Power To the People or the Profession?— The Public Interest in Public Interest Law

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Our society seems to be possessed of a sudden anal retentive compulsion to scrub clean our skies, our rivers, and our streets—perhaps because our souls have become ineradicably sullied with the stains of racism and poverty. Environmental crusaders might well pause and ponder the underlying concern expressed by the Chorus in T. S. Eliot's *Murder in the Cathedral*:

Clean the air! clean the sky! wash the wind! take the
stone from the stone, take the skin from the arm,
take the muscle from the bone, and wash them.
Wash the stone, wash the bone, wash the brain,
wash the soul, wash them wash them!¹

In the current romance between public interest law devotees and pollution, there is danger of a major moral default by the legal profession. Mayor Hatcher correctly observed that the environment issue had done what Alabama's George Wallace had not been able to do—"distracted the attention of the nation from the pressing problems of the black and poor people of America."² Given the current unresponsiveness of the political system to ethnic minorities, the allocation of public interest law resources to majoritarian, middle-class, white concerns is contrary to the public interest. The political system can respond to these concerns without siphoning off the limited, special and constitutionally distinctive resources of the legal profession.

The constitutionally insulated role of legal advocacy carries a concomitant obligation to recognize that, while many causes may be legitimate, the allocation of scarce legal resources to a "public" cause

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1. T. S. ELIOT, *MURDER IN THE CATHEDRAL* 75 (Harcourt, Brace & Co. 1935).

2. Address by Mayor Hatcher, Environmental Teach-in, University of Michigan, March 14, 1970. Beneath all the rhetoric, the concern with pollution appears to be nothing other than a way of securing subsidization for white suburban communities to cope with the waste disposal problems caused by their hasty and ill-executed flight from the cities. This is in keeping with the American way. We self-righteously subsidize highways and other middle-class needs, but insist on stigmatizing welfare as a dole.

where other avenues of redress are clearly open is professionally and institutionally immoral. As the Supreme Court stated in *NAACP v. Button*: "[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."³ There are fashions in all things, including fashions in righteousness, but for the legal profession to succumb to the most recent fashion would be a betrayal of its historical and constitutional role as the advocate of disenfranchised members of our society.

Putting aside the issue of which injustice merits most attention from the legal profession, it should be recognized that underlying the currency of "public interest law" is a newly emergent and valid understanding of the need to protect all members of society in their relatively passive capacity as citizens who consume not only material goods and services but also governmental policies and programs. The consumer of governmental policies and services—irrespective of whether they involve pollution or poverty—is perhaps even more helpless and passive than the consumer of material goods and services.⁴ The citizen *qua* consumer has never been particularly effective in any sustained manner in protecting his interest against the producer—whether that producer be public or private and whether the goods be non-material or material—except when "producer roles" are created to protect the consumer interest. The public interest is not self-defining in our society of competing private interests, but the lawyer's role as public champion of the citizen as a consumer is inherent in the uniquely protected status accorded him by the adversary process of the legal system.⁵

3. 371 U.S. 415 (1963).

4. The need to institutionalize this function on behalf of the poor underlay the original proposal for a legal service program. Jurisprudentially, articulation of this perspective in the law is rooted in the writings of Edmond Cahn. See, e.g., Cahn, *Law in the Consumer Perspective*, 112 U. PA. L. REV. 1 (1963); Cahn, *THE PRECIPITANT OF DEMOCRATIC MAN* (1961).

5. The specially privileged status assigned the lawyer as advocate is rooted in constitutional law. *NAACP v. Button*, 371 U.S. 415 (1963), *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967).

Politically the insulation of the lawyer's role from external interference was demonstrated by the position of leaders of the organized bar, transcending any apparent conservative-liberal dichotomy. They have risen consistently and successfully to defend the integrity of the advocacy role from repeated congressional attempts to impose restrictions on government-paid lawyers for the poor in the OEO Legal Services programs. See Hannon, *The Murphy Amendments and the Response of the Bar—An Accurate Test of Political Strength*, 28 LEGAL AID BRIEFCASE 163 (1970).

Within the legal profession there has been a burgeoning awareness which stems from many sources: the vast number of new career lines in poverty law created by the OEO

Behind the notion of public interest law lies the special relationship between legal representation and the responsiveness of the political system. DeToqueville, fascinated by the status of American lawyers, shrewdly characterized the legal profession as the natural aristocracy of a democratic society, suggesting that in a government of law, not men, it is the Men of Law who govern.⁶

The lawyer has unique skills to bring to bear in marshaling countervailing power against the public and private institutions that cause widespread secondary harm to the public through their primary operations. But this use of legal advocacy raises a series of institutional questions about public interest law that were raised, if at all, as peripheral rather than central issues by its predecessor, "poverty law."

The current crop of public interest law firms are essentially hot-house flowers.⁷ They are the product of limited, short-term foundation largesse. A major and as yet unanswered question for these new public interest law firms is that of economic viability. If they can realistically subsist for only a short period, then such organizations must necessarily develop a carefully defined mission, a set of priorities, a *modus operandi* and a realistically phased time table based upon the time period of projected life span. It remains to be seen whether government or private law firms will be willing to underwrite public advocacy (with integrity) on a massive scale and, if so, in what fields other than poverty law. The question of economic viability makes it critically important to ask whether it is possible to institutionalize career lines which permit lawyers who desire to live on a better than sub-

legal services and VISTA lawyers program; the notoriety of the work of Ralph Nader, John Banzhaf, Benny Kass and others in the consumer law and regulatory agency law field; the catalytic role which the Law Students Civil Rights Research Council has had on law students; and the long standing contributions made by the NAACP Legal Defense Fund, the ACLU, and the Lawyers Committee for Civil Rights Under Law, among others. It must, however, be recognized that the new focus on the advocacy role of lawyers represents politically a turning away from attempts to underwrite the advocacy function by non-lawyers and thus is, at least partially, an elitist, and implicitly anti-democratic development.

6. 1 A. DE TOQUEVILLE, *DEMOCRACY IN AMERICA* 298 (Barnes & Co. 1858).

7. Among the converging forces leading to the growth of these firms are the phenomenal growth of the poverty law field, from \$5 million in 1964 to \$58 million in 1970, and moving rapidly toward \$90 million within the next year or so; the increased congressional backlash against government programs which underwrite quasi political organizing efforts by the poor and the disenfranchised; the war in Viet Nam with its concomitant incentive to stay in law school and to enlist in the VISTA lawyers program; the new tax legislation with its ominous ambiguity regarding organizations which appear to bear the stamp of social activism; and the increased racial polarity of our nation which has made the services of fewer and fewer white professionals acceptable to ethnic minorities. It will be interesting to see what effect President Nixon's order eliminating occupational draft deferments will have on the growth of the VISTA lawyers program.

sistence level to engage substantially or exclusively in work on behalf of clients who pay little or nothing.

Of equal concern are the moral implications of a group of independent lawyers free to choose their own version of the public interest. This raises the critical question of accountability in a democratic society. Whether public interest law will develop new methods of ensuring democratic control of the nation's resources and programs or whether it will be a further entrenchment of the most elitist tendencies in the law remains to be seen. The problem is of paramount importance, and we will return to it later in this article.

The ultimate issue posed by the growing practice of public interest law, however, is whether it will provide the occasion and the leverage for confronting the crisis now faced by the rule of law—a crisis of extreme logistical, doctrinal, institutional and philosophical dimensions because of the almost mythical centrality which the judicial process presently occupies in the legal order. The legal system is not equipped to cope with those rights already in existence; not to mention those grievances which are rights-in-embryo, nor those areas of official discretionary conduct which have hitherto been immune from scrutiny but which are now coming under increased attack in legal as well as political forums. It is currently an open question whether public interest law will simply further inundate the courts, exacerbate the crisis and further reduce the legal system's viability, or whether it will generate both pressure and specific efforts to secure a major restructuring of the legal system.

I. The Breakdown of Traditional Legal Institutions

The institutional crisis which is threatening to overwhelm the traditional adjudicative machinery of the legal system can be traced to at least three sources.

The Rights Explosion

Recent years have witnessed the creation of a vast and still growing array of legally vested rights which are enshrined in statutes and court decisions but which are not honored in practice. The developing case law regarding the rights of juveniles, tenants in public housing, persons accused of crimes, welfare recipients, and minority group members has challenged the capacity of the legal system. In the criminal field, the newly expanded right to counsel for those charged with a crime will require, conservatively estimated, a fivefold increase in

the number of full-time public defenders. In the civil field, the crisis is even more acute: cases take longer and longer to come to trial; congestion of the court calendars increases steadily. It is reliably estimated that it will take \$90,000,000—double the resources now expended, and nearly twenty times the sum expended in 1964—to provide legal representation to the indigent in noncriminal cases.⁸

Concern over the shortage of lawyers and the high price of justice, doubtless, lies behind the Supreme Court's decision in *United Mine Workers v. Illinois State Bar Association*,⁹ where the state's traditional power to regulate the practice of law within its own courts came into conflict with the critical need of the public for financially viable arrangements to secure access to counsel in matters involving private legal injuries.

The shortage of lawyers is matched by the incapacity of the courts to deal with the increased workload they now face, leading both former Chief Justice Warren and Chief Justice Burger to single out the field of judicial administration as posing the most critical problem facing the judiciary, more critical even than particular substantive issues of law.

The Grievance Explosion

Each new right means, at least theoretically, that a remedy exists for an old class of wrongs. A vast quantity of lesser injuries, however, deserve redress but fall short of the magnitude necessary to give them the status of legally recognized injuries. In certain situations, such grievances are elevated to constitutional status, as in the case of the black woman who successfully challenged an official for addressing her by her first name.¹⁰ Similarly, in the recent *de facto* school segregation case in the District of Columbia,¹¹ a host of trivial differences together constituted unconstitutionally discriminatory treatment. But,

8. *Hearings Before Ad Hoc Task Force on Poverty of the House Comm. on Education and Labor on Economic Opportunity Amendments of 1969*, 91st Cong., 1st Sess., Pt. IV, at 1819-70 (1970).

The incapacity of the profession to supply the requisite quantity and quality of representation recently prompted Justice Douglas to remark in dissent:

The supply of lawyer manpower is not nearly large enough . . . It may well be that, until the goal of free legal assistance to the indigent in all areas of the law is achieved, the poor are not harmed by well-meaning charitable assistance of laymen. On the contrary, for the majority of indigents, who are not so fortunate to be served by neighborhood legal offices, lay assistance may be the only hope for achieving equal justice at this time.

Hackin v. Arizona, 389 U.S. 143 (1967).

9. 389 U.S. 217 (1967).

10. *Hamilton v. Alabama*, 376 U.S. 650 (1964).

11. *Hobson v. Hansen*, 408 F.2d 175 (D.D.C., 1967).

by and large, grievances such as these are neatly dispatched by the aphorism, *de minimis non curat lex*.

The law provides no immunity from the contumely and arrogance of officials: the taunting word "boy" flung in the face of a black male; corporal punishment of Mexican-American children for speaking Spanish on school grounds; the continuous insult of being stopped, searched, and humiliatingly interrogated. Nor does the legal system purport to offer remedy for poor garbage collection in slum areas. Lawyers cannot stand by to institute an action every time a child or parent is humiliated by a teacher, every time a taxi refuses to pick up a passenger in the ghetto, every time a chain store offers shoddy merchandise in its slum branches. Yet, it is just such petty grievances which cumulatively have made tinderboxes of every major urban center.

