BEYOND ENTHUSIASM AND COMMITMENT

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The image:

> A large reception office, beige carpet, xerox machine, IBM electric typewriters, a tasteful peace poster on one wall, a bright Picasso on the other. Activity, noise, movement—phones ringing, the hum of the typewriters; a young man, sleeves up, collar loose, looking over a secretary's desk, dictating a hurried memo. In the inner offices, talking, writing, reading, stretching, the "Experts": lawyers, sociologists, economists, political scientists, ecologists, planners. An efficient, organized and highly competent team. The goal: The "public interest."

The image excites—the sense of commitment, action, progress—but it also disturbs. While others in this symposium will focus on the excitement, here let us ask why the image is also disturbing.

The basic goal of the public interest law movement is to assure adequate representation of currently unrepresented or underrepresented interests and peoples. Democratic theory and the adversary system require that all be heard. All are not. Thus, the large "public interest" umbrella encompasses such diverse interests as racial equality, consumer protection, poverty and ecology.

While agreeing totally that a vast amount of legal talent must be shifted to the unrepresented, this article questions whether the public interest firm, as presently conceived, can accomplish this goal. First, the rhetoric of the movement, its seizure of the coveted mantle of "public interest," may in fact reduce the net pool of legal manpower available to the unrepresented. Such rhetoric alienates the private bar whose support and involvement is needed by the movement. Perhaps a greater danger with such rhetoric, however, is that it will be believed. When lawyers proclaim that they are the protectors of blacks, of the poor, and

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of the environment, the rest of the bar might conclude that these matters are no longer their concern. The result, therefore, would be a reduction of the number of lawyers involved in public interest work. Second, the public interest movement has generally failed to distinguish between unrepresented interests and peoples in terms of their relative need for legal manpower. It will be asserted that there is often adversity between those interests currently lumped together under the public interest label (racism, poverty, ecology) and that lawyers, because of the unique role of the law, should be concerned more with some than with others.

In addition to its rhetoric and its failure to focus—both of which are counter-productive to the goal of increased representation of the unrepresented—there are at least two other disturbing aspects of the public interest law movement. First, although the movement is in essence an attempt to make the adversary system more representative of all interests, its politicalization of the practice of law—the assertion that lawyers represent "interests" rather than people—may undermine the keystone of that system: the public's confidence, already shakey, that the law will protect the individual even if he is unpopular. Finally, and most fundamentally, there is the problem of the attorney-client relationship. Given the vast numbers of unrepresented interests and peoples, the public interest practitioner, to increase his effectiveness, attempts to assert generalized interests rather than specific interests; to view clients as representatives of large nebulous classes (blacks, the poor, consumers, ecologists) rather than as individuals. The attorney's role consequently shifts from that of advocate to that of planner. This is regrettable. First, there is the problem of the accountability of these new planners. Second, there is the notion that our major problems cannot be solved by planners and experts; that they can be solved only by returning decision making to the individual. That planning is the cure-all is an extremely dangerous trap for lawyers. Only lawyers are capable of protecting the rights of the individual against those who would plan for his happiness.

As we begin our tour of a theoretical public interest firm, let us pause and consider the extent of these unrepresented interests. In the poverty field alone, they are vast. For example, the Pima County Legal Aid Society employs nine full-time staff attorneys—there are approximately 300 members of that county's bar association. Conservatively estimating that 20 percent[1] of that county's residents are eligible for legal aid, we find 3 percent of the attorneys representing 20 percent of the people; instead of nine attorneys working for legal aid, there should be 60.[2] Obviously, the 3 percent, no matter how competent or dedicated,

1. Interview with Delane C. Carpenter, Executive Director, Legal Aid Society of the Pima County Bar Association, in Tucson, Arizona, March 17, 1972.

2. Fault can be found with this analysis. Some poor, for example, are represented by the remaining 97 percent of the attorneys either on contingent fee

cannot assure the poor of Pima County that they will not be illegally evicted from their homes, unlawfully discriminated against at their jobs, or have their belongings improperly taken from them.

