34] and troubleshooter—"a triple threat champion for citizens beset by arrogant bureaucrats and self-aggrandizing private interests."[35] To this end the Department of the

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[31] Marshall, *Foreword to* Public Interest Law, *supra* note 27, at 6.

[32] *See Senate Hearing*, *supra* note 4, at 3. New Jersey courts had, however, long recognized the right of citizens to keep their government accountable by challenging the conduct of public officials and compelling the officials to perform their duties through common-law prerogative writs. *See, e.g.*, City of Camden v. Mulford, 26 N.J.L. 49, 55 (Sup. Ct. 1856) (stating that writs are "habitually used as a remedy against unlawful taxation, either for state, county, township, or city purposes . . . [and] have been found eminently salutory"). Prerogative writs are remedies issued by the judiciary only in unusual and compelling circumstances. *See* W. Gellhorn & C. Byse, Administrative Law 50 (6th ed. 1974). Relief by prerogative writ was later determined to be overly complex and inadequate. *See* Ward v. Keenan, 3 N.J. 298, 303-08, 70 A.2d 77, 79-83 (1949) (setting forth criticisms of writ system leading to constitutional amendment). Therefore, in 1947, the New Jersey Constitution was amended to provide that "prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal cases where such review shall be discretionary." N.J. Const. art. 6, § 5, para. 4. The New Jersey Supreme Court recently found that the amendment was "intended to streamline and strengthen the traditional prerogative writs." *In re* Li Volsi, 85 N.J. 576, 593, 428 A.2d 1268, 1276 (1981); *see also* Ward v. Village of Ridgewood, 531 F. Supp. 470, 473 (D.N.J. 1982). *See generally* Jacobs, *Procedure in Lieu of Prerogative Writs*, 2 Rutgers L. Rev. 34 (1948 special edition).

[33] The legislature initially considered the institution of a state ombudsman to monitor government actions but opted instead for Governor Byrne's more comprehensive proposal establishing the Department of the Public Advocate. *See* Note, *supra* note 16, at 394-96.

[34] The ombudsman traditionally monitors the actions of government officials and is accountable to the legislature. *See id.* at 393-94.

[35] Jaffe, *The Public Advocate Pleads Their Case: Voice of the Voiceless*, Bergen Record, Nov. 16, 1976, at A1, col. 3.

Public Advocate Act of 1974[36] established six divisions: the Division of Administration,[37] the Division of Rate Counsel,[38] the Division of Mental Health Advocacy,[39] the Division of Citizen's Complaints and Dispute Settlement,[40] the Division of Advocacy for Developmentally Disabled,[41] and the Division of Public Interest Advocacy.[42] The Division of Public Interest Advocacy (PIA) is by far the most novel and controversial.[43] This is the division that is empowered to vindicate the public interest[44] and upon which this Article will focus.

The Act defined the public interest in broad and amorphous language as an "interest or right arising from the Constitution, deci-

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[36] N.J. STAT. ANN. §§ 52:27E-1 to -47 (West Cum. Supp. 1982-1983).

[37] *Id.* § 27E-7. The Division of Administration is charged with the duties of determining a budget for the Department of the Public Advocate, hiring personnel, providing information to the public, and conducting research projects for the department. *Id.* § 27E-8.

[38] *Id.* § 27E-16. The Division of Rate Counsel represents the public interest in proceedings by businesses, industries, or utilities regarding services to the public or the fixing of rates or fares. *Id.* § 27E-18.

[39] *Id.* § 27E-21. This division can provide legal services and medical consultation to indigent mental hospital patients regarding their admission, retention, or release from the hospital. *Id.* § 27E-24.

[40] *Id.* § 27E-33. The Office of Complaints forwards complaints to agencies and investigates complaints in which the action or nonaction appears to be unfair, inefficient, or without explanation. *Id.* § 27E-36. The Office of Dispute Settlement may mediate and provide services to "community and civic groups, associations and organizations, and to municipal and county governmental agencies [at their request] for the purpose of aiding such parties in resolving disputes which involve the public interest." *Id.* § 27E-41.

