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Public Interest Litigation: Insights From Theory and Practice

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Public Interest Litigation: Insights From Theory and Practice

Cover Page Footnote

Professor of Law, UCLA School of Law. Ernest W. McFarland Professor of Law, Director, Center on the Legal Profession, Stanford University. The comments of Paul Brest and William Simon are gratefully acknowledged.

PUBLIC INTEREST LITIGATION: INSIGHTS FROM THEORY AND PRACTICE

Scott L. Cummings & Deborah L. Rhode†*

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INTRODUCTION

In the American struggle for social justice, public interest litigation has played an indisputably important role. Yet over the past three decades, critics from both the left and right have challenged its capacity to secure systemic change. The critiques have varied, but have centered on two basic claims. The first is that litigation cannot itself reform social institutions. The second related concern is that over-reliance on courts diverts effort from potentially more productive political strategies and disempowers the groups that lawyers are seeking to assist. The result is too much law and too little justice.

These critiques, although powerful in their analysis of the limits of litigation, have generally failed to adequately acknowledge its contributions and the complex ways in which legal proceedings can support political mobilization.¹ Against the examples of lawyer domination, there are competing accounts of client empowerment and community-directed lawsuits.² Even as liberal critics have disparaged reliance on courts, conservative activists have enlisted them in efforts to block or roll back progressive change.³

This Article seeks to situate the debate over public interest litigation in a richer theoretical and empirical context. In essence, our argument is that such litigation is an imperfect but indispensable strategy of social change. Our challenge is to increase its effectiveness through better understanding of its capacities and constraints.

1. See RICHARD L. ABEL, *POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980–1994* (1995); Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 261 (Austin Sarat & Stuart Scheingold eds., 1998).

2. See MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994); Scott L. Cummings, *Law in the Labor Movements Challenge to Wal-Mart: A Case Study of the Inglewood Site Fight*, 95 CAL. L. REV. 1927 (2007) [hereinafter Cummings, *Wal-Mart*].

3. See ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* (2008); STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2037 (2008) [hereinafter Rhode, *Public Interest Law*].

To that end, we draw on two bodies of work: research on law and social change, and research on social philanthropy. The first literature offers a detailed empirical and theoretical picture of how lawyers mobilize law to change institutional rules and redistribute power.⁴ In its empirical dimension, this research explores the ideals and practices of public interest lawyers and how their strategies are informed by where they work—non-profit public interest organizations, large firm pro bono programs, plaintiff-side law firms, and law school clinics.⁵ In its theoretical dimension, this literature draws on the sociology of law and social movements to explore the interplay between legal proceedings and political mobilization. A second body of work, which focuses on strategic philanthropy, holds important insights for how public interest organizations and pro bono programs can most effectively direct their social reform efforts.

We draw a number of lessons from this research. The first is that litigation, although a necessary strategy of social change, is never sufficient; it cannot effectively work in isolation from other mobilization efforts. Second, money matters: how public interest law is financed affects the kinds of cases that can be pursued and their likely social impact. A deeper understanding of financial constraints and opportunities in different practice contexts is therefore critical to effective reform. A third key insight is the importance of systematic evaluation. Only through more reflective assessments of the impact of litigation can we realize its full potential in pursuit of social justice.

Any discussion of these issues confronts a threshold definitional issue: what constitutes public interest litigation. The concept of the “public interest” is contested at the level of both theory and practice.⁶ Commentators differ over whether there are widely shared criteria for assessing the public’s interest as well as whether any particular case meets the definition.⁷

4. STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3 (2004); *see also* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES, *supra* note 1.

5. *See* Laura Beth Nielsen & Catherine R. Albiston, *The Organization of Public Interest Practice: 1975–2004*, 84 N.C. L. REV. 1591 (2006); Rhode, *Public Interest Law*, *supra* note 3; *see also* DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE (2005); SOUTHWORTH, *supra* note 3; Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004) [hereinafter Cummings, *The Politics of Pro Bono*]; Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather eds., forthcoming 2009) [hereinafter Cummings & Southworth, *Between Profit and Principle*].

6. SCHEINGOLD & SARAT, *supra* note 4, at 5-7.

7. Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of Public Interest Law*, 52 UCLA L. REV. 1223 (2005).

Our point here is not to revisit that debate, but rather to suggest that it needs to become part of the process for evaluating social impact litigation. Lawyers who pursue what they consider “public interest” work need concrete criteria for assessing its impact and justifying their priorities. In many contexts, there may be no single “right” answer about what advances social justice but there are better and worse ways of analyzing the question.

I. LAW AND SOCIAL CHANGE

A. Litigation and Its Discontents

The role of law as an instrument of social change rests on a fundamental assumption about its relative autonomy from politics: decision makers are to some extent bound by legal rules irrespective of their political consequences.⁸ Although the degree of judicial autonomy varies across contexts, it provides the leverage that public interest lawyers seek to exploit. Litigation is a key strategy for protecting the rights and enlarging the power of subordinated groups, particularly when other channels of influence are unavailable. Groups hobbled by discrimination or collective action problems may turn to courts as allies in the struggle for social justice.

The public interest law movement that emerged in the 1960s and 1970s advanced this vision of court-centered social change,⁹ drawing on models from civil rights and civil liberties groups, particularly the test-case strategy of the NAACP Legal Defense and Educational Fund.¹⁰ Early litigation victories brought status and resources to developing public interest organizations, which enlisted courts in progressive social reform.¹¹ A number of structural factors encouraged this strategy: a federal judiciary receptive to civil rights claims; centralized administrative agencies susceptible to re-

8. ABEL, *supra* note 1, at 1.

9. LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (1996) (referring to the use of courts promote liberal social change to as “legal liberalism”).

10. For an overview, see DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 879-80 (2005); MARK V. TUSHNET, *THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925–1950* (1987). *See generally* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (Burton A. Weisbrod et al. eds., 1978); Louise G. Trubek, *Crossing Boundaries: Legal Education and the Challenge of the “New Public Interest Law”*, 2005 *Wis. L. Rev.* 455 (2005).

11. *See* JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE 1* (1978) [hereinafter HANDLER, *SOCIAL MOVEMENTS*]; Trubek, *supra* note 10, at 457-60; Burton A. Weisbrod, *Conceptual Perspective on the Public Interest: An Economic Analysis*, in *PUBLIC INTEREST LAW*, *supra* note 10, at 22.

form through impact lawsuits; and a system of welfare entitlements open to enforcement and expansion.¹²

It was, in part, the very success of public interest litigation that threatened its structural foundations. Courthouse victories fueled a conservative reaction seeking to limit federal authority over civil rights and civil liberties, economic and environmental regulation, and social welfare. As the right gained power in the 1980s and 1990s, national governance structures were reshaped. An increasingly conservative federal judiciary became less hospitable to the claims of liberal public interest groups. Federal agencies, long criticized as inefficient and unaccountable, lost authority in the trend toward decentralization and deregulation.¹³ Core federal entitlements, particularly those involving welfare, were curtailed.¹⁴ These structural changes foreclosed litigation opportunities for liberal public interest organizations at the federal level, while opening the door to claims by the growing number of conservative advocacy groups.¹⁵ In addition, public interest lawyers faced new procedural and financial constraints: Congress prevented federally-funded legal services lawyers from bringing class actions, lobbying, collecting attorney's fees, and engaging in political advocacy; the Supreme Court limited attorney's fee awards in civil rights and environmental cases; and some states capped attorney's fees and damage awards, and restricted the ability of law school clinics to undertake controversial cases.¹⁶

This backlash coincided with a scholarly critique of public interest law, which came largely from the left. One strand of criticism questioned the efficacy of litigation strategies. It drew on empirical research to demonstrate the inadequacy of law reform as a vehicle of social change. Joel Handler's assessment of public interest law concluded that litigation alone could not reform field-level practice in the consumer, environmental, civil rights, and welfare rights arenas due to the exercise of vast administrative discretion—what he called the “bureaucratic contingency.”¹⁷ Gerald Rosenberg's quantitative study concluded that courts could “*almost never be*

12. Michael McCann & Jeffrey Dudas, *Retrenchment...and Resurgence? Mapping the Changing Context of Movement Lawyering in the United States*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS* 37 (Austin Sarat & Stuart Scheingold eds., 2006); Trubek, *supra* note 10.

13. JOEL F. HANDLER, *DOWN FROM BUREAUCRACY: THE AMBIGUITY OF PRIVATIZATION AND EMPOWERMENT* (1996) [hereinafter *HANDLER, DOWN FROM BUREAUCRACY*]; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

14. JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* (1997).

15. Southworth, *supra* note 7.

16. David Luban, *Taking Out the Adversary: The Assault on Progressive Public Interest Lawyers*, 91 CAL. L. REV. 209 (2003).

17. HANDLER, *SOCIAL MOVEMENTS*, *supra* note 11, at 18-22.

effective producers of significant social reform” because of their dependence on other political institutions and their lack of enforcement powers.¹⁸

A second critique emphasized the tradeoffs between litigation and political mobilization. Stuart Scheingold famously warned against the “myth of rights,” which diverted attention from the political roots of social problems.¹⁹ On this view, litigation drained scarce movement resources, created confusion between “symbolic” and “substantive” victories, and co-opted potential movement leaders by paying them off with monetary awards. Critical legal scholars further argued that reframing collective grievances in terms of individual rights dissipated collective political energy. Even when litigants prevailed, the result was to legitimize a fundamentally unjust social and legal order.²⁰ For these critics, collective political struggle was the only effective way to challenge structural inequality.²¹

A third line of criticism revolved around issues of accountability. In one of the most influential expressions of this concern, Derrick Bell challenged the NAACP’s school desegregation campaign. In his view, the NAACP’s commitment to desegregation—supported by its middle-class white and black constituents—ignored the preferences of black communities for local control and quality initiatives in neighborhood schools.²² Poverty law scholars in the 1990s, incorporating insights from critical race theory and feminist scholarship, extended this analysis by focusing on the marginalization of clients in traditional litigation strategies.²³

B. Beyond Critique: The Pragmatic Turn in Law and Social Change Scholarship

The critique of rights associated with first-wave public interest law partly reflected disillusionment with its failure to achieve transformational

18. GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 338 (1991).

19. STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 3-10 (1974); see also GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VISION OF PROGRESSIVE LAW PRACTICE* (1992); Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) (cataloging the criticisms of rights strategies).

20. Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983).

21. Stephen Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1053 (1970).

22. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

23. LÓPEZ, *supra* note 19; Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107 (1991); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1 (1990).

change. With time and scholarly distance have come new approaches to understanding the relationship between law and social reform. These approaches reflect varied theoretical and empirical frameworks, but share a pragmatic focus. They start from the premise that litigation has limits, but go on to question how it can best advance social justice. In essence, this literature addresses the tradeoffs of different forms of activism—including litigation—in different social contexts and practice sites. Its key claims are that: (1) litigation is a political tool that, when used strategically, can stimulate meaningful change and complement other political efforts; (2) whether litigation “works” or not must be judged in relation to available alternatives; and (3) in order to evaluate the social change potential of litigation in a given circumstance, it is necessary to examine the conditions—political, economic, cultural, and organizational—within which a lawsuit operates.

1. *Law as Politics*

Recent scholarly efforts to reassess what lawyers can “do for, and to” social movements tend to offer more positive accounts of impact litigation.²⁴ This research sees law as politics by another name, and links courtroom battles to political mobilization and community organizing. In these accounts, litigation is shaped by clients and community activists and the objective is political transformation, not doctrinal victory.²⁵

This is not, of course, a new conceptualization. Three decades ago, Handler underscored both the direct and indirect ways that legal claims shape social movements.²⁶ During the same era, Gary Bellow advanced a “focused case” strategy in combination with community organizing and legislative advocacy.²⁷ Throughout this period, labor lawyers similarly saw litigation as a means of advancing the cause of unionization.²⁸ What contemporary research offers is a deeper theoretical and empirical foundation for integrating legal advocacy and political mobilization.

At the theoretical level, William Simon has proposed a model of lawyering that promotes flexibility, transparency, evaluation, and inclusive par-

24. Austin Sarat & Stuart Scheingold, *What Cause Lawyers Do For, and To, Social Movements: An Introduction*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 1.

25. Thomas M. Hilbink, *You Know the Type...: Categories of Cause Lawyering*, 29 L. & SOC. INQUIRY 657, 683 (2004).

26. HANDLER, SOCIAL MOVEMENTS, *supra* note 11, at 191-201.

27. Gary Bellow, *Turning Solutions into Problems: The Legal Aid Experience*, 34 NLADA BRIEFCASE 106, 121-22 (1977).

28. See Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 279.

participation in institutional decision-making processes.²⁹ While he raises questions about the winner-take-all approach of traditional impact strategies, he believes that litigation, when combined with inclusive political processes, can be put to pragmatic ends. For example, when deployed strategically, lawsuits can destabilize entrenched institutional structures and subject them to greater accountability.³⁰ From a social science perspective, Michael McCann argues for a constitutive understanding of the role of law in social transformation. That approach moves beyond a causal analysis of the relationship between court decisions and social outcomes, and instead traces the complex processes by which law shapes social meaning and informs individual and collective action.³¹ For example, a lawsuit that receives widespread attention may raise public consciousness and stimulate movement activity by revealing the vulnerability of structural arrangements that once seemed impervious to change.³² Even lawsuits unsuccessful in the courts may generate public outrage that spurs political action. From this perspective, judicial decisions are not simply legal decrees, but also social signals that are channeled into collective movements.³³ Similarly, legal action may allow activists to leverage gains by putting specific issues on the public agenda and threatening to impose litigation costs if decision makers fail to find political solutions.³⁴ Assessing the animal rights movement, McCann finds that “[w]hen carefully coordinated with demonstrations, pranks, and other media events, high-profile litigation worked as a double-barreled threat—at once mobilizing public opinion against targeted ‘abusers’ and threatening both costly legal proceedings and possible defeats in court.”³⁵ Austin Sarat and Stuart Scheingold, who have led a path-breaking investigation into cause lawyering over the past decade, have similarly concluded that in the right circumstances, lawyers can make “seminal contributions to the building of social movements.”³⁶

29. William H. Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 181, 193, 198 (2004).

30. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1021 (2004).

31. McCann & Silverstein, *supra* note 1, at 269.

32. Michael W. McCann, *How Does Law Matter for Social Movements?*, in HOW DOES LAW MATTER? FUNDAMENTAL ISSUES IN LAW AND SOCIETY RESEARCH 76, 83-84 (Bryant G. Garth & Austin Sarat eds., 1998) [hereinafter McCann, *How Does Law Matter?*].

33. Marc Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 117, 125-26 (Keith Boyum & Lynn Mather eds., 1983).

34. McCann, *How Does Law Matter?*, *supra* note 32, at 92.

35. *Id.*

36. Sarat & Scheingold, *supra* note 24, at 10; see also CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES *supra* note 1; CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001); CAUSE LAW-

Empirical research on public interest lawyers suggests that they often view their work as complementing and contributing to political mobilization. McCann and Helena Silverstein's study of the pay-equity and animal rights movements found that lawyers generally did not view lawsuits as "ends in themselves" and were "committed to encouraging, enhancing, and supplementing" movement activity.³⁷ Similarly, Ann Southworth's study of civil rights and poverty lawyers found that both groups saw litigation as part of multi-dimensional strategies.³⁸ Many perceived lawsuits as "political assets" that could provoke legislative reform, discourage future wrongdoing, and mobilize community participation.³⁹ In the same vein, Cummings' project on low-wage worker advocacy in Los Angeles has examined lawyers who view legal advocacy as part of a comprehensive campaign that deploys multiple strategies to advance local policy reforms to strengthen labor rights.⁴⁰

Rhode's recent empirical study of prominent public interest organizations confirms that their leaders generally recognize the need to think strategically and to pursue multiple approaches.⁴¹ Litigation remains important, but it is used strategically in tandem with other initiatives.⁴² Some 90% of leading public interest legal organizations bring impact cases, and nearly half devote at least 50% of their efforts to such work.⁴³ These lawsuits often attempt to maximize effectiveness by targeting practices that require systemic reform.⁴⁴ Objectives apart from winning can be critical, such as making a public record, raising awareness, or imposing sufficient costs and delays that will force defendants to adopt more socially responsi-

YERS AND SOCIAL MOVEMENTS, *supra* note 12; THE WORLDS THAT CAUSE LAWYERS MAKE (Austin Sarat & Stuart Scheingold eds., 2005); cf. HANDLER, SOCIAL MOVEMENTS, *supra* note 11; SCHEINGOLD & SARAT, *supra* note 4.

37. McCann & Silverstein, *supra* note 1, at 269.

38. Ann Southworth, *Lawyers and the "Myth of Rights" in Civil Rights and Poverty Practice*, 8 B.U. PUB. INT. L.J. 469, 477 (1999) [hereinafter Southworth, *Lawyers and the "Myth of Rights"*].

39. *Id.* at 470.

40. Cummings, *Wal-Mart*, *supra* note 2, at 1985-88; see also Scott L. Cummings, *Hemmed In: Legal Mobilization in the Anti-Sweatshop Movement*, 26 BERKELEY J. EMP. & LAB. L. (forthcoming 2009) (on file with author) [hereinafter Cummings, *Hemmed In*].

41. Rhode, *Public Interest Law*, *supra* note 3, at 2046.

42. The typical effort devoted to litigation fell from 60% of total workload in 1975 to 51% in 2007; during the same period, the typical amount of legislative work increased from 7% to 17% and research, reports, education, and media activities grew from 12% to 26%. *Id.* at 2047-48. However, because the figures from 2007 come from a different sample of organizations than the 1975 study, the change reflects broad trends not precise comparisons.

43. *Id.*

44. *Id.* at 2046; see also *id.* at 2046 n.101 (citing interviews with Carole Shauffer, Youth Law Center, Brian Stevenson, Equal Justice Initiative, and Tod Gaziano, Heritage Found.).

ble practices.⁴⁵ Many leaders stress the need to maintain litigation as a “credible threat,” but also to avoid a “scattergun” approach that would “spread [resources] too thin” for structural change.⁴⁶

2. *Relative Efficacy*

An important premise of the critique of litigation is that political mobilization, such as organizing and social activism, is generally more effective in producing long-term change. Reforms that come through the legislative process may appear more legitimate than those that come through courts. So too, political mobilization can create the ongoing citizen engagement that is crucial to sustain, consolidate, and build on victories. For this reason, scholars have raised concerns about what Orly Lobel calls “legal cooptation”—the tendency of legal strategies to dissipate activism and limit a movement’s transformative potential.⁴⁷

The more pragmatic approach to law and social change, however, suggests that the limits of litigation cannot be assessed in a vacuum. It is, of course, true that—under certain circumstances—litigation may divert activists from sustained mobilization or result in decisions that are susceptible to political reversal. But so can political strategies. A key insight of the recent literature is that evaluations of litigation always need to consider the risks and feasibility of alternatives. Sometimes political strategies are not realistic options because of the strength of the opposition. Even when political strategies are possible, they are not always superior to litigation. Scholars often assume that political mobilization continues over time, but movements are frequently episodic. When successful, they often culminate in legislative actions that can sometimes trigger backlash. Thus, statutory reforms no less than judicial orders are vulnerable to strategic reinterpretation, deliberate non-enforcement, and political reversals.⁴⁸ For instance, the crowning achievement of the labor movement in the 1930s—the Na-

45. *Id.* at 2046-47; *see also id.* at 2047 n.102 (quoting Anthony Romero, ACLU, regarding the value in making historical record, and Carl Pope, Sierra Club, regarding the value in taking cases to create delay and thus force a shift to more environmentally responsive approaches).

46. *Id.* at 2047-48; *see also id.* at 2048 n.103 (quoting references to “credible threats” from Brian Wolfman, Public Citizen; Richard Rothschild, Western Center on Law & Poverty; Irma Herrera, Equal Rights Advocates; and Carole Shauffer, Youth Law Center; concerns about “scattergun” approaches from Jamine Studley, Public Advocates; and references to “spreading too thin” from Barbara Olshansky, Center for Constitutional Rights).

47. Lobel, *supra* note 19, at 949.

48. *See* Edwin Amenta & Neal Caren, *The Legislative, Organizational, and Beneficiary Consequences of State-Oriented Challengers*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 461 (David A. Snow et al., eds., 2004); Lobel, *supra* note 19, at 939; *see also* Gordon, *supra* note 28, at 277-78.

tional Labor Relations Act—has been consistently eroded through judicial decree, legislative amendment, and administrative interpretation.⁴⁹ In short, the legitimacy of a law resulting from democratic processes does not insulate it from subsequent political challenge. This is particularly true when the law benefits a less powerful group.⁵⁰ Moreover, in some situations, legal strategies can prove highly effective in changing social practice, as when the rights at issue are relatively self-executing and do not require substantial administrative enforcement. Judicial decrees mandating gay marriage are a case in point.

What the recent literature suggests, therefore, is that the effectiveness of litigation in any given situation depends on a range of complex, contextual factors, and must be evaluated in relation to plausible alternatives. Although, as Scheingold warned, activists must avoid mythologizing rights, so too they must avoid romanticizing political activism.

3. *Opportunities and Constraints*

Focusing on the potential contributions of litigation—not just its limits—invites analysis of the conditions that shape effective litigation strategies. Law and social movement scholars, in particular, have emphasized political and organizational structures that influence the development and impact of legal efforts. Sarat and Scheingold have labeled this dynamic the “‘structure-agency’ problematic”—the interaction between structural “opportunities and constraints” and the actions of individual agents, like lawyers, who can sometimes alter the structural terrain.⁵¹ The organizational level—where lawyers work—shapes norms, defines missions, and imposes resource constraints.

Scholars associated with the political process school of social movements emphasize the importance of the “political opportunity structure” in generating movement activities, defining the range of tactics, and identifying goals.⁵² Formal political institutions constitute the key structural ele-

49. See NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* (2002).

50. Indeed, Gordon’s recent work on the UFW suggests that legislative victories, such as the passage of the California Agricultural Labor Relations Act in 1975, are “at least as vulnerable to subversion as their judge-made cousins, given their highly public and—in comparison with litigation victories—often potentially more far-reaching character.” Gordon, *supra* note 28, at 289.

51. Austin Sarat & Stuart Scheingold, *The Dynamics of Cause Lawyering: Constraints and Opportunities*, in *THE WORLDS THAT CAUSE LAWYERS MAKE*, *supra* note 36, at 4-5.

52. Hanspeter Kriesi, *Political Context and Opportunity*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS*, *supra* note 48, at 67, 69. On political process versus resource

ment, and their degree of centralization shapes both the possibility for intervention and the ability of the state to meet movement demands.⁵³ These institutions have the power to reward or sanction movement activities: policy makers can increase the cost of challengers' collective action through repression or assist it through political support.⁵⁴ The legal regime shapes the political context both in the sense that it offers an institutional forum for attacking injustice and provides symbolic resources like "rights" for movement activists.⁵⁵ A key incentive for movement actors, then, is the emergence of opportunities within the institutional structure that invite challenges. For litigators, these opportunities include a receptive judiciary and statutory or doctrinal developments that allow for systemic change.

Whether a movement can take advantage of such opportunities depends on its access to resources and its ability to marshal them in pursuit of collective goals.⁵⁶ Organizations therefore mediate the relationship between legal action and the broader political environment.⁵⁷ Resources are necessary not only to overcome the free-rider problem faced by groups seeking to provide collective goods, but also to sustain organizational activity in pursuit of movement goals.⁵⁸ Resources often come with strings attached, which both enables and channels movement activities.⁵⁹ For example, some public interest legal organizations report that foundations are reluctant to fund litigation, and prefer new "hot" projects promising demonstrable outcomes.⁶⁰ Federally-funded legal services organizations are constrained by statutory restrictions. Groups dependent on attorney's fees must gear their activities toward revenue-generating cases.

How resources are mobilized depends, in part, on an organization's governance structure and priorities, which reflect both formal rules and infor-

mobilization, see also Steven E. Barkan, *Legal Control of the Southern Civil Rights Movement*, 49 AM. SOC. REV. 552 (1984).

53. Kriesi, *supra* note 52, at 70.

54. *Id.* at 78.

55. McCann, *How Does Law Matter?*, *supra* note 32, at 82.

56. See Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 48, at 116.

57. HANDLER, DOWN FROM BUREAUCRACY, *supra* note 13, at 20.

58. On resources and collective action, see MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965); see also JOHN D. MCCARTHY & MAYER ZALD, THE TREND OF SOCIAL MOVEMENTS IN AMERICA: PROFESSIONALIZATION AND RESOURCE MOBILIZATION (1973); J. Craig Jenkins, *Resource Mobilization Theory and the Study of Social Movements*, 9 ANN. REV. SOC. 527, 537-38 (1983). On resources and group mobilization, see Bob Edwards & John D. McCarthy, *Resources and Social Movement Mobilization*, in THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS, *supra* note 48, at 116; Jenkins, *supra*, at 533.

59. See Edwards & McCarthy, *supra* note 58, at 135.

60. Rhode, *Public Interest Law*, *supra* note 3, at 2056-57.

mal norms. Groups that operate through staff consensus and loose oversight from a board of directors may have more freedom to allocate resources than institutions subject to more hierarchical decision making, such as large law firms. Organizations may place more or less value on collaboration, political purity, community participation, and public recognition. How these contextual factors play out within public interest organizations—and interact with external opportunities—shapes the frequency and impact of public interest litigation.

C. Lessons for Contemporary Public Interest Litigation

The law and social change literature suggests several key lessons for public interest practice. A central theme is that the effective use of litigation requires a strategic analysis of the forces that shape its outcome, including organizational capacity, the likelihood of success on the merits, the challenges of enforcement, and the possible political responses. This strategic analysis should be informed by two considerations. The first relates to how lawyers can maximize the political impact of litigation. Litigation typically works best when it is strategically embedded in broader political campaigns that help define litigation goals and enforce legal mandates. The second consideration involves which lawyers are most capable of bringing litigation in different circumstances. The way that legal groups are structured affects the content and scope of their litigation dockets—both in terms of the types of substantive cases they can file and the resources they can marshal. It is crucial, therefore, to understand the opportunities and constraints of distinct public interest workplace settings in order to assess when litigation can best serve particular social justice causes.

1. *Litigation Integrated with Political Mobilization*

A key lesson from law and social change research is the importance of situating litigation within broader political campaigns—of using it as means to an end, rather than an end in itself. Unlike early models of public interest litigation in which lawyers looked for test cases that could establish important principles, this approach explores multiple strategies from the outset, including not just lawsuits but also policy, organizing, and media initiatives. Litigation is attractive only if it is the most effective means of advancing broader objectives. Lawyers do not always take the lead in making that determination, but frequently “appear as supporting players rather than main characters, seeking to help organizations build the power needed

to achieve their goals.”⁶¹ This role does not eliminate concerns about accountability, but rather changes their tenor. For instance, commentators note the tensions between lawyers’ obligations to clients and the demands of organizing campaigns.⁶² And schisms within community groups can make it difficult to determine which stakeholders legitimately speak for the community.⁶³ Nonetheless, proponents of politically integrated litigation believe that these tensions are a normal byproduct of movement activity and can usually be managed by setting clear expectations at the outset of campaigns. Moreover, the costs of reconciling competing interests are generally offset by the political benefits of coordination.

A growing number of examples across different substantive fields suggest the potential of linking litigation to other forms of advocacy. In the environmental context, some national legal groups stress the importance of addressing issues in a “campaign mode” that combines litigation and other advocacy strategies.⁶⁴ Environmental justice lawyers have effectively used litigation, or the threat of litigation, in conjunction with grassroots organizing to prevent low-income communities of color from bearing the burden of environmental hazards.⁶⁵

The gay rights movement has also developed sophisticated linkages between legal and non-legal advocacy.⁶⁶ In California, the struggle for same-sex marriage has demonstrated the multiple ways that activists have tried to use litigation to both establish rights and to ignite support for political efforts. There, a 2000 statewide initiative defining marriage as between “a man and a woman” was challenged when San Francisco mayor Gavin Newsom authorized city officials to issue marriage licenses to gay couples. When anti-gay rights groups filed suit to stop the marriages, San Francisco responded by challenging the legality of the prohibition. Gay couples and gay rights organizations like Equality California—represented by lawyers from the National Center for Lesbian Rights, the Lambda Legal Defense

61. Jennifer Gordon, *Concluding Essay: The Lawyer Is Not the Protagonist: Community Campaigns, Law, and Social Change*, 95 CAL. L. REV. 2133, 2133 (2007).

62. See, e.g., Cummings, *Hemmed In*, *supra* note 40, at 19-20.

63. Cummings, *Wal Mart*, *supra* note 2, at 1991-97.

64. See Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 1016 (2008).

65. See Scott L. Cummings & Ingrid V. Eagly, *A Critical Reflection on Law and Organizing*, 48 UCLA L. REV. 443, 474-75 (2001).

66. See QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW (Scott Barclay, et al. eds., 2009); Scott Barclay & Shauna Fisher, *Cause Lawyers in the First Wave of Same Sex Marriage Litigation*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 84; Scott Barclay & Anna Marie Marshall, *Supporting a Cause, Developing a Movement, and Supporting a Practice: Cause Lawyers and Sexual Orientation Litigation in Vermont*, in THE WORLDS THAT CAUSE LAWYERS MAKE, *supra* note 36, at 171.

and Education Fund, and the ACLU—filed additional lawsuits arguing that the ban on gay marriage violated the state constitution. In May 2008, the California Supreme Court held that gay marriage was a constitutional right, reversing the 2000 initiative, but provoking opponents to launch another anti-gay marriage initiative: Proposition 8. When Proposition 8 passed in November of 2008, amending the state constitution to prevent gay marriage, it drew national attention and galvanized gay rights activists. They again filed suit to overturn Proposition 8 on the ground that it constituted a revision to the state constitution, which required a two-thirds vote of the legislature. The California Supreme Court rejected the challenge, but gay rights groups used the announcement of the court’s decision to stage large rallies and mobilize supporters, setting the stage for another effort to reverse Proposition 8 through political channels.

The workers’ rights movement has also provided important examples of integrated political and legal campaigns. Cummings’s study of anti-Wal-Mart activism in Los Angeles is a case in point.⁶⁷ In that campaign, a labor-backed community group mounted a “site fight” to prevent the passage of a city initiative that would have approved the development of a Wal-Mart Supercenter in Inglewood. As part of the fight, the group’s lawyers filed a pre-election lawsuit to halt the initiative process, arguing that it violated the state constitution. The labor activists understood at the outset that their chances of blocking the initiative before the scheduled city-wide vote were slim, given existing legal precedent. However, they proceeded with the lawsuit in order to undermine the initiative’s legitimacy by highlighting the way that it preempted the local land use and environmental laws that typically governed such developments. Thus, the lawsuit was brought mainly for its public education and organizing impact. And in fact, its filing generated substantial media attention that allowed the activists to get out their message that Wal-Mart saw itself as “above the law.” This proved to be a powerful theme: although most community members had initially supported the Supercenter on economic grounds, the lawsuit helped to turn public opinion around and contributed to the initiative’s defeat.

Sameer Ashar’s account of restaurant worker organizing in New York provides a similar example.⁶⁸ There, workers were organized by the union-backed Restaurant Opportunities Center of New York (ROC-NY), which sought to target abuses at high-end chain restaurants in order to set new industry standards. In one prominent campaign, ROC-NY collaborated with the CUNY Law School clinical program to represent “back-of-the-house”

67. See Cummings, *Wal-Mart*, *supra* note 2.

68. See Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CAL. L. REV. 1879 (2007).

workers who had been denied minimum wage and overtime payments. The litigation was specifically designed to advance broader industry-wide reform objectives and proceeded in tandem with public boycotts of the restaurants and a sophisticated media campaign. The result was an innovative settlement agreement that not only awarded unpaid wages, but also instituted policy changes involving paid vacations, sick leave, and some measure of job security.⁶⁹

Just as litigation has promoted collective action in the workers' rights context, it has also been used to shield worker organizing from repressive responses. The use of litigation to protect activists punished for engaging in civil disobedience has a long tradition in the civil rights, antiwar, and labor movements. In the context of day labor organizing, litigation has been necessary to strike down laws criminalizing the very act of seeking work. Over the last ten years, a number of localities in California have passed ordinances making it illegal to congregate in public for the purpose of soliciting work, on the ground that such activities constitute a public nuisance. In response, activists from the National Day Laborer Organizing Network have launched protest campaigns, but have also strategically enlisted public interest lawyers from the Mexican American Legal Defense Fund and the ACLU to challenge anti-solicitation ordinances on First Amendment grounds.⁷⁰ These suits have resulted in courts striking down ordinances in Los Angeles County, Redondo Beach, and Glendale, thus preserving the ability of day laborers to earn a living.⁷¹

The workers' rights movement has also witnessed innovative efforts to combine litigation and organizing to promote enforcement of legal protections. One of the most prominent enforcement campaigns grew out of activism in the Los Angeles garment industry in the late 1990s, during a time when nearly two-thirds of the city's garment contractors were violating wage-and-hour regulations—underpaying workers by over \$70 million per year.⁷² A group of lawyers from the Asian Pacific American Legal Center initiated an impact litigation campaign targeting prominent manufacturers and retailers who controlled, and benefited from, sweatshop contractors. The resulting public outrage supported policy and grassroots organizing efforts, which in turn led to the enactment of state legislation holding gar-

69. *Id.* at 1916.

70. Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 490-91 (2005-2006).

71. *Id.* at 493-95.

72. EDNA BONACICH & RICHARD P. APPELBAUM, *BEHIND THE LABEL: INEQUALITY IN THE LOS ANGELES APPAREL INDUSTRY* 3 (2000).

ment manufacturers liable for abuses by their sweatshop contractors.⁷³ The activists knew that the law's passage would not automatically end labor abuse without a strong enforcement effort. To promote legal compliance, they therefore established the Garment Worker Center, which provided direct assistance to individual workers filing wage-and-hour claims pro se and referred workers with more complicated cases to lawyers for full representation. The goal was both to keep pressure on garment contractors to comply with the law and to promote further community activism. However, activists found that even with this stepped up enforcement program, employers were still refusing to pay, betting that the time, expense, and aggravation of enforcing judgments would cause workers to settle for less than they were owed.⁷⁴ In the face of such resistance, another group of lawyers, with seed money from the Echoing Green Foundation, founded the Wage Justice Center, a project dedicated solely to enforcing judgments the garment industry and other low-wage sectors. With the goal of giving "low-income workers the same power to collect their wages as commercial entities have to collect their claims against other businesses," the Center has taken low-wage worker cases on referral and successfully pursued collection strategies borrowed from business litigation.⁷⁵ Although these efforts have by no means eliminated enforcement challenges in the garment sector, they show how lawyers and activists can use multiple tactics to mount a coordinated response.

2. *Litigation Across Diverse Practice Sites*

The second lesson from the literature on law and social change relates to the way money influences legal advocacy. Although funding constraints are most explicit in the context of federal support for civil legal assistance, they operate across all practice sites, and shape the dockets of public interest organizations, law firm pro bono programs, private public interest law firms, and law school clinical programs. Understanding these constraints enables us to think strategically about which organizations offer the most promising contexts for different types of cases.

73. Cummings, *Hemmed In*, *supra* note 40.

74. *Id.* (referring to a report stating that, five years after the law's enactment, workers were recovering on average less than one-third of the total amount of unpaid wages and seldom were receiving any liquidated damages or penalties authorized by statute).

75. The Wage Justice Center, *Waging Justice for Exploited Workers*, <http://www.wagejustice.org/advocating-low-income-workers-rights.html> (last visited June 23, 2009); The Wage Justice Center, *Wage Justice Delivered*, <http://www.wagejustice.org/wage-claim-success-stories.html> (last visited June 23, 2009) (reporting that the Center helped to recover \$100,000 for five garment workers who had been unable to collect a judgment by the California Labor Commissioner in 2005).

a. Legal Services

No public interest institution has been more vulnerable to funding restrictions than the federal legal services program.⁷⁶ The political backlash to the early law reform agenda of the legal services program brought significant budget cuts that resulted in a 50% decline in federal funding for legal aid between 1980 and 2003.⁷⁷ In addition, the government has steadily curtailed the advocacy of legal services lawyers by prohibiting an array of activities, including most lobbying and organizing efforts, class action and fee-generating lawsuits, representation of prisoners and undocumented individuals, and litigation related to welfare reform.⁷⁸ Most drastically, this legislation prohibited lawyers in federally funded organizations from using non-federal funds to engage in any of the banned activities.⁷⁹

The impact of these restrictions has been dramatic. Some organizations chose to forgo federal aid to avoid the restrictions and many legal aid lawyers left organizations that continued to receive federal funds. Until the recent recession, overall financial support for civil legal aid remained relatively stable due to the increase in funding from other sources, such as Interest on Lawyer Trust Accounts, foundation grants, and private lawyer contributions.⁸⁰ However, the reliance on these revenue sources has increased the time and effort that legal aid programs need to devote to fundraising at the expense of other substantive activities. The diversification of funding sources has also required programs to structure activities in ways that will attract private or foundation support, sometimes at the expense of more urgent programmatic priorities.⁸¹ Moreover, the reduction of federal support has made legal services to the poor deeply vulnerable to market fluctuations, reducing aid at precisely the moments that low-income people

76. Cummings, *The Politics of Pro Bono*, *supra* note 5, at 130; *see also* EARL JOHNSON, JUSTICE AND REFORM: THE FORMATIVE YEARS OF THE AMERICAN LEGAL SERVICES PROGRAM 188-91 (1978).

77. ALAN W. HOUSEMAN & LINDA E. PERLE, SECURING EQUAL JUSTICE FOR ALL: A BRIEF HISTORY OF CIVIL LEGAL ASSISTANCE IN THE UNITED STATES 36 (2003).

78. Omnibus Consolidated Rescissions and Appropriations Act § 504(a) (1996).

79. 45 C.F.R. §§ 1610.1-1610.9 (1997).

80. As of 2005, LSC funds constituted only about one-third of the total legal services budget in the United States, with state and local government funds contributing about one-third, Interest on Lawyer Trust Accounts about 10%, foundations about 7%, and private lawyers roughly 4%. ALAN W. HOUSEMAN, CIVIL LEGAL AID IN THE UNITED STATES: AN OVERVIEW OF THE PROGRAM IN 2005, at 4 (2005), *available at* http://www.clasp.org/publications/us_overview_program_2005.pdf.

81. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2056-58 (providing a general discussion of these effects on public interest organizations, including those that serve low-income clients).

need it the most—a problem underscored by the current economic downturn.⁸²

By design, the substantive restrictions on legal services advocacy have undermined the effectiveness of legal services programs in bringing impact litigation or engaging in political tactics likely to result in systemic reform. In particular, the restriction on class actions and fee-generating cases prevents legal services lawyers from pursuing large-scale resource-intensive lawsuits, while withdrawing an important bargaining chip against defendants who can litigate without the threat of a large fee payout. Proposed federal legislation would increase funding for legal services back to 1980 levels and remove many of the programmatic restrictions, including the ban on class actions and attorney's fees.⁸³ Without such reforms, federally-funded legal aid organizations will remain severely constrained in efforts to pursue systemic justice through litigation.

b. Pro Bono

The decline in the federal legal services program has been met by the rise in pro bono—indeed, the two have been sometimes linked. Opponents of the reformist agenda of legal services championed pro bono as an acceptable alternative, knowing that it would not pose a comparable threat to business interests. This linkage was codified in the early 1980s in a program known as “private attorney involvement,” which earmarks a portion of federal funding to programs that recruit and train pro bono volunteers. As a result, the number of such programs over the past quarter century has increased from about fifty to roughly 900, and lawyer participation constitutes an estimated one-quarter to one-third of full-time equivalent lawyer staff within the entire U.S. civil legal aid system.⁸⁴

Other factors also have encouraged expansion of the pro bono system, including the growth of large firms, which contributed over 3.5 million hours of pro bono services in 2005 (up nearly 80% from 1998); the support of the organized bar for increased pro bono in response to declining federal resources; the emergence of media ranking structures, which make contribution levels more transparent and more important in recruitment and public relations; the growing use of unpaid cases to train associates as mentor-

82. See Marcia Coyle, *FDIC, Heeding Attorneys, Heads off a Potential IOLTA Disaster*, NAT'L L.J., Dec. 1, 2008; Bill Myers, *Economic Collapse Will Affect Legal Aid to Poor*, WASH. EXAMINER, Feb. 16, 2009.

83. See Brennan Center for Justice, *Civil Access to Justice Act of 2009*, http://www.brennancenter.org/content/resource/civil_access_to_justice_act_of_2009.

84. Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 L. & SOC'Y REV. 79, 85 (2007).

ing in paid work declines; and the cultural pressure for firms to give back during periods of financial success.⁸⁵ The recent economic downturn has also encouraged many large firms to expand their programs as a way to provide valuable professional experiences for lawyers or new recruits who lack sufficient paid work.⁸⁶

The rise of pro bono as a delivery structure creates a distinct set of opportunities and constraints for public interest litigation. Law firm pro bono programs are able to take on cases where federally funded legal services programs cannot, and have the resources to handle complex, discovery-intensive lawsuits that would overwhelm the staffs of nonprofit groups.⁸⁷ Law firms also underwrite litigation that supplements legal services in key areas such as immigration and civil rights. Yet the reliance on pro bono efforts also raises important distributional and quality concerns. Certain categories of cases are less likely to receive attention because of firms' bottom-line considerations. In particular, positional conflicts of interest often prevent firms from taking cases that could antagonize corporate clients.⁸⁸ Thus, labor, employment, and consumer claims are unlikely to receive significant support from firms that regularly defend business clients in these areas. Legal services and public interest groups that rely on volunteers may find that difficult clients and unpopular causes too often fall through the cracks.⁸⁹ In joking with his firm's managing partners about the issue, one lawyer catalogued all the cases against powerful business and government clients that positional conflict policies prevented and concluded, "pretty soon the only people we are going to be able to represent are the poor against other poor people."⁹⁰

85. Cummings, *The Politics of Pro Bono*, *supra* note 5, at 5; *see also* Steven A. Boucher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in PRIVATE LAWYERS AND THE PUBLIC INTEREST, *supra* note 5.

86. Susan Dominus, *\$80,000 for Year Off From Law? She'll Take It!*, N.Y. TIMES, Apr. 13, 2009, at A1; Karen Sloan, *Trying To Make Deferrals into Something Positive*, NAT'L L.J., Apr. 13, 2009, at 6.

87. For example, law firms can undertake large-scale impact cases against governmental entities, such as a recent case brought by the ACLU and Morrison & Foerster on behalf of a class of California public school students forced to attend schools lacking books and trained teachers. *See* Cummings, *The Politics of Pro Bono*, *supra* note 5, at 126.

88. *Id.* at 116-21; Stephen Daniels & Joanne Martin, *Legal Services for the Poor: Access, Self-Interest, and Pro Bono*, 12 SOC. CRIME, L. & DEVIANCE 145, 161 (2009); Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1421-22 (1998).

89. Deborah L. Rhode, *Rethinking the Public in Lawyers' Public Service: Pro Bono, Strategic Philanthropy, and the Bottom Line*, 77 FORDHAM L. REV. 1435, 1445 (2009) [hereinafter Rhode, *Rethinking the Public*].

90. Daniels & Martin, *supra* note 88, at 163.

Another significant constraint involves the inability of most pro bono lawyers to connect cases to broader social reform or political organizing efforts. Few of these lawyers have the time to gain the substantive expertise and familiarity with the major players in the field that are necessary to meet the long-range goals of client groups. Rather, firm lawyers often use pro bono cases to *train themselves*. There is, of course, an irony in this: underserved clients are asked to accept pro bono lawyers seeking to hone their skills, which are then deployed on behalf of private clients, often in the pursuit of contrary ends.

c. Private Public Interest Law Firms

When public interest groups are unable to find large firm pro bono assistance in impact litigation, they frequently turn to smaller plaintiff-side firms, which rely on attorney's fees to underwrite their services. These private public interest law firms have positioned themselves as an alternate site for "doing well by doing good." They support resource-intensive impact litigation that nonprofit groups cannot afford to pursue on their own, and that large firm pro bono programs will not pursue because of conflicts of interest. No systematic data on these firms are available, but some evidence suggests that they have grown in number. Handler and his colleagues identified approximately twenty private firms in the late 1970s.⁹¹ A recent compilation of private public interest and plaintiff's firms put the number at over 200.⁹² Although this recent list includes firms involved in personal injury and commercial matters, the majority pursue cases that have analogues in the non-profit sector, such as employment and civil rights.⁹³

The evolution of private public interest law firms reflects distinctive structural opportunities and constraints. On the opportunity side, the use of the class action form and the availability of fee-shifting statutes and contingency fees have permitted cause-oriented lawyers to build powerful litigation practices around issues such as employment and housing discrimination, wage-and-hour violations, human rights, and police abuse. For many of these attorneys, private practice avoids the problems associated with

91. JOEL F. HANDLER ET AL., *LAWYERS AND THE PURSUIT OF LEGAL RIGHTS* (1978).

92. CTR. FOR PUB. INTEREST LAW AT COLUMBIA LAW SCH. & BERNARD KOTEEN OFFICE OF PUB. INTEREST ADVISING AT HARVARD LAW SCH., *PRIVATE PUBLIC INTEREST AND PLAINTIFF'S FIRM GUIDE* (2008).

93. Cummings & Southworth, *Between Profit and Principle*, *supra* note 5, at 19. Other common specialties involve environmental and consumer law. *Id.*

some nonprofit organizations, such as low salaries, fundraising obligations, the lack of training, and scarce resources for large-scale litigation.⁹⁴

Another important advantage of private public interest firms is autonomy.⁹⁵ In studies of such firms, lawyers often emphasize the ability to set their own priorities as one of the most attractive features of their practice. For instance, lawyers at the Washington, D.C.-based Bernabei & Katz started their civil rights firm in order to “maximize discretion to select cases” consistent with their own political goals.⁹⁶ The desire for such autonomy seems true of lawyers on the right as well as left. Southworth’s study of socially conservative and libertarian lawyers found that small firm practice accommodated individuals who wanted “practices reflecting their political commitments.”⁹⁷

Yet the autonomy of lawyers in private public interest firms is also constrained by financial imperatives, which often force tradeoffs between mission and money. These firms are typically small, often less than ten lawyers, and risky, because they generally lack a stable of repeat clients. Many struggle financially, and the unpredictability in revenue streams constrains their ability to handle more than a few large-scale cases or matters outside the most profitable fields. To be sure, many firms hedge financially riskier cases against ones that promise a strong likelihood of recovery, leaving some room for cases on behalf of low-income clients. However, the constant concern about fee generation creates incentives to screen out meritorious but low-value cases. In this sense, the litigation agenda of private public interest firms is driven by the delicate balance between profit and principle, which different firms handle in different ways. Some pursue *only* work that partners believe in—and sacrifice income to do so.⁹⁸ The lawyers at Bernabei & Katz—which accepted civil rights, civil liberties, employment discrimination, whistleblower, and prisoners’ rights claims—refused to take cases for purely financial reasons and paid its attorneys on a nonprofit scale. Many firms, however, supplement their mission-driven work with other matters that are at least consistent with their commitments, if not their priorities. Still other firms take cases that do not further any

94. See Rhode, *Public Interest Law*, *supra* note 3, at 2059-60.

95. SCHEINGOLD & SARAT, *supra* note 4, at 88.

96. Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 296 (1994).

97. Ann Southworth, *Professional Identity and Political Commitment Among Lawyers for Conservative Causes*, in *THE WORLDS THAT CAUSE LAWYERS MAKE*, *supra* note 36, at 96.

98. Katz & Bernabei, *supra* note 96.

core values but subsidize other work that does.⁹⁹ Resource constraints shape the course as well as type of litigation. Some private public interest firm attorneys report being financially outmatched by large firm opponents, which can skew strategic and settlement decisions.¹⁰⁰

Finally, these firms' dependence on the private market works against innovative high risk efforts and the development of strong ties to political movements. Although private public interest firms do sometimes take pro bono work, their economic model is generally inconsistent with pursuing claims primarily for their impact on organizing or policy campaigns. As a result, these firms are unlikely to be tightly integrated with, and accountable to, social movements. Lawyers in private public interest firms therefore confront an important tradeoff: although they generally remain free of government and foundation influence, they are dependent on paid work in ways that may limit political collaboration and risk-taking.

d. Law School Clinics

Law school clinics constitute another important (and under-explored) site of public interest litigation. The clinical movement, which began in tandem with public interest law in the 1970s, occupies a paradoxical space within law schools: firmly institutionalized but frequently marginalized. Its institutional presence is powerful: in 1999, the AALS Section on Clinical Legal Education's database showed 183 law schools with clinics staffed by over 1700 professors.¹⁰¹ A recent study by the Center for the Study of Applied Legal Education found that there were over 800 in-house, live client clients in U.S. law schools, in areas that cut across a range of substantive public interest issues including children's rights, immigration, housing, human rights, disability, employment, civil rights, consumer, family, and environmental law.¹⁰² Clinical programs have thus developed into substantial providers of legal services. And the pressure to expand these programs is strong. Law students generally report receiving great value from their clinical experiences and law schools recognize the need for courses that will attract top students interested in experiential learning and public ser-

99. Stuart Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 246 (1998).

100. Cummings, *The Politics of Pro Bono*, *supra* note 5, at 134.

101. Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 30 (2000).

102. DAVID A. SANTACROCE & ROBERT R. KUEHN, CTR. FOR THE STUDY OF APPLIED LEGAL EDUC., REPORT ON THE 2007-2008 SURVEY 8.

vice practice.¹⁰³ In addition, as law schools try to adapt their curricula to meet the challenges of the contemporary profession, they see clinics as a valuable way to link analytic approaches with practical applications.¹⁰⁴

Yet as is clear from an ongoing controversy over law school accreditation standards, the institutional status of clinicians remains a significant issue.¹⁰⁵ Many lack the security and status that come with tenure.¹⁰⁶ The Center for the Study of Applied Legal Education survey reported that nearly two-thirds of respondent clinicians had contractual appointments, or served as adjuncts, staff attorneys, or fellows; just over 10% were on a clinical tenure track, while just under a quarter were on an academic tenure track.¹⁰⁷ For those in charge of in-house, live-client clinics, the proportion of non-tenure track (clinical or academic) appointments is even larger.¹⁰⁸ One reason for the status disparity is financial. Clinical education requires intensive supervision, which is correspondingly expensive. Cost constraints often drive schools to avoid dedicating more expensive ladder-track lines for clinicians, choosing instead to reserve them for those whose scholarly reputations may bring national attention (and enhance law school rankings).¹⁰⁹ And law schools are often reluctant to guarantee adequate resources for skills-based instruction. As federal funding has eroded over the past decade, clinical programs have scrambled to supplement institutional funding with periodic grants from foundations, corporations, and individual donors.¹¹⁰ However, clinicians report deep frustration with financial constraints, citing the lack of hard money, insufficient staffing and office

103. THE NALP FOUNDATION FOR LAW CAREER RESEARCH AND EDUCATION & THE AMERICAN BAR FOUNDATION, *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* 81 (2004).

104. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007).

105. Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183 (2008).

106. Barry et al., *supra* note 101, at 31 (of nearly 800 clinicians reporting on their status in 1999, slightly more than 40% stated that they either had tenure or were on the tenure-track).

107. SANTACROCE & KUEHN, *supra* note 102, at 29.

108. *Id.* at 15.

109. Clinical instructors, who frequently come from non-profit organizations in search of opportunities to do the same cause-oriented work with higher salaries and better working conditions, may not initially perceive disparate status as a problem and students may not be attuned to how status disparities may impact their educational experience.

110. Barry et al., *supra* note 99, at 19-20 (during the 1980s and 1990s, the Federal Department of Education spent nearly \$90 million to support the expansion of clinical education).

space, and lack of administrative and secretarial support as major challenges.¹¹¹

Litigation efforts within clinics play out against these status and financial disparities, which vary across institutional context. At some law schools, clinical programs have resources that rival their non-academic public interest counterparts and clinical faculty receive equal—or near-equal—treatment to non-clinical faculty.¹¹² With resources and security, clinicians may be willing to take on larger and more controversial cases without fearing negative repercussions; clinicians with less support and stability may be less able to assume such risks. As an example, faculty at law schools with relatively well-funded and institutionally integrated clinical programs have worked on prominent cases representing Guantánamo detainees, challenging the legality of New York's workers' compensation system, and supporting undocumented immigrant workers' struggle for better employment conditions.

Yet even within well-supported programs, the mission and structure of clinical education impose significant challenges to social impact litigation. Clinicians need to select cases based on pedagogical value and to accommodate students' schedules, time commitments, and level of experience.¹¹³ The need for discrete assignments that can be parceled out during the course of a semester works against taking on intensive litigation with heavy resource demands and unpredictable timing. Many clinical faculty, particularly those on a tenure track, are expected to publish scholarly articles, which creates incentives to curtail or delegate client supervision in order to protect research time. Controversial litigation can also pose problems for schools, which can be threatened with the loss of state funding or the withdrawal of private donors who disagree with a clinic's political goals. Over the last decade, several prominent clinics have become embroiled in controversies that sapped resources and imposed restrictions on student representation.¹¹⁴ Finally, many institutions are under increasing pressure to offer skills instruction more responsive to the demands of private practice, in

111. SANTACROCE & KUEHN, *supra* note 102, at 12.

112. At Georgetown, for instance, the clinical program includes twelve free standing clinics with seventeen full-time faculty, twenty-six graduate student fellows, and several adjunct instructors. See Georgetown University Law Center, Law Center Clinical Program, <http://www.law.georgetown.edu/clinics/> (last visited Apr. 21, 2009).

113. Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 410-11 (2008); Juliet Brodie, *Little Cases on the Middle Ground*, 15 CLINICAL L. REV. 332, 353 (forthcoming 2009).

114. Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235, 237-40 (1999).

areas like business transactions, intellectual property, and securities law. Investment in these fields often diverts resources from social justice causes.

As this overview suggests, the major sites of public interest litigation each confront distinctive opportunities and limitations. For those seeking social impact through law, the challenge is to think more strategically about the comparative capacities of particular forums. To that end, the literature on strategic philanthropy offers some relevant insights.

II. STRATEGIC PHILANTHROPY

A. The Strategic Giving Framework

1. *The Rationale for Strategic Frameworks*

An increasing proportion of public interest legal work is financed through philanthropic contributions, either pro bono time and money donated by private lawyers, or grants from foundations and corporate sponsors. In Rhode's recent study of the nation's leading public interest legal organizations, foundations typically accounted for about one-third of their budgets, individual donations for just over a quarter, and corporate contributions for about 14%.¹¹⁵ About four-fifths of these organizations also reported substantial collaboration with pro bono counsel, particularly for major litigation.¹¹⁶ In addition, many lawyers also contribute time and money directly to social impact work. Taken together, these contributions are quite substantial. The nation's 200 largest firms alone report time valued at \$1.45 billion annually.¹¹⁷ Yet participants in public interest legal activities are often strikingly unstrategic in their giving. Many operate with a "spray and pray" approach, which spreads assistance on multiple projects with the hope that something good will come of it.¹¹⁸ Something usually does, but the result is not necessarily the most cost-effective use of resources.

Paul Brest, former Stanford law professor, and now President of the Hewlett Foundation, likes to remind organizations that "[i]f you don't know where you're going, any road will get you there."¹¹⁹ Lawyers' deci-

115. Rhode, *Public Interest Law*, *supra* note 3, at 2054.

116. *Id.* at 2070 (47% reported extensive and 33% reported moderate collaboration).

117. Aric Press, *In-House at the American Lawyer*, AM. LAW., July 2008, at 13 (basing calculation on blended rate of \$300 per hour).

118. PETER FRUMKIN, STRATEGIC GIVING: THE ART AND SCIENCE OF PHILANTHROPY 371 (2006). For an analysis of the problems of self-interest facing public interest lawyers, see Rhode, *Rethinking the Public*, *supra* note 89.

119. PAUL BREST & HAL HARVEY, MONEY WELL SPENT: A STRATEGIC GUIDE FOR SMART PHILANTHROPY 35 (2008).

sion-making often lacks that sense of direction. Many have not thought deeply about their objectives or attempted to assess the social impact of their contributions.¹²⁰ When the amounts of assistance are small, such an ad hoc approach is not particularly problematic; attempts at systematic assessment would not be worth the effort. But many individuals and institutions that make major contributions are motivated at least in part by a desire to give back to the community, to build a more just society, and to make a difference on issues that have affected them personally.¹²¹ The objectives of these donors would benefit from a more systematic framework. Esther Lardent, President of the Pro Bono Institute, notes that too much of lawyers' charitable assistance is random and episodic.¹²² What is needed are approaches that are strategic: informed, sustained, collaborative, and accountable.¹²³ Those approaches could benefit from the growing literature on strategic philanthropy.

2. *The Strategic Process*

What exactly qualifies as strategic philanthropy and how much it differs from major foundations' longstanding practices is a matter of dispute.¹²⁴

120. See Rhode, *Rethinking the Public*, *supra* note 89, at 1445 (quoting representative senior partner's comment that the firm was unable to assess the social impact of its work); Gary Blasi, *Framing Access to Justice: Beyond Perceived Justice for Individuals*, 42 *LOY. L.A. L. REV.* (forthcoming 2009) (manuscript at 61-62, on file with author) (noting the frequent absence of evidence for Legal Aid lawyers' sense of effectiveness).

121. See RHODE, *supra* note 5, at 62 (2005); see also ROBERT COLES, *THE CALL OF SERVICE* 91 (1993); Gil Clary & Mark Snyder, *A Functional Analysis of Altruism and Pro Social Behavior: The Case of Volunteerism*, in *PROSOCIAL BEHAVIOR* 119, 125-26 (Margaret Clark ed., 1991); THE CTR. ON PHILANTHROPY, IND. UNIV., 2008 STUDY OF HIGH NET WORTH PHILANTHROPY: ISSUES DRIVING CHARITABLE ACTIVITIES AMONG AFFLUENT HOUSEHOLDS (2009); MICHAEL L. GROSS, *ETHICS AND ACTIVISM: THE THEORY AND PRACTICE OF POLITICAL MORALITY* 128-32 (1997).

122. Esther Lardent, President of the Pro Bono Inst., Comment at UCLA Conference on the Future of Pro Bono (Oct. 3, 2008).

123. *Id.*; see also Rhode, *Rethinking the Public*, *supra* note 89, at 1447.

124. For a claim that the term "strategy" has become so overused to describe any grant with a purpose that the term is almost meaningless, see Michael E. Porter & Mark R. Kramer, *Philanthropy's New Agenda: Creating Value*, *HARV. BUS. REV.*, Nov.-Dec. 1999, at 121, 125 [hereinafter Porter & Kramer, *Philanthropy's New Agenda*]. For a claim that virtually all foundations claim to practice some form of strategic philanthropy, see Mark R. Kramer, *Strategic Confusion*, *FOUND. NEWS & COMMENT.*, May-June 2001, at 40. For a suggestion that whether strategic philanthropy involves a new concept or just new terminology is less relevant than whether it makes a difference, see Peter Karoff, *Saturday Morning*, in *JUST MONEY: A CRITIQUE OF CONTEMPORARY AMERICAN PHILANTHROPY* 3, 13 (Peter Karoff ed., 2004) [hereinafter *JUST MONEY*]. For an argument that the practice of strategic philanthropy isn't all that different, see Joel L. Fleishman, *Simply Doing Good or Doing Good Well: Stewardship, Hubris, and Foundation Governance*, in *JUST MONEY*, *supra* at 104; Peter Frumkin, *Inside Venture Philanthropy*, *SOC'Y*, May-June 2003, at 7, 15; Stanley M.

Most experts agree, however, on two distinguishing features of strategic giving: clarity in objectives and specific measures of performance.¹²⁵ Unlike “mission driven” charity, which furthers a broadly stated organizational purpose (such as reducing poverty), strategic philanthropy demands a well-supported plan for achieving measurable goals. That plan needs to include means of tracking progress toward its goals and comparing the costs, benefits, and risks of any particular approach against other methods of achieving the same ends.¹²⁶

Two strands of strategic philanthropy have particular relevance for public interest law. One involves the trend among large corporations to target charitable contributions in ways that serve business as well as societal interests. In its most effective form, such strategic giving both draws on the organization’s distinctive resources and appeals to its particular stakeholders. For example, information technology companies contribute equipment to non-profits, and subsidize distance-learning programs for IT workers around the globe.¹²⁷ The closest analogy in the legal profession involves “signature” pro bono initiatives, which build on law firms’ substantive specialties and align philanthropic goals with training, recruitment, and retention objectives.¹²⁸

Katz, *What Does it Mean to Say that Philanthropy is Effective? The Philanthropists’ New Clothes*, 149 PROC. AM. PHIL. SOC’Y 123, 126 (2005), available at <http://www.aps-pub.com/proceedings/1492/490201.pdf>.

125. BREST & HARVEY, *supra* note 119, at 7; Porter & Kramer, *Philanthropy’s New Agenda*, *supra* note 124, at 126-27.

126. BREST & HARVEY, *supra* note 119, at 59; Paul Brest, *Strategic Philanthropy and its Malcontents*, in MORAL LEADERSHIP: THE THEORY AND PRACTICE OF POWER, JUDGMENT, AND POLICY 229, 230-31 (Deborah L. Rhode ed., 2006) [hereinafter MORAL LEADERSHIP]; see also Kramer, *supra* note 124, at 44 (describing key elements of strategic philanthropy as identifying the desired change, clarifying internal values and strengths, and ascertaining external needs).

127. John V. Kania, Found. Strategy Group, *Benchmarking Philanthropy*, PERSP. CORP. PHILANTHROPY, Winter, 2004, at 1, 2-3 (describing Microsoft signature initiatives); John V. Kania & Mindy W. Oakley, Found. Strategy Group, *Design for Giving: Understanding What Motivates Corporate Philanthropy*, PERSP. CORP. PHILANTHROPY, Winter, 2003 at 1 (describing Cisco Networking Academy); Michael A. Porter & Mark R. Kramer, *The Competitive Advantage of Corporate Philanthropy*, HARV. BUS. REV., Dec. 2002, at 57, 61, 64 (describing Cisco and Apple projects) [hereinafter Porter & Kramer, *Competitive Advantage*]. For other examples, see Michelle Courton Brown, *Making The Case for Corporate Philanthropy: Key Element of Success*, in JUST MONEY, *supra* note 124, at 151 (describing banks’ efforts to bridge the digital divide and expand online banking services to low and moderate income communities); Keith Epstein, *Philanthropy, Inc.: How Today’s Corporate Donors Want Their Gifts to Help the Bottom Line*, STAN. SOC. INNOVATION REV., Summer 2005, at 21 (describing missile manufacturer’s support of local engineering and science education programs).

128. RHODE, *supra* note 5, at 30-31 (2005); Rhode, *Rethinking the Public*, *supra* note 89, at 1442 (describing the “bottom line” orientation in many firms).

A second form of strategic giving involves venture philanthropy. This approach, modeled after venture capitalism, helps high-potential non-profit organizations scale up to a point where they can sustain major social impact work.¹²⁹ This entails sufficient engagement and management assistance to promote organizational growth, capacity, and continued financial viability.¹³⁰ The closest analogy for the legal profession involves long-term pro bono collaborations between law firms and public interest groups, which can include significant financial support and assistance as general counsel, along with participation in particular legal projects.¹³¹ Unlike venture philanthropists, however, who often look for an exit strategy after the initial investment, firms generally cultivate an ongoing relationship.

What unites these different forms of strategic philanthropy is a well-designed process for developing and evaluating a plan of action. To achieve social impact, a strategic plan needs a theory of how to achieve the desired result, an approach that is within the capacity of the project, and criteria for measuring progress.¹³² Ideally, as Brest notes, the theory should be “empirically validated.”¹³³ At the very least, it should be informed by the best available research on what works in the field, or confidence that the organization being supported has that base of knowledge. For many social problems, the most effective strategy is to address its root causes, rather than just alleviate its symptoms.¹³⁴

Experts describe several stages of the strategic process. The first is “scoping,” in which the philanthropist reviews factors such as research and expert opinions on the nature of the problem; the views of those who would benefit from assistance; the relative costs, benefits, and risks of potential solutions; the experiences of other groups that have worked on the issue; and any unique capabilities of the philanthropist.¹³⁵ In effect, the key question is where and how the donor can have the greatest effect on the dynamics that perpetuate the problem.¹³⁶ A second stage involves developing a

129. BREST & HARVEY, *supra* note 119, at 195; Frumkin, *supra* note 124, at 9.

130. See HANDLER, SOCIAL MOVEMENTS, *supra* note 11, at 9; Karoff, *supra* note 124, at 3, 13.

131. Rhode, *Public Interest Law*, *supra* note 3, at 2074.

132. Brest, *supra* note 126, at 233.

133. *Id.*

134. John A. Byrne, *The New Face of Philanthropy*, BUS. WK., Dec. 2, 2002, at 82; Hal Harvey & Barbara Mertz, Problem Solving Philanthropy (unpublished manuscript, on file with author).

135. Bill & MELINDA GATES FOUND., STRATEGY LIFECYCLE OVERVIEW AND GUIDE 6-7 (2008), available at <http://www.gatesfoundation.org/about/Documents/strategy-lifecycle-overview-and-guide-2008.pdf>.

136. Byrne, *supra* note 134, at 82; Kramer, *supra* note 124, at 6.

specific strategy, identifying potential collaborators, and establishing criteria for measuring outcomes and long-term impact.¹³⁷ Once a philanthropist has made a commitment, the third stage of the process involves evaluating progress, and modifying the strategy in light of experience.

The most difficult and divisive aspect of this framework concerns the choice of “measurable outcomes” to use for assessment. Some strategic philanthropy, again borrowing from business models, attempts to quantify the social return on investment (“SROI”). In essence, the process estimates the social impact of an organization’s project, adjusted by the likelihood of achieving it, in relation to the amount invested.¹³⁸ In 1996, the Roberts Enterprise Development Fund pioneered the concept as a way to attach monetary value to “social purposes enterprises” that attempted to move disadvantaged employees out of poverty.¹³⁹ By calculating the savings from social services when workers became self-sufficient, along with tax revenues generated by the businesses, the framework found a highly positive return from the original project investment. Building on that framework, a cottage industry has developed to quantify the social benefits of non-profit initiatives.¹⁴⁰

3. *The Challenges for Strategic Philanthropy*

In principle, the virtues of strategic philanthropy are self-evident. Everyone benefits when money is well spent, not just well intentioned. Demanding measurable social impact is particularly important in contexts where other forms of accountability are lacking, as is typically the case in

137. BILL & MELINDA GATES FOUND., *supra* note 135, at 7-9; *see also* Porter & Kramer, *supra* note 124, at 129-30 (describing the need for foundations to engage in systematic research, learn from prior efforts, and identify its unique capacities); V. Kasturi Rangan, *Lofty Missions, Down-to-Earth Plans*, HARV. BUS. REV., Mar. 2004, at 1 (describing necessity and examples of development of specific strategies); Rebecca W. Rimel, *Strategic Philanthropy: Pew’s Approach to Matching Needs with Resources*, HEALTH AFF., May–June 1999, at 229-30 (describing strategic process of Pew Charitable Trusts).

138. *See* BREST & HARVEY, *supra* note 119, at 153; Alison Lingane & Sara Olsen, *Guidelines for Social Return on Investment*, 46 CAL. MGMT REV. 116 (2004).

139. CYNTHIA GAIR, ROBERTS ENTER. DEV. FUND, A REPORT FROM THE GOOD SHIP SROI (2005), available at <http://www.redf.org/learn-from-redf/publications/119> (scroll to bottom of page to find link to .pdf file, username and password is required). For the evolution of this model, see Carla I. Javits, *REDF’s Current Approach to SROI*, May, 2008, available at <http://www.redf.org/publications-sroi.htm> (scroll to bottom of page to find link to .pdf file, username and password is required).

140. JACK QUARTER ET AL., WHAT COUNTS: SOCIAL ACCOUNTING FOR NONPROFITS AND COOPERATIVES 65-69 (2003); John Sawhill & David Williamson, *Measuring What Matters in Nonprofits*, MCKINSEY Q., May 2001, at 98; Lisa Sanfilippo, New Econ. Found., *Measuring Real Value: A DIY Guide to Social Return on Investment*, <http://www.lsbu.ac.uk/bcim/cgcm/conferences/serc/2007/speakers/sanfilippo-serc-2007a.ppt> (last visited Apr. 27, 2009).

philanthropic contexts, including lawyers' pro bono programs.¹⁴¹ In practice, however, even experts sympathetic to this strategic framework question whether its rhetoric has outpaced its capacity.¹⁴²

A threshold difficulty involves identifying a theory of change for the major social problems that philanthropists, particularly in law, are interested in addressing. These remain problems precisely because they defy simple solutions, and the causal dynamics of change are difficult to unpack with any certainty. Determining how much particular strategies have helped reduce homelessness, homophobia, or similar social pathologies are matters on which even the most well informed experts disagree.¹⁴³ Plausible theories frequently prove flawed in practice.¹⁴⁴ Or it may be impossible to tell. A program that does not succeed in some ambitious effort may still have prevented a worse result.¹⁴⁵

So too, what constitutes "success" may be open to dispute. Many social initiatives have mixed results, and what one expert labels "philanthropy's biggest mistakes" may look to others like partial victories.¹⁴⁶ School desegregation litigation is a case in point. It often leads both to white flight and financial starvation for inner city schools, but also to greater racial tolerance and community engagement on local educational policy.¹⁴⁷ Much may turn on the time frame for evaluation. For example, leading gay and lesbian rights organizations generally opposed the first wave of same-sex marriage lawsuits.¹⁴⁸ Their concern was backlash, and their fears were not without foundation. Court victories in several states were reversed by vot-

141. For the absence of oversight in lawyers' pro bono programs, see Deborah L. Rhode, *Where is the Public in Lawyers' Public Service? Pro Bono and the Bottom Line* (Aug. 28, 2008) (unpublished essay), available at http://documentoleo.angelfire.com/Rhode_Essay.pdf; see also discussion *infra* Part II.B.1.d. For the lack of accountability in the philanthropic sector, see Fleishman, *supra* note 124, at 114, 124.

142. See FRUMKIN, *supra* note 118, at 15; Karoff, *supra* note 124, at 13.

143. Kramer, *supra* note 124.

144. Megan Greenwall, *New Way to Rate Charities Sought*, WASH. POST, Nov. 24, 2000, at B1 (discussing example of where theories were wrong about what made domestic violence treatment and prevention programs effective); see also BREST & HARVEY, *supra* note 119.

145. Steven A. Schroeder, *When Execution Trumps Strategy*, in JUST MONEY, *supra* note 124, at 190 (describing the failed effort by the Robert Wood Johnson Foundation to reduce the number of individuals lacking health insurance, but noting that without the effort, the problem might have been worse).

146. BREST & HARVEY, *supra* note 119, at 278. See generally MARTIN MORSE WOOSTER, HUDSON INST. & BRADLEY CTR. FOR PHILANTHROPY & CIVIC RENEWAL, GREAT PHILANTHROPIC MISTAKES (2006).

147. For the impact of *Brown v. Board of Education*, see BROWN AT FIFTY: THE UNFINISHED LEGACY (Charles Ogletree & Deborah L. Rhode eds., 2004).

148. William B. Rubenstein, *Divided We Litigate, Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1637-39 (1997).

ers and prompted statutes denying recognition to same-sex marriages.¹⁴⁹ Yet litigation also required an increasing number of states to permit gay and lesbian couples to marry or to enter domestic partnerships with comparable benefits.¹⁵⁰ Public support for those options has also grown dramatically.¹⁵¹ It is impossible to know whether a different strategy would have been more effective in extending gay rights. Moreover, as that example illustrates, even the best laid strategies of major public interest organizations and their funders can be undermined by the actions of individual plaintiffs and politicians who force the issue into judicial or legislative forums before the necessary foundations are in place.¹⁵²

A second difficulty for strategic philanthropists is that not all outcomes can be accurately measured. That is particularly the case in many public interest legal contexts. How do we price due process? Dennis Collins, former director of the Irvine Foundation, worries that strategic philanthropy encourages a “pseudo science” of “metrics and matrices” that cannot capture intangible values.¹⁵³ Bruce Sievers, former head of the Haas Family Foundation, similarly warns against what Alfred North Whitehead termed the “fallacy of misplaced concreteness.”¹⁵⁴ Even the strongest advocates of SROI frameworks acknowledge their inability to quantify all relevant outcomes.¹⁵⁵ In many contexts, philanthropists cannot help but suffer “measurement angst;” they lack the research or methodology on which to make informed assessments of social impact.¹⁵⁶

149. For an account of this history, see JANE SCHACTER, *THE BACKLASH THAT WASN'T: MARRIAGE EQUALITY LITIGATION THEN AND NOW* (forthcoming 2009); see also WILLIAM RUBENSTEIN ET AL., *SEXUAL ORIENTATION AND THE LAW* 612 (2008).

150. For a list of states, see Same Sex Marriage, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited May 12, 2009).

151. SCHACTER, *supra* note 149, at 56; Patrick Eagly et al., *Gay Rights*, in *PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY* 235 (Nathaniel Persily et al. eds., 2008).

152. The suit in Hawaii was brought by plaintiffs without the support of any major gay and lesbian rights organization. See Rubenstein, *supra* note 148, at 1637. The decision by San Francisco mayor Gavin Newsome to issue marriage licenses forced the issue into the courts before local gay and lesbian rights organizations thought it prudent. For Newsome's action, see Patrick Dillon & Lee Romney, *S.F. Judge Won't Halt Marriages: The City Gets Until March 29 to Return to Court and Defend the Merits of Allowing Same Sex Unions*, L.A. TIMES, Feb. 18, 2004, at A1.

153. Dennis Collins, *The Art of Philanthropy*, in *JUST MONEY*, *supra* note 124, at 64.

154. Bruce Sievers, *Philanthropy's Blindspot*, in *JUST MONEY*, *supra* note 124, at 135; see also Bruce Sievers, *Ethics and Philanthropy*, in *MORAL LEADERSHIP*, *supra* note 126, at 257.

155. QUARTER ET AL., *supra* note 140, at 81.

156. The phrase is Brown's, based on her experience with Fleet bank initiatives. Brown, *supra* note 127, at 160; see also Fleishman, *supra* note 124, at 118 (discussing the absence of research); WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & CO., *THE NONPROFIT*

Moreover, as experts like Peter Karoff of the Philanthropic Initiative have noted, insistence on objective performance measures can discourage funders and their grantees from taking on the “tough issues where success is hard to measure.”¹⁵⁷ Philanthropists who demand measurable indicators of impact may be reluctant to “swing for the fences” on “complicated, messy, seemingly insoluble problems” where charitable funds and creativity are most needed.¹⁵⁸

A further concern is that if philanthropists insist on combining business and societal objectives, they risk having bottom-line concerns distort giving priorities. A common criticism of corporate philanthropy is that too much money goes to publicizing good works rather than to the works themselves.¹⁵⁹ Similar problems arise when law firms select pro bono projects more for their training and public relations potential than for their social impact.¹⁶⁰ A related difficulty involves “signature projects” designed to brand the donor with a charitable cause. These projects might be more effective if pursued in collaboration, but organizations intent on enhancing their reputation may not want partners who would share in the reflected glory. At its worst, this mindset reflects a form of philanthropic hubris, in which donors delude themselves into believing their contributions alone are making a major dent on complex social problems.¹⁶¹

A final concern arises when philanthropists want hands-on engagement with their grantees but lack the expertise to make that relationship mutually beneficial.¹⁶² Some nonprofits report that the process of working closely with donors is draining and unproductive.¹⁶³ Yet if, as is often the case,

MARKETPLACE: BRIDGING THE INFORMATION GAP IN PHILANTHROPY 1 (2008) (discussing the absence of any central repository for information about performance).

157. Peter Karoff, *Introduction*, in JUST MONEY, *supra* note 124, at xxii; *see also* Collins, *supra* note 153, at 65; Karoff, *Saturday Morning*, *supra* note 124, at 13; Sievers, *supra* note 154, at 134.

158. Collins, *supra* note 153, at 65, 67.

159. Porter & Kramer, *Competitive Advantage*, *supra* note 127, at 57 (citing Philip Morris’s expenditure of \$100 million to publicize a \$75 million charitable campaign); Deborah L. Rhode, *Where is the Leadership in Moral Leadership?*, in MORAL LEADERSHIP, *supra* note 126, at 20 (noting that the demand for “value added” has pushed corporations to spend more on publicity than on what they are publicizing).

160. *See infra* note 199.

161. Fleishman, *supra* note 124, at 106.

162. BREST & HARVEY, *supra* note 119, at 200.

163. Frumkin, *supra* note 124, at 12; *see also* CTR. FOR EFFECTIVE PHILANTHROPY, TOWARD A COMMON LANGUAGE: LISTENING TO FOUNDATION CEOs AND OTHER EXPERTS TALK ABOUT PERFORMANCE MEASUREMENT IN PHILANTHROPY 12 (2002) (describing grantee perception that foundation staff sometimes increase their workload without compensating benefits, and foundation leaders’ acknowledgement of the inadequacy of efforts to monitor and respond to concerns).

fundes do not seek bottom-up feedback from their grantees, those organizations will be wary about volunteering it. The result is to prevent candid dialogue that could make their collaborations more effective.

4. *Responding to the Challenges*

These are all real concerns. But what is the alternative? Social impact is often hard to predict and measure, but abandoning the effort would be no improvement. All too often, leaders of philanthropic and non-profit organizations fall back on the claim that they just “don’t have the resources for in-depth evaluation.”¹⁶⁴ But organizations have choices regarding where to spend the resources they do have and the failure to spend some of them on assessment compromises the value of funds invested in programs.

A case history on point involves the Nature Conservancy. Its mission is to preserve the diversity of plants and animals by protecting the habitats of endangered species. For most of its history, the organization measured success by the amount of money it raised and the habitats it preserved. By this “bucks and acres” metric, the Conservancy appeared to be highly successful. Its membership, contributions, and protected land all grew steadily; by the turn of the twenty-first century, it had projects in twenty-eight countries, and had preserved some twelve million acres in the United States alone.¹⁶⁵ Yet the diversity of species continued to decline, even within protected areas. In-depth assessments revealed that survival rates depended on ecosystem preservation in bordering areas. To be effective, the Conservancy came to realize that it would need more multifaceted efforts focusing on issues such as economic development, pollution, and soil erosion. That broader strategy was a tough sell to some donors, who were wedded to the aesthetic value of wilderness preservation.¹⁶⁶ But a different approach was essential to achieving the organization’s biodiversity objectives.

Of course, in some contexts, objective measures of progress will be much harder to come by. It is, however, generally possible to identify some indicators or proxies.¹⁶⁷ In legal contexts, these might include the number and satisfaction of individuals affected, the assessment of experts, and the impact on laws, policies, community empowerment, and social ser-

164. Brown, *supra* note 127, at 160; see also WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & Co., *supra* note 156, at 14 (noting perceived incapacity of leanly staffed organizations to gather and act on performance information).

165. Sawhill & Williamson, *supra* note 140, at 100.

166. *Id.* at 101.

167. Brest, *supra* note 126, at 237, 243; Harvey & Mertz, *supra* note 134; see also WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & Co., *supra* note 156, at 18 (noting value of proxy information such as views of stakeholders).

vices. For complex problems, it often makes sense to pool resources and expertise through strategic alliances with other funders and nonprofit organizations.¹⁶⁸ Another option is spread betting—distributing support over a wide range of approaches and organizations, and then periodically revising priorities in light of which investments prove most productive.¹⁶⁹

The effectiveness of all of these strategies is likely to increase if organizations become more demanding in their evaluations and more willing to share information about what works and what does not. To be sure, those who invest significant amounts of time and money in impact litigation want to feel good about their efforts, and are understandably reluctant to spend additional resources to identify possible flaws in their efforts. That reluctance is particularly easy to rationalize in legal contexts, where organizations can generally point to at least some positive outcomes. Legal representation is, after all, itself a value. And what leader of a public interest organization or pro bono program wants to rain on the parade when it might jeopardize support for their work? But sometimes at least a light drizzle is essential to further progress. In addition, philanthropists need forums in which they can candidly share their experiences and prod each other to do better.

B. Lessons for Lawyers

For lawyers who seek social impact, strategic philanthropy holds several lessons. The first is the importance of clear goals and specific measures of progress. In essence, decision makers need to determine how they can use resources most effectively, given their distinctive concerns and capabilities. At a minimum, a strategic approach needs processes for:

- identifying objectives and establishing priorities among them;
- selecting projects that will best advance those objectives; and
- overseeing performance and evaluating how well objectives are being met.

The more substantial the investment, the more informed, inclusive, and transparent those processes should be. To develop the expertise and sustain the resource commitment necessary for major impact, organizations need to limit their substantive fields and focus on manageable goals.¹⁷⁰

168. James Austin, *Strategic Alliances*, STAN. SOC. INNOVATION REV., Summer 2003, at 50; see also BREST & HARVEY, *supra* note 119, at 224.

169. TELES, *supra* note 3, at 20; Austin, *supra* note 168, at 54.

170. Michael A. Bailin, *Requestioning, Reimagining, and Retooling Philanthropy*, 32 NONPROFIT & VOLUNTARY SECTOR Q. 635, 636 (2003) (describing the need for focus); see

A second lesson from strategic philanthropy is the importance of developing appropriate measures of long-term impact. An example comes from Gary Blasi's experience with a Los Angeles slumlord.¹⁷¹ In successive lawsuits against that building owner, a neighborhood legal aid office declared victory; it prevented evictions, obtained significant monetary judgments, and used the litigation to organize a tenants union. None of these cases, however, were able to force structural changes in the building that would have prevented future code violations and increased the supply of habitable housing. In retrospect, Blasi questions whether a different strategy might have been a better use of limited resources. But that question would never even have surfaced if, as is often the case, the organization tracked only short-term outcomes, not long-term results.

A third insight from strategic philanthropy involves the value of collaboration. Given the scale of problems they are typically addressing, public interest legal initiatives are up against what experts label "unsuitable odds."¹⁷² In these contexts, significant change generally depends on extensive consultation and strategic alliances. Even organizations that are looking for a distinctive niche will benefit from working with other players and stakeholders to identify the best opportunity. All of these groups will also profit from developing common metrics of evaluation and benchmarking results against those of comparable programs.¹⁷³

A final lesson concerns accountability. Given their relative insularity from market discipline and government regulation, public interest organizations and pro bono programs need structures for ensuring adequate feedback. In the long run, neither those who give nor those who receive legal and financial assistance are well-served by the common "don't ask, don't tell" approach concerning well-intentioned but ill-conceived efforts. In commenting on the Los Angeles slumlord case, Blasi noted that too often, legal aid and public interest lawyers go "for years feeling effective without ever actually examining the empirical facts to validate that feeling."¹⁷⁴ Organizations that want to maximize their social impact need pressure to assess their long-term impact and safe spaces to share their difficulties.

also *CTR. FOR EFFECTIVE PHILANTHROPY*, *supra* note 163, at 9-10 (noting that nearly all CEOs agreed on the importance of limiting project areas).

171. *See* Blasi, *supra* note 120.

172. Harvey & Mertz, *supra* note 134, at 2; *see also* Bailin, *supra* note 170, at 636 (noting the eventual recognition by Edna McConnell Clark Foundation leaders of the futility of trying to "reform huge, complex entrenched multibillion-dollar public systems with a staff of 25 people and around \$25 million a year in grants.").

173. WILLIAM & FLORA HEWLETT FOUND. & MCKINSEY & CO., *supra* note 156, at 43.

174. Blasi, *supra* note 120, at 70-71 (on file with authors).

1. *Pro Bono Contributions*

Lawyers' pro bono contributions have played a central and increasing role in public interest litigation. As noted earlier, part of the increase is due to the rising support by legal employers, the legal media, and the organized bar.¹⁷⁵ Another factor is the growing scale and complexity of social impact initiatives, and the inability of nonprofit organizations to keep pace without outside help. About half of leading public interest organizations rely extensively on pro bono collaboration, and another third report moderate collaboration.¹⁷⁶ Almost all of these organizations involve private lawyers in impact litigation, and partner with them in about half of their major cases.¹⁷⁷

a. *The Extent of Pro Bono Work*

How much unpaid effort lawyers devote to public interest cases is impossible to assess with any precision. Only seven states require reporting of pro bono work, and neither they, nor other published surveys provide much detail on the nature of contributions. The best available data come from a 2008 ABA study, which found that almost three-quarters of lawyers provided some pro bono assistance to persons of limited means or organizations serving them, for an average amount of forty-one hours per year.¹⁷⁸ About two-thirds of lawyers reported serving individuals rather than organizations, and only 7% of that aid went to pursuit of civil rights or liberties or other public rights.¹⁷⁹ Service to organizations included a wide range of groups, not just those targeted to public interest causes or individuals of limited means, and service encompassed a range of activities besides litigation assistance.¹⁸⁰

Although the portion of pro bono work that goes towards social impact work remains unclear, there is little dispute that more and better focused assistance is needed. Only a quarter of the lawyers in the ABA's study met

175. ABA surveys have found an increase in the number of lawyers who engage in pro bono work, as well as in their amount of service over the past five years. See ABA STANDING COMM. ON PRO BONO AND PUB. SERV., SUPPORTING JUSTICE II, A REPORT ON THE PRO BONO WORK OF AMERICA'S LAWYERS 21 (2009) [hereinafter ABA STANDING COMM.]. The *American Lawyer's* survey of the 200 most profitable firms also registers an increase.

176. Rhode, *Public Interest Law*, *supra* note 3, at 2070.

177. *Id.*

178. ABA STANDING COMM., *supra* note 175, at 3.

179. *Id.* at vii, 17.

180. *Id.* at 9, 17 (noting that service to organizations did not track the ABA Model Rule definition singling out organizations serving clients of limited means, and that 60% of lawyers believed that sitting on a board of a non-profit organization or providing legal training could qualify as pro bono work).

its aspirational norm of fifty hours of assistance to persons of limited means or to organizations that serve them.¹⁸¹ The percentage of lawyers providing any such assistance was disturbingly low in some sectors of the profession, such as corporate counsel (43%) and government (30%).¹⁸² In the *American Lawyer's* latest survey of the nation's 200 most profitable firms, only 40% of lawyers had contributed at least twenty hours a year.¹⁸³ A significant amount of what lawyers define as pro bono work includes bar activities, public education, and favors for friends, family, or coworkers.¹⁸⁴ However valuable, relatively little of this work is likely to qualify as strategic philanthropy; it is seldom part of a focused initiative to achieve social impact.

b. The Rationale for Greater Pro Bono Involvement

The failure of more attorneys to become involved in significant public interest initiatives represents a missed opportunity for both the profession and the public. Bar surveys find that lawyers' greatest source of dissatisfaction in practice is their lack of contribution to the social good.¹⁸⁵ For many attorneys, participation in impact work is a way to restore that connection, to feel that they are "making a difference," and to express the values that sent them to law school in the first instance.¹⁸⁶ Assistance to racial, ethnic or other disadvantaged groups can also be an important form of "giving back" and affirming identity.¹⁸⁷ There are also practical payoffs. Public interest litigation can bring recognition, contacts, trial experience,

181. *Id.* at 3. For the ABA's Model Rule on Pro Bono Service, see MODEL RULES OF PROF'L CONDUCT R. 6.1.

182. ABA STANDING COMM., *supra* note 175, at 10.

183. See Press, *supra* note 117; Nate Raymond, *A Silver Lining*, AM. LAW., July 2008, at 101.

184. The ABA's survey finds that a majority of referrals come from sources other than legal aid organizations, such as other attorneys (13%), family/friends (11%), coworkers/employers (7%) and court/judge (5%). ABA STANDING COMM., *supra* note 175, at 14. The survey finds that most lawyers also consider bar activities and speaking on legal topics pro bono. *Id.* at 9. For prior surveys on sources of pro bono work, see RHODE, *supra* note 5, at 19, 145-48.

185. AM. BAR ASS'N., ABA YOUNG LAWYERS DIVISION SURVEY, CAREER SATISFACTION 19 (2000).

186. RHODE, *supra* note 5, at 131-32.

187. See generally Robert Granfield, *The Meaning of Pro Bono: Institutional Variations in Professional Obligations Among Lawyers*, 41 LAW & SOC'Y REV. 113, 137 (2007); Robert Granfield & Thomas Koenig, *It's Hard to be a Human Being and a Lawyer: Young Attorneys and the Confrontation with the Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 496 (2003); David Wilkins, *Doing Well By Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers*, 41 HOUS. L. REV. 1 (2004).

and skill development that will ultimately yield career advantages.¹⁸⁸ Legal employers also stand to benefit in ways that vary somewhat across the practice settings described below.

For society generally, lawyers' involvement in impact litigation has played a central role in advancing public values. Pro bono assistance has helped protect fundamental rights, establish crucial principles, save individual lives, and safeguard the environment.¹⁸⁹ Finding more ways to attract private lawyers to this work and ensure the most cost-effective use of their assistance should be professional priorities.

c. Large Law Firms: Opportunities for Influence

The pro bono contributions of large law firms have increased substantially in both quantity and quality over the last decade. The average contributions of the top 100 law firms have more than doubled since the turn of the twenty-first century.¹⁹⁰ Among 135 large firms tracked by the Pro Bono Institute, contributions have increased 170% since 1995.¹⁹¹ Large firms have also become more strategic in managing their aid. About half of the nation's 200 most profitable firms have at least one full time pro bono lawyer or coordinator, up from about a dozen in 2000.¹⁹² These individuals bring a more professional focus to public service initiatives, and can channel efforts in ways that maximize social impact.

Underlying these trends is a growing recognition that effective pro bono programs serve institutional as well as societal interests. Particularly for junior attorneys, public interest litigation can offer training, trial experience, intellectual challenge, and responsibility far beyond what is available in their other work.¹⁹³ As corporate clients become increasingly unwilling to subsidize professional development opportunities for young associates, and firms become too highly leveraged to provide such opportunities to all

188. RHODE, *supra* note 5, at 131-32; Granfield, *supra* note 187, at 139; Esther F. Lardent, *Pro Bono in Uncertain Times: Learning from the Past/Looking to the Future*, PRO BONO WIRE, July 2008, at 2-3; Karen Lash, *Pitching Your Pro Bono Projects: Getting to 'Yes' with the 'Big Firm'*, 2 DEPAUL J. SOC. JUST. 3, 7-8 (2008).

189. For the work of public interest organizations that receive pro bono assistance, see Rhode, *Public Interest Law*, *supra* note 3, at 2040-41.

190. See Raymond, *supra* note 183.

191. Michael Moline, *In the Business of Doing Good: Pro Bono Projects Help Firms Define Their Identities*, NAT'L L.J., Jan. 5, 2007, at 1.

192. Daphne Eviatar, *Pro Bono Pros*, AM. LAW., July 2008, at 104; see also Moline, *supra* note 191, at 13 (describing improved managerial focus of firm programs); Emmett Berg, *Pro Bono Goes Full Time*, CAL. LAW., Dec. 2008 (describing full-time pro bono coordinator positions in California firms).

193. RHODE, *supra* note 5, at 30; Cummings, *The Politics of Pro Bono*, *supra* note 5, at 113; Granfield, *supra* note 187, at 138.

who need them, pro bono representation fills an important gap. Firm leaders consistently cite these professional benefits, along with recruitment and retention, as primary justifications for their public service initiatives.¹⁹⁴ Such work can also enhance the firms' reputation and visibility in the community, and improve their rankings in the *American Lawyer*, which rates the pro bono programs of the 200 most profitable firms based on the number of hours per lawyer and the percentage of lawyers who contribute more than twenty hours. A firm's pro bono rating also accounts for a third of its score in the competition for membership on the *American Lawyer*'s coveted "A-List" of the nation's top twenty firms. So too, a student-run organization, Building a Better Legal Profession, also has begun to rank law firms on their pro bono performance.¹⁹⁵

As firms' public service reputation becomes more visible, it also becomes more important to clients and potential recruits.¹⁹⁶ Despite recent slowdowns in hiring, there remains a "war for talent," and "many if not most of the lawyers these firms want to hire" expect public interest opportunities.¹⁹⁷ Moreover, in the current economic downturn, such opportunities have also become increasingly important as way stations for underemployed or furloughed attorneys. This, of course, makes pro bono programs easier to sell as a purely financial proposition. As one lawyer in an American Foundation study put it: "[l]aw firms do not support pro bono unless there is a business reason to do so. The bottom line on this question is the bottom line."¹⁹⁸ From this perspective, pro bono looks like a sound investment in law firm image and market position.¹⁹⁹ Another lawyer expressed the common view with uncommon candor: "We're not running a charity here. This is good business and essential business for large firms."²⁰⁰

194. See AM. BAR FOUND., NEW APPROACHES TO ACCESS TO LEGAL SERVICES: RESEARCH, PRACTICE AND POLICY 10 (2006), available at <http://www.americanbarfoundation.org/uploads/cms/documents/rmoserfund.pdf>; Brent Harris, Fulfilling the Promise of Law Firm Pro Bono (2008) (unpublished manuscript, on file with the author).

195. Building a Better Legal Profession, <http://www.betterlegalprofession.org/> (last visited Apr. 27, 2009).

196. See Eviatar, *supra* note 192, at 106 (quoting Ronald Tabak, pro bono coordinator for Skadden, Arps, Slate, Meagher & Flom, about the increasing number of external constituencies, "including potential recruits, who now care about how big or successful a pro bono program you have").

197. Daniels & Martin, *supra* note 88, at 154.

198. AM. BAR FOUND., *supra* note 194, at 6.

199. See Harris, *supra* note 194, at 29-30 (2008); see also Ben Hallman, *Starting at the Top*, AM. LAW., July 2007, at 95.

200. Daniels & Martin, *supra* note 88, at 153.

d. Challenges and Constraints

Yet one unsettling byproduct of the “business case” for public service is that, as with corporate giving, the public can sometimes fall by the wayside. Problems arise along two main dimensions: lack of clarity in priorities, and insufficient oversight and accountability concerning performance.

A threshold difficulty involves the multiple objectives of pro bono programs, which sometimes tug in different directions. Relatively small cases offering the greatest responsibility and experience for junior associates do not generally provide the greatest visibility for the firm or social impact for the community. And policies that maximize choice and satisfaction for individual attorneys may not serve other institutional priorities. Well-publicized difficulties have surfaced when pro bono attorneys have challenged policies on positional conflicts, or have wanted to litigate controversial cases in areas such as affirmative action, abortion, and gay/lesbian rights.²⁰¹

When asked about case selection, firm leaders often fall back on platitudes: as one put it, “I’d like to think [our choice of work] reflects values.”²⁰² But which values? There is obviously value in providing representation for unpopular positions and allowing lawyers to choose where to put their charitable efforts. There is also value in having firms focus resources in ways that are widely supported by their members and their communities, and that seek to maximize social impact. Under the latter approach, lawyers can always pursue different commitments on their own time.

There is, of course, no single appropriate resolution of these questions, but there are better and worse processes for deciding them. An important lesson from strategic philanthropy is that firm leadership needs to be clear about objectives, inclusive in the way it sets priorities, and well-informed about what work might best advance them. In effectively managed programs, multiple goals need not be mutually exclusive. Firms can offer a range of opportunities that accommodate different concerns. Programs that are strategic will also seek projects that are cost-effective, that build on distinctive capabilities, fill urgent needs, and hold capacity for systemic changes. The ABA’s Standards for Pro Bono Programs underscore the importance of assessing community needs and many firms have become increasingly proactive in doing so.²⁰³ So, for example, after surveying local

201. For protests regarding positional conflicts, see *supra* text accompanying note 94; for controversial cases, see Vivia Chen, *Rise of the Right*, AM. LAW., July 2007, at 114.

202. *Id.*

203. See ABA Standing Comm. on Pro Bono and Public Serv., R. 2.1 (1996).

service providers, one Philadelphia firm decided to assist veterans and the elderly; a Los Angeles firm focused on abused and neglected children; and a San Francisco Bay area firm concentrated on guardianship proceedings.²⁰⁴ Such approaches can be especially cost-effective because the firm's investment in training and contacts pays off in multiple cases.

Maximizing social impact, however, is more challenging and often requires collaboration with other groups that have relevant expertise and resources. A model of such joint efforts is a coalition among the Los Angeles City Attorney's Office, the Legal Aid Foundation of Los Angeles, the Los Angeles Community Action Network, and several Los Angeles firms to address housing issues in the city's Skid Row. Each member of the coalition brings distinctive strengths: law firms offer resources and litigation expertise; nonprofit organizations have knowledge of substantive law and community needs; and city prosecutors have special investigative capacities and the leverage of criminal and civil penalties.²⁰⁵ Yet all too often, the complexities and compromises necessary in collaboration, together with the desire for some distinctive signature program, prevent the partnerships that might maximize social impact.

A second challenge for pro bono programs is oversight. Here again, ABA Standards for Pro Bono Programs, as well as frameworks developed for strategic philanthropy, provide appropriate criteria for assessing effectiveness. Firms need systematic information about the quality of services, the outcomes achieved, the satisfaction of clients and pro bono partners, and the long-term impact of assistance. Such oversight is too often noticeable for its absence.²⁰⁶ One result is that almost half of recently surveyed public interest organizations, reported extensive or moderate problems in the quality of pro bono assistance they received.²⁰⁷ Some volunteers lack the relevant skill sets or supervision.²⁰⁸ Others lack the time. As public interest leaders noted, practitioners may "want to do pro bono work in theory but in practice, don't [always] want to make the commitment."²⁰⁹ Some firms look for "training and opportunities for bored associates but don't want to give them the time . . . when other paid work comes up."²¹⁰

204. Michael Aneiro, *Room to Improve*, AM. LAW., July 2006, at 102; Eviatar, *supra* note 192, at 106; Harris, *supra* note 194, at 27, 45.

205. For this example, I am indebted to presentations made at a conference on the Future of Pro Bono at UCLA Law School, Oct. 4, 2008.

206. *See supra* text accompanying note 141.

207. *See* Rhode, *Public Interest Law*, *supra* note 3, at 2071.

208. *Id.* at 2071-72 (problems range from lack of knowledge of substantive law and procedure to an inability to take a deposition).

209. *Id.* at 2072 (quoting Richard Rothschild, Western Center on Law & Poverty).

210. *Id.* (quoting Steven Bright, Southern Center for Human Rights).

At the root of the problem is accountability. As in other philanthropic contexts where the need for help vastly exceeds the supply, those who contribute assistance often face inadequate pressure to worry about recipients' satisfaction or other measures of cost-effectiveness.²¹¹ The problem is exacerbated by media ranking structures that focus only on the quantity, and not quality, of pro bono service. Indeed, as some program coordinators note, current frameworks penalize efficiency; a supervising partner who prevents pointless time-consuming work makes the firm's hourly "statistics in the *American Lawyer* look worse."²¹²

This is not to suggest that checks on quality are entirely missing. Well-established public interest organizations, which generally control access to the most interesting high-visibility cases, can afford to be selective in their choice of outside counsel. Many receive more requests for pro bono work than they can accommodate, and choose firms that have demonstrated a commitment to effective representation.²¹³ So too, most lawyers have internalized an ethic of client service and care about their reputation among colleagues and the local community. But even the best intentioned attorneys may operate with unduly flattering self-evaluations when more disinterested forms of oversight are absent.

The same is true of social impact. One firm leader described a common state with uncommon candor: "we cannot opine as to which of our pro bono projects most effectively contributes to the community."²¹⁴ And why should they? Who wants to spoil the "helper's high" that comes from volunteer work, or the favorable write ups in firm publications and press releases with annoying qualifications concerning long-term impact?²¹⁵

Yet the same societal concerns that prompt law firms to take on significant public interest work should also prompt efforts to assess its effectiveness. In the absence of formal structures of accountability, firms need to create their own. The Association for Pro Bono Counsel can push in that direction. Just as the Center for Effective Philanthropy has encouraged

211. See FRUMKIN, *supra* note 118, at 334; Judith Kaye, *The Legal Community's Response to 9/11: Public Service in a Time of Crisis; A Report and Retrospective on the Legal Community's Response to the Events of September 11, 2001*, 31 FORDHAM URB. L.J. 831, 938 (2004); Deborah L. Rhode, *Pro Bono in Times of Crisis, Looking Back by Looking Forward*, 31 FORDHAM URB. L.J. 1011, 1018 (2004).

212. Harris, *supra* note 194, at 49 (quoting pro bono coordinator of a New York firm).

213. See Rhode, *Public Interest Law*, *supra* note 3, at 2070.

214. Harris, *supra* note 194, at 24-25 (quoting Paul Saunders, Cravath, Swaine & Moore).

215. For discussion of the helper's high, a psychological state triggered by biological reactions, see ALAN LUKS WITH PEGGY PAYNE, *THE HEALING POWER OF DOING GOOD*, at xi-xii, 17-18, 45-54, 60 (2d ed. 2001).

foundations to pay attention to evaluations from its grantees, the Association could pressure law firms to seek assessments from clients and community partners.²¹⁶ Media ranking structures could also include information about oversight structures, and more forums could be available for pro bono coordinators to share insights from failures as well as successes. A useful model is the Hewlett Foundation's annual practice of having program officers identify their worst mistake and what they learned from it.²¹⁷ Only through more systematic evaluation processes can law firms take full advantage of their charitable capacities.

2. *Public Interest Organizations*

Most of the key lessons from research on social change and strategic philanthropy are reflected in the evolution of public interest legal organizations. Over the past three decades, these groups have grown dramatically in size and scope, largely in response to a corresponding growth in the scale and complexity of problems they are addressing.²¹⁸ Groups that started with a few idealists and several well timed lawsuits have become multi-million dollar organizations with multifaceted agendas. As they have evolved, public interest groups have become increasingly strategic in their approaches and mindful of the capacities and constraints of litigation.

a. *The Strategic Value of Litigation*

As Part I noted, a long-standing criticism of public interest legal organizations is that they have relied too heavily on lawsuits at the expense of broader social and political strategies.²¹⁹ Many leading organizations began with a litigation focus that quickly proved inadequate to the task. Environmental law is a case in point. In organizations like the Sierra Club, the legal staff's initial philosophy was "Just say no. Shut it down, clean it up."²²⁰ So too, the Natural Resources Defense Council first defined its

216. MATHEW BISHOP & MICHAEL GREEN, PHILANTHROCAPITALISM 169 (2008).

217. *Id.* at 170.

218. See Rhode, *Public Interest Law*, *supra* note 3, at 2032-35; Nielsen & Albiston, *supra* note 5, at 1600-12.

219. See LÓPEZ, *supra* note 19; Lynn Jones, *The Haves Come out Ahead: How Cause Lawyers Frame the Legal System For Minorities*, in CAUSE LAWYERS AND SOCIAL MOVEMENTS, *supra* note 12, at 182, 183.

220. Rhode, *Public Interest Law*, *supra* note 3, at 2035 (quoting Carl Pope, President, Sierra Club).

mission as “identify polluters and make them stop.”²²¹ And for Earth Justice, litigation victories were seen as “ends in themselves.”²²²

Yet as soon became apparent, judicial decrees without a political base are vulnerable to chronic non-compliance, public backlash, statutory reversal, or judicial retrenchment.²²³ In many contexts, courts lack the necessary expertise, legitimacy, and enforcement resources to secure lasting change.²²⁴ And in other contexts involving fundamental rights, public interest organizations lack the resources to represent more than a small fraction of deserving claims. “Bailing with a thimble” is how many leaders define the challenge.²²⁵

Further limitations of litigation arise from opportunity constraints underscored by social movement theory, particularly the growing conservatism of the federal courts and the difficulties of obtaining major victories in judicial forums. Over the past two decades, doctrine has “gone south” on many issues central to public interest work such as standing, mootness, civil rights, attorneys’ fees, civil liberties, welfare, prison reform, consumer protection and capital defense.²²⁶ At the same time, clear villains and victims are harder to come by. Defendants are more sophisticated and discrimination is more subtle. Litigation has become more fact-sensitive, the facts are less clear cut, and judicial solutions are more elusive and expensive. Richard Rothschild of the Western Center on Law and Poverty puts it bluntly: “There are fewer easy cases.”²²⁷

Leaders of contemporary public interest organizations generally acknowledge these limitations. It is, they recognize, impossible to “create policy,” “change attitudes,” or “build a movement” solely through litiga-

221. *Id.* at 2034 (quoting Frances Beinecke, President, NRDC).

222. *Id.* at 2046 (quoting Buck Parker, Earth Justice).

223. Kevin R. Den Dulk, *In Legal Culture But Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, in *CAUSE LAWYERS AND SOCIAL MOVEMENTS*, *supra* note 12, at 199-200; *see also* SCHEINGOLD, *supra* note 19, at xxiv (1994); sources cited in Southworth, *Lawyers and the “Myth of Rights”*, *supra* note 38. For early versions of this concern, see Gary Bellow quoted in Comment, *The New Public Interest Lawyers*, 79 *YALE L.J.* 1069, 1077 (1977). *See also* Steve Bachmann, *Law, Lawyers, and Social Change*, 13 *N.Y.U. REV. L. & SOC. CHANGE* 1, 4 (1984); Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 *STAN. L. REV.* 207, 243 (1976).

224. *See generally* ROSENBERG, *supra* note 18; ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* (2003); Kenneth Lee, *Where Legal Activists Come from*, 4 *AM. ENTERPRISE* 50 (2001).

225. Rhode, *Public Interest Law*, *supra* note 3, at 2042 (quoting Gen Fujioka, Director, Asian Law Caucus).

226. *Id.* at 2037.

227. *Id.* at 2036 (quoting Rothschild).

tion.²²⁸ Rather, as Ralph Nader once summed it up: “You have to deal with the adversary on all the fronts on which your adversary deals with you.”²²⁹

Yet courts also remain a necessary, if by no means a sufficient, forum for public interest work. As social movement theory suggests, and experience confirms, other more political approaches often require a level of financial and popular support that many groups find difficult to marshal.²³⁰ Courts may not always be the most effective dispute resolution forums, but they are often the most accessible; they are open as of right and can force more economically or politically powerful parties to the bargaining table.²³¹ As the preceding research on social movements makes clear, litigation can build public awareness, help frame problems as injustices, and reinforce a sense of collective identity, all of which can build a political base for reform.²³²

b. Strategic Focus, Collaboration, and Evaluation

In describing their most effective approaches, public interest leaders echo other themes from social movement theory and strategic philanthropy concerning the importance of collaboration and communication.²³³ Some groups’ greatest successes come from partnering with community organizations and helping them become more effective advocates. “Victory” in this context is often legal representation that leaves a client organization “stronger, and in a position to monitor and enforce a favorable decision.”²³⁴

228. *Id.* at 2043 (quoting Susan Gates, Children’s Defense Fund); *Id.* (quoting Rothenberg, N.Y. Lawyers for the Public Interest); *Id.* (quoting Gen Fujoka, Director, Asian Law Caucus).

229. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 90 (1989).

230. For discussion of lobbying restrictions and other institutional constraints that push lawyers to litigate, see Southworth, *Lawyers and the “Myth of Rights”*, *supra* note 38, at 508.

231. Sabel & Simon, *supra* note 30.

232. For the importance of framing, see JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 171 (2005); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOC. 611, 615-16 (2000); see also Bend Simon, *Individuals, Groups and Social Change: On the Relationship Between Individual and Collective Self Interpretation and Collective Action*, in INTERGROUP COGNITION AND INTERGROUP BEHAVIOR 257, 260-61 (Constantine Sedikides et al. eds., 1998).

233. Rhode, *Public Interest Law*, *supra* note 3, at 2048; see also Madeline Janis-Aparicio & Roxana Tynan, *Power in Numbers: Community Benefits Agreements and the Power of Coalition Building*, SHELTERFORCE ONLINE, Nov.–Dec. 2005, <http://www.columbus.nhi.org/online/issues/144/powerinnnumbers.html>.

234. Rhode, *Public Interest Law*, *supra* note 3, at 2048 (quoting Barbara Arnwine, Lawyers’ Committee for Civil Rights Under Law).

Public interest organizations, like strategic philanthropists, are sometimes instrumental in founding these groups or training their members.²³⁵ Other coalitions involve the kind of partnerships among non-profits and corporations that research on philanthropy and social movements has advocated.²³⁶ Public interest organizations are also devoting more attention to public education and are becoming more skilled in providing it. Putting a “human face on social problems” and showcasing “real life stories” of injustice are critical.²³⁷ Many organizations are also increasingly effective in using internet technologies and blogs to mobilize support.²³⁸

Yet while public interest organizations have clearly grown more strategic in their focus, many lack the formal and inclusive processes of decision-making and evaluation that research on strategic philanthropy recommends. For example, in establishing priorities, only about a quarter of leading public interest organization make significant efforts to include stakeholders such as a clients or community groups.²³⁹ Although the criteria that organizations use to select cases are typically consistent with a strategic framework, few organizations operate with explicitly articulated theories of change or specific measures of performance. Rather, most rely on staff assessments of what needs are most urgent, where there are gaps in coverage, where they can bring value added, and where they see the greatest likelihood of success.²⁴⁰ Some leaders express skepticism or frustration concerning funders’ insistence on more “measurable outcomes.”²⁴¹ Yet none of those surveyed have much experience with systematic assessment frameworks or principled objections to their use.

c. Challenges and Constraints

The central challenge for contemporary public interest organizations, as their leaders generally perceive it, involves not formulating strategies, but developing the funding and policy leverage to implement them. Virtually all organizations report major difficulties in meeting their financial needs.

235. *Id.*

236. *Id.* at 2048, 2064 -65.

237. *Id.* at 2049 (quoting Susan Gates, Children’s Defense Fund; Kate Kendell, National Center for Lesbian Rights; Francis Beneicke, NRDC).

238. *Id.* (citing interviews with Tod Gaziano, Heritage Foundation; James Ross, Human Rights Watch; Laurence Paradise, Disability Rights Advocates; Fred Krupp, Environmental Defense Fund; Beneicke, NRDC; Roger Clegg, Center for Equal Opportunity).

239. *Id.* at 2050-51.

240. *Id.* at 2053.

241. *Id.* at 2056.

Some confront equally daunting obstacles in mobilizing the other sources of influence that social movement theory identifies as critical.

The challenges vary across substantive areas. Environmental organizations have what seems to be the most favorable opportunity structure in terms of public support and access to funding. But they also confront problems of massive global dimensions and opponents with substantial resources and political leverage.²⁴² Civil rights and women's rights groups bump up against cultural complacency—the perception that “we've solved that.”²⁴³ Children may seem more sympathetic than other groups but they have neither the votes nor money necessary for political leverage.²⁴⁴ Technology organizations have difficulty framing issues in ways that are compelling to the public; they lack pictures of “belching smokestacks or kids with AIDS,” and “peoples' eyes glaze over” when the discussion turns technical, even if serious privacy and free speech concerns are involved.²⁴⁵ Still greater challenges arise with groups that Americans find easy to demonize, such as prisoners, death-row defendants, and undocumented immigrants.²⁴⁶

Further difficulties arise from the growing competition for resources and recognition. As more public interest organizations enter the arena, they face increasing pressure to distinguish themselves from other groups. The result, as leaders often acknowledge, is that too much work occurs in isolation, and too many coalitions are sabotaged by infighting over credit.²⁴⁷ Problems are compounded by lawyers' lack of training in running nonprofit organizations. The skills required for effective lawyering are not the same as those required for effective management and marketing. “Why didn't I go to business school?,” was one director's question.²⁴⁸

Most of these challenges are by no means insurmountable. Law schools, continuing education programs, bar organizations, and non-profit groups could all do more to equip public interest leaders with managerial and strategic evaluation skills. Funders could provide more support for assessments and coalition work. More forums could be made available for can-

242. *Id.* at 2042-43 (citing interviews with Beneicke, NRDC, and Krupp, Environmental Defense Fund).

243. *Id.* at 2045 (quoting Irma Herrera, Equal Rights Advocates).

244. *Id.* at 2044 (citing interviews with Susan Gates, Children's Defense Fund; John O'Toole, National Center for Youth Law).

245. *Id.* at 2045 (quoting Jim Dempsey, Center for Democracy & Technology, and Shari Steele, Electronic Freedom Frontier Foundation).

246. *Id.*

247. *Id.* at 2045, 2068-69.

248. *Id.* at 2046 (quoting Cohen, Immigrant Legal Resource Center).

did dialogue about lessons learned from unsuccessful strategies or inadequate assessment.

Greater effort could also center on expanding resources, and on building collaborative funding initiatives. One notable failure of current organizational structures is their inability to realize the full potential of pro bono support. Although virtually all of the leading public interest organizations report that they are understaffed and overextended, only about a quarter believe that they could benefit from increased volunteers.²⁴⁹ Part of the reason involves the quality concerns discussed below. But much of the problem lies in inadequate resources to identify projects, and provide supervision and backup services. Private lawyers, bar associations, and public interest organizations all need to work together to strengthen the financial foundations for public service.

CONCLUSION

In *The Last Lecture*, Randy Pautsch noted that “[e]xperience is what you get when you didn’t get what you wanted.”²⁵⁰ If public interest litigation has not always delivered all that we desire, it has surely provided no lack of experience. Our challenge now is to integrate these lessons from practice with insights from allied disciplines. Taken together, they remind us of the need to coordinate litigation with broader mobilizing efforts, to think strategically about effectiveness, and to create adequate systems of evaluation and accountability. These are no small tasks, and we are grateful for occasions like this symposium to reflect more deeply about the capacities and constraints of law in pursuit of social justice.

249. *Id.* at 2072.

250. RANDY PAUTSCH, *THE LAST LECTURE* 148 (2008).