PART I

WHO PUBLIC INTEREST LAWYERS ARE

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CHAPTER 1

DEFINING PUBLIC INTEREST LAWYERING

“After decades of pro bono practice, no one yet has a sharp or clean definition of public interest law.”


I. Introduction

This book is about the practice, pitfalls, and possibilities of public interest lawyering. In it, we examine who does it and why, the challenges they face, and the successes they have achieved. To do so requires that we define the subject of analysis. This, it turns out, is no easy task. Indeed, what exactly it means to be a “public interest lawyer” or engage in “public interest lawyering” is a question that has generated debate and disagreement since the very beginning of the public interest law movement nearly a half-century ago. The discussion has focused on whether it is possible to adequately define lawyering in the “public interest,” and if so, precisely what that definition is. Many attempts at definition have been made, and an equal number have foundered, leaving some scholars to jettison the concept altogether as hopelessly indeterminate.
STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 5-6 (2004). This chapter confronts public interest law’s definitional problem as a threshold matter. What it reveals is that the concept of public interest lawyering is—like all concepts—deeply contested. See Ann Southworth, Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,” 52 UCLA L. REV. 1223, 1236-37 (2005). Our goal is to clarify the terms of the debate and offer a means for analyzing it. In the end, we conclude that no definition is unassailable; all raise boundary questions and pose tradeoffs. We adopt public interest lawyering precisely because it has framed the boundary questions since the movement’s inception and does so in a rubric that is both historically grounded and consistent with the term-of-art that contemporary American practitioners generally adopt. As we will see later, the term is also a vector of change—and controversy—around the world. See generally Scott L. Cummings & Louise G. Trubek, Globalizing Public Interest Law, 13 UCLA J. OF INT’L L. & FOREIGN AFF. 1 (2008).

Despite the disagreement over terminology, there have long been lawyers who have devoted their careers to promoting some version of the public good, through their representation of individual clients, the pursuit of specific causes—or both. See Robert W. Gordon, Are Lawyers Friends of Democracy?, in THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 31, 38-39 (Scott L. Cummings ed., Cambridge University Press, 2011). These lawyers have played critical roles in defending and extending American democratic institutions, Laura Beth Nielsen & Catherine R. Albiston, The Organization of Public Interest Practice: 1975-2004, 84 N.C. L. REV. 1591, 1595-96 (2006), providing access to justice for those unable to afford it, DEBORAH L. RHODE, ACCESS TO JUSTICE (2004), and advancing the causes of marginalized groups unable to influence politics by other means, RICHARD L. ABEL, POLITICS BY OTHER MEANS: LAW IN THE STRUGGLE AGAINST APARTHEID, 1980-1994 (1995). They have made significant contributions to foundational civil rights and antipoverty struggles, MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 (1993); MARK V. TUSHNET, THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (2d ed. 2004), thus embodying the highest ideals of a profession that aspires to serve the public good. Although they are a relatively small fraction of the total lawyer population, public interest lawyers have thus had an outsized role in making good on the profession’s promise of “equal justice under law.” The most prominent of these lawyers have become national icons who represent the highest aspirations of the legal profession. There are many notable examples, which include: Thurgood Marshall, and other lawyers for the NAACP Legal Defense and Education Fund, Inc. (LDF) during the civil rights movement; Clarence Darrow, famous for his pro bono representation of unpopular and controversial clients, such as the 1925 defense of John Scopes against the charge of illegally teaching human evolution in Tennessee schools; Reginald Heber Smith, a lawyer in a private Boston law firm in the early 1900s, who first called the profession’s attention to the severely unmet legal needs of the poor; and Ruth Bader Ginsburg, who, before she was a U.S. Supreme Court Justice, was a leading women’s rights lawyer for the American Civil Liberties Union (ACLU) in the 1970s.

But, as we will see throughout this book, public interest lawyering extends far beyond these canonical cases to encompass a broad range of advocacy techniques (not just litigation) across various practice sites (not just nonprofit organizations) undertaken by different types of
lawyers with distinct goals. This book is about these public interest lawyers and their efforts to create what they envision as a more just and equitable society. It seeks to understand their professional heritage, their personal choices, their most ambitious aspirations, and the practical limits on their achievement. It also seeks to present a picture of their day-to-day practice: the financial choices they face, the ethical problems they confront, and the strategies they deploy. In the end, we aim to present a comprehensive picture of contemporary public interest lawyering, assessing what it has achieved so far and what the future holds.

Before we do, we begin with a preliminary, yet important, inquiry: What precisely do we mean by public interest lawyering? Does it represent a distinctive model of advocacy that contrasts with conventional lawyering? Does it encompass a distinct set of motivations? Does it refer to a particular set of clients or causes?

Scholars have long struggled to answer these questions. The goal of this chapter is to provide a framework for thinking about the aspects of public interest lawyering that are most central to the concept and those that are more peripheral, while focusing on the always contested boundary cases and suggesting how the definitional debate has real world lawyering consequences. Ultimately, these materials point to an understanding of public interest law as a terrain upon which competing social interests do battle in order to define the very meaning of a just society.

II. Terminology: What’s In a Name?

At bottom, all lawyering affects the rules that guide our behavior as members of society. Every time lawyers act on behalf of clients to enforce, evade, reinterpret, distinguish, modify, repeal, or comply with law, they influence the basic terms of social interaction in ways that shape our collective experience of freedom and fairness. This is true whether we are talking about a plaintiff’s lawyer representing an employee in a wrongful termination case, an in-house lawyer counseling her company on legal compliance, or a solo practitioner advising her client on forming a small business venture.