[41] *Id.* § 27E-41.1. This division provides legal services to developmentally disabled persons and other handicapped individuals as funds permit. *Id.*

[42] *Id.* § 27E-28. This division is enpowered to institute proceedings "before any department, commission, agency or board of the State leading to an administrative adjudication or administrative rule." *Id.* § 27E-32.

[43] For favorable commentary, see Trenton Times, May 17, 1981, at G2, col. 1 (Public Advocate Department "is probably, dollar for dollar the public's best investment in state government"); Trentonian, May 9, 1981, at 24, col. 1 (Public Advocate unites government with its people and "elimination of the department would be a regrettable step backwards"); 120 N.J.L.J. 524 (1977) (Public Advocate Act most significant legislation in recent years); Star-Ledger, Apr. 21, 1974, at 2, col. 3 (creation of Department of Public Advocate with power to protect the public interest is "a valid concept that has been certified by long and productive experience in other countries where it was originally conceived").

For commentary critical of the department, see Asbury Park Press, Nov. 1, 1978, at 22, col. 1 (Public Advocate when it loses an action should be required to pay legal fees to winning party in order to protect citizens from "wave of litigation propelled by an irresponsible Public Advocate Department that rushes into court with the public paying its expenses"); Star-Ledger, Oct. 15, 1982, at 14, col. 1 (Assembly Speaker Karcher denouncing the Public Advocate as "nothing more than a Kean administration mouthpiece").

[44] N.J. STAT. ANN. § 52:27E-32(b) (West Cum. Supp. 1982-1983). The division must, however, receive the consent of the Public Advocate to institute a suit. *Id.*

sions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens."[45] This broad delegation of legislative power[46] gave the PIA considerable discretion to determine the parameters of the public interest and was immediately challenged as unconstitutional.[47] It was argued in *Van Ness v. Borough of Deal*[48] that the Act's delegation of power was unconstitutional because it did not contain sufficient standards "to guide the Public Advocate's exercise of power."[49] The court found, however, that the delegation of power was constitutional.[50] The courts have repeatedly rejected similar constitutional arguments that the Act is violative of the separation of powers doctrine because it fails to set sufficient standards for the determination of the public interest.[51]

In light of the New Jersey courts' deference to the PIA to assess and vindicate the public interest,[52] it is necessary to examine the

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[45] *Id.* § 27E-30; *cf.* Vasquez v. Glassboro Serv. Ass'n, 83 N.J. 86, 98, 415 A.2d 1156, 1162 (1980) ("sources of public policy include federal and state legislation and judicial decisions"); Allen v. Commercial Casualty Ins. Co., 131 N.J.L. 475, 478, 37 A.2d 37, 39 (Ct. Err. & App. 1944) (sources of public policy include common law and "prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people for whom the government—with us—is factually established").

[46] Broad delegations of legislative power have been found valid on the federal and state level. *See* Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility"); General Assembly v. Byrne, 90 N.J. 376, 392, 448 A.2d 438, 447 (1982); Ward v. Scott, 11 N.J. 117, 123-24, 93 A.2d 385, 388 (1952).

[47] *See infra* notes 48-50 and accompanying text.

[48] 139 N.J. Super. 83, 352 A.2d 599 (Ch. Div. 1975), *rev'd on other grounds*, 145 N.J. Super. 368, 387 A.2d 1191 (App. Div. 1976), *rev'd in part on other grounds*, 78 N.J. 174, 393 A.2d 571 (1978).

[49] *Id.* at 92, 352 A.2d at 604.

[50] *Id.* at 94, 352 A.2d at 605.

[51] *See* Township of Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 533, 416 A.2d 886, 891 (1980) (finding public interest guideline sufficient); Borough of Morris Plains v. Department of the Public Advocate, 169 N.J. Super. 403, 412, 404 A.2d 1244, 1250 (App. Div. 1979) (statutory guidelines for Public Advocate "sufficiently circumscribe the exercise of that discretion while properly allowing for the meaningful effectuation of the policy of the legislation"); *cf.* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 (1953) (finding Federal Communication Act's delegation of power to FCC to regulate in public interest constitutional); New York Cent. Sec. Corp. v. United States, 287 U.S. 12, 24 (1932) (finding Federal Transportation Act's delegation of power to Interstate Commerce Commission under public interest standard constitutional).

