# TROUBLED REFLECTIONS ON PUBLIC INTEREST LAW*

by JEROLD AUERBACH

In the three years since *Unequal Justice*[1] was published, professional issues have moved in very different directions than those I saw, or anticipated, at the time I wrote it. Maldistributed legal services, and their implications for justice, were my primary concern, but deeper issues of fairness that affect the purposes and future trends of public interest law have raised questions that I cannot answer. The best I can do is to share some of those questions with you and to try to put public interest law in some sort of historical framework that will make sense out of our present condition. Public interest law now is sufficiently established to have its own history, and also to be part of the history of the American legal profession. The unanswered problems that the public interest movement now faces at least in part are related to the whole pattern of legal aid and public interest work over the last century of American legal development.

I suspect, however, that the answers may lie entirely beyond the public interest law movement. I am somewhat uncertain as to whether these kinds of questions can be dealt with in law schools, in codes of professional responsibility, or by public interest lawyers themselves. My feeling is that law schools provide a particularly receptive forum in which to raise these questions; if they cannot be raised there, there may be no segment of the legal profession in which they can be raised.

Let me begin by saying that I believe there is still a vast unmet need for legal services even though the public interest law movement has taken important steps to provide them. Existing educational and ethical norms, however, are not prepared to move public interest law significantly beyond the direction in which it already has moved. Public interest law alone cannot remedy the problem of maldistributed legal services. There are too many legal problems, and too few public interest lawyers, for that. Even assuming that the public interest law movement could solve this problem, the question still remains whether redistribution necessarily would resolve what I would call the "fairness" problem: Can the legal system produce fair results in a society where wealth and power are unequally distributed? In other words, is it enough

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1. J. AUERBACH, UNEQUAL JUSTICE (1976).

that all people who need legal services have them available? The problem of scarcity, in fact, may be less important than the problem of fairness. Alleviation of the former provides no guarantee that the latter will resolve itself.

The history of the public interest law movement elucidates this point. The movement springs from the legal aid tradition. The last ten or fifteen years have witnessed a new turn in a cyclical pattern, repeating the first great turn at the end of the nineteenth and the beginning of the twentieth century. At that time, it was argued that expanded legal services must be provided, in part as a deterrent to social upheaval, but in larger part, to correct an aberration in what otherwise was perceived to be an essentially fair legal system. Procedures were fair, the rules were fair, judges were fair, but there was one glaring deficiency: Not everyone who needed a lawyer had one. Published just at the end of World War I, Reginald Heber Smith's book responded to this deficiency and fueled interest in legal aid. Smith's book, *Justice and the Poor*,[2] now a classic, contained all of these assumptions. The most basic of these was that the legal system did what it should do in every way, except to provide enough lawyers to those who were without them and needed them. If only this deficiency were corrected, it was assumed, the system would be perfected.

Having the advantage of hindsight, today we can see how Smith overlooked problems that an increased supply of lawyers simply could not resolve. There were substantive inequities in the legal system: assumption of risk, contributory negligence. Substantive and procedural inequities still exist that no increase in the size of the public interest bar can alleviate. Smith failed to recognize that the problem did not concern the scarcity of lawyers alone, but also involved the lack of substantive fairness in the system as a whole. Indeed, a continuing part of the history of legal aid, of which public interest law is a part, has been a focus on the scarcity question at the expense of the fairness question.

The way in which the public interest law movement resurfaced in the 1960's reflects a similar pattern: A gap between the need to serve clients and the duty to serve the public is perceived and the response is to establish legal aid. Perceiving the gap forces us to focus on society. The response by public interest lawyers is to expand subsidized legal services, create innovations in delivery systems, create and defend new rights, revise the professional rules against advertising and soliciting, and even move towards deprofessionalization and informal dispute resolution. Precisely because there is this cyclical pattern in which the gap is perceived, a legal aid response is made and the focus is on scarcity.

The earliest surge of hostility against the public interest movement came from the privileged and political Right; the notion that poor and unrepresented people should enjoy the same access to lawyers at public expense as those who could pay for them privately was nothing less than subversive. Yet now public interest law is institutionalized. With this institutionalization, a wholly different

2. R. SMITH, JUSTICE AND THE POOR (1919).

set of criticisms by those of the Left, directed at public interest law, is beginning to surface. It is that set of criticisms on which I would like to focus. If we are to break out of the pattern I have described, it is necessary to try to expose these issues.