A threshold question, therefore, is what separates these acts of day-to-day lawyering designed to advance client interests from lawyering that aspires to make society better. Of course, framing the question in this way reveals the heart of the problem: that one person’s vision of the just society will be another’s vision of a society gone wrong. And there are so many visions—all of which are deeply contested—that choosing among them is ultimately an exercise in political judgment. How we make that judgment will, in the end, determine what counts as lawyering in the public interest.

For at least the last century, lawyers have sought to deploy their legal skill to advance the interests of certain types of individual clients or social groups: legal aid lawyers from the early twentieth century who dispensed free legal services to aid the urban poor, JOEL F. HANDLER ET AL., LAWYERS AND THE PURSUIT OF LEGAL RIGHTS 18-19 (1978); so-called “country lawyers” who provided professional charity in order to help their less fortunate neighbors, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 15 (1976); and activist lawyers who defended war protesters, labor organizers, and racial minorities suffering discrimination, HANDLER ET AL., THE PURSUIT OF LEGAL RIGHTS, supra, at 22-24.
Yet it was not until the 1960s that the term “public interest law” was coined in a self-conscious effort to describe a nascent movement to use legal advocacy, primarily litigation, to advance a political agenda associated primarily with the protection and expansion of rights for racial minorities, the poor, women, and other disadvantaged groups, while also providing collective goods, like a clean environment. Louise G. Trubek, Public Interest Law: Facing the Problems of Maturity, 33 U. Ark. Little Rock L. Rev. 417, 417-20 (2011); see also Deborah L. Rhode, Public Interest Law: The Movement at Midlife, 60 Stan. L. Rev. 2027, 2032 (2008). At the outset of the U.S. public interest law movement, proponents asserted its definition in the language of market failure. Burton A. Weisbrod, Conceptual Perspective on the Public Interest: An Economic Analysis, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 10-12 (Burton A. Weisbrod, Joel F. Handler & Neil K. Komesar et al. eds., 1978). One classic study from the 1970s defined public interest law as “activity that (1) is undertaken by an organization in the voluntary sector; (2) provides fuller representation of underrepresented interests (would produce external benefits if successful); and (3) involves the use of law instruments, primarily litigation.” Id. at 22 (emphasis added). This study drew upon economic analysis to elaborate the concept of “external benefits,” which was grounded in both concepts of efficiency—putting productive resources “to their most ‘valuable’ uses”—and equity—ensuring that the distribution of the resulting goods and services was fair. Id. at 4-5. The central claim was that public interest law was activity that “if it is successful, will bring about significant external gross benefits to some persons; that is, the activity provides more complete representation for some interest that is underrepresented in the sense that the interest has not been fully transmitted through either the private market or governmental channels.” Id. at 20.

It was this notion of “underrepresentation” that informed other definitional efforts. For the program officers at the Ford Foundation, who designed and executed the public interest law funding initiative that launched the field in the 1970s, public interest law was “the representation of the underrepresented in American society.” Gordon Harrison & Sanford M. Jaffe, Public Interest Law Firms: New Voices for New Constituencies, 58 ABA J. 459, 459 (1972). This definition included both the provision of legal services to “poor or otherwise deprived individuals who are unable to hire counsel,” as well as legal actions in the defense of “broad collective interests”—such as on behalf of “consumer protection and environmental quality”—“for the benefit of large classes of people” who could not individually afford the cost of mounting lawsuits and who could not easily organize collectively to advance their political interests. Id. One observer, writing about public interest law at the end of the 1980s, articulated a similar position:

Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, public interest law rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace.

Nan Aron, Liberty and Justice for All: Public Interest Law in the 1980s and Beyond 3
The classic definition, rooted in underrepresentation, came under attack from two directions. Beginning in the 1970s, and gaining momentum in the 1980s, the emergent conservative movement took issue with both the efficiency and equity rationales for public interest law. Southworth, *Conservative Lawyers and the Contest over the Meaning of “Public Interest Law,”* supra, at 1248-49. In terms of efficiency, conservatives argued that it was not obvious that regulation benefitted society at large, rather than simply making distributional choices. *Id.* at 1249. Thus, environmental regulation could have the effect of reducing jobs, or consumer regulation might increase prices. Without aggregating individual preferences for a clean environment and jobs, for consumer safety and low prices, it was not clear *ex ante* what the optimal social welfare function was. The concept of equity was indeterminate as well. What qualified as an underrepresented group? Conservatives argued that the concept of underrepresentation was politically contingent and changed over time. Whether or not one agreed with the conservative framing, it highlighted a fundamental tension in equity conceptions of public interest law: on contested issues of public policy, one group’s benefit could be construed as another’s burden.

As conservatives challenged the meaning of public interest law from the right, critics on the left challenged its practice—and offered new theories to supplant what many viewed as the outmoded and politically ineffective model of litigation-centered reform embodied in the conventional definition of public interest law. Beginning in the 1980s, new theories emerged with an impressive array of new labels: community lawyering, critical lawyering, facilitative lawyering, political lawyering, progressive lawyering, rebellious lawyering, third dimensional lawyering, law and organizing, and legal pragmatism—to name some of the most prominent. Although these theories varied considerably, they shared the concern that rights-based efforts, by themselves, were inadequate to the task of radical social transformation. All of these efforts rested upon a liberal discomfort with lawyer-led strategies that undercut genuine participatory democracy and risked inflicting a double-marginalization on clients: disempowered by society and then by the very lawyers who purported to act on their behalf.