[52] *See, e.g.*, Delaney v. Penza, 151 N.J. Super. 455, 376 A.2d 1334 (App. Div. 1977) (per curiam) (Public Advocate's defense of tenants' association in slander suit by landlord justified on tenants' asserted first amendment right).

division's pursuits in particular substantive areas to gain insight into its operational understanding of the public interest. The Public Interest Advocacy Division has focused its efforts on housing and community development,[53] health care,[54] employment,[55] and environmental issues.[56] It has also been an advocate in the areas of education[57] and consumer protection.[58]

Much of the division's energy and a good deal of the controversy surrounding it has involved cases brought in the area of housing and community development.[59] Exemplifying this involvement is the *Mount Laurel* litigation. The original action, *Southern Burlington County NAACP v. Township of Mount Laurel*[60] was not brought by the PIA.[61] The Camden County Legal Services Division, representing a local chapter of the NAACP, argued that the township's zoning ordinance was unconstitutional in that it systematically excluded low and middle income families.[62] The New Jersey Supreme Court found the zoning ordinance to be exclusionary and adverse to the general welfare.[63] Accordingly, the court directed the township to modify the ordinance.[64] Following this decision, the PIA participated in the case on appeal to the United States Supreme Court and in a subsequent action to enforce the original *Mount Laurel* decision.[65] The Public Advocate's position was simple—it merely sought to enforce an opin-

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[53] *See infra* notes 59-76 and accompanying text.

[54] *See infra* notes 77-92 and accompanying text.

[55] *See infra* notes 93-97 and accompanying text.

[56] *See infra* notes 98-102 and accompanying text.

[57] *See, e.g.*, Robbiani v. Burke, 77 N.J. 383, 390 A.2d 1149 (1978) (challenge to constitutionality of statute exempting schools with less than 5% of their enrollment eligible for subsidized lunch program from mandatory school lunch program).

[58] *See, e.g.*, Stubbs v. Security Consumer Discount Co., 85 N.J. 353, 426 A.2d 1014 (1981) (class action setting aside mortgages violative of Secondary Mortgage Loan Act).

[59] *See, e.g.*, DePalma, *Morris County vs. The Public Advocate*, 9 N.J. REP. 10, 15 (1980).

[60] 67 N.J. 151, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

[61] Carl Bisgaier argued the suit on behalf of the local NAACP chapter. Mr. Bisgaier was then an attorney for the Camden Regional Legal Services, Inc. *See id.* at 156, 336 A.2d at 716. Mr. Bisgaier later became the Director of the Division of Public Interest. *See* 1978 DIVISION OF PUBLIC INTEREST ADVOCACY, N.J. DEP'T OF PUBLIC ADVOCATE ANNUAL REPORT [hereinafter cited as 1978 REPORT].

[62] *See* 67 N.J. at 157, 336 A.2d at 716.

[63] *Id.* at 187-88, 336 A.2d at 731-32.

[64] *Id.* at 191, 336 A.2d at 734.

[65] *See* Southern Burlington County NAACP v. Township of Mount Laurel, 161 N.J. Super. 317, 391 A.2d 935 (Law Div. 1978).

ion of the New Jersey Supreme Court which implicated the public interest.[66] The PIA has remained involved in the *Mount Laurel* progeny representing excluded groups seeking to implement the supreme court's zoning mandate.[67]

More recently, the PIA has shifted its housing and community development focus away from zoning and toward preservation and rehabilitation of already existing housing.[68] In 1976, largely as a result of PIA lobbying efforts, the New Jersey Legislature passed an anti-eviction act.[69] The Act prohibited housing developers who intended to convert rental property into condominiums from evicting residents without giving notice[70] and affording the tenant the first opportunity to buy.[71] Recognizing the negative impact of condominium conversions upon senior citizens and moderate income families and convinced that the anti-eviction law would not adequately protect these individuals, the division lobbied for legislation to prohibit such individuals from being evicted or subjected to excessive rent increases.[72] In 1981, the legislature passed the Senior Citizens and Disabled Pro-

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[66] *See* Township of Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 526, 416 A.2d 886, 888 (1980).