The solution, and it is that advocated by the public interest movement, is to have more attorneys represent the poor and, similarly, blacks, consumers and ecologists. Given the vast numbers of unrepresented individuals and the magnitude of their interests (racial equality, consumer protection, poverty and ecology), the public interest movement simply cannot succeed by the infusion of small bands of dedicated attorneys.[3] What is needed is the active support and involvement of the private bar.[4]

Viewed from the perspective of allocation, what of the sign on the door, "Public Interest Law Firm"? It tends to reduce the net pool of legal help available. The assertion, represented both by the sign and much of the rhetoric of the movement, that there are two kinds of practitioners—public interest practitioners ("good guys") and other practitioners ("bad guys")—is bad politics. It undercuts the goal of representation of the unrepresented by alienating the "bad guys" so that they will not support, help or even possibly become "good guys." No one likes the black hat and this may explain much of the hostility that the private bar harbors for the public interest movement.[5] The assertion,

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arrangements or through the Public Defender's Office in criminal matters. Additionally, some attorneys in private practice do free work. See note 4 *infra* for a description of a program in which private attorneys work in a poverty store front. On the other hand, it may be that the poor have more legal problems than do others. They are more often victimized in the market place and more often in contact with those governmental agencies which tend toward the arbitrary.

3. Since their funding must come from the government, either by direct subsidy or by tax exemption, the support of the bar is needed to protect the small bands of public interest lawyers from political attack. This is shown by the experience of the O.E.O. Legal Services Program. When the government funded programs started suing governmental agencies on behalf of their clients, the response of many was predictable—rather than judging the legitimacy of the complaint, just eliminate the trouble-maker. The organized bar was instrumental in defeating these efforts. *See* Hannon, *The Murphy Amendments and the Response of the Bar—An Accurate Test of Political Strength,* 28 LEG. AID BRIEF. 163 (1970).

4. As to the need of involving private practitioners in public interest law and the unique contribution they can make, see Cahn & Cahn, *Power to the People or to the Profession?—The Public Interest in Public Interest Law,* 79 YALE L.J. 1005, 1031-37 (1970).

Many private practitioners are anxious to involve themselves in public interest law. The major impediment to the solo practitioner's or small firm's participation is the lack of an effective mechanism that limits the attorney's commitment so to assure that he will not be flooded with free work. An attorney is not like a physician who can "give" a couple of hours a week in a free clinic, knowing that that will be the end of it. Each time an attorney sees a client, there is no way of predicting how much time his case will require. The Chicano Law Students Association at the University of Arizona Law School has started a program which deals with this problem. Their free legal clinic is manned by volunteer Tucson attorneys, who agree to spend seven hours a month on clinic business—two hours manning the Clinic, five hours following through on the cases they took during the clinic hours. Under an agreement with Pima County Legal Aid, cases requiring more work than pledged are referred to a staff attorney of Legal Aid.

5. Those who oppose the public interest law movement should ask them-

however, has a greater danger: it may make the "bad guys" even worse by allowing them an easy way out of their professional responsibilities. One of the basic ideals of the legal profession is that of public service. While the very need for the public interest firm stems from the failure of the bar to conform to that ideal, the public interest firm may end in killing it. For example, the mere existence of legal aid has allowed many attorneys who previously did free work to now refer that work to legal aid and, with a clear conscience, focus on paying clients. A more basic example is that of prison reform. It must shame the private bar that public interest firms have been created to deal with the repugnant conditions of prisons. While knowing of the conditions, the bar itself did virtually nothing about them. It is ironic that many in the private bar condemn public interest firms by raising the ideal of the attorney-client relationship and by asserting that lawyers should represent people rather than causes. If this is to be the criteria, how does the bar fare? Has the private bar represented people? Clearly not in the area of criminal justice—there the bar has represented only facets of the client's problems. The criminal defendant does not have a "bail problem" or a "plea problem"; he has the problem of surviving the criminal justice system. Yet lawyers routinely part company with their clients at the prison door—what happens inside is "someone else's" problem. Other examples could be given—the divorce lawyer who shrugs when told that the police cannot protect his client from physical assaults by her husband and the trial attorney who, while waiting for his case to be called, studiously examines his shoes while the magistrate runs rampant over the rights of an unrepresented defendant.

The danger with the assertion that there are two kinds of legal practice—public interest and private interest—is that the public interest law firm may become the institutionalized conscience of the bar. For the traditional practitioner, justice may become, even more than it is today, "someone else's" problem.

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selves just why they do so. Upon analysis, I believe, most objections disappear or are greatly weakened. Some may object that the goals sought by public interest firms are essentially political and hence not the proper subject of judicial redress. When one realizes that all judicial decisionmaking is ultimately based on political premises, this objection disappears. Public interest firms are simply asserting new political premises. *See* note 6, *infra.* Others may object to the active stance of public interest firms such as their greater willingness to seek cases, to attack traditional standing requirements and, generally, to force the courts into more active roles. This active stance is, however, inevitable in a society in which the rate of change is continually quickening and the time lag between problem and crisis is continually shortening. The job of lawyers and courts is to resolve conflict: they can no longer afford the luxury of passivity. *See* text accompanying note 11 *infra.* A third objection may stem from disagreement with the substantive claims asserted by public interest firms. If this is the objection, members of a profession committed to the right of all to be heard cannot oppose the mere existence of the public interest firm but could only oppose its substantive arguments in court. *Cf.* note 3 *supra.* A final objection is that of the different nature of the attorney-client relationship in public interest law firms. As the text will indicate, I believe that this objection has merit.

Further, the sign on the door, "Public Interest Law Firm," clouds the basic issues and hence prevents the movement from allocating help on a "greatest need" basis. Loggers, gleefully stripping the forest, are working for a public interest: cheaper operating costs means cheaper lumber, means cheaper houses. Under traditional economic theory (the public good being that which the public is willing to pay for) the loggers may have a stronger claim to the "public interest" than do the ecologists: people are clearly willing to pay for their product.

Quite simply, the public interest law movement is the assertion of special interests which are currently slighted or ignored by decision makers in defining the "public interest."[6] This elemental proposition is worth noting. Recognition that public interest law firms are really asserting special interests underscores the fact that there will be conflicts between public interest firms. The clearest example is the conflict between ecology firms and poverty firms. Insistence on strict conservation measures will raise the cost of low cost housing; curtailment of pollution causing power generation will mean that many poor families will go without heat.

As noted by Jean and Edgar Cahn,[7] there is a more subtle competition between various public interests. The basic thrust of the public interest movement is to represent people who currently do not have legal representatives. Given the fact that legal manpower is a scarce commodity, it should be allocated to those interests which have least chance of success without it. As the politically powerful—the upper and middle classes—cannot escape breathing smog and drinking impure water, the ecology movement can be expected to achieve its goal (if it is achievable at all) politically, without massive legal help. Indeed, the executive and

6. It will be objected that these others interests—interests in the quality of the environment, interests in the equality of men—are essentially political and hence ones which the courts cannot properly handle. This can be best answered by the simple recognition that all judicial and legal decisions are based on political interests as broadly understood. Take, for example, the classic case of a man leaving his watch with a jeweler for repair. The jeweler sells it. Between the owner and the purchaser, who prevails? The decision will turn on the court's conception of which alternative before it will better aid commerce, protecting "title" or protecting "transactions." The goal is pure political theory: it is best to aid commerce because this will create more goods and the public good is served by the creation of more goods. "Public interest" or "other interest" is simply an assertion that other interests, interests in the past not generally asserted, must be taken into account. The traditional job of law is the balance of competing interests. This job will be made more difficult as qualitative, as well as quantitative, demands are made. The job must be done, however. It is the function of law. Of course, it will be a difficult task. The courts are currently breaking down under the stress of traditional cases. For a multitude of reasons, such as the breakdown of such traditional dispute-resolving institutions as the church, we are turning more and more to courts. As the Cahn article suggests, *supra* note 4, lawyers, and especially the law schools, must work to relieve the pressure on the courts by developing alternative dispute-resolving institutions such as community landlord-tenant courts, and by expanding the pool of legal manpower such as by the use of paraprofessionals.

7. *See* note 4 *supra.*

legislative branches of government are expressly designed to respond to majority movements, which the ecology movement is fast becoming. Compare the "political muscle" of the black welfare recipient. Her goals cannot be achieved politically because the majority feels its interests are adverse to hers. Her problems, such as feeding, clothing and sheltering herself and her child for $107.50 per month,[8] do not directly affect the majority. The governmental institution designed to protect the individual from the majority is the judiciary. Quite simply, the fight against poverty cannot be won without attorneys whereas the fight against pollution may be. Hence, under this analysis, the ecology movement, by drawing off legal talent, is adverse to the interests of the black welfare recipient. This should be remembered by law students planning their careers and by practitioners desiring to participate in "public interest" work.

Only one further comment on the sign, "Public Interest Law Firm." What does it tell the public? The traditional sign, "X & Y Law Firm" asserts that either X or Y will handle your case. The public interest firm label, however, adds a qualification—your case will be handled only if it is in the "public interest." The traditional ideal of the attorney is that he is a professional—one who will put aside personal belief in the practice of his skills. The ideal is currently under attack in the law schools where one repeatedly hears students assert that they will never work for a prosecutor or for a huge corporation. Further, it is debatable whether the public ever really believed the image of the lawyer as the nonpolitical technician. Finally, on the basis of the old saying that action speak louder than words, it can be asserted that lawyers have always represented interests, since the majority has traditionally worked for primarily one interest—the rich and powerful.

Upon analysis, the image proves more of a mirage. Does this mean we disregard it and simply put "Public Interest" or "X Interest" on the door? There is no doubt that the practice of public interest law in such areas as civil rights, poverty and consumer fraud has greatly enhanced the image of the lawyer as the defender of the downtrodden, as opposed to that of the mere spokesman for vested interests. But what of the sign or, more basically, the assertion that lawyers represent interests rather than individuals? There are dangers.

To lawyers, the practice of law may mean several things: money, excitement, power to bring social change, the ability to help others. In the current debate among lawyers as to what the practice of law should mean to them, it is easy to forget what it means to the public. To the individual in trouble, a lawyer is often his only hope. From such a person's standpoint, the role of the lawyer is simply to help him, even though

8. This is the amount of the welfare grant to a mother and one child in Arizona.

the attorney does not agree with him or relate to him. For the members of the public, the bar should be striving to make the old ideal of the "professional" a reality, not casting it aside because it has often proven to be a sham. For practitioners and especially for law students, it must be affirmed that the role of the attorney is not to work out his own political philosophy or even to sleep well at night. It is to help others not as interests, but as individuals. It must be remembered that lawyers have a monopoly and that monopolies have a duty to serve all; to coin a phrase, it's in the "public interest."[9]

Having finally gotten beyond the door of the Public Interest Law Firm, let us continue our tour. Everything seems in order—conference room, library, coffee pot. But still, something seems to be missing. Suddenly, it hits us: "Where are the clients?"

Of course, there will be clients, but not traditional ones. By definition, the public interest law firm begins with a concept of the public interest and fashions its clients around that. This reverses the traditional process where attorneys begin with clients and then fashion a concept of the public interest to correspond to the interests of their clients. This is not to say, as is frequently alleged, that public interest law firms use their clients as pawns. There is enough "lawyer" in public interest practitioners to prevent them from sacrificing a client's interests on the altar of the higher good.[10] A more accurate view of public interest clients is

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9. The problem of a lawyer as a "mere spokesman" versus a lawyer as an independent actor is an extremely difficult one. At the one extreme, few would defend the proposition that the lawyer must cease to be a moral being and assert any claim his client wishes. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 7 (1970).

The current reaction against the "mere spokesman" function stems from the belief that attorneys, in the past, have given up their morality to serve their clients. In many areas of law, I feel that the breakdown has occurred for the opposite reasons—the failure of lawyers to vigorously assert their clients' interests. This is clearly true in the area of criminal law where defense counsel have known for years the deplorable conditions of the prisons, but have done relatively nothing about them. What is needed is not a pronouncement that the lawyer should remain a moral being, but rather a pronouncement that lawyers represent people, not just cases. For example, the lawyer's responsibility extends beyond the guilt or innocence stage of a criminal proceeding to the human being whose sole interest is coming out of the criminal system whole.

There is a danger that the pendulum will swing too close to the other extreme, with lawyers, as moral beings, asserting only that with which they agree. It is good to alert practitioners that they cannot hide behind the adversary model. The danger lies in the assertion of this as a governing principle, the result of which will be that lawyers will become judges rather than advocates and the unpopular will find it even more difficult to obtain representation.

10. There are problems, however. Even the most careful attorney, in presenting his client alternatives, will favor the one he thinks best. The attorney who begins with a concept of the public interest, as opposed to a commitment to his individual client, cannot help but let his preconception influence the kind of advice he gives the client. The attorney may not even be conscious of this. There is new substantial scientific support for the psychological view that one can subtly and even unconsciously transmit cues and suggestions to another during ordinary social intercourse. *See, e.g.*, Rosenthal, *Self-Fulfilling Prophecy*, in READINGS IN PSYCHOLOGY TODAY 466 (CRM Books ed. 1969).

that they are "tickets"—without which the firm could not play the law game.

So why should attorneys have clients—shouldn't they just be issued free passes allowing them to play? The question may sound flip, but raised is a fundamental question concerning the role of the courts. Traditionally, courts have existed to keep the peace. *A* did *X* to *B*. If the courts didn't do something about it, *A* and *B* might just fight it out in the street. From this peace-keeping role, several rules follow:

1. Rules against solitication. (If *B* isn't mad enough to see an attorney, he won't beat up *A*.)
2. Rules against advisory opinions. (If *A* hasn't done it yet, *B* can't be too mad.)
3. Rules requiring standing. (OK, *B*, you're mad at *A*. But what *A* did does not directly affect you. Your anger is unreasonable. No reasonable *B* would beat up *A* and you know what happens to unreasonable *B*'s.)

Judicial passivity, responding only when things become critical, is fine in a society where *X*'s aren't really that serious or where *B*'s, when really angered, will resort to the courts. Current realization that there are circumstances in which neither condition exists has forced the courts out of their passive roles. Often, as in ecology suits, *X* would do irreparable damage to innumerable *B*'s—the courts cannot wait to see if *A* will actually go ahead with *X*, or require special damage done to *B* as a prerequisite. Often, as in poverty suits, *B*, because of his conception of the law, will simply not seek legal help when wronged.[11] *B* still suffers the wrongful X: a system concerned with justice cannot prohibit its practitioners from telling *B* that he can do something about it.[12]

As the rate of social change increases, the time lag between problem and crisis decreases; to effectively cope with the problem, the courts simply must get involved at an earlier stage. So what's wrong with the "free pass" concept—groups of attorneys deciding, on their own motion, what suits should be filed and what interests vindicated? There are valid interests of society which should be considered in defining the "public good"—should they not be heard simply because they have not been verbalized by a traditional off-the-street client? Surely the magnitude of the conflicting interests in society means that the courts must become more active, must do away with technical standing requirements, case and controversy requirements, and bans against some forms of solicitation. But does this mean we should do away with clients?

Without clients, what are we doing? Without clients, we are

11. The traditional legal model assumes that an injured party will seek legal help. The poor generally do not. As to why this is so, see J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 61-76 (1966).

12. The new Code of Professional Responsibility has lessened restrictions against advertising and against solicitation in some cases. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES 2-103(D), 2-104(A) (1970).

setting up a law office that is indistinguishable from a good governmental bureaucracy. A governmental agency, whether concerned with housing, welfare or the environment, brings together diverse experts whose job is to define and implement the "public interest". Those advocating public interest law firms correctly argue that these governmental agencies have often failed. It is, however, ironic that they would adopt, as the means of solution, the governmental model. How are they to suceed where government has failed? Better experts? Bigger hearts?

By viewing clients as tickets rather than as individuals, the lawyer becomes a planner rather than an advocate. The planner begins with a nebulous class, such as blacks, consumers, the poor, and then generalizes and distills the interests of that class, projects goals and finally adopt strategies. The advocate, on the other hand, begins with specific individuals or specific groups within the generalized class (Welfare Rights Association, C.O.R.E., the Black Panthers) and thereafter simply acts as their advocate, allowing them to define their interests, formulate their goals, and adopt methods of achieving them.[13]

The shift from advocacy to planning has been justified on the basis that it is the best way to allocate limited legal manpower; there are just too many blacks, too many poor people, too many consumers to treat them as individuals. To maximize the effectiveness of the limited number of attorneys involved, it is reasoned, they must focus on issues common to the generalized class rather than on problems of individuals or specific groups within the generalized class. This reasoning, for example, leads many legal services programs to reject service cases, such as divorce and bankruptcy, in favor of law reform—a focused attack on statutes which adversely affect the generalized class of poor persons.[14]

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13. This does not mean, however, that the advocate representing specific individuals or groups within the generalized class (poor, blacks, consumers) will practice in the same manner as does the traditional practitioner. An attorney representing a group of poor persons, for example, will behave differently than the attorney representing a corporation: the client's interests, and hence the method of best serving those interests, differ. The attorney-client commitment, however, is the same. Thus, the poverty attorney helps organize groups and may engage in "direct action" such as picketing. For the details of such a practice, see Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049 (1970).

14. At the other extreme from law reform there are those legal aid offices which, realizing that they do not have adequate legal manpower to serve all potential clients, attempt to stretch that manpower by offering the poor a watered down form of service. For example, many legal aid attorneys have open caseloads numbering in the hundreds; their clients cannot help but receive inadequate legal representation. This is grossly unjust to the client and to the attorney—a young attorney, given such a caseload, cannot help but develop habits which will likely prevent him from becoming truly competent. The argument for taking more cases than one can properly handle is powerful: "Look, I'm the only attorney who will help these people. They need help desperately. Something is better than nothing." Upon analysis, however, "something" proves worse than "nothing." That something means that all the clients receive less than they are entitled. Further, that something deludes the poor into believing that the "system" is protecting their legal rights. Obviously, the system is not: a mechanism that allocates 3 percent of the lawyers to 20 percent of the people (see text accom-

While the allocation analysis seems to demand the new role, there are dangers when lawyers become planners rather than advocates. Immediately, there arises the problem of accountability. How can one assume that these new planners truly represent the interests of blacks, consumers or the poor? Moreover, there is the basic problem of planning itself—to the degree that planners make decisions, the individual does not. This, in turn, contributes to the individual's sense that he has less and less control over his life. Perhaps the basic problem of our time, as well as the root cause of many others is precisely this: the individual's growing sense of loss of control, of lack of worth. Finally, there is the issue of the institutionalized role of law and of lawyers. The law is perhaps the only profession capable of protecting the individual in our ever increasingly planned society. While many can plan, only lawyers can protect the rights of the individual in the process.

Once the attorney breaks the moorings of a specific client's interests, how can he be held accountable? How can the attorney be sure of the correctness of his concept of the interests of a generalized class of people such as the poor? Take, for example, *Shapiro v. Thompson*,[15] the successful culmination of the attack on welfare residency laws. Does that decision further the interest of the poor? It undoubtedly helps many poor—those wishing to move to another state. It may, however, also harm others: if there is a great influx of recipients in those states may find their benefits reduced and their state taxes increased.

To cope with the accountability problem, many legal services programs and public interest law firms have created advisory bodies composed of representatives of the client community. Whether such bodies can achieve accountability is questionable. There is the danger that such lay bodies will be consciously or unconsciously manipulated by professional staff which has its own concept of its function: law reform versus service work. Further, there is the problem of just how representative the representatives are. Initial selection will tend to favor the more militant—those who have already taken on a "spokesman's" role. Even if selected in a manner to assure representativeness, they may quickly become an elite group, identifying more closely with the interests of the public interest firm than with those of their theoretical constituents.

It should be remembered that a major professed goal of public interest firms is to make government accountable to the individual. By adopting the governmental model of planning for generalized classes

panying note 1 *supra*) is not guaranteeing "equal justice under law." Those committed to the poor should not conceal this from them: glossing over injustice, even in the best of motives, perpetuates it. Legal aid attorneys must realize that it is not their fault that many go without legal assistance. They should not assume the responsibility and feel compelled to help everyone. It is unfair both to the attorney and the client and it is counter-productive to the proper solution of the ultimate problem.

15. 394 U.S. 618 (1969).

of individuals, however, the public interest firms may themselves become unaccountable to their "clients." If they do, all that has been accomplished is to subject the individual to the whims of yet another group of professionals. Nevertheless, even if a mechanism could be devised to assure that the attorney-planner was truly planning to achieve the best interests of the generalized group, the fundamental question remains whether the basic problem of our society has been inadequate planning or too much planning.

Our society has grown more complex; so too has our reliance on experts. When faced with a difficult problem, we turn to those who gave us penicillin and radar. Given our apparent inability to solve our critical problems—racism, pollution, poverty—it is tempting to conclude that there are simply not enough experts working on them or that those who are are on the wrong side. This appears to be the conclusion of the public interest law movement. Its thrust is to create groups of "counter-experts" who will be plugged into decision-making bodies.[16] From heated yet scholarly debate (outsiders cannot be expected to understand their jargon), the true "public interest" will emerge—Joe's, yours, mine. In the pitched battle between urbanologist and ecologist, the insistence on clients seems rather picyunish—what, after all, do they know?

There is considerable support, however, for the proposition that our public interest machine (government) is not malfunctioning because of inadequate planning or biased experts, but rather the basic problem is inherent in the machine itself, in our reliance on experts. Quite simply, when experts decide, individuals don't. This demeans the individual as a person capable of governing his own life:

> In a technocracy, nothing is any longer small or simple or readily apparent to the non-technical man. Instead the scale and intricacy of all human activities—political, economic, cultural—transcends the competence of the amaturish [*sic*] citizen and inexorably demands the attention of specifically trained experts.[17]

Theodore Roszak, the author of the above statement, believes that the whole youth movement is in essence a reaction against the planned society and an attempt to return to life styles where the individual has control over his own destiny.[18] Surprisingly, this analysis is close to that

16. In a sense the concept of counter-experts is a self-contradiction. Laymen defer to experts in the belief that there is a real and correct answer to any problem and in the further belief that experts, because of their knowledge and cool reflection, can best find it. How then can two experts disagree? Either water expands when it is heated or it does not. Either freeways are the correct solution to the transportation problem or they are not. If the experts disagree, doesn't this explode the myth of the single right answer and doesn't this mean laymen can also play the game?

17. T. ROSZAK, MAKING OF THE COUNTER CULTURE 6-7 (1969).

18. *Id.* He argues that a total rejection of planning and expertise is needed. It is not just that reliance on expertise takes from the amateurish citizen the ability to govern his own life, but that it robs the citizen of his ability to truly

of Michael Harrington of the "new poverty." Contrasting it to the poverty of the early American immigrant Harrington writes: "If a group has internal vitality, a will—if it has inspiration—it may live in delapidated housing, it may eat an inadequate diet, and it may suffer poverty, but it is not impoverished."[19]

These two men, starting from radically different perspectives, the upper middle class youth and the ghetto dweller, reach essentially the same conclusion: men must live in an environment in which they can make their own decisions and control their own futures. In the current rush to "solve" our pressing problems, we may overlook the most fundamental: the relationship of man, the decision maker, to the planned society. The implication of this to the attorney is clear. By viewing client as ticket, as representative of some generalized interest, the lawyer becomes a decision maker. While, arguably, his decisions may be "better" than that of the welfare worker or other bureaucratic decision makers, at bottom, they are the same: an expert deciding what the individual truly needs.[20]

This tension between "expert" decision making and individual decision making is more acute for the lawyer attempting to define his proper role than it is for other professionals. The institution of law is probably the only one capable of protecting the individual in the planned society. There are simply enough experts and planners deciding the greatest good for the greatest number; once lawyers start playing that game, the individual suffers the hazard of escalating dehumanization.

The law has a unique role to play in society—the protection of the rights of the individual *against* the greatest good for the greatest number. Jerome Carlin provides an extremely helpful analysis.[21] There are, he believes, two models of justice, the adversary model and the welfare model. Under the adversary concept, individuals are deemed to have rights against each other and against the state. Not so under the welfare

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live. The layman, he feels, adopts the expert's world view. That view stresses intellectual knowledge at the expense of emotional life and isolates the individual from his environment by insisting that he be objective—that he be outside of it, categorizing it rather than experiencing it. Given this view, an accommodation with technology will not do; a total rejection is required.

19. Harrington, *The Invisible Poor*, in INEQUALITY AND POVERTY 146 (E. Budd ed. 1967).

20. Even the short term value of such decisions is questionable. Take, for example, the case of Goldberg v. Kelly, 397 U.S. 254 (1970), in which it was held that welfare recipients have a right to a hearing prior to the termination of their benefits to test the legality of such action. Such a holding obviously has little worth unless welfare recipients insist upon a hearing. They will not unless they believe they can control their future. This belief cannot be "given" by lawyers or the Supreme Court—it must be taken. It is taken when the client participates in the fight to such a degree as to believe that it is *his* victory, but not when lawyers, by themselves, decide the fight is worth it and then go out and win it.

21. J. CARLIN, J. HOWARD & S. MESSINGER, CIVIL JUSTICE AND THE POOR 24-34 (1966).

concept which recognizes no conflict between the interests of the individual and those of the state. Hence the state is free, even required, to control the individual for his own best interest. Typically, the welfare model is employed when dealing with the poor, as in the juvenile court where the judge does not act as referee between two compting interests, but rather adopts the role of parent to the child, looking to his needs rather than to his rights.[22] Given the non-adversary framework, it is not surprising to find a loosening of procedural guarantees and the seed of total government control.

Public interest firms, viewing clients as tickets rather than as individuals, tend to adopt the welfare model. The question becomes "What are the needs of blacks?" rather than "What are the rights of this specific black man?" There are many experts asking the first question, lawyers are the only ones capable of asking the second. In a planned society, the law must not forget its fundamental mission: protecting the individual as the possessor of given rights, rights which he can assert even if not in the best interests of society; indeed, even if not in his own best interest.

22. Recently, the movement in juvenile and other *parens patriae* law has been toward the adversary model. *See, e.g.*, In re Gault, 387 U.S. 1 (1967); Heryford v. Parker, 396 F.2d 393 (10th Cir. 1968); *cf.* Project, *The Administration of Psychiatric Justice: Theory and Practice in Arizona*, 13 ARIZ. L. REV. 1, 16-25, 42-51 (1971).