Despite all the critiques of its political and conceptual coherence, the use of “public interest law” as a label for a distinctive form of lawyering for the good has shown great resilience. Although it is unavoidably contested, public interest law remains the term-of-choice for U.S. practitioners, and has taken root in emerging democracies around the world. It retains its power not because there is an Archimedean point by which we may judge the public interest across the divisions of politics and culture, but rather precisely because it claims a higher political ground, asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms. In the end, the term “public interest lawyering” has continued power precisely because the contest over its meaning reveals the important political choices at stake. A label at the center of so much fighting must be worth fighting for.

This book uses the term “public interest lawyering” to refer to a broad and contested range of activities that includes legal advocacy focused on the representation of individuals shut out of the private market for legal services as well as lawyering to advance the collective interests of defined groups or constituencies (both liberal and conservative). Because there are no value
neutral boundaries, what ultimately qualifies as public interest law turns on how one identifies the relevant criteria and values them in relation to a conception of a just society. It is therefore useful to start by breaking down and examining in more depth the criteria considered most important in defining what counts as public interest lawyering.

III. Criteria: What Counts?

Today, people use the term “public interest” law as a gloss for a wide range of sometimes contradictory lawyering categories. Some people define “public interest” law as lawyering for the poor. Some define it as “cause” lawyering. Others think of it as lawyering specifically with a left-wing or politically progressive agenda. Still others define the term as encompassing jobs in the public and nonprofit sectors. This last definition equates “public interest” law with law practiced in organizational forms in which lawyers do not take fees for their legal services from their clients.


Drawing from the “wide range” of definitional efforts, this section explores three distinct criteria associated with the concept of public interest lawyering. It begins by considering whether public interest law can be defined by reference to the clients, constituencies, and causes on whose behalf lawyers advocate. Can lawyers be classified as acting in the public interest by virtue of who or what they represent? The section then turns to consider the importance of individual motivation as a criteria informing the definition of public interest lawyering, asking whether being driven by altruism, moral or political commitment, or a desire to change the status quo makes one a public interest lawyer. Third, the section explores institutional factors: how important is where lawyers work and the type of work they do in defining them as public interest lawyers?

As you read the following materials, consider which criteria for defining public interest lawyering are most useful. Who do they include? Who do they exclude? How they match your own definition of public interest lawyering?

A. Clients, Constituencies, and Causes

1. Which “Public’s” Interest?

The literal meaning of public interest lawyering is lawyering that advances the public’s interest as well as (or perhaps instead of) the client’s private interests. It therefore rests, in the first instance, on a crucial public-private distinction. Consider the following effort to define the public interest:

A decision is said to serve special interests if it furthers the ends of some part of
the public at the expense of the ends of the larger public. It is said to be in the 
**public interest** if it serves the ends of the whole public rather than those of some 
sector of the public.

**MARTIN MEYERSON & EDWARD C. BANFIELD, POLITICS, PLANNING, AND THE PUBLIC INTEREST: THE CASE OF PUBLIC HOUSING IN CHICAGO** 322 (1955) (emphasis added). The question we immediately confront is whether this public-private distinction does any analytical work to help us understand what makes public interest lawyering special. Is this definition of the distinction between special interests and the public interest persuasive? Why or why not? Can you think of any action that “serves the ends of the whole public”?

The authors of the classic 1970s study of public interest law referred to earlier proposed a “Public Interest Ratio,” which measured the ratio of the external benefits created by the organization’s work (inuring to members of the public outside the group’s membership) to the total benefits (including those accruing solely to the membership):

If all benefits are reaped by members of the group, external benefits are zero, and the ratio will be zero. In that case, the group can be said to be a pure “private interest” group, and its behavior can be explained in terms of the usual self-interest models. By contrast, the closer the value of the ratio is to unity—that is, the greater the value of external relative to internal net benefits—the more we might be justified in calling the group a public interest group, or the activity a public interest activity.

**WEISBROD, et al., supra, at 21.** Is this formula useful? In applying it, how would one measure the benefits produced by a public interest law organization’s activities?

One question posed by this approach is that just what constitutes an external benefit—and, by extension, the public interest. The work of many lawyers has the potential for producing externalities, positive and negative, beyond the immediate result obtained by a particular client. For instance, an attorney’s successful representation of Company A in a patent infringement prosecution may, in the long run, facilitate more innovation by that company and others, though the immediate goal is to protect A’s economic interests.

This example underscores the definitional dilemma. Because the public is comprised of competing groups with conflicting normative views regarding what is best for society as a whole, the notion of the “public interest” becomes an ideological battlefield on which groups compete for political influence by casting their claims in the language of the public good—and their adversaries as “special interests.” For example, one group might view extensive government regulation of handguns as benefitting all of the public, while another group might believe just the opposite. From this vantage point, groups advocating on behalf of the public interest might be most accurately described as asserting a political claim that their vision of the public good should be adopted by society at large.