[67] *See* Home Builders League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979) (zoning ordinance prescribing minimum floor areas for residences held invalid); State v. Barker, 81 N.J. 99, 405 A.2d 368 (1979) (municipality's prohibition against housing for four unrelated individuals found unconstitutional); Oakwood At Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977) (developing municipality must provide fair amount of low income housing for region); Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 71 N.J. 249, 344 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977) (local zoning ordinance designed to benefit senior citizens validated); Township of Ewing v. King, 131 N.J. Super. 29, 328 A.2d 242 (App. Div. 1974), *rev'd on other grounds*, 69 N.J. 67, 350 A.2d 482 (1976) (municipality's zoning ordinance limiting number of students who could live in single dwelling invalidated).

[68] Interview with Richard Shapiro, Director, Public Interest Advocacy Division, March 16, 1983; *see also Testimony of Public Advocate Van Ness Before Governor Byrne Concerning the Condominium Conversion Problem in New Jersey* (Jan. 31, 1981) [hereinafter cited as *Testimony*].

[69] Act of Feb. 19, 1976, ch. 311, 1975 N.J. Laws 1234 (1976) (codified at N.J. STAT. ANN. § 2A:18-61.1 to .11 (West Cum. Supp. 1982-1983)).

[70] N.J. STAT. ANN. § 2A:18-61.8 (West Cum. Supp. 1982-1983); *see also* Trieste v. McBryde, No. A-383-79 (N.J. App. Div. Oct. 5, 1979) (PIA successfully represented defendant tenants against landlord who failed to comply with condominium conversion notice requirements and eventually abandoned his appeal).

[71] N.J. STAT. ANN. § 2A:18-61.8 (West Cum. Supp. 1982-1983).

[72] *Testimony*, *supra* note 68, at 6, 15.

tected Tenancy Act[73] which embodied some of the recommendations made by the Public Advocate.[74] In addition to the division's role as litigator and lobbyist for community development, it has played a role in procuring government monies. For example, the PIA was influential in the allocation of Federal Community Development Block Grant Funds[75] and reviewed applications for state funding under the Green Acres Program.[76]

In the health care area, the PIA has attempted to protect the interests of the aged and infirm who live in nursing homes. To this end, the division has worked closely with the Department of Health in developing a "pattern and practice" approach to the licensing of nursing homes,[77] and has sought receivership of nursing homes which failed to meet state and federal standards of care.[78] The PIA has argued against the termination of medicaid funds for nursing home services[79] and has participated in the drafting of Department of Health regulations applicable to nursing homes.[80]

The division takes an active role in recommending that the Department of Health adopt administrative rules to accommodate the health care needs of New Jersey residents.[81] *New Jersey Association of Health Care Facilities v. Finley*,[82] demonstrates how the PIA attempts to promote the public interest in appropriate health care. The conflict in *New Jersey Health Care Facilities* arose over a regulation advanced

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[73] 1981 N.J. Sess. Law Serv. 637 (West 1981) (codified at N.J. STAT. ANN. § 2A:18-61.22 to .39 (West Cum. Supp. 1982-1983)).

[74] *Compare* N.J. STAT. ANN. § 2A:18-61.23 (West Cum. Supp. 1982-1983) (finding it in "public interest of the State to avoid the forced eviction and relocation of senior citizen tenants wherever possible") *with Testimony*, *supra* note 68, at 8 (advising that forced evictions of elderly is inconsistent, with public interest; recommending enactment of law to protect from evictions caused by conversions).

[75] 1977 DIVISION OF PUBLIC INTEREST ADVOCACY, N.J. DEP'T OF PUBLIC ADVOCATE ANNUAL REPORT 12 [hereinafter cited as 1977 REPORT].

[76] 1978 REPORT, *supra* note 61, at 13.

[77] *Id.* at 2.

[78] *See* Van Ness v. Hinson, No. C-4664-77 (N.J. Ch. Div. Aug. 14, 1978).