Mounting Challenges to Official Discretion

Finally, we must add a third dimension to this crisis in the rule of law. Elsewhere, we have termed it the "new sovereign immunity"¹²—the immunity of officials who administer major government grant programs (in the fields of poverty, welfare, housing, transportation, urban renewal, and pollution control) from any meaningful form of scrutiny, surveillance, criticism, challenge, or accountability. Government expends billions upon billions of dollars, presumably to aid the poor; and other billions are being or will soon be spent on fighting crime and pollution. Yet, the poor are still impoverished; their children still uneducated; their lives still shorter; and the public is told that it must measure government efforts by intentions and expenditures, not results—by sincerity, and not by achievement.¹³

As the case law develops which will permit scrutiny of previously unreviewable, discretionary decisions,¹⁴ the case load problem faced by the courts will become even further intensified. Moreover, the prob-

12. Cahn & Cahn, *The New Sovereign Immunity*, 81 HARV. L. REV. 929 (1968).

13. Regarding the failure of federal food programs, see HUNGER U.S.A. (New Community Press, 1968); THEIR DAILY BREAD (Committee on School Lunch Participation, 1968); WHY CHILD NUTRITION PROGRAMS FAIL (Childrens' Foundation, 1969).

The failure of U.S. Indian policy is documented in OUR BROTHER'S KEEPER: THE INDIAN IN WHITE AMERICA (New Community Press, 1969).

Is IT HELPING POOR CHILDREN? (NAACP Legal Defense Fund & Washington Research Project, 1969) describes the failure of Title I, Elementary and Secondary Education Act.

Regarding the failure of federal urban renewal relocation policy, see *Hearings on Uniform Relocation Assistance and Land Acquisition Policies Before the House Comm. on Public Works*, testimony of Edgar S. Cahn, 91st Cong., 2d Sess. at 379 (1970).

14. See, e.g., *Peoples v. Dep't of Agriculture*, #22574, Feb. 3, 1970, as modified by 22574, May 26, 1970 (D.C. Cir.); *Barlow v. Collins*, 397 U.S. 159 (1970).

lem of securing additional legal resources to mount such challenges will be—and, indeed, has already been—compounded by the federal government's actions decentralizing authority and decision-making by delegation to regional offices, state capitals and city halls. Diffusion of responsibility will mean diffusion of accountability: decentralization (despite its rhetoric) has already had the effect of creating a different "national" policy for each region, influenced by political expedience and local pressure.

Public interest law institutions that have sprung up in Washington, D. C., will find that each battle fought and won on the national level may well have to be fought again on the regional, state or local level. And, as presently structured, they may find that they lack the capacity to do battle in every forum where decisions are made that alter the substance of federal policy. There is not now, in Washington, the capacity to monitor the activities of the executive branch and to cope with the lawlessness of government officials in the nation's capital. The situation will become even more critical as it becomes clear that once having created such a set of watchdog institutions and mechanisms in Washington, nothing short of a nationwide network to supplement those institutions will be essential if the rule of law is not to become eroded by pervasive flaunting of the law by officials at all levels through delegation, decentralization, block grants to states and municipalities and other techniques reducing the visibility of official decisions.

If the rule of law is to cope with the Rights Explosion, the Grievance Explosion, and the New Sovereign Immunity, the legal system will have to be expanded and restructured. The legal profession—particularly the growing public interest bar—is caught between two distinctly different aspects of the institutional crisis of law. On the one hand, public interest law predictably will lead to court cases, thus intensifying pressure on the traditional adjudicative system's capacity to cope with the Rights Explosion and to provide judicial redress for a whole new range of grievances resulting from longstanding but recently articulated types of disenfranchisement. On the other hand, public interest law will have to manifest increased awareness of the necessity to reduce the level of activity in traditional forums of redress—most notably the courts—in order to get swift results as well as to save those institutions from complete inundation and ultimate paralysis. To escape from this quandary, the profession must begin to develop a new technology for resolving conflicts and providing redress for grievances.

II. A Conceptual Framework: Consumption Versus Investment

To cope with the crisis, the legal system will have to redefine and come to grips with the so-called "service" versus "law reform" conundrum.¹⁵ The poverty law practitioner's simplistic equation of law reform with test cases and legislative drafting represents a failure to understand the institutional dimension of the crisis. Instead of merely inundating the courts, law reform must focus on developing new ways to complement a judicial system increasingly incapable of responding to the Rights and Grievance Explosions. There is a need to concentrate on extra-judicial, institutionally oriented law reform rather than legislative drafting and test cases.

The resolution of the endless service-versus-law reform debate lies in a more useful conceptual dichotomy drawn from economic theory. Underdeveloped countries, we are told, remain poor because they teeter so on the edge of subsistence that they cannot and do not save any portion of current income for use in increasing their future productive capacity. They cannot obtain technological innovation and increased productivity unless they find some way of diverting income from consumption to investment or supplement their present income with special sources of investment capital.

We would advance the proposition that the application of this principle provides a key to generating change and increased productivity in the current system for producing legal services, legal redress, and more broadly, justice. In exploring the implications of this proposition, we shall draw upon the experience gleaned from the OEO legal services program, the main source of legal assistance for the poor. When legal service organizations concentrate on the service function, they in effect devote all their resources to the production of consumables. Few resources, if any, are devoted to capital formation for purposes of significantly increasing the productive capacity of the legal system to respond to broad classes of injustice and inequity. The consumers of legal services—the poor—rely more and more on this "foreign" professional assistance to vindicate their rights rather than becoming producers of effective redress themselves. The goal of self-sufficiency appears to become more distant as the professional program grows.¹⁶

15. The equation of law reform with test cases has provided ready ammunition for the congressional backlash expressed in the Murphy Amendment's attempt to restrict the forms of advocacy. See, Holmes, *The Poverty Lawyers' Work is So Good It Has To Be Stopped*, WASHINGTON MONTHLY (June 1970).

16. We have elsewhere tried to analyze the defects, obsolescence, and inherent limita-

The legal services attorney who feels himself overwhelmed with demands for current services is, like the underdeveloped nation, too perilously close to subsistence (as he defines it: furnishing the maximum quantity of services consistent with minimal quality standards) to honor any priority that does not cater to present needs, present demands, immediate gratification and immediate consumption.¹⁷ Among these pressures the attorney must list, of course, the very critical need to use today's grant so as to secure tomorrow's salary and to justify one's past existence to wave after wave of evaluators. Such legal service lawyers have, in fact, internalized the crisis syndrome of the poor. As with the poor, planning has precious little relevance or utility in the face of continuing crisis. That such crises may, in no small measure, be of one's own creation is irrelevant. That one's present mode of operation invites and, indeed, rewards and reinforces crisis patterns does not alter what is perceived: The difficult present is all-engulfing, and continuing crises rob both individuals and institutions of the ability to perceive themselves as having the power to avert many of the crises they face. The answer—both for the poor and their caretakers—is not more test cases and increased dependency on a profession and institutions already inundated with consumption demands that cannot be met.

The utility of this conceptual formulation stems from one inescapable fact: Our present brand of judicially oriented legal services for the nonaffluent is incapable of providing justice on a mass scale for the mass market that a democratic society creates when it seeks to guarantee "Equal Justice under Law." In recasting the service-versus-law reform dichotomy we must strike a new balance between the necessity of vindicating the new rights of disenfranchised citizens and our need to alleviate the pressures on an increasingly inundated judicial system. If rights are not to be sacrificed, if justice is not to be rationed in the interest of relieving pressure on the courts, we must begin

tions in the current method by which the legal system produces legal redress and have attempted to indicate some of the changes which a medieval guild system of production must undergo via its own form of industrial revolution in order to meet the demands of the mass market for justice in a democratic society. See Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAWYER 927 (1966). We would assert once again that the market is not for "legal services"; the market is for Justice. Legal services is simply a brand name which currently has a monopoly.

17. Whatever investment is made in the form of in-service training, professionalization, up-grading, and ironically, even law reform (as presently interpreted) does not constitute an investment in technological change. Rather it is merely what the economists refer to as duplication, replacement of worn-out capital goods, or linear expansion of a fundamentally antiquated technology.

to invest in new justice-producing institutions which can supplement and, in some cases, supersede the old ones.

The utility of the investment concept for the rule of law will be determined ultimately by the extent to which it facilitates conscious movement toward increased self-sufficiency on the part of the aggrieved and permits them to secure effective redress without dependency on an ever increasing volume of "foreign" legal aid. To be sure, there is nothing novel in the idea that the law needs additional institutions and expanded enforcement mechanisms to become more effective. It is the crisis in the rule of law in this country, the threatened collapse of the legal institutions we depend upon, that makes our present need for conceptual articulation of the investment function so acute.

Yet, to an extent that one can only dimly perceive it, the cultural arrogance of our society and the inbred elitism of our profession stand squarely in the path of any effort to restructure the legal system to meet even the current demands we place upon it. If we are to plan effectively for the expanded demands for justice that the Rights and Grievance Explosions and the challenge to the New Sovereign Immunity promise, we must begin to look beyond the Anglo-Saxon experience with justice-producing mechanisms and to contemplate institutions that do not rely on the legal profession for their normal functioning.

Thus, for instance, from the Indian culture (past and present), we can learn the elements of a legal system that relies heavily on group sanctions—ridicule, community ostracism and disapproval. Certain aspects of law enforcement and conflict resolution are shifted to legitimated, non-judicial forums.

In Alaska . . . all disputes except murder are settled by a song duel . . . The song duel consists of lampoons, insults, and obscenities that the disputants sing to each other and of course, to their delighted audience . . . [T]he loser suffers a great punishment, for disapproval of the community is very difficult to bear in a group as small as that of the Eskimo.¹⁸

Even the incredible proliferation of test case law in the welfare field is basically engrafted onto a system stemming back to the Poor Laws and workhouses of England. Other cultures have found other ways:

The Arctic Explorer Peter Freuchen once made the mistake of thanking an Eskimo hunter with whom he had been living for

18. FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA*, 45-46 (1969).

some meat. Freuchen's bad manners were promptly corrected: "You must not thank me for your meat; it is your right to get parts. In this country, nobody wishes to be dependent upon others. . . . With gifts you make slaves just as with whips you make dogs."¹⁹

The impersonal sterility of our system of criminal law is made the more impervious to reform because our cultural and racial arrogance prevents us from learning from others. Felix Cohen, characterizing the Indian tribal codes, notes:

The form of punishment is, typically, forced labor for the benefit of the tribe or of the victim of the offense, rather than imprisonment.

The tribal penal codes, for the most part, do not contain the usual catch-all provisions to be found in state penal codes (vagrancy, conspiracy, criminal syndicalism, etc.), under which almost any unpopular individual may be convicted of crime

The comparison suggests that perhaps the Indian penal codes may be more "civilized" than the non-Indian.²⁰

An impersonal legal system, separated from neighborhoods and local communities, divorced from any significant element of popular participation, stubbornly persists in limiting the availability of justice. A non-lawyer had the following comment to make on our legal system:

You have a very complicated legal system. It is not that way with my people. I have always thought that you had so many laws because you were a lawless people. Why else would you need so many laws? After all, Europe opened all her prisons and sent her criminals to this country. Perhaps that is why you need so many laws. I hope we never have to reach such an advanced state of civilization.²¹

The speaker was an Indian—well acquainted with the white man's brand of justice.

One might expect and perhaps even endorse continued reliance on mere linear expansion of our present legal institutions if there were any realistic basis for believing that more courts and more judges could, by themselves, cope with the variegated demands for legal redress. But when, as now, commentators from virtually every point on

19. *Id.* at 43.

20. Cohen, *Indian Rights and the Federal Courts*, 24 MINN. L. REV. 145, 156 (1940).

21. Statement by Janet McCloud, a Tulalip Indian, at Law Day ceremonies. University of Washington Law School, May 1, 1969.

the ideological spectrum grant that the formal adjudicative machinery is institutionally inappropriate for a variety of functions, our exclusive dependence on those same avenues of legal redress is intolerable. We can no longer afford to deny legitimation to new forums, to new types of sanctions, to new categories of "men of law" merely because they do not fit a comfortably familiar culture-bound pattern. The legal profession must begin consciously to cast about for new modes of investment to stave off the crisis facing the presently besieged rule of law by moving systematically toward reconstituting the basic element of a viable legal system.

The magnitude of this task—and the scope of the changes required to cope with the demands upon the legal system—can be inferred from a preliminary survey of some of the most obvious places where investment in innovative restructuring and expansion of our legal system is critically needed.

III. Uses of Investment Capital

There are at least four principal areas where the investment of dollars, manpower, and institutional resources would yield critically needed changes: The creation (and legitimation) of new justice-dispensing institutions, the expansion of the legal manpower supply through new forms of legal education, the development of a new body of procedural and substantive rights, and the development of forms of group representation as a means of enfranchisement.

A. *Establishment of New Legal Institutions*

There is a manifest need to develop institutions competent to deal with problems and grievances which courts are ill-equipped to handle. Certain grievances are *de minimis* to the law, and the law provides no redress. Other grievances involve virtually closed institutions which, in all but the most extraordinary cases, are their own judge and jury—school systems, hospitals, police departments all are a law unto themselves. Still others are only a small part of a complex pattern of conflict and injustice, compounded by years of insensitivity so that the particular grievance cannot be approached within a limited, two-party, case-and-controversy framework without distorting the actual nature of the conflict.

Litigation does not necessarily provide an effective way of redressing many such grievances. The doctrinal posture of the courts may dictate that they abstain from substantive review of acts of official

discretion even when the decision of the official results in injury or hardship to the presumed beneficiaries of those actions. There are other cases best handled out of the court as presently constituted because the judicial quest for fault, the stigma involved in formal judicial proceedings, the delay and expense and psychological strain, the hostility or lack of empathy engendered by differences of class, or race, or verbal style all make it highly desirable for the parties to seek some alternative mode for settling their dispute.²² Finally, even those cases which survive the winnowing process and secure judicial vindication for the aggrieved are subject to the incredible expense, delay and procedural entanglement of the court system which substantially reduces the value of judicial remedy for the individual involved.

There are a few scattered beginnings in developing new legal and para-legal institutions, but much more investment in experimentation is needed. Programs to provide mediation and arbitration of disputes, bureaus to take complaints of citizens, lay advocates within the school system and welfare system, special juvenile courts run by juveniles, neighborhood advisory groups to the local prosecutor's office, community patrols to police the streets and report lawlessness by citizens and police alike, citizens' advice bureaus modeled after those in England, ombudsman offices where a public official serves as watchdog and investigator of official conduct, are all possibilities which may suit a particular community's needs or the needs of a particular functional area. These institutions are difficult to design and require the sophistication and expertise of a lawyer to describe their functions and processes so that local groups can understand and use them. What is even more difficult is to design from scratch an institution which blends several of these approaches into a coherent institution capable of responding to the special concerns of local groups.²³

Designing new legal institutions requires recognition that law is not solely or even centrally an affair for courts, but rather consists in

22. The rabbinical courts of the Associated Synagogues of Massachusetts provided a unique breakthrough in landlord-tenant relations when it provided for a formal agreement on grievance procedures (among other things). Both parties—landlords and tenants—agreed to abide by a board of review and Rabbinical Court. This was the first instance of successful negotiation and sanctioning of an ecclesiastical court as an alternative to the judicial system. Appeals to governmental agencies were complex, costly, frustrating and got bogged down in lower courts. However, "the sanctions available to the Rabbinical Court for those of Jewish faith [allowed] . . . both parties [to agree] . . . to submit their grievances to the Court." Statement by Robert Spangenberg, Director, Boston Legal Assistance Project, as quoted in 3 *LAW IN ACTION* at 3 (Aug. 1968).

23. For a discussion of the right to speak and the right to influence decision-making, see Cahn & Cahn, *Citizen Participation*, published in *CITIZENS PARTICIPATION, A CASE BOOK IN DEMOCRACY* 7, 38-54 (1969).

constellations of forums where pressures bearing the imprimatur of legitimation are exerted to make conduct conform to publicly articulated norms, rules, policies, and principles. Courts are one such forum, but judicial proceedings and rules of law are only one amongst the kind of pressures available. In a number of contexts, we have experimented with the creation of new forums—to air grievances, to bring outside scrutiny to bear upon an otherwise closed system, to generate pressures which cause officials to become responsive, not simply to a single plaintiff or class of plaintiffs, but to a spectrum of community wishes, concerns and commonly held values activated by the creation of a forum in which they could be heard.

Most recently, we were involved in the structuring and conduct of a "Peoples' Forum," a community inquest held in Memphis to probe into bail procedures, the right to protest, and discriminatory hiring and promotional policies within the police force, harassment efforts, brutality and stop-and-frisk tactics of the Memphis Police Force.²⁴ While the Forum was called for and held under the auspices of a coalition of local groups, several key elements enhanced the Forum's effectiveness: bringing in prominent outsiders as "hearing examiners;" promulgating simple, equitable procedures with an air of formality (without needless adversary technicalities); ample publicity; and careful staff work in securing expert testimony from outside the community and witnesses with differing knowledge and viewpoints coming from different elements in the community. The end result was a proceeding in which certain official conduct and practices were exposed to widespread community comment, and, in some cases, disapproval, and a proceeding in which the basic concern of the community was to find out how to live with itself, to discover its own problems, and to talk to itself candidly in a quest for solutions rather than to arrive at some judgment of guilt or fault.

A closely related and largely unexplored area for the creation of new "legal" institutions is the potential provided by the mass media for informing people of their rights, bringing community disapproval to bear upon particular actions of particular officials, and generating support for norms delimiting the range of permissible behavior in a society where the "legal norms" may have little reality or authority in the community. Cable TV and community owned and operated radio

24. The structure and hearing procedure of the "Peoples' Forum" was essentially that of the U.S. Commission on Civil Rights. A copy of the Rules and Regulations governing the proceedings and a detailed press release are on file at the *Yale Law Journal*.

stations in particular have substantial potential for creating new, legitimated forums for community debate, norm promulgation and sanctioning—from praise to condemnation. In this connection, it is worth noting that the chief weapon available to the Ombudsman in Scandinavian countries is the final issuance of a report condemning officials and agencies for their policies or decisions. In this country, highly publicized reports and TV documentaries dealing with hunger, Indians, the Federal Trade Commission, the Elementary and Secondary Education Act, Medicare and Medicaid have all demonstrated the *de facto* sanctioning power of the mass media. It remains to be seen whether such forums can be legitimated to supplement a restructured legal system for the “tribal community” that Marshall McLuhan claims the electronic media have recreated.

B. Expansion of the Legal Manpower Supply

The legal system, however defined, faces a critical manpower shortage—a lack of justice-producing persons, “men of law.” The present crisis of the legal system requires far more than merely educating more lawyers, although in many areas of the country—and in many areas of the law—more lawyers are needed. Expansion of the legal manpower supply further entails three distinct tasks.

First there is a real need to expand the supply of manpower which can be effectively absorbed into existing legal institutions. An experienced legal secretary can handle a very large number of routine matters at a law firm or legal aid office (as many often do). There is no reason why that status and function should not be formalized systematically, as has been done in the medical profession. Many technical jobs now performed by lawyers must be broken down and analyzed to determine whether they can be done more efficiently by less extensively trained persons. New legal technician roles should have their own career lines, training program, and system of accreditation. There are no justifiable, functional barriers to developing such legal technician roles except the profession’s own self-serving notion of the intrinsic mystery of legal tasks. Freeing lawyers from routine tasks—drafting form documents, tedious Shepardizing, negotiating with welfare caseworkers—might, indeed, free them to contribute more profoundly to both their client’s and the rule of law’s welfare.

Second, expanding the supply of legal manpower must also be an integral part of the process of creating new legal institutions. Thus, for instance, we have proposed the creation of neighborhood courts, of people’s forums, of a student advocate center, and of other institu-

tions all of which we would define as "legal" and all of which would be staffed by "legal" manpower, including lawyers, legal technicians, lay advocates, arbitrators, mediators, or ombudsmen for parents, students or consumers. Most notably, in the realms of health care and education (as in the now familiar field of welfare rights) there is a critical need for advocacy mechanisms which can penetrate otherwise closed institutions. In these areas, law normally defines only the outer limit of permissible behavior. Minor offenses, seemingly trivial actions or long entrenched, mildly offensive practices which do not quite transgress those outer limits generate serious grievances that can only be redressed by new modes of legal intervention.

In the context of education, for example, the question is whether effective legal advocacy combined with an independent grievance mechanism within the school system can shield a child from institutional practices which have long demonstrated their capacity to retard, discourage and destroy a child's sense of confidence and his capacity to perform.²⁵ Thus, one formulation of the role of the law in educa-

25. The following is simply a random list culled from one school system of the minutiae which cumulatively assure the present failure of our educational system:

1. Children are forced to reveal that they are on ADC to secure workbooks free.
2. Children on welfare are forced to pay for school lunches on the school lunch program.
3. Poor parents working in New Careers programs, breakfast programs, etc., are afraid to speak their minds for fear of losing their jobs.
4. Teachers and counselors force students to take general courses and lead the child to believe that they should not take college preparatory or business courses.
5. If a child commits three alleged "disciplinary" offenses, he and his parents automatically may be referred downtown to central administration to a person who in all probability has no knowledge of the child or his problems.
6. Principals, teachers, and students spend large portions of time on candy sales and other so-called money-making ventures which in fact only benefit the candy company.
7. Women gym teachers habitually prod stout girls' stomachs to see if they are pregnant. They get Brownie Points if they happen to locate an expectant mother and report her to the principal for immediate expulsion.
8. Children are promoted because of chronological age rather than scholastic achievement.
9. Children are promoted because they are easy going and obedient, while other children are retained because they are outspoken.
10. High school students are disciplined because they raise questions about erroneous statements made by teachers.
11. High school students are disciplined because they complain about teachers coming to school too intoxicated to teach.
12. Kids who live with rats, roaches, wine bottles, and cops beating their parents are taught to read from books about Dick and Jane that do not relate to their environment.
13. Substitute teachers, who are poorly qualified to teach in low-income schools, teach in such schools out of proportion to other schools.
14. Certain teachers are noted for sending a great number of kids to the office, and the kids are always investigated rather than the teachers.
15. Transfer students are placed without any preparation for new course work.
16. School laboratories are locked, and students not allowed to use them.

tion might be to protect the presumption of educability of a child, just as in the criminal law, it protects the presumption of innocence. In short, law might no longer permit the school system, like the prosecutor, to pronounce a verdict of guilty and a sentence of failure, retardation or drop-out. Instead, the school system might be required to bear the burden of proof each step of the way, at each moment when it sits in judgment on a child's attitude or performance or capacity. In many, many schools, the burden of proof now rests with the minority group or low-income child. It rests there wrongly. Effective legal advocacy within the school system should have the purpose of shifting that presumption—of compelling accountability, of forcing the educator and the educational system to shoulder the burden of proof rather than make the child the scapegoat for an institutional record of failure.