2. **The Representation Rationale**
Because of the indeterminate meaning of the “public interest,” the effort to define public interest law as a category of practice has often been anchored to the types of clients lawyers represent and the causes they pursue. A key concept is whether a particular group or cause is adequately represented—either through the existing market for legal services or in the realm of democratic politics. From this perspective, the need for public interest law is based on the presumption that a particular group’s lack of adequate market or political representation. Public interest legal representation, on this view, makes up for deficient representation in the marketplace or political arena.

The market-based justification for public interest law begins with the unfairness of a legal system in which economic status determines one’s ability to access services. Those with great financial resources will never want for legal representation because the economic market will always attract sufficient legal talent to satisfy their needs. A well-known New Yorker cartoon by J.B. Handelsman illustrates this point, showing a lawyer quipping to his client, “You have a pretty good case, Mr. Pitkin. How much justice can you afford?” Indeed, the interests of large corporations and other well-resourced segments of society always will be more than adequately represented—equipped with the best lawyers money can buy.

But, as we discuss in more detail in Chapter 8, there are many people who go without representation in a pure market-based legal services system. Legal Services Corporation, Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans 17 (2009). This is, in part, a result of the structure of the market for legal services, which is artificially limited by entry barriers (such as the bar examination) and dominated by private firm lawyers. Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in 2000 6 (2004) (noting that, as of 2000, 74% of lawyers worked in private law firms). As a result, the U.S. legal profession serves less than 30% of the legal needs of the poor. Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 Wm. Mitchell L. Rev. 35, 47 & n.54 (2003); see generally Rhode, Access to Justice, supra. Those who have limited financial means are less likely to be able to afford legal services for most types of legal problems, criminal or civil. Even those in the substantial middle-class of American society would likely struggle to finance any sort of significant legal dispute. Joy, supra, at 47 n.54.

One approach to the definitional issue is therefore to say that public interest lawyers are those who serve the needs of clients who would not otherwise receive legal counsel or would receive insufficient legal counsel. Nan Aron’s statement in the previous section articulates this position, as does the following definition by the Council for Public Interest Law, the trade group of public interest firms originally funded by the Ford Foundation in the 1970s:

Public interest law is the name that has recently been given to efforts to provide legal representation to previously unrepresented groups and interests. Such
efforts have been undertaken in recognition that the ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant interests. Such groups and interests include the poor, environmentalists, consumers, racial and ethnic minorities, and others.

COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA: A REPORT 6-7 (1976). Note that the Council refers to “previously unrepresented groups and interests.” What happens when public interest lawyers begin to represent those groups and interests? Does that representation undercut the justification for associating those groups with the “public interest”? How far back should we go to determine if a group has been “previously unrepresented”?

David Luban offers a slightly different market-based definition of public interest law:

By “public-interest law,” I do not mean “law practiced on behalf of the public interest.” That usage would make the phrase completely tendentious, because people disagree fundamentally over what the public interest is. Those on opposite ends of the political spectrum are likely to insist that they are practicing law in the public interest but their counterparts on the other side are not. I think that one should instead look for less loaded criteria. As I use the term, a public-interest lawyer is a lawyer for whom making money is not the primary purpose for taking a case—or, to put it in different terms, a lawyer who would like to take the case pro bono if it were feasible to do so. This minimalist definition aims to capture common-sense usage. An additional criterion, different from and not always consistent with the minimalist one, is that public-interest lawyers represent interests that would not otherwise be represented in the legal system. Though different, the two criteria are connected, because most lawyers would not take on pro bono cases from clients who can afford paid counsel, even if it were economically feasible to do so. Thus, cases that meet the first criterion (the lawyer would like to take the case pro bono) will typically meet the second criterion as well (the client would not otherwise be represented in the legal system). These criteria, rough as they are, avoid begging political questions. They include public interest law on the right as well as the left, and they include lawyers delivering routine legal services to low income clients . . . as well as lawyers representing causes. The second criterion does rule out self-styled “public interest” organizations that are really front groups for well-funded corporate interests that think it bad public relations to operate under their own flag. Some might see this structure as an anticonservative bias built into the definition. But I think not calling front groups for well-represented parties “public-interest lawyers” simply eliminates the basic functional difference between public-interest lawyers and lawyers for paying clients.

the concerns with using the phrase “public interest” to define this type of law practice? Does it include lawyers who work in private firms that enforce antidiscrimination law by bringing cases on behalf of women and minorities under contingency fee or fee-shifting arrangements? Barack Obama, before he became President, worked for Miner, Barnhill & Galland, a civil rights firm in Chicago, which among other things represents plaintiffs in important race discrimination lawsuits challenging violations of voting rights laws. Would he have been considered a public interest lawyer under Luban’s definition?

Luban’s definition is consistent with an \textit{access} orientation to public interest law: free legal services should be provided to those unable to afford them. Under this view, lawyers who provide legal representation for those in lower socio-economic groups would clearly qualify as public interest lawyers. But how are consumers and those interested in protecting the environment unable to secure legal representation? Because those two groups can conceivably cut across socioeconomic lines and include people who are wealthy, how does the market-based rationale apply to lawyers who work on these issues?

Proponents of the market-based definition point out that legal interests are not always unrepresented in the legal process solely because of the clients’ lack of financial resources. Sometimes the interests of disparate citizens may go unrepresented because the benefit to each individual is small and the transaction costs of organizing and seeking representation outweigh the individual benefit. This sort of inefficiency was a driving force behind the adoption of the class action litigation device. \textit{See Barbara Allen Babcock, et. al, Civil Procedure: Cases and Problems} 941 (3d ed. 2006). Do you think it justifies labeling environmental or consumer lawyers as public interest lawyers? Does the existence of mechanisms to aggregate claims and shift fees, which create financial incentives for private attorneys to take on some of these claims, affect your judgment?