[79] *See, e.g.*, Klein v. Mathews, 430 F. Supp. 1005 (D.N.J. 1977); *see also* 1976 DIVISION OF PUBLIC INTEREST ADVOCACY, N.J. DEP'T OF PUBLIC ADVOCATE ANNUAL REPORT 10 [hereinafter cited as 1976 REPORT].

[80] 1979 DIVISION OF PUBLIC INTEREST ADVOCACY, N.J. DEP'T OF PUBLIC ADVOCATE ANNUAL REPORT 6 [hereinafter cited as 1979 REPORT].

[81] 1980 DIVISION OF PUBLIC INTEREST ADVOCACY, N.J. DEP'T OF PUBLIC ADVOCATE ANNUAL REPORT 4 [hereinafter cited as 1980 REPORT].

[82] 83 N.J. 67, 415 A.2d 1147 (1980).

by the Public Advocate and adopted by the Department of Health.[83] The regulation required nursing homes to make a reasonable number of their beds available to indigent persons as a condition of licensing.[84] The New Jersey Association of Health Care Facilities brought suit against the Commissioner of Health, alleging that the regulation was invalid on its face,[85] in conflict with federal standards,[86] and in effect an unconstitutional taking of private property.[87] The Public Advocate intervened on behalf of the Department of Health.[88] The New Jersey Supreme Court adopted the Public Advocate's argument that a licensed health care facility is subject to comprehensive regulation by the state, and can therefore be required to provide a reasonable number of beds for indigent patients, and can also be restricted with respect to the involuntary transfer of patients.[89] Although a great deal of the PIA's health care efforts focus upon nursing homes, the division has also participated in health policy planning activities,[90] conducted county-wide surveys to determine needs and access to health care facilities[91] and assumed an active role in infant health care.[92]

In 1976, the PIA began to pursue problems connected with employment.[93] It challenged preemployment tests which were unrelated to job performance[94] and supported resident restrictions in the hiring of municipal police.[95] The division scrutinizes the hiring practices of

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[83] *See id.* at 74-75, 415 A.2d at 1150-51.

[84] *See* N.J. ADMIN. CODE tit. 8, § 30-14.1 to -14.7 (1978).

[85] 83 N.J. at 77, 415 A.2d at 1152.

[86] *Id.* at 84, 415 A.2d at 1155.

[87] *Id.* at 80, 415 A.2d at 1153.

[88] *See id.* at 74 n.1, 415 A.2d at 1150 n.1.

[89] *Id.* at 79, 415 A.2d at 1153.

[90] 1980 REPORT, *supra* note 81, at 5-6.

[91] 1979 REPORT, *supra* note 80, at 6.

[92] Specifically, the PIA lobbied for legislation licensing nurse-midwives, discussed with insurance carriers third party payment for nurse midwives, and developed with the State Department of Health a program of prenatal care and community education to reduce the number of high risk births. *Id.* at 5.

[93] *See* 1976 REPORT, *supra* note 79, at 11-13.

[94] In Van Ness v. Department of Civil Service, No. C-922-76 (N.J. Ch. Div. Nov. 10, 1976) the Division argued that civil service examinations were unrelated to job performance and that in order to ensure the maintenance of civil service, a "merit system" should be established. *See* 1976 REPORT, *supra* note 79, at 11. A settlement was reached the next year which resulted in new methods of job-related testing. As a result of that case, federal authorities in the Department of Civil Service indicated that they would "use the settlement as a model for other States." 1977 REPORT, *supra* note 75, at 8.

[95] The Public Advocate in an *amicus* brief supported the city of Plainfield in its attempt to restrict police examinations to its own residents. 1976 REPORT, *supra* note 79, at 13. The

federally subsidized economic development projects[96] and monitors the regulations governing both federal and state employees.[97]

The PIA also devotes considerable time to environmental issues. For example, the division has attempted to secure greater public access to New Jersey's beaches and waterfront areas,[98] to establish regulations and controls over the siting of dangerous energy substances and the disposal of hazardous wastes,[99] to encourage conservation,[100] and to improve air and water quality in the state.[101] The division also has been concerned with the siting of nuclear power plants.[102]

IV. Conclusion

The foregoing discussion demonstrates that the PIA is an important force in ensuring that the government is responsive to the public's needs. In this capacity the PIA is faced with a task once described as "comforting the afflicted and afflicting the comfortable."[103] Indeed, the PIA is no stranger to controversy.[104] From the beginning, apprehension surrounding the PIA focused upon two related issues: whether the division's broad discretionary power is subject to checks, and, whether the division is vulnerable to political pressure which could undermine its objectivity in assessing the public interest.

With respect to the division's discretionary power it should be noted that the Act places limits upon the Public Advocate's power to bring suits to vindicate the public interest. It requires that the Public Advocate consider "the importance and the extent of the public interest involved and whether that interest would be adequately repre-

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argument advanced was that the approach taken by the city was both effective and rational because it encouraged affirmative action. *Id.*

[96] 1979 Report, *supra* note 80, at 2.

[97] For example, in 1980, the division challenged the United States Postal Service Regulations for allegedly discriminating against the hearing impaired. 1980 Report, *supra* note 81, at 17.

[98] *See, e.g.*, Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978) (municipality cannot limit beach access to its residents); Toms River Affiliates v. Department of Envtl. Protection, 140 N.J. Super. 135, 355 A.2d 679 (App. Div. 1976) (PIA intervened in proceeding before Coastal Area Review Board charging developer must guarantee public access to water in order to obtain building permit).

[99] American Littoral Society v. Costle, No. 77-1073 (D.N.J. June 3, 1977).

[100] 1978 Report, *supra* note 61, at 18-19.

[101] 1980 Report, *supra* note 81, at 14-15.

[102] 1975 Division of Public Interest Advocacy, N.J. Dep't of Public Advocate Annual Report 3.

[103] *See* DePalma, *supra* note 59, at 15.

[104] *See supra* note 43.

sented without the action of the department."[105] The Act also defines the public interest[106] in a manner which indicates that the Public Advocate is bound by existing law.[107] Therefore, the Public Advocate is not free to create new rights or new causes of action. Indeed, the New Jersey Supreme Court has found that "[t]he Public Advocate acts to enforce the public interest rather than to create it."[108]

In addition to the Act's limitations on the Public Advocate's discretion, the legislature serves as a check in three ways. First, the Department of the Public Advocate could be abolished by the legislature. This legislative power keeps the DPA accountable to the legislature and thereby, at least theoretically, accountable to the public. Second, and less drastic, the department depends upon appropriations from the legislature to continue its operations. Each year the PIA must submit an annual report of its activities to the legislature for its consideration in making future appropriations. Third, the legislature has the power to legislate matters that are in the public interest thus obviating PIA action. Moreover, the DPA's actions are always subject to judicial review.[109]

Because the Public Advocate serves at the pleasure of the Governor,[110] it can be argued that the Public Advocate is vulnerable to political pressure. Clearly, the Public Advocate must walk a fine line between serving the Administration of which he is a part and serving his clients. The history of the department has demonstrated, however, that a balance can be achieved. In view of the PIA's effectiveness in vindicating the public interest by representing the unrepresented and the underrepresented, the New Jersey Department of the Public Advocate Act should serve as a model for other states to follow in their efforts to institutionalize public interest advocacy.

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[105] N.J. STAT. ANN. § 52:27E-31 (West Cum. Supp. 1982-1983); *see also* N.J. ADMIN. CODE tit. 15A, § 1-1.6 (1978) (regulations enacted by Public Advocate circumscribing discretionary power to determine public interest).

[106] *See supra* text accompanying note 45.

[107] Township of Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 531, 416 A.2d 886, 891 (1982).

[108] N.J. STAT. ANN. § 52:27E-46 (West Cum. Supp. 1982-1983).

[109] *See, e.g.*, Township of Mount Laurel v. Department of the Public Advocate, 83 N.J. 522, 416 A.2d 886 (1980); Delaney v. Penza, 151 N.J. Super. 455, 376 A.2d 1334 (App. Div. 1977).

[110] N.J. STAT. ANN. § 52:27E-3 (West Cum. Supp. 1982-1983).