Finally, and ultimately, expanding the legal manpower supply must involve increasing the capacity of each individual to cope independently and preventatively with situations posing the possibility of legal injury. Thus, we would propose teaching legal concepts in grade school as a means of protecting that fragile sense of morality and fair play with which children enter the wider world. We submit that the child's moral sensitivity and basic sense of fair play and reciprocity can be reinforced and strengthened both as a defensive and offensive weapon for the child's well-being in a manner that will enable him to cope more effectively with his environment, to sort out real from fancied injuries, to honor obligations, and to hold both his peers and seniors to standards of conduct which are equitable and rooted in reasonable expectation. Coleman's study observes a direct correlation between a child's academic performance and his belief that he has some control over his own destiny, that he counts, that he can affect his own future by his own actions.²⁶ Conversely, the study indicates that poor

17. Parents are coerced by teachers into making examples of their children by physically beating them in the presence of their classmates.

The source of the above list of grievances is the "Proposal for a Student Advocate Center to Secure Legal Redress for Student Rights and Grievances," 49-51. Copy on file at the *Yale Law Journal*.

Most states, it should be noted, have an extensive body of school law and regulations governing school administration. If those regulations and rules were viewed, not simply as "instructions" to school administrators, but rather as being made to benefit the student and thus as vesting certain rights of enforcement in him to ensure that school administrators acted in the student's best interest as defined by law, then a vast new body of rights would emerge. The "right to read" program and the development of performance contracting, where payment to outside contractors is scaled to performance ratings (popularly known as "read or else"), may constitute a breakthrough here. See *Wash. Post*, July 15, 1970.

26. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966).

academic performance is accompanied by the attitude that his future depends entirely on "luck" and "breaks."²⁷ We believe that a carefully trained teacher can communicate the most basic and the most complex legal concepts in directly relevant terms: Evidence (But, teacher, I didn't do it); Precedent (But teacher, you let them do it); Contract (But you promised me); Corporate Organization (Let's start a club); Tort (He scared me); Equity (It isn't fair). We posit that there may well be a positive correlation between academic achievement and the understanding of legal concepts which entail propositions about cause and effect, behavior and reward, act and consequence—and, thereby, instill a belief that one can have some effect on one's own destiny. A right, in Hohfeldian terms, is the ability to compel some person to perform a duty.²⁸ The ability to generate predictable results based upon legally binding relationships lies at the heart of law—and may correlate directly with academic achievement to the extent that law can vindicate and reinforce the belief that one can have some control over one's own life.

Decreasing the dependency of the layman on the legal profession increases the justice-producing capability of the society at large and frees other "capital" elements of the legal system for other tasks. Thus, education in the law has major investment potential if it affects basic perceptions at an early age, increases one's ability to resist injustice and to compel fair dealing, if it enables one to distinguish between real and fancied injustices and if it instills a sense of mutual obligation and mutual responsibility. To accomplish these ends, law ought to be taught, long before children begin to accept it cynically merely as a set of technical rules for dealing with the police and avoiding responsibility for illegal actions. Investment entails restructuring fundamental cognitive processes to include basic values, standards and concepts—freedom, justice, reasonableness, free speech, due process, honoring promises, deciding like cases alike and respecting the rights of others.

C. *Increasing the Accountability of Officials—New Doctrines of Law*

Most of the new doctrines of law which have emerged in recent years are procedural in nature. They do not attack the basis of an official decision—but only the manner in which that decision was reached. The right to counsel, the right to a hearing, the right to be informed of the charges against one are essentially procedural rights. They affect the

27. *Id.* at 275-90.

28. For a concise analysis and summary of Hohfeld's jurisprudential view on this and other issues, see K. LLEWELLYN, *THE BRAMBLE BUSH* 84-88 (1951).

outcome of a decision by requiring the decision-maker to take account of previously unintroduced facts in reaching his decision and in articulating its basis. They also affect the outcome by making capitulation (individual and wide-scale) cheaper than observing all the procedural niceties which make justice so expensive for all involved. We can expect—with the Freedom of Information Act²⁹ (if used more vigorously than hitherto), with broadened definitions of standing, and with increased enumeration of the requirements of due process—to witness an expansion of these procedural doctrines.

But just as important, we need to begin developing a body of law which speaks more directly to substantive issues; for a biased decision-maker, having gone through the motions of hearing all sides, can often reach the same unjust conclusion if he really wants to. We are not urging a return to the days of the 1930's when the courts threw out New Deal legislation by reading their own economic and political biases into the Constitution. But we do think that new grounds for scrutinizing government programs are emerging. They will take the form, first, of demanding (either legally or politically) that an agency articulate its minimal goals in measurable, specific terms; second, that an agency take the steps necessary to collect the information needed to determine whether those goals are being reached; and third, that the agency develop the sanctions and incentives necessary to ensure adherence to its policies and attainment of its target goals. Thus, while judges will not second guess administrators on how best to fulfill a broad policy mandate, creative advocacy can begin to develop new ways of increasing the public accountability of agencies by requiring the articulation of certain minimal performance specifications and then devising ways of holding the agency to its own goals and policies.

D. Forms of Group Representation and Enfranchisement

The process of enfranchisement through legal redress in our society has outstripped the capacity of our legal system to enforce new rights and to formalize the institutions which have given them birth. In virtually every community, a spate of grass-roots organizations has emerged. Some specialize in particular concerns such as welfare, public housing, consumer fraud, discrimination in the construction trades, landlord-tenant relationships, and public education; others are of a more general nature, concerned with operating programs and representing the neighborhood vis-à-vis the larger community. Such groups are

29. 5 U.S.C. 552 (Supp II, 1967).

skilled in making general demands, developing bargaining leverage, pressing for overall changes—but often lose everything and even dissolve because they cannot list a bill of particulars and cannot enumerate the specific concessions they want, such as the clauses written into a public housing lease or an installment sales contract. Others, such as welfare rights organizations, tenants organizations, and recipients of federal grants, often have to fight against harassment, official retaliation and death by attrition caused by bureaucratic delay, sometimes purposeful, sometimes inadvertent. Still others have reached a point of maturity where they want to formalize their existence, draw up a charter and by-laws, or incorporate and define the rights and duties of different classes of shareholders. In other communities the poor want to form unions not only to secure better wages and working conditions but also to invest part of their wages in group enterprises and services. And increasingly, organizations of the poor seek governmental and private grants but lack the staying power, the formal organizational structure, the mastery of jargon, the art of “packaging” their idea (grantsmanship) or the range of negotiating styles necessary to overcome the unending obstacles presented by seemingly objective, but in fact discriminatory, requirements.

By and large, legal service programs have not handled these kinds of group representation and have rarely acted either as advocate and negotiator for groups, or as legal advisor and house counsel. Yet the structuring of new organizations and enterprises has always been one of the most important roles of the legal profession. The relation of the professional to grass-roots groups, of white lawyers to all-black groups, of legal advisors to those engaged in civil disobedience, involve some of the most difficult and challenging issues facing the legal profession today. This is the “corporate” or “constitutional” function through which lawyers historically have made their most distinctive contributions: shaping the basic ground rules within which human beings would be free to create, to participate and contribute without continued dependency on the legal profession.

IV. Two Untapped Sources of Investment Capital—Law Schools and Law Firms

We believe, in the next months and years, that law schools and law firms represent the greatest potential sources of investment capital for restructuring the legal system. Substantial pressures—from within law firms and law schools, from law students and from the broader com-

munity—can increasingly make it in the best interest of these institutions consciously to commit resources to such ends. Nor do we underestimate the extent of residual concern and conscience which is a self-generating force within those institutions.

Law schools must begin to discharge their duty to the larger society on an institutional basis, by changing the type of training provided lawyers, by institutional involvement in the operation of the legal system, and by serving as a primary “brain bank” for ideas, expertise and manpower to design, test, and implement models for institutional change within the legal system.

Apart from the contribution which government and foundations can make, private law firms must become involved on an institutional basis in public interest work, giving priority to those fields and client groups where the political system is least responsive and where recourse to the law is tantamount to political enfranchisement. Through such involvement, law firms will be able to bring to bear their cumulative expertise in non-judicial forums, in developing other forms of “law making,” in creating new institutions for vindicating the rights of the disenfranchised.

A. The Law School as a Source of Capital Investment

Law schools represent a major but largely untapped resource for investment in innovation within the legal system. Law schools’ training function and accreditation power seem peculiarly suited to experiments in expanding the manpower supply of the legal system—educating not only lawyers but, more broadly, Men of Law. These considerations would appear to make the law school an ideal resource bank for investment in the restructuring of the legal system. Moreover, the present trend toward clinical legal education programs, combined with student demands for “involvement” and “relevance,” would appear to make such a development timely.

Ironically, nearly every element of legal training militates against such a development. Legal education operates to enervate moral indignation and to inculcate intellectual and moral timidity. The discipline of scholarship feeds on itself, validates itself, and perpetuates those aspects of the legal system which decrease the capacity of the system to respond to injustice.

The intellectual and moral intimidation generated by legal education takes many forms. First, law school courses never present raw fact—the injury as felt, perceived, and apprehended by flesh and blood

beings. Typically, the quest for fact moves backward from a legal conclusion contained in an appellate decision, through a mythical reconstruction of the past (as filtered through restrictive laws of evidence) and finally ends in assessing the grievances of parties possessing all the animation implicit in their classic names—Richard Roe and John Doe.

Second, one's willingness to speak from partial knowledge, from uncertainty, from empathy unsubstantiated by conclusive documentation is systematically discouraged. The only facts which are considered are those which meet the convoluted and rarefied standards of proof needed for one and only one forum—the courts. Intuitively formulated hypotheses are not even honored as points of departure for more systematic attempt to marshal the facts needed to generate change. on which human beings normally base judgment, those instinctive, emotional reactions which are the well-springs of moral action, are viewed as "unprofessional." Yet, they are often the predicates of any systematic attempt to marshal the facts needed to generate change. In life we never have all the facts we optimally could use to make a decision. To impose such a prerequisite to speech in the law classroom is in fact to compel silence. And all too often, to withhold one's voice is an act of moral abdication.³⁰

Third, legal discussion typically preoccupies itself with legal rules and legal doctrines. The more "avant garde" discussions utilize the findings of other disciplines and advance them as bases for rejecting one doctrine and accepting another. The debate rarely moves from rules and doctrines to issues of legal institutions or new modes of redress available outside of courts. But when an institution stands as an insuperable barrier to effective remedy, the practitioner must turn to new institutions, forums, doctrines, and rules. *This* is the area of debate that will ultimately determine the shape of a new legal system capable of dealing with the vast explosion of rights and grievances and un-

30. In serving as staff to the Citizens' Board of Inquiry Into Hunger and Malnutrition in the United States, the Citizens Advocate Center found to its dismay that there were less than three dozen studies dealing with the malnutrition and hunger of the poor in the United States and that many of those were methodologically questionable. In the face of clear but scientifically uncorroborated indications of widespread hunger and malnutrition, the report's two principal editors, Edgar S. Cahn and S. Steven Rosenfeld, in desperation evolved three rule-of-thumb principles:

Principle I—You go with what you got.

Principle II—You can't go with what you don't got.

Principle III—You can't go with what you don't got,
but you can promise to go with it
when you get it.

Cf. HUNGER U.S.A. (New Community Press, 1968).

checked discretionary decisions for which the courts will provide, at best, a forum of last resort.

To the extent that a law school indulges in debate about the legal system, its debates on specific doctrines and rules usually take the form of a pitched battle between those who are result-oriented (frequently, but not necessarily equated with judicial activists), and those who argue from the constraints of and the limits of judicial competency. Until academic debate embraces *institutional* as well as *doctrinal* activism, law schools will breed intellectual and moral sterility. It will turn out lawyers ill-equipped to recognize the possibility of creating new forums, ill-fitted to serve the needs of the injured and the disenfranchised through the legitimizing force of the law and the legitimizing power of the legal profession.

Fourth, law schools militate against the use of law as an instrument of social reform by imposing standards of acceptable performance which are perniciously narrow. They reward ingenuity, even at the expense of humane perceptiveness; they reward removal from the chaotic world of emotion, events, passions and people to the rarefied stratosphere of metaphysical debate where the ability to proliferate distinctions is the ultimate offensive and defensive skill. We do not deny the value of rigorous legal analysis as an indispensable skill nor would we make its acquisition merely an optional aspect of legal education. We only take exception to its being the only standard of academic performance. The ability to speak to a client, to understand another human being, to take an inchoate and ill-defined set of demands and give them structure and content—all these capacities go largely unrecognized and unrewarded in law school. Unfortunately, those among the faculty who are fit to judge—or to guide—are few and far between.³¹

Fifth, the law school—as an institution—has failed to acknowledge that it has an institutional obligation to the legal system as a whole. Academic freedom and legal scholarship have become the shibboleths for defending a massive institutional default which is not remedied by

31. The faculty recruitment system rewards those who achieved by the standards of intellectual dexterity and moral timorousness—made law reviews, served out a clerkship, practiced for a year or two (during which little or no contact with live clients was permitted by the firm) and finally sought the solace, serenity, and sanctuary of like-minded souls. Whatever motivations call persons to teaching law, they unfortunately rarely draw those who would emulate Stephen Daedulus going “to encounter for the millionth time the reality of experience and to forge in the smithy of my soul the uncreated conscience of my race,” J. JOYCE, *PORTRAIT OF THE ARTIST AS A YOUNG MAN* 253 (Viking, 1969).

the concern of individual professors or the offering of two or more courses in poverty law, urban law, or social policy. The issue is whether the law school, as an institution of higher education, can utilize its unique vantage point and its relative detachment to enable society to proceed more rationally to reshape its legal system, to provide effective redress of grievances and to permit orderly and rapid social change within the framework of the rule of law. As quasi-public institutions, law schools have a fiduciary obligation. That obligation must be given a structural correlative in order to discharge an institutional commitment which transcends the good intentions, and even good deeds, of any individual professor.

If the law schools are to fully discharge their institutional obligations and remedy the defects generic to legal education, the line of demarcation between the law school and the outside world will have to be redrawn.

Some of the changes needed are already upon us—wrought by the increased demands by students for “relevance.” The response need not be characterized by the anti-intellectualism and the dogmatism of some of the demands. A major contributing factor to this new pressure will come from the increase in the number of black students who are able, as many of their self-styled radical white peers are not, to make assertions based upon personal knowledge of the nature of the legal system, and the extent of disenfranchisement within the society.

Unfortunately, descriptions of reality (such as the conduct of officials) drawn from personal experience fail to comport with the neat logical reality assumed by many professors and casebooks.³² At considerable

32. For a less than deferential view of the profession and the legal services program, Julius Hobson's remarks at an orientation session on October 1, 1969, conducted by the Urban Law Institute reflect the sentiments of one community leader with a record of extensive personal experience in seeking social change both within—and in defiance of—the traditional legal system:

The neighborhood legal services run by the poverty program for all practical purposes deal with minutia. They go down on Seventh Street and argue with some merchant about an escape clause in a contract written by Harvard people who are too numerous and too diversified to be counted. They come out of the law school and graduate and specialize in how you can escape paying corporate income tax or how you can write loopholes into contracts or fill up the *Harvard Law Review* with articles on the administrative and constitutional niceties which prohibit the advent of justice in the United States. I call them the “Harvard crowd” punks, a dime-a-dozen. All you've got to do is open the law review: one of them wrote a very beautiful article on how the *Hobson v. Hansen* school case (408 F.2d 175) couldn't possibly win because of the constitutional niceties and what some ancient puritanical judge had to say about it back in 1776. This is what we face in this community: there are some angry men who are trying to combat these problems. There is also something that pervades the atmosphere that I think is good and that is that the professionals are no longer soothsayers in these matters. Even the lawyers are being called to book and questioned about this.

personal cost, black law students in predominantly white schools vainly seek to destroy the myths of white students and professors—to propound the reality of the world they know and to challenge the reality of the parchment world of the judicial opinion. We have seen representations of this nonsanitized world rejected—partly because it comes with that raw emotionalism and strident absolutism which offends the decorum of the law and the equanimity of the law school universe. And all too often, black law students are forced to play jester in the king's court—cast in the role of the law school's own "house militants." If black law students get attention and even win some acknowledgment and semblance of authority, they also are secretly derided as not "real" legal craftsmen. Black students may find at last that they can be conceded to be bona fide law students without the unremitting pressure to cease being black.³³

Part of the task of presenting the reality of an ineffective legal system and a disenfranchised society can and should be transferred to the shoulders of members of the black, the Indian, and the Mexican-American communities. They have something to teach the legal profession, and they should be appointed and paid as teachers for doing so.

Just as the outside world must enter the law school, so too the law school must expand its walls to include the urban environment in which it is situated. Clinical legal education is the rubric under which the law schools have undertaken their initial sortie in this direction.³⁴ But the fashionableness of the term "clinical education" is likely to mask a critical ambiguity. Clinical programs will tend unthinkingly and imperceptibly to commingle the consumption and investment functions, especially if such programs become a manifestation of the self-conscious posturing, the anti-intellectualism and the uncritical demand for involvement that characterizes much of the current revolt against traditional legal education. Under such a program, the third year of law school is devoted to "clinical work" but clinical work largely takes the form of providing legal aid—discharging the "service func-

33. The law students who boycotted Howard Law School in September of 1969 contended that they were not receiving a legal education which would equip them as lawyers to cope with the legal problems that confront black people in America today. They were correct in their assertion but were made to appear foolish when, in court, they were asked to describe in detail the nature of a relevant curriculum. This was an unfair burden to thrust on them: the law schools themselves have not been able to meet this task. It may be asked whether the law school should not undertake to perform specific services for portions of the community—just as certain medical schools have undertaken to accept responsibility for the delivery of health services to different geographic sectors of the city of Washington.

34. See, e.g., *Symposium on Legal Education*, 21 U. MIAMI L. REV. 505 (1967).

tion" of the law. The third year law student thus may come out more nearly a competent practitioner. His guilt will be assuaged, and his demand for "relevance" seemingly met because the needs of society for traditional legal representation in both civil and criminal cases is well nigh infinite. But if this is the sum total of the law schools' response, it is in fact a default.

Clinical programs must not be permitted to degenerate into a grandiose abdication of responsibility whereby the law school simply abandons the student during the third year and leaves him largely to his own devices under the guise of affording him "practical experience." It must become a joint venture in discovery for the academic community where undigested chunks of reality are subjected to the most highly disciplined form of intellectual scrutiny.

The law school determines who may share in the inner secrets and mysteries of the law—who are to be accredited Men of Law and who are not. If there is any area in which the law school preeminently can make a unique contribution to the restructuring of the legal system, it will be in utilizing its accrediting and training role, to expand the manpower of the legal profession and to disseminate legal knowledge to the population at large. The law school in the future will have to begin working with colleges and high schools—and even grammar schools—to develop legal curricula. It will have to learn how to utilize the media. If television has, in McLuhan's terms, recreated the world in the image of a global village, it is still an open question whether we will revert to the forms of bloodletting and revenge that have characterized tribal justice from the *Oresteia* to the *Kerner Commission Report*.³⁵ There are alternatives—but law schools will have to take respon-

35. One form of tribal justice is epitomized by the Chorus in *The Libation Bearers of the Oresteia*:

It is but law that when the red drops have been spilled upon the ground they cry aloud for fresh blood. For the death act calls out on Fury to bring out of those who were slain before new ruin on ruin accomplished.

Washington Square Press (1953) at 118. We are indebted to Professor David Littlefield of Middlebury College for a penetrating analysis of developing concepts of justice, drawn from the *Oresteia* to Virgil, Ovid, Shakespeare, and Yeats, among others.

The same concept is mirrored in the following passages from the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968):

During the 4 days of the Newark riot, when Jersey City was flooded with tales of all description, Mayor Whelan announced that if there were any disturbances he would "meet force with force." The ghetto area was saturated with police officers.

Id. at 39.

About 60 persons had been on the street watching the looting. As the police arrived, three of the looters cut directly in front of the group of spectators. The police fired at the looters. Bullets plowed into the spectators. Everyone began running . . . Bullets continued to spatter against the walls of the buildings. Finally, as the firing died down, Morris—whose stepfather died that evening—yelled to a sergeant that innocent

sibility for imparting to the populace at large not merely rote legal knowledge, but a sensitivity to those fundamental values of due process, fair play, free speech, privacy and official accountability.

If the relative insulation of the law school is to serve any unique function, it is to be found in the partial liberation which the detachment of the institution affords from consumption pressures, and the freedom it provides to design new legal institutions, new doctrines and new modes of coping with the clear and present danger to the rule of law. That insulation, that tradition of a community of scholars, becomes even more precious if the law school ceases to be an island for contemplation of one's jurisprudential navel and becomes instead the sanctum in which the inner life of the law is born and reborn of experience.

B. *The Law Firm as a Source of Investment Capital*

Law firms are increasingly becoming involved in "public interest" work. But, since lawyers have traditionally given time to innumerable public causes, philanthropic institutions, indigent clients, and civic affairs, what is new or promising about recent developments?

One of the most useful talents a private law firm can bring to public interest law is its expertise in developing techniques of asserting rights and settling disputes which minimize formal adjudication. The society at large—and the poor and disenfranchised in particular—might well benefit by direct borrowing and adaptation from those forums, procedures, and alternative redress systems developed to enable the powerful and the affluent to settle their differences efficiently, equitably, and expeditiously without resort to the courts.

In addition, the frontiers of poverty law have increasingly moved from welfare cases and landlord-tenant law to issues of economic development, antitrust, tax law, communications law, and corporate law.

people were being shot. "Tell the black bastards to stop shooting at us," the sergeant, according to Morris, replied.

Id. at 36.

On Lycaste Street, between Charlevoix and Goethe, they saw a jeep sitting at the curb. Believing it to be another roadblock, they slowed down. Simultaneously a shot rang out. A National Guardsman fell, hit in the ankle. Other National Guardsmen at the scene thought the shot had come from the station wagon. Shot after shot was directed against the vehicle, at least 17 of them finding their mark. All five occupants were injured, John Leroy fatally.

Id. at 55.

Action by police officers accounted for 20 and, very likely, 21 of the deaths; action by the National Guard for seven, and very likely, nine; action by the Army for one. Two deaths were the action of storeowners. Four persons died accidentally. Rioters were responsible for two, and perhaps three of the deaths; a private guard for one.

Id. at 61.

In these fields, legal service attorneys have no expertise. But neither the poor nor the lawyers need be required to reinvent the wheel; involvement of private law firms provides a ready source of expertise in these areas.³⁶

Legal service programs generally are not characterized by the kind of tight administrative management and the necessity to justify one's expenditure of time (for billing purposes) that characterizes private practice. Public interest law firms might do well to emulate the techniques of office management time keeping, training techniques, and administrative discipline which determine both survival and profit margins in private practice. From another vantage point, the organizational structure of the private bar provides a potential network of watchdog institutions to hold the government accountable as it decentralizes its operations.

If private law firm involvement in public interest law is to be more than simply a public relations repackaging of the *pro bono* work which a firm has always done, the critical ingredient will be the structural or organizational measures taken by the firm to give public interest work new status and new prominence.³⁷ Depending upon the way in which

36. Legal service programs generally are not characterized by the kind of tight administrative management and the necessity to justify one's expenditure of time (for billing purposes) that characterizes private practice. Public interest law firms might do well to emulate the techniques of office management, time keeping, training techniques, and administrative discipline which determine both survival and profit margins in private practice. From another vantage point, the organizational structure of the private bar provides a potential nationwide network of watchdog institutions to hold the government accountable as it decentralizes its operations.

37. If we are to see law firms undertaking involvement in the public interest field on a massive scale, a two-fold process will have to be intensified and accelerated: the pressure now coming from law students will have to be sustained and intensified; and the capacity of law firms to respond to that pressure in a creative and informed manner will have to be increased.

Last fall, the Citizens Advocate Center and the Urban Law Institute launched a campaign to stimulate student pressure on law firms, based on the position that graduating law students could dramatically increase the availability of legal representation to the poor and other forms of public service work if, as a condition of employment with private law firms, they would seek both information and meaningful guarantees that the firm would commit substantial time and resources to public service work. 15 *STUDENT LAW J.* 70 (1969).

Over the past months, numerous questionnaires (See Appendix I) have been sent out to law firms, some relatively neutral in tone, others distinctly adversary in nature—some extremely general others quite detailed. Law firm interviewers report that they are increasingly being met with questions about their firms' involvement in public interest work—and innumerable symposiums, local bar meetings, lecturers, law review articles, petitions, confrontations, picketing, and panel discussions all testify to the increasing pressure to which law firms have been subjected of late to make distinctive commitments in this area. See Woodward, *Private Law Firms and Legal Services for the Poor*, 28 *LEGAL AID BRIEFCASE* 171 (1970).

The most promising step toward sustaining pressure, interest, and informed response would come from the establishment of a continuous updated Reporter service assembled by teams of law students as a result of in-depth interviews with major law firms around

the firm chooses to institutionalize its public interest commitment, there are at least five major advantages which can flow from structural innovations.

First, the creation of a structural unit (involving bookkeeping, work assignments, physical plant, cost accounting, etc.) operates to insulate a minimal body of man hours and resources from the constant erosion and downgrading which formerly have operated to subordinate *pro bono* work to the demands of paying clients and to prevent full mobilization of the firm's institutional resources. This subordination can be halted by an assignment structure that treats both kinds as equally appropriate ways to expend firm time. Once such assignments are elevated to co-equal status, an attorney engaged in *pro bono* work can afford, and indeed can be required, to produce the same quality of work and the same intensity of effort expended in paying cases.³⁸

the country. The questionnaire developed in conjunction with law firms last summer by the Citizens Advocate Center and the Urban Law Institute (see Appendix 1) provides at least a point of departure for such interviews and attempts to use in-depth requests for disclosure and dialogue as a means of generating informed, non-hostile pressure on law firms while at the same time securing additional information on how to proceed in a field where no one has "the answer" and where it is impossible to begin to suggest the range of possible approaches which experimentation could and should generate. It is too early for prescribing a dogmatic blueprint. It is *not* too early to ask questions about the nature and extent of law firm involvement.

A Public Interest Law Reporter or directory could inform law students as to what they might reasonably expect, what specific law firms interviewing on campus are doing, what alternatives other law firms might have to offer—and might also contain information on the extent to which representations made by recruiters in past years had been honored by concrete affirmative action on the part of the firm. Such a directory would help local groups seek legal assistance efficiently and would also help reduce threshold problems that stem from lack of contact, information, and plain fear.

The Reporter itself could in turn be the catalyst for generating a series of discussions, conferences, and symposia on standards of professional obligations and joint exploration by practitioners, the academic community, potential client groups, and law students as to what approaches remained to be explored in the public interest field. It is difficult to predict what might emerge from such a directory, though in-depth interviews would themselves be a powerful stimulant to action and commitment by law firms.

It is at best dubious to envision the development of any massive approach to collective bargaining by law students. The profession appears to attract more than its share of individualists. And one cannot readily see law firms sitting down in collective bargaining sessions at each campus. On the other hand, it is not unlikely that one would begin to see students signing declarations of conscience, or petitions, or entering into dialogues within law schools, or on a local level with a consortium of law firms, to develop minimal standards of public service obligation for the profession, taking appropriate cognizance of local conditions, resources and needs. On the national level, a parallel development would be discussions taking place between law students and lawyers within forums provided by the organized bar to begin to define realistic standards and hammer out statements of commitment.

The reporting service could and should be expanded to include articles, proposals, case histories, observations, and critiques—and thus could provide a central clearing house and resource book for educating law students and law firms alike regarding developments in this area. Given the manifold catalytic effects and the potential of such a directory and reporting service, its prompt establishment appears for the moment to represent the most productive strategy for generating widespread law firm involvement in public interest work.

38. If this is to occur, then one danger to be confronted squarely in creating public

Second, the creation of a structural unit within the firm is likely to produce a significant quantitative increase in the firm's involvement in the public interest law field. Increased efficiency is likely to result from approaching *pro bono* work in the same manner as regular firm matters. The peculiar advantages that a large law firm has over the solo practitioner are well known; ironically, however, in the past even the senior partner of a firm has often had to forego these special institutional advantages when contributing time in the public interest field. Ability to tap additional expertise, to summon the help of other associates, to utilize the xerox and the secretarial pool are all part of the special "economies of scale" which the structural arrangements of a law firm can now extend to public interest work. Finally, increased quantitative involvement is likely to stem from the increased demand upon the firm generated by the formal creation of a public interest division. Most grass roots organizations, community leaders, organizations (and certainly individual minority group members) are not accustomed to think of major law firms as sources of help in time of need unless the law firm has taken some formal step to hold itself out as a resource in a manner which makes the firm more approachable and less formidable to this new clientele. Capacity begets demand; formalized structure provides a point of entry and a gesture of welcome necessary to span the gulf which has barred groups and individuals from access to "equal protection of the law" in the fullest sense of that term.

Third, by structuring a commitment of resources, it becomes possible for the first time for a firm to come face to face with the magnitude and nature of the contribution it is already making in the public interest field. Once it can quantify the contribution in terms of man hours and dollars, it can begin to think in terms of impact, of capital investment and priorities. If a large firm finds that it is committing several hundred thousand dollars worth of legal resources in the public interest field, it may begin to ask whether the firm is getting the most impact and so society the greatest benefit from that contribution.³⁹ In some firms, dis-

interest divisions within private law firms will be that of insulation of those engaged in public interest work from the main body of the firm. If this occurs, those in the public service division or those on loan or those staffing the "satellite office" will be viewed as second class members of the firm. We have noted that even where a co-equal division of a firm is created with power to make public interest assignments throughout the firm, there is a marked tendency not to dispense such assignments to senior partners of the firm—and this can have grave consequences.

39. Thus, for instance, if a substantial portion of time is expended on assigned criminal cases for indigent defender, the firm may begin to ask itself whether it would not be more efficient to secure specialized supervision for that work, whether the expertise that it has built up can be utilized to effect an overhaul of our system of criminal justice, and whether there is any way in which the firm can force the legal system to get at

cussion has already gravitated to just this issue in the planning process.

Decisions about public interest cases cease to be isolated decisions. They become, cumulatively, a form of policy-making by a law firm about the needs of the legal system, the special assets of the firm in contributing to the restructuring of that system, and the potential for significant contribution which exceeds in impact the sum of all the hours previously given on an isolated, hit or miss basis. Such dialogue may well lead to a decision that time is better spent in devising new kinds of legal institutions and creating dispute-settling and avoidance mechanisms designed to increase the capacity of the legal system to produce justice on a mass basis. Most important, structure provides the format for creating within each law firm an internal forum for bringing the entire legal profession to grips with the broader dimensions of the crisis faced by the rule of law.

There are those who would seriously question whether this is an advantage, since major law firms are in fact already a power elite and the ultimate symbol of "the Establishment." Yet, the cumulative result of decisions made by default about the legal order are far more likely to perpetuate the status quo and to disregard the public interest, than decisions made consciously and rooted in that form of direct lawyer-client involvement which converts social problems from abstractions to personal realities, which quickens the sense of injustice and which spreads throughout the legal profession the perspective of the victim, the aggrieved, the injured, the disenfranchised, and the poor. To the extent that law firms already operate as the makers of public policy—with regard to the operation and design of the legal system, with respect to the conduct of powerful corporate clients, and with respect to official governmental policy—then direct conscious involvement in public interest work is essential if law firms are not to be the unwitting perpetrators of institutionalized injustice.

A fourth virtue which the private lawyer would bring to a public interest practice is a much stronger sense of the meaning of the lawyer-client relationship than that held by lawyers for the poor. We have observed—both in the law reform units set up in legal service programs and also in day to day interaction between legal service attorneys and their clients—that there is a greater tendency to manipulate, to usurp group decision-making functions, to use clients to fit the private agenda

underlying causes that impede rehabilitation, guarantee recidivism, and contribute to the prevalence of crime and delinquency. Similarly the firm may begin to take a hard look at the operation of the court system, the conduct of police officials, and the utility of time spent on honorary boards and community chests.

of the lawyer than is to be found in private practice. There are several contributing causes which induce lawyers for the poor to cease to be accountable to clients and to aggrandize their role as "social engineers" and self-styled reformers. It is not clear whether they feel free to do so because the clients are poor or members of minority groups or because legal service programs have a monopoly which makes it impossible for the client not to concur in any decision by the attorney. All contribute: the arrogance of youth, the monopoly power of attorneys, and condescension based on race and class. None are consistent with the traditional lawyer-client relationship. All are especially pernicious when the client is poor and when legal advocacy serves as a quasi-political form of enfranchisement, for then client manipulation perverts not only the legal system but also the democratic process itself. Competition with private law firms—where a different tradition and different constraints define the lawyer-client relationship—might have a salutary and chastening effect on the public interest bar.

One last, and critical, advantage would stem from increased institutional involvement of private law firms in public interest work. It would help avert, or at least mitigate, polarization within the legal profession between those engaged in public interest or poverty law and those engaged in the fields traditional to private practice. So long as those in private practice are cast in the role of villains, then public interest work is likely to be relegated to an inferior status within the profession, and the ability of legal service programs to attract top talent will be markedly diminished. Moreover, such a polarization will erode, if not destroy, the base of political support provided by the organized bar—the legal service program's mainstay and chief protection.⁴⁰ How long can one expect the organized bar to support the expansion of a program which increases the cost of private practice, drains off many of the most talented law graduates, intensifies the bidding for top law students, and stigmatizes private practice as the embodiment of the Enemy? If public interest work becomes the private preserve of the few, the entire field is likely to become static, dominated by those who "got there first." The entire profession, not just an elite which presently tends to regard

40. Cf. Segal, *The Higher Calling of the Bar*, 28 LEGAL AID BRIEFCASE No. 5 at 157 (Apr., 1970).

See also Hannon, *The Murphy Amendments and the Response of the Bar: An Accurate Test of Political Strength*, 28 LEGAL AID BRIEFCASE No. 5 at 163 (Apr., 1970). At page 165, Hannon quotes the *Wall Street Journal* as saying, "indeed, Congress quite probably would stop this program if President Earl F. Morris and other leaders of the American Bar Association were not busily lobbying to uphold Mr. Shriver's hand." *Wall Street Journal*, Nov. 8, 1967, at 1.

itself as the pure and the virtuous, must become actively engaged in the business of justice.

What is the best structural form for a private law firm's involvement in public interest law? It is too early to give any definitive answer, but several approaches to public interest work have been developed by private law firms. They include the creation of a public service division within the firm; staffing of a satellite or branch office; development of referral arrangements for major public interest cases and projects; placing lawyers on loan with legal service and other public interest institutions; and select retainer relationships with specific community groups and national organizations. Each of these arrangements may provide a different form of capital resource, available for enhancing the fundamental productive capacity of the legal system. Each may devolve into a purely service operation where all resources are immediately siphoned off into the consumption function by a wave of crisis service demands.

Yet, if there is any single distinctive—and promising—aspect about the highly publicized involvement of private law firms in public interest work, it is in the emphasis on structure common to all. The setting aside, as a matter of the firm's internal organization, of a specified quantum of resources for use in the public interest can constitute a major breakthrough.⁴¹

V. Democratizing the Rule of Law

Ultimately, the value of increased investment by law firms and law schools in public interest work will be measured by whether such efforts accelerate the development of a restructured legal system which is capable of meeting the mass demand for justice by providing new remedies, new sources of redress, and new forums for the equitable resolution of conflicts. If the present legal system is to develop the expanded capacity necessary to cope with the Rights Explosion, the Grievance Explosion, and the assault now being made upon the New Sovereign Immunity, it will require systematic and sustained investment and innovation.

The most obvious areas for investment necessary to equip the legal system to deal with a democracy's mass demand for justice have already

41. All have wanted to preserve some elements of *laissez faire* for the individual partner or associate to accept some non-paying cases as a purely personal matter. See Appendix II for an analysis of some other practical aspects of a private firm's involvement in public interest law.

been listed and a few illustrations given: the creation of new justice-dispensing institutions; the expansion of the legal manpower supply through new modes of legal education and accreditation; the development of new procedural and substantive rights; and the utilization of forms of group representation as a mode of enfranchisement.

Elsewhere we have suggested some other of the specific forms which such investment might take.⁴² It would be premature and presumptuous now to attempt still another set of specific proposals. We must wait to see what will come from those first two steps—utilization of law firms and law schools as sources of investment for restructuring the legal system. But at all points, it becomes necessary to recognize that the profession can best discharge its obligation to the rule of law by relinquishing an exclusionary control of legally protected advocacy, by ceasing to deny legitimacy to new legal institutions and by ceasing to interpose barriers to expansion of legal manpower which serve no functional purpose and which operate primarily to keep justice in short supply.

These barriers to democratizing the rule of law can manifest themselves in any of the above-mentioned areas of investment—from the creation of new legal institutions to the development of new forms of group representation. At present one finds an exclusionary quality about the legal system which disenfranchises (in varying degrees) all non-lawyers, pitting the legal system in conflict with lay advocates of social justice. The incapacity of the legal system to effectuate the legitimate—and judicially recognized—demands of minority groups for the equal protection of the law provides the most graphic illustration of the explosive consequences of a legal system which disenfranchises laymen, leaving them only the forum of the streets.

There is a second dimension of this exclusionary characteristic of the legal system—one which has long held sway within the inner sanctum of the law. It stands as a barrier within the legal system and the legal profession to effective democratization of the rule of law. That barrier is institutional racism—within the legal profession and within the legal system.

Analytically, racism is just a sub-class of the broader exclusionary principle—disenfranchisement. Just as laymen are disenfranchised with respect to the operation of the legal system itself, so within the legal profession there are the disenfranchised: young lawyers, women lawyers, and minority group lawyers. All are discriminated against within

42. See Cahn & Cahn, *What Price Justice: The Civilian Perspective Revisited*, 41 NOTRE DAME LAWYER 927 (1966).

the profession—all are disenfranchised in varying degrees and excluded from full participation in the governance of the legal system.

But we are a nation founded on genocide and nurtured on slavery. And thus, racism has historically been the particular form through which the generic evil, disenfranchisement, has consistently found its most symbolic and visible expression. Accordingly, we single out racism—in the legal profession and in public interest law—as that manifestation of disenfranchisement which preeminently poses a clear and present danger to any effort to expand the capacity of the legal system to yield justice for all. Racism takes many forms within the law, for we are talking about an evil far more subtle and pervasive than that susceptible to elimination by any simplistic quota system.

The virtually segregated composition of the legal profession—over 98% white—is now generally recognized. And this state of affairs will exist for some time to come. Despite concerted efforts by some law schools, the minority group composition of the total law school student body remains below five per cent. The statistical pattern of racial disenfranchisement within the legal system extends to the judiciary, to law school faculties, to law firms and to the organized bar. And this pattern is perpetuated, according to reports we have received, by widespread discrimination by some admissions committees against black candidates for admission to the bar.

But the dimensions of racism within the legal system are more than statistical. Racism takes the form of condescension toward black solo practitioners, characterizing them as legal hacks. The profession views graduates of black law schools as presumptively incompetent and further compounds the insult by viewing older black lawyers as “out of touch” with the black revolution. Younger black (brown and red) lawyers who take militant stances are presumed to be poor craftsmen, concerned with radical rhetoric rather than qualified as true professionals. The more pernicious criticism denigrates them as unprofessional in manner, irresponsible, psychologically scarred, unsound in judgment because of racial loyalties and, thus, regrettably unacceptable to the select inner circles of law firms, policy making bodies or collegial social gatherings.

The legal profession has its own seemingly neutral but in fact racially biased standards that impose disabilities upon minority group practitioners on account of race. Race, however, is expressly denied as the basis. That is currently neither fashionable nor acceptable. The criticism is typically directed at a seemingly individual or idiosyncratic flaw—style, language, ethnically rooted leadership roles, patterns of com-

munication, or modes of advocacy. The Anglo-Saxon (and for that matter, Roman) mold in which our system is cast extends beyond pigmentation. It is permeated by a racially biased etiquette disguised under seemingly objective, procedural and stylistic niceties that are propounded as supposedly functional standards of "true" professional performance.

And sad to say, such arrogance born of racism infects even the seemingly pure field of poverty law.

The white lawyer is one of the few professionals still welcome among the most racially militant groups. De Toqueville was uncannily perceptive when he stated that "[t]he profession of the law is the only aristocratic element" with which "the natural elements of democracy" will combine.⁴³ But from our direct personal contact with legal service attorneys in varied programs—law reform units, research centers, and VISTA lawyers stationed in the field and living in impoverished neighborhoods—De Toqueville's characterization likening American lawyers to the aristocratic classes of Europe remains disturbingly accurate:

They participate in the same instinctive love of order and formalities; and they entertain the same repugnance to the actions of the multitude, and the same secret contempt of the government of the people.⁴⁴

Legal advocacy when tainted by racism can readily be converted into a form of imperialism by expertise which increases dependence and manipulates clients under the guise of providing assistance. We have seen this take place in the legal service programs—where lawyers "for" the poor decide what in their professional collective wisdom is in the best interests of the poor. Consequently, they draft legislation; they handle test cases, and for the most part studiously avoid all contact with those insights which come from neighborhood offices, from contact with live clients, from group representation or from any structural mechanism of accountability to the constituency they ostensibly serve. Increasingly, the essentially antidemocratic and elitist characteristics of the profession leave the poor, the discriminated against (and even the middle class who are "legally indigent") with a bundle of unenforceable rights and unredressable but legitimate grievances. Racism as the quintessence of disenfranchisement leaves the poor and disenfranchised waiting helpless and dependent on a profession that discards its own ethical standards when dealing with minority groups and impoverished clients.

43. 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 301 (Barnes & Co. 1858).

44. *Id.* at 298.

Poverty lawyers, without realizing the implications of their elitism, unwittingly become part of the vast bureaucracy charged with the care and tending of the poor and lacking in any accountability to the poor. In some instances legal service programs have been gravely unresponsive to major needs, concerns and grievances of the client population—as unresponsive as the very institutions that have been a source of injustice to the poor. Legal advocacy can be emancipating; it can compel accountability in a manner which enhances the capacity of individuals to cope on their own, to secure justice, and to avoid injury. But we will not bring justice to the poor by a wholesale importation of attorneys to swell the ranks of those care-taking officials who presently help to perpetuate dependency.

Until new legal institutions are structured that permit laymen to enforce effectively their own rights, the key guarantee that legal representation will not be used as a form of manipulation to generate dependency is to be found in the time-honored nature of the lawyer-client relationship—a relationship which makes the lawyer the employee of the client, accountable to the client and retained to use his professional skills as an advocate on behalf of his client's best interest. But the client retains the ultimate power to determine what that best interest is. Inexplicably, lawyers for the poor seem to feel freer to discard this fundamental relationship—perhaps because they are not paid by the client, perhaps because they perceive the client as powerless to do anything about it. Thus in the case of the poor, the lawyer may feel that he can, with impunity, impose his own will and his own convictions as to what is “best for his client.” And in some instances—where law reform units, research centers, or academic institutions have become involved—there is no identifiable client, present or prospective, to whom one need feel accountable.

In this respect, it must be said that private law firms tend to honor the lawyer-client relationship more scrupulously than poverty lawyers. And the evil of professional imperialism (which is the form racism takes in the poverty law field) must be dealt with by designing ways to institutionalize, reinforce, and enforce the client perspective. Most recently, this has taken the form of using clients in the evaluation of performance by legal service programs.⁴⁵ Short of some such attempt to con-

45. Partially in recognition of the need to create a mechanism for compelling accountability to clients, the Standing Committee on Legal Aid of the American Bar Association passed a precedent-setting resolution on February 21, 1970, endorsing the proposed program of the Clients' Council to evaluate the performance of legal services programs and to increase the accountability of those programs to the poor. This was the first time

front the racism within our legal system, we are unlikely to be able to eliminate it in subtle forms elsewhere.

In the field of poverty law, and now in the field of public interest law, one may witness the same lack of accountability to the rule of law for which we have criticized private law firms and law schools. Yet, in the public interest field, the power to serve the public can all too readily be viewed as a personal possession—a private prerogative to play god in defining the public interest for the public. The legal profession holds its status, its power, and its skills in trust—a public trust which racism can all too readily pervert into a new elitist imperialism cloaked in the garb of righteousness.

One can already see this danger manifesting itself in public interest law in the legal profession's version of "benign neglect." It finds its most invidious expression in the allocation of priorities without accountability in such a manner as to divert attention away from the disenfranchised, the discriminated against, and the poor. It is not a matter of subjective intent—but of result.

Thus, when lawyers, law students, and law schools respond to the legitimate need to represent the consumer of material goods, but do so *to the exclusion* of attacking the manufacturers of even more dangerously defective social goods (education, health services, public housing, urban renewal programs, etc.) they unwittingly divert scrutiny from those who would perpetuate institutionalized racism. When lawyers quite properly attack the lawlessness of regulatory agencies, but, in that preoccupation, leave immune from scrutiny the far greater lawlessness that pervades the grant-making agencies of government, they help to ensure that those officials in charge of grant-making programs are, for all intents and purposes, not subject to the rule of law. Yet, more than any other group of citizens who need public interest representation, the poor and members of minority groups may depend, as a matter of life itself, on the relatively new but extensive array of government grant programs which provide sustenance and shelter and opportunity. To ignore lawlessness in these realms, particularly when one belongs to a profession that possesses a monopoly on the skills and access required to halt that lawlessness, is to become an unwitting party to its

that the organized bar has ever acknowledged the possibility that non-lawyers might have a function in policing the performance of the profession. The Clients' Council was originally supported by funds channeled through NLADA, and subsequently was funded for one year by OEO Legal Services. Several training programs and evaluation contracts let by OEO now bear a special condition requiring paid participation (on a contractual basis) by the Clients' Council.

perpetuation. Each action, however righteous in itself, precludes alternative actions when resources are finite. And the morality of a given act depends in the final analysis on those other alternatives which were rejected, even if unwittingly.

Such "racism by inadvertence" or "selective inattention" now takes its most ironic form in the new crusade over pollution. There were those among us who truly valued the beauty of this land. They viewed their own personal life story simply as

the story of all life that is holy and is good to tell, and of us two-leggeds sharing in it with the four-leggeds and the wings of their air and all green things; for these are children of one mother and their father is one Spirit.⁴⁶

These peoples who understand that man does not stand apart from his universe, we killed, and their survivors we herded to reservations, America's prisoners of war. They remain there to this day, still holding to that sense of the sacredness of nature.⁴⁷ Yet, to this day, we ignore both their wisdom and their plight altogether.

Instead we proceed to seek more money to subsidize the maintenance of racism. Having subsidized the flight to the suburbs by building highways (for the national defense, of course), we are now called upon, under the banner of pollution, to clean up the waste products of the suburbs—to cleanse the water by paying for the waste treatment plants that suburban developers neglected to plan and that suburban dwellers decline to pay for, and to clean the air of those fumes spewed by commuters in their daily foray into the cities and back. Under the same banner of pollution, the major suppliers of utilities who are among the chief offenders will pass on their costs to the consumer in what amounts to a regressive tax which hits the urban poor hardest, the suburban dweller less hard (because a uniform per unit charge in effect discriminates in his favor), and the industrial user least hard. The poor will underwrite this war too as they have the war in Vietnam. Under the

46. Statement of Black Elk, an Oglala Sioux holy man, printed in *THE INDIAN IN AMERICA'S PAST* (Forbes ed., 1964).

47. Those who would question the continued vitality of that culture, its special beauty and its will to survive might do well to read the 1969 Pulitzer prize winning novel by F. Scott Momaday, *HOUSE MADE OF DAWN*. Former Secretary of the Interior Stewart Udall has remarked: "It is ironical that the conservation movement finds itself turning back to ancient Indian land ideas, to the Indian understanding that we are not outside nature, but of it." But in our arrogance and pride we do not heed the ancient Indian proverb:

The frog does not
Drink up
The pond in which
He lives.

banner of pollution, we are asked to postpone expenditures for and to avert our eyes from the greater waste and pollution of our nearly bankrupt and poverty-ridden cities, our migrant camps, our Indian reservations, and the poverty-blighted mountain hollows of Appalachia. The concept of ecology preached by the new conservationists—and incorporated into the new public law gospel—does not appear to include those two-legged animals of varied hues who are the most hard hit by urban and industrial pollution, and heavily subsidized corporate farming complete with pesticides (which we now claim so solicitously menaces plant and animal life).

It is excusable that the political system should move in this direction and be primarily, if not exclusively, responsive to the majority's concerns. One may lament the decision of a political system that chooses to deal only with those waste products which have reached the point of becoming distasteful, dangerous, or inconveniently costly to a rural-suburban white majority. But one can reconcile oneself to such a legislative decision by rationalizing it as the price of majority rule.

There can be no such excuse for the legal profession and especially for those who profess a concern for true social justice. For the law has traditionally provided the only avenue of redress for the disenfranchised. And the allocation of scarce legal resources away from the poor, the black, the Mexican American, the Puerto Rican, and the Indian deprive him of the only political weapon available to him. At a time when government money (and now foundation money) will no longer be spent to enable the disenfranchised to claim their rightful share of the wealth and opportunity of this nation, the only form of advocacy left may well be stripped from minorities by the crusading members of a profession which is 98% white. At a time when the political system has become less responsive, if not outright hostile, to the grievances of ethnic minorities, the only profession specially protected in an advocacy role cannot justify its dereliction by regrouping under the righteous banner of essentially majoritarian concerns.

Public interest law's greatest contribution can be in generating the reallocation of legal manpower necessary to institutionalize representation for all those interests—the consumer's, the citizen's and the public's—which have gone unrepresented or under-represented for too long. It is essentially a call for a redistribution of legal manpower which is now arrayed too one-sidedly on behalf of powerful private interests to the detriment of the public interest.

Yet, if public interest law is not to go down in history as the legal profession's own era of Reconstruction, there must be as keen a concern

over the allocation of legal resources *within* the public interest field as there is over the allocation of legal resources between private and public interests. We will know soon enough. The test is clear. Will public interest law cross the Racial Rubicon?

Appendix I

A Proposed Questionnaire to Law Firms

The following questions are suggested as raising some of the issues and securing some of the information most pertinent to ascertaining the extent of a law firm's present and potential commitment to public service work.

1. What kind of public service work is presently done by the firm, either as a firm *or* as members acting in their individual capacity? Could you give some examples?

2. How does the firm presently handle the current public service work of its members? Are time records kept just as if such hours were treated as billable hours? Are public service cases added to the firm's file system? Are secretaries, messengers, law clerks and other lawyers available on an overtime basis to complete a crash assignment in the public service area just as they would be for a regular paying client? Do associates working on a public interest case feel as free to go—and do they in fact, go—to a senior partner for advice or assistance as they would if it were a regular firm matter?

3. Has the firm made a quantitative assessment of the hours and dollar resources it already devotes to public service work? If so, what is the total, in terms of billable hours and dollar valuation? If not, is such an assessment planned?

4. If the firm has analyzed the aggregate resources currently expended on public service work, has it analyzed the current utilization of those resources to determine whether it would be possible to make more effective use of part or all of those resources? Has the firm developed any criteria as a firm for assessing the effectiveness of the resources now devoted to such work? If so, what are they? If not, is such an assessment planned—when and by whom?

5. What is the firm's present attitude toward public service work by its members? (*Laissez-faire*? Approval? Active encouragement? Formal assignments?) Has the firm taken formal action to express its position on this kind of work? If so, what form has that action taken? How often, and how explicitly is this policy communicated to new associates after they join the firm?

6. What would be the reaction of the firm if an associate turned in only ten or twenty billable hours for several weeks at a time because of involvement in public sector work? Would it redound to his detriment in terms of consideration for promotions, raises, bonuses? Is there any means by which it could redound to his benefit within the firm?

7. What is your assessment of the most appropriate forms of public service work for individual lawyers and for the firms, at present? What do you consider the particular strengths and areas of expertise of your firm? Has the firm considered undertaking, or already undertaken, a specific project or mission in the public service field which would use its special strengths or expertise? Has it consulted with any persons concerning developing a project or line of public service specialty?

8. Are there any areas, types of cases, or types of clients that the firm would not approve of as an appropriate form of public service work—either for an individual member acting on his own or for the firm to undertake as part of the firm's ongoing caseload? Are there any groups too militant to be acceptable as clients? Are there any issues, offhand, which the firm might consider too controversial to become involved with? How would such determinations be made within the firm?

10. By what means does a person, or does the firm, presently become involved in public service work? Has the firm gone beyond simply permitting individuals to contribute personal time (after the firm's business is completed)?

11. Has the firm entered into any formal arrangements to facilitate individual members' contributions to traditional civil or criminal representation; undertaking special projects through the Lawyers Committee, Legal Service Program or other organization; taking on, as retainer clients, particular non-profit community groups? What is the extent and depth of participation in those arrangements in terms of number of persons participating and time devoted to public service work through these arrangements?

12. Has the firm entered into any formal arrangements for involving the firm itself—including use of the firm's name, resources, senior partners, and formal supervisory structure—for particular forms of public service work?

13. Has there been much expression of interest to date within the firm on the part of younger members or senior partners in engaging in public service work? Does the firm encourage or allow members to take leaves of absence in order to undertake public service work with a right to return to the firm without loss of status? Has any younger lawyer left the firm recently or taken a leave of absence because of a desire to devote full time to public service work?

14. Has the firm considered any particular policy for accommodating the desires of those interested in doing public service work to the necessity of handling the ongoing, paying business of the firm?

15. Has your firm actively sought to recruit minority group attorneys and law students, not only from the top prestige schools, but from predominantly black law schools? Does it have any minority group lawyers in the firm and at what rank within the firm?

16. Would your firm be willing to contribute a percentage of its profits for the next three years to a national scholarship fund for minority group law students? If so, what percentage would the firm consider appropriate?

Appendix II

Practical Issues of Private Law Firm Involvement in Public Interest Law

A. Profit and Loss

For some law firms, a commitment to become involved in public interest law conjures up fears of imminent bankruptcy and of an inundation by the non-paying, work-evoking legal problems of the yellow hordes of the East who will swoop down into the downtown reception rooms.

Perhaps the critical determinant of a law firm's decision to move or not to commit itself in this area will be the extent to which it has a time-keeping system sufficiently precise to enable it to record and retrieve a continuous and prompt statement of the number of billable hours and nonbillable hours which the firm's partners and associates are putting in each week. Some law firms will say that if they actually required listing of the *pro bono* work done by firm members, it would expose the contributions of some firm members to the less friendly eyes of others, and thereby destroy the *pro bono* program. In fact, the contrary is the case. Total honesty with respect to the kinds of hours logged appears to be nearly a prerequisite of informed decision making by a firm as to whether, and to how great an extent, it can become involved in the public interest sector.

Most law firms already have begun to create separate categories for nonbillable hours—including time spent serving the legal needs of office staff, professional reading, conferences, bar activities, assigned defender cases, etc. A firm may find, if it looks honestly at what it is doing, that already more than 15 per cent of the hours put in by partners and associates is nonbillable. Costs become less frightening as they become more susceptible of control, scrutiny, and rational informed deliberation. It is not a coincidence that one major Washington law firm felt able to make a massive public interest law commitment shortly after it instituted a computerized time-keeping system which could provide immediate readings on the extent to which the minimum of billable hours needed to sustain expenses and minimal incomes of firm members was being maintained.

Pro bono work must be recorded in as detailed a fashion as time devoted to paying clients if the spectre of an open-ended financial burden to the firm's partners, associates, and clients is to be banished.

B. Vehicles for Securing Pro Bono Clients

Different law firms have taken different approaches to ensure that their "plunge" into the public interest field has sex appeal—because of a genuine desire to do something significant, because of the firm's desire to establish a reputation or project an image, and because of the recruitment value which a clearly identifiable and significant form of activity can have.

The methods by which law firms have sought, upon entering this field, to ensure that their public interest clients and issues will be significant have varied widely. The office in the ghetto is one technique (whether staffed by associates, supported by a number of firms, or operated by the Lawyers Committee). The recruitment of a person to head up a public interest department who has expertise and ready entree to community groups is another. The development of a referral network through formal or informal agreements is still another.

Some of these arrangements have given offense to the minority practitioners in the area. Some have proven to be illusory in their ability to generate significant cases which challenge the firm's imagination and capacity. Others have produced significant cases but have identified them with the ACLU or Lawyers Committee or other group, so that the firm cannot garner the credit which it may need and deserve for purposes of recruitment and general reputation.

Several devices for securing significant cases have emerged as a result of an agreement worked out between the Urban Law Institute and Arnold and Porter to establish a Housing Law Unit. Under this agreement the law firm undertakes to provide supervision for graduate law students and law students engaged in matters undertaken by the project. Experience with this arrangement suggests several other possibilities:

(1) arrangements between law schools and law firms by which practitioners are given adjunct faculty appointments, with their teaching taking the form of supervising students responsible for specific projects and cases;

(2) arrangements between an "establishment" law firm and a minority practitioner which enable the minority practitioner to continue heavy involvement in community affairs, provide a basic retainer fee that can help subsidize the minority lawyer's practice and which, at the same time, provide an entree for the law firm into cases, issues and clients to which it might not otherwise have access;

(3) arrangements between law firms and other institutions (local legal service programs, lawyers committees, urban law institutes, advocate centers, community groups, urban coalitions, League of Women Voters research projects and other such activities) where the institution can provide an informed focus for the firm's legal advocacy and legal representation, while simultaneously expanding the manpower supply of justice-dispensing institutions.

Whatever the referral and cooperative arrangements utilized to secure clients, it is essential that the law firm be publicly identified with each case, issue or project the firm handles. The use of the firm name will (1) ensure quality work since the firm's reputation in the legal community will be at stake and (2) allow the firm to reap its just measure of advantages (in professional image and in recruiting) for its work.