What about groups unable to secure representation because their views are morally repugnant? Here are some groups whose interests are probably un- or unrepresented in the American legal system: Nazis, pedophiles; terrorists; serial killers.\footnote{That is not to say that individual members of these groups necessarily lack representation in cases when they are charged with crimes. In that context, they may receive a legal defense from a public defender or court-appointed attorney.} Should attorneys representing these groups be classified as public interest lawyers?

Does a definition of public interest law that hinges on access to the legal system imply that substantive outcomes are irrelevant? Does it mean that there is no political content to public interest law? Consider the following commentary on this point:

Because of the increasing variety of organizations that claim its status, public interest law has defined itself so as not to exclude organizations based on substantive legal programs. The diversity of substantive claims made by today’s public interest law organizations and the tensions that result from the march of such a diverse group under one banner has generally required that public interest law define itself in procedural, representation-based terms. Thus, Nan Aron, of the Alliance for Justice, describes the \textit{sine qua non} of public interest law as
“provid[ing] underrepresented groups with access to the legal system.” Modern public interest law is repeatedly justified this way—in terms of procedure, rather than in terms of a substantive vision . . . .

In this way, the language of modern public interest law has become the language of procedural justice as articulated by [the philosopher John] Rawls. Presumably, the “public interest” is something to which everyone in a pluralistic society can reasonably agree. This is an application of Rawls’ theory of the “overlapping consensus.” Because this overlapping consensus cannot rely on any comprehensive religious, philosophical, or moral doctrines, modern public interest law does not permit religious, philosophical, or moral ideas to define what it is or does. Public interest law’s insistence on a procedural and value-neutral identity—that of merely assuring representation—embodies the Rawlsian notion of the priority of the right over the good.

This was not the definition of justice for the National Civil Liberties Bureau [predecessor of the ACLU] or the Civil Rights Movement. . . . The Reverend King’s movement represented a particular community with a particular substantive vision of the good whose cause was articulated as a moral and religious imperative. Modern public interest law faces an identity crisis as it seeks to reconcile the substantive visions of its predecessor organizations with the extirpation of visionary language from its modern “justice as procedure” rhetoric.

One public interest commentator attempts to solve this crisis of identity by recasting the substantive agendas of predecessor organizations in procedural justice terms. “Both [the NAACP and the ACLU] used the legal process to clarify and protect the rights of minorities—blacks and persons deprived of civil liberties—who would not otherwise have had adequate representation in the legal process.” This assertion—that African-Americans and other politically unpopular groups would have gone without representation but for the NAACP and the ACLU—is a crucial one. In modern public interest law rhetoric, it is essential that these groups otherwise go without representation, because without this need the ACLU and NAACP might be seen as endorsing the substantive views of their clients or, worse, claiming that their clients’ victories would enhance the common good. Modern public interest law, unlike its predecessors, denies the substantive good to be achieved by the victory of its clients.

David R. Esquivel, Note, The Identity Crisis in Public Interest Law, 46 DUKE L.J. 327, 341-43 (1996). Do you agree with Esquivel’s argument that the procedural approach to thinking about public interest lawyering leads to a morally neutral definition that diminishes the importance of the substantive issues these groups are addressing? Is the procedural definition too narrow? Can public interest lawyering be viewed more broadly, as encompassing the idea of access not only to the justice system in the context of litigation, but also to other institutions of change, such as the
political process? Could the ends sought through such a process then be viewed as “substantive,” thus addressing some of Esquivel’s concerns?

As these questions suggest, the representation rationale for public interest law may also relate to political representation (not just legal). One reason for this is that public interest lawyering emerged during a period when the United States was gradually reducing formal barriers to participation in the political process, but members of these groups had yet to achieve political power, even in proportion to their numbers, because of the effects of historical discrimination. That is, it was not just that minority groups were unable for financial reasons to secure legal counsel. It was that lawyers needed to represent these individuals and groups because the latter could not pursue social change through ordinary political channels because of their political powerlessness. Lee Epstein, Conservatives in Court 9 (1985).

Thus, for example, the NAACP Legal Defense Fund’s legal work on behalf of African Americans was deemed necessary because it was unlikely that a white majority population in the early to mid-twentieth century was going to support racial integration and the eradication of Jim Crow laws. Although formal barriers to political participation, at least in terms of voting, were wiped out by the ratification of the Fifteenth Amendment, African Americans represented both a numerical minority and a relatively powerless group because of past discrimination against them and state voting laws designed to limit African American participation. In a similar way, political dissidents, such as Socialists or Communists, have been unlikely to exercise much political weight in the world of ordinary partisan politics. When their speech is restricted by the major political parties, going to court is a legitimate—and perhaps the only viable—approach to advance their interests.

Indeed, in a decision recognizing that advocacy in legal action is protected activity under the First Amendment, the Supreme Court acknowledged this role for litigation:

In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression. Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. Just as it was true of the opponents of New Deal legislation during the 1930’s, for example, no less is it true of the Negro minority today. And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.


