

# PUBLIC INTEREST LAW AND THE FELT NECESSITIES OF THE TIME

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The recent emergence of the practice of public interest law has provided a fertile field for discussion among members of the legal community. Lavishly praised in some quarters as an important and desperately needed new dimension for our legal system, it is disparaged in others as an attempt to carry the practice of law beyond its proper scope. The advent of this new form of practice should be welcomed as a development which not only fits within the proper boundaries of the legal system, but which is indeed crucial if the law is to be restored to its function as a catalyst for change rather than a bulwark of the status quo.

The history of our legal system has been largely one of change. In order to maintain legitimacy in the eyes of those whom it has sought to rule, the common law has embodied the flexibility to accommodate the dynamics of social change. Mr. Justice Holmes emphasized this adaptability when he wrote, "The life of the law has not been logic: it has been experience. The felt necessities of the time . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed."<sup>1</sup>

It is in the context of flexibility that the practice of public interest law becomes an important new milestone in the development of our legal system. It represents the long overdue response of the legal system to the "felt necessity" of affording legal remedies to all members of society, rather than only to those who could afford legal services.

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1. O. HOLMES, *THE COMMON LAW* 1 (1881).

Thus, it is the professional response of a growing number of lawyers to the unsolved problems and unresponsive institutions which pervade our society, aptly characterized by John W. Gardner as 19th century institutions staffed by 20th century minds grappling with 21st century problems. The goal of public interest law, then, is to smooth out the disjunction which has emerged between the diverse problems in society and the institutions established to deal with them by bringing the benefits of effective legal representation to those who have previously been denied those benefits.

As government has grown, public policy-making institutions have become increasingly remote from the problems and interest of the ordinary citizen. These large government institutions now face a crisis of legitimacy, born of the skepticism of those whose vital interests they have short-changed. All too often, consumers, the poor, and those concerned with the quality of life have consistently seen their interests ignored by a government machinery that too frequently caters to the status quo desires of special interest groups.

In some measure this imbalance in treatment is caused by an imbalance in the representation of these competing interest before government administrative agencies. It is not difficult to understand why this is so. Commercial interests, financially able to retain aggressive and competent legal counsel, have been highly successful in influencing governmental decisions and policies. They have capitalized on the fact that understaffed administrative agencies, confronted with heavy workloads and complex issues, have become increasingly dependent on private industry for the vital data and information required to enable them to make public policy decisions.<sup>2</sup>

In the past, citizen groups have not only lacked the resources to advocate the public interest in government forums, but the juggernaut momentum of our industrial system has usually foreclosed adequate consideration of long-term values and individual justice. A dramatic case in point is the environmental degradation of the past 25 years. In the main, it occurred because crucial decisions were made by compartmentalized minds and institutions: life values were steadily sacrificed and quality of life considerations were ignored because private companies and government agencies were not forced to consider the long-term consequences of their decisions.

Public interest advocacy can take many forms, from demanding that statutory environmental protection guidelines be adhered to if an oil pipeline, freeway, Corps of Engineers project or SST is proposed, to

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2. See generally Goldman, *Administrative Delay and Judicial Relief*, 66 MICH. L. REV. 1423 (1968) for an in-depth study of the various problems faced by administrative agencies and the delays caused thereby.

ensuring that auto safety statutes, equal employment laws, consumer protection laws, and pesticide control regulations are enforced.<sup>3</sup> By helping to make our legal system a life-protecting, egalitarian instrument, public interest advocates add lustre to the law. By representing those interests which have previously gone unrepresented, such lawyers may truly be said to be citizen attorneys-general who use the courtroom to protect the future and broaden the concept of democracy.

Nevertheless, the advent of public interest advocacy has not been uniformly welcomed by the bar. Its critics decry many of the activities of public interest lawyers as "frivolous" and "unnecessary burdens" on the already crowded dockets of the courts and administrative agencies.<sup>4</sup> According to these traditionalists, social change should come only through the political process. They regard any attempt to utilize the judicial process to effectuate such change as an ill-advised subversion of the legal system and prefer to let the courts and administrative agencies tend to their "normal business."

These criticisms of the activities of public interest lawyers are unfounded for two reasons. First, a great deal of the energy of public interest lawyers is devoted not to so-called political endeavors, but to efforts to compel the various agencies of government to enforce existing laws.<sup>5</sup> Indeed, much of this work is directed toward the effective implementation of presently existing legislative mandates. In the environmental area, for example, tremendous effort has been expended to ensure the compliance of government and industry with the guidelines set forth by the National Environmental Policy Act,<sup>6</sup> which requires that environmental impacts be evaluated as decisions are made on future public projects and ongoing regulatory programs.

More important, however, criticizing public interest practice as "political" ignores the sweeping changes that have occurred in the role of the law and the responsibilities of its practitioners. Twenty-five years ago the practice of law was largely confined to advising private clients and representing them in litigation. Today the class action has come of age, however, and it is bringing new meaning and balance to the concept of law itself. Nowadays, the "client" of some lawyers is

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3. For the various ways public interest lawyers can effectuate responsible social change, see Note, *The New Public Interest Lawyers*, 79 YALE L.J. 1069 (1970).

4. Many attorneys who criticize the work of public interest advocates may have been conditioned by the traditional teaching methods of law schools, in which "courses dealt with collapsible corporations, but the cupboard was bare for any student interested in collapsing tenements. Creditors' rights were studied deeply; debtors' remedies were passed by shallowly." Nader, *Law Schools and Law Firms*, 54 MINN. L. REV. 493, 495 (1970).

5. Environmental lawyers have accomplished a great deal before administrative agencies. See Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

6. 42 U.S.C. §§ 4321 *et seq.* (1970).

the whole community, the health and welfare of future generations, the legal rights of unrepresented segments of citizens, or values important to the consuming public.

By enlarging the scope of *pro bono* advocacy, public interest law is an innovation of great promise. It brings a missing balance to the legal process, for it ensures that public values will be weighed alongside private interests, thus broadening the concept of equal justice for all. In this sense, public interest law benefits not only its immediate clients, but all of society as well.

In light of the need to restore this balance, law schools, bar associations, judges and government administrators should encourage the development of public interest law. In an age of increasing social and civic complexity, the law must be an integral part of the process of social change. Otherwise, it will become a bulwark of the status quo and its institutions will be incapable of responding to the "felt necessities of the time." Should this occur, the law will wither as a central influence in our national life and society itself will surely suffer.