One set of criticisms that has been directed toward lawyers has come from Gary Bellow. From his point of view, education, service, remedies for maldistribution, and political organization are all interconnected activities. Bellow's criticisms suggest that the public interest law movement has acquiesced in the very norms of professionalism that created the need for the public interest law movement in the first place. He asserts, for example, that public interest lawyers are themselves victimized by routine and by the need to move cases through the bureaucracy, believing that the more clients, the better. This results in decreasing the time and energy devoted to any one client. Overwork and fatigue take hold and lead to that much publicized phenomenon called "burnout," which, within a short time, causes many public interest lawyers to no longer be able to do what they have been doing.[3] These same public interest lawyers, moreover, must cooperate with other lawyers, and with judges, in effect becoming a part of the very system that created the problem which led them to become public interest lawyers initially. The end result is that clients tend to be served in very traditional ways, and that the lawyers who serve them are themselves bound by restraints that are often built-in by the very charter of the legal services corporation, or are incorporated in the Code of Professional Responsibility. For example, legal services attorneys may not engage in picketing, boycotts, or strikes. They may not seek to influence legislation, engage in community organizing, or offer legal advice regarding desegregation or abortion, among other things. That is a fairly confining set of constraints. But it makes sense if you conceive of law as separate from politics. If you accept these constraints, as in some measure I suppose you must to remain a legal services lawyer, you then are unable to define as legal problems those that are potentially legal and hence are unable to give legal aid to people with those problems.

An even more radical critique has emerged in a fascinating, troubling analysis entitled *The Ideology of Advocacy*,[4] by William Simon. Simon, a legal services attorney, essentially takes the position that the nature of legal services itself, not its distribution, is the problem. Merely to expand legal services is ultimately only to enlarge the size and power of the legal profession. That, of course, is why the organized bar came to support first the legal aid movement and later the public interest movement. In each instance, once the initial fear or hysteria had subsided, the light dawned: Because more issues will be litigated, more lawyers will be needed. Legal services lawyers are especially good at generating business for the bar.

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3. See review of J. HANDLER, E. HOLLINGSWORTH, & H. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978), at page 159, 161-64 *infra*, for a recent statistical analysis of the "burnout" phenomenon.

4. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

Simon therefore argues that the nature of legal services in some substantial way is part of the problem, not part of the solution. One of the reasons why he believes this is because the lawyer's power can only be enhanced in a situation where a potential client knows that only this lawyer, who does not charge a fee, can supply legal redress. I am not sure this is always true, but it does suggest a potential problem in providing legal services in many contexts. It is profoundly upsetting for a layperson to encounter a lawyer in a stressful situation where clearly it is the lawyer who has the power to advance or not to advance one's interests; where it must be done in ways that the lawyer prescribes, with language that the layperson usually does not understand. The layperson thus has little control or autonomy.

In Simon's view, disputes arise in a social setting infiltrated with substantive norms and values, but end up being thrust into the very specialized, formal setting in which procedures and lawyers dominate. I doubt that this is the only way (for our own historical experience suggests alternatives), but this development casts doubt on the proposition that legal services are the panacea that the legal services movement perceives them to be.

The solution Simon suggests is a movement towards non-professional advocacy—advocacy that does not rely upon lawyers, be they public interest or private interest. Simon's position (that the provision of legal services is going to make things worse, not better), and his solution, are beginning to circulate in the legal services community. If it sounds preposterous, consider the various deprofessionalizing trends that have emerged in the last few years. Some jurisdictions have tried to reduce the professional monopoly, for example, by lowering licensing requirements, training non-lawyers as advocates, and giving non-lawyers a share in regulation and discipline within the legal profession. Other deprofessionalizing steps are the do-it-yourself instruction manuals that have begun to circulate, *pro se* representation, and the direction of poor people away from litigation and toward political organizations. All of these are efforts to move away from the dependence upon legal services that is a stronger addiction in this country than it is anywhere else in the world.

The legal services movement may have pushed about as far as it can go. Why expect it to do more? Yet should we be satisfied that it does less? Why not socialize the legal profession? The market can never be relied upon to deliver legal services fairly. If it could, then we never would have had a legal aid movement and we never would have had the legal services movement. Market forces are not going to solve the problem. So much of the disparity is rooted in social and economic and political realities that are reflected in the substantive law, in patterns of power or deference among clients, judges, and attorneys, in codes of professional responsibility, and in patterns of legal education as well. Thus, even an expanded public interest movement—redistribution beyond anything that any of us have thought of—probably still would not rectify the imbalance between the advantaged and the disadvantaged classes. We face, I think inevitably, the realization that most lawyers always have and always will serve advantaged people rather than disadvantaged. Indeed, most lawyers, however uncomfortable that makes us feel, are themselves advantaged by definition.

What, then, are the possibilities? The levels of subsidization for public interest lawyers will always be inadequate. The private sector will always have more power than the public sector. And yet, in some ways the legal system is close to being a subsidized national industry, perhaps the most "nationalized" of all American industries. We always have had a socialized bench. We have public police, not private police forces. Why not create a socialized bar?

All these ideas are already beginning to circulate within the legal community. They are worth listening to. It is worth trying to determine both whether history need imprison us in quite the same way that it has, and whether it is part of a lawyer's responsibility to consider explicitly the political, economic, and social consequences of a lawyer's own activities, of client service, of advocacy, and of hired-gun theory. Perhaps it then would be possible to develop even more imaginative ways of dealing with some of the problems than those that the most sensitively attuned lawyers yet have been able to develop. If that does not happen, then it is likely that about thirty years from now there will be another public interest law movement, calling itself something a little bit different than this one, but confronting essentially the same problems, responding to them in essentially the same ways, and wondering why the more things change the more they stay the same.