This perspective resonates with a familiar doctrine from constitutional law. One justification for judicial enforcement of the federal Constitution against other branches of government suggests that such enforcement is most justifiable when the courts are intervening where the political process has broken down. See, e.g., United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1944) (stating in dicta that more stringent judicial review might be permissible to correct government “prejudice against discrete and insular minorities” which
may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."). As discussed below, some conservatives have criticized this aspect of progressive public interest lawyering. They have claimed, among other things, that lawyers who seek to change the law through litigation are elitists seeking a second bite at the apple, bypassing the democratic political process and going to court where they have failed to gain majoritarian support for their values. See David Luban, Lawyers and Justice: An Ethical Study 303 (1988) (summarizing these arguments).

The political representation rationale supports a vision of public interest lawyering predicated on procedural fairness. It shows great faith in the adversary system of justice, as it relies on the assumption that if everyone’s interests were equally represented in the legal and political arenas, outcomes would be fair (or at least fairer). However, it raises its own questions.

Chief among them is how to know which groups are political underrepresented and what the relevant time frame is for assessing their political power. Does underrepresentation have to be ongoing or is it sufficient that it occurred sometime in the past? Several forms of such political disadvantage continue to exist, despite important social gains, including disadvantage based on poverty, minority status, discrimination, and impediments to collective action. Are environmentalists still underrepresented? What about the interests of workers? Does it matter why a group is underrepresented? For some groups, like undocumented immigrants, there may be costs to organizing because the clients belong to politically vulnerable groups that may suffer retaliation if they raise their profiles. Consumers of collective goods like the environment may have insufficient incentives to act collectively because they believe that can benefit from the work of others (the classic “free rider” problem).

What happens when there are multiple groups laying claim to underrepresentation whose interests are in conflict? Lawyers who advocate for political causes are oriented toward the enforcement and reform of laws and institutions that affect broad social groups. Accordingly, they inevitably clash with adversaries who hold different policy views: civil libertarians versus defenders of religious rights; environmentalists versus developers; consumer advocates versus business interests. Groups on both sides of these policy disputes deploy law to advance their aims. Which is public interest law?

Labor unions, which traditionally have supported strong civil rights laws, have sometimes backed legal restrictions on immigration because they have viewed immigrant labor as a source of competition for domestic jobs. See Kevin R. Johnson, Civil Rights and Immigration: Challenges for the Latino Community in the Twenty-First Century, 8 La Raza L.J. 42, 58 (1995). Similarly, civil liberties organizations such as the ACLU, which staunchly support abortion rights, also have asserted the free speech rights of anti-abortion protestors. See Brief as Amicus Curiae of American Civil Liberties Union Supporting Petitioners at 6, Hill v. Colorado, 530 U.S. 703 (2000). When the interests of underrepresented groups clash, can we still categorize all of the attorneys on both sides of these disputes as public interest lawyers? Whose interests are more underrepresented: criminal defendants or crime victims? Environmentalists (backed by powerful groups like the Natural Resources Defense Council and Sierra Club) or small business owners? Minorities who benefited from affirmative action or poor whites who received no preferences? Are these the right comparisons to draw?
The following revisits the classic definition of public interest law (referenced at the beginning of this chapter) as providing “fuller representation to underrepresented interests,” which was proposed in the 1970s by Joel Handler, Burton Weisbrod, and Neil Komesar.

[W]e may fairly ask whether the original definition of public interest law propounded by Handler and others, perhaps lacking the courage of its progressive political convictions, has lead to a conceptual dead end—or whether it still offers a meaningful foundation for understanding the field. As the critiques of public interest law have made clear, it is not possible to define “external benefits” or “underrepresentation” in an absolute sense that is applicable across different contexts and over time. But this does not necessarily lead to the extreme relativistic point—that the “public interest” in public interest law is simply in the eye of the beholder—that some conservative critiques of public interest law would suggest. In this vein, it is worth recalling that a key force behind the early mobilization of conservative public interest law organizations was the Chamber of Commerce, which—urged on by soon-to-be-Justice Louis Powell—sought to counter the rising influence of liberal groups in court by promoting conservative counterparts that would appropriate the form and label of public interest law. The manipulation of terms for the advantage of powerful groups does not mean that such terms apply equally by virtue of mere invocation. Rather, it should cause us to scrutinize the labels more carefully.

Toward this end, building on Handler’s definition might lead us to reframe the core element of contemporary public interest law in terms of relative disadvantage. Public interest law, as a category of practice, would thus be used to describe legal activities that advance the interests and causes of constituencies that are disadvantaged in the private market or the political process relative to more powerful social actors. Disadvantage, in this sense, relates to the resources (money, expertise, social capital) that a constituency may mobilize to advance individual or collective group interests. I draw attention to the relative nature of a constituency’s disadvantage since disadvantage is, at bottom, deeply situational—shaped by power inequality between rival constituencies. This framing suggests that it is possible to identify the constituencies served by different organizations, in different cases, and then to assess the power differential between them. It does not claim that this is calculation is easy—or even always possible. But it does point toward a metric—power—that can provide a basis for distinguishing which among competing causes might legitimately lay claim to the public interest.

The first type of disadvantage is basic market inequality, in which individuals, despite suffering a legal harm, are blocked from legal redress because they are too poor to pay for a lawyer (and there are no viable contingency or fee-shifting arrangements available). Public interest law responds to this type of disadvantage by providing no-cost or low-cost services to expand the entry of the poor into the legal system on an individual, case-by-case basis. Call this the access dimension of public interest law. Note that this dimension is the least controversial because it tracks the procedural justification for public interest law—facilitating
representation as a means of achieving the equal opportunity to present claims—rather than advancing a substantive conception of the good by preferring some types of claims over others.

Market inequality maps onto, although it is not always coextensive with, forms of political inequality as well, which leads to the second (and more controversial) type of disadvantage: that of social groups or constituencies hindered in advancing collective interests through political channels. Several forms of such structural disadvantage continue to exist, despite important social gains, including disadvantage based on poverty, minority status, discrimination, and impediments to collective action. Members of disadvantaged groups have historically used American-style public interest law, particularly court-based litigation, to leverage policy gains that could not be effectively achieved through majoritarian politics. Thus, in the U.S. context, classic areas of public interest litigation have included welfare rights litigation on behalf of the poor, civil rights litigation on behalf of communities of color, and environmental and consumer litigation on behalf of those diffuse interests. Call this the policy dimension of public interest law.

A key feature of these types of public interest law activities is that, unlike standard access lawyering, they are oriented toward the enforcement and reform of laws and institutions that affect broad social groups. Accordingly, they inevitably clash with adversaries who hold different policy views: civil libertarians versus defenders of religious rights; environmentalists versus developers; consumer advocates versus business interests. Groups on both sides of these policy disputes deploy law to advance their aims. Which is public interest law? Focusing on relative disadvantage would frame the policy dimension of public interest law as encompassing advocacy on behalf of constituencies who seek to mobilize law to make up for their relative lack of political power to move policy in legislative arenas. This calculus would require looking at the nature and depth of a group’s disadvantage vis-à-vis those against whom that group seeks to mobilize. This, in turn, would require attending to deeply entrenched and persistent forms of inequality based on poverty, race, national origin, gender, sexual identity, and other grounds. It would, on the other side of the political equation, lead us to ask whether proponents of public interest law legitimately pursue policy change on behalf of the less powerful—or whether they cynically invoke the banner of dispossession to mask the reality of privilege.

From this vantage point, public interest law would as a general matter include groups seeking to use legal means to challenge corporate or governmental policies and practices. This definition would encompass activities on both sides of the political spectrum that legitimately advance disadvantaged interests, but exclude lawyering on behalf of existing structures of power. It does not, in the end, suggest that all claims asserted by less powerful groups necessarily advance a normative conception of the public interest to which all segments of society should subscribe. Rather, it asserts that the public interest is served when constituencies that genuinely face greater barriers to influencing political decisionmaking because of their less powerful status gain meaningful avenues to assert their claims through law.
Building on Handler’s definition in this way does not avoid the boundary questions that inevitably and inescapably arise. To the contrary, it asks hard political questions. Where should we locate certain plaintiff-side lawyers, who might use law on behalf of individuals (accident victims, consumers, or investors) to challenge systematic practices by corporate actors (insurance companies, product manufacturers, or corporate insiders) but who do so in the pursuit of private enrichment instead of political reform? Or how should we think about libertarian groups that might select cases on behalf of sympathetic and relatively disadvantaged groups as a means to build deregulatory precedent designed to advance a broader pro-business agenda that redounds to the benefit of powerful corporate financial patrons? Similar questions might be posed about some Religious Right organizations, which use the backing of politically influential Christian-denominated churches in the pursuit of a wider role for religion in public life (which may, in turn, curtail the rights of religious minorities or religiously disfavored groups, like gays and lesbians). Or we might ask how to define government lawyers, who may, in some instances, mobilize the power of the state to validate the repression of minority groups while, in others, might use their resources to advance minority interests? No definition of public interest law can definitively answer these questions based on neutral principles—but that does not mean that the questions should cease to be asked. And, indeed, to the extent that the liberal vanguard of public interest law has retreated from the definitional project, the questions are being asked—and answered—by their adversaries.

Cummings, The Pursuit of Legal Rights—and Beyond, 59 UCLA L. REV. 506, 522-26 (2012). Is this reframing around relative disadvantage or power useful? Is it too facile to equate lawyering in the public interest just with lawyers who purport to represent the less powerful? Those with power could themselves use it to advance the public good. And lawyers for power holders could guide them along this path. In a sense, this notion is consistent with the ideal of the “people’s lawyer” associated with Louis Brandeis—someone who sought to be the “lawyer for the situation,” counseling powerful corporate clients on solutions that would not just advance their private interest but also uphold the broader public interest. Clyde Spillenger, Elusive Advocate: Reconsidering Brandeis as People’s Lawyer, 105 YALE L.J. 1445, 1472, 1502 & n.194 (1996). In another version of this idea, consider the following statement from a well-known liberal federal judge (and former legal aid lawyer):

I firmly believe that a prosecutor who wisely and fairly uses his or her power to forego prosecuting someone when the interest of justice so requires furthers the public interest just as much as a public defender who, from the trenches, defends the criminally-accused indigent. A partner in a major law firm who works to ensure that his or her corporate clients treat their employees in a non-discriminatory manner, or that his or her clients take the high road even as they pursue the bottom line (for example, consider Enron or Worldcom) furthers the public interest just as much as the plaintiffs' lawyer who sues the corporation.
for discrimination or the government lawyer who charges the corporate executive with fraud and malfeasance.

Hon. Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 12 WASH. U. J.L. & POL’Y 33, 35 (2003). Do you agree with Judge Henderson’s broader conception of pursuing public interest law? Why or why not? Do any of the definitions based on clients, constituencies, or causes make sense to you? If you were a government official or in charge of philanthropic giving at a foundation, would any of these definitions help you decide what types of law practice are worthy of being subsidized as advancing the public interest?

### 3. Operationalizing the Definition

In private practice, the decision about which cases to take is generally a business one. Clients who are solvent, can afford the law firm’s hourly rates, and can pay bills regularly are likely to be taken on, assuming that the firm has sufficient staffing for the job and that no conflicts of interest bar the firm from representing a new client. Other reasons exist for law firms to turn down clients besides the profitability of the work. A law firm might, for public relations purposes, decline to represent an unpopular client, or a client that will make the firm’s other clients uncomfortable by association. *See, e.g.*, Monroe Freedman, *Must You Be the Devil’s Advocate?*, LEGAL TIMES, Aug. 19, 1993, at 19 (describing Sullivan & Cromwell lawyer’s refusal to accept court appointment to represent a suspected terrorist in 1992 World Trade Center bombing). Furthermore, law firms sometimes will not accept clients whose cases would require the firm to take a position that could be disadvantageous to its work for other clients in other cases. These are known as “positional” or “issue” conflicts. *See NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 274-76 (3d ed. 2004); John S. Dzienkowski, Positional Conflicts of Interest, 71 TEX. L. REV. 457, 460 (1993).* It is conceivable that a law firm might take a high profile pro bono case to enhance its stature in the legal community and the public eye, but even that decision may be related to generating future paying clients.

One way of distinguishing public interest lawyers from the rest of the bar, then, is by the factors they use to select clients and cases. As Robert Rabin observed:

> The distinctive element . . . is the criterion of case selection. The attorney who selects clients principally on the basis of whether representation would involve working on socially desirable cases is a lawyer engaged in law reform practice. Conversely, where the market is the principal, though not necessarily exclusive, determinant of docket priorities, the legal activity [does not constitute law reform practice].


In its early years, the Center for Law and Social Policy (CLASP), one of the organizations that pioneered the concept of the public interest law firm, used the following...
guidelines to select cases:

(1) an important public interest is involved;
(2) the individuals and groups involved do not have the financial resources to retain and compensate competent counsel for the matter involved;
(3) no other legal institution is likely to provide effective representation;
(4) the area of the law has not been adequately explored;
(5) opportunities for innovation are present;
(6) the subject matter is one in which the staff of the Center has competence;
(7) the activity is one in which there is substantial room for participation by students at the Center;
(8) the resources of the Center required are commensurate with the gains likely to be achieved.


• Is the case likely to have significance beyond the parties involved? Would the substantive outcome of the case, if we win, matter? Is it important to a fairer process or a better world?
• Is the area central to the interests of the Litigation Group or some piece of Public Citizen or its allied public interest groups?
• Do we have a chance of winning?
• Will the cost of carrying on the litigation be within our means?
• Is anyone else likely to do the case, so we do not have to?
• Is there something we would rather do with our limited resources that this would prevent?
• Does the case involve an issue of such moral outrage that none of the above matter much?


Given our discussion of the indeterminate meaning of the public interest and the contested nature of underrepresentation, do you think these criteria usefully guide client selection? Or are they simply a way for lawyers to exercise judgments about what types of cases are the most politically important to them? If so, what is the purpose of having criteria at all? Which, if any, of these concerns would be relevant to a lawyer representing clients in a private firm?

B. Motivation

The representation rationale attempts to justify public interest law in reference to external
facts—the degree to which particular groups or interests are underrepresented in the market or in politics. The limits of this approach, as we have seen, are that (1) there is no agreed-upon metric of underrepresentation, and (2) groups asserting underrepresented status have conflicting visions of what type of society fuller representation will produce.

This fundamental disagreement about the meaning of public interest law has produced alternative definitional efforts rooted not in the external world of political and economic inequality, but in the internal world of lawyer motivation. The most influential scholarly alternative is the concept of “cause lawyering,” defined by Stuart Scheingold and Austin Sarat as follows: “At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic, or, indeed, legal.” Scheingold & Sarat, Something to Believe In, supra, at 3. The cause lawyering idea seeks to distinguish legal advocacy on the basis of lawyer motivation rather than a particular conception of the good society or a specific political agenda: “political or moral commitment [is] an essential and distinguishing feature of cause lawyering.” Id.

This section explores the importance of motivation to public interest lawyering. In particular, we look at three types of motivation: altruism, moral or political commitment to a specific cause, and a desire to change the status quo. As we will see, these categories of motivation are not neatly separable and the very concept of motivation poses its own challenges as a vehicle for defining public interest lawyering. But the drive to do good is a key factor distinguishing what we think of as public interest lawyering from traditional notions of client-centered lawyering, in which lawyers’ normative commitments are not supposed to matter. Moreover, understanding lawyers’ motives for undertaking public interest work is important for reasons beyond defining this sector of the legal profession. From a systemic perspective, if the legal profession’s goal is to increase the legal resources for public interest work, designing effective initiatives to encourage lawyers to devote more time and energy to such work is dependent on understanding the reasons underlying their professional choices.

1. Altruism

Altruism can be a key motivation of public interest lawyers, who seek to use their legal skills to benefit others (clients and society at large), in contrast to more conventional views of lawyering, which center on the advancement of client interests. Carrie Menkel-Meadow, The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers, in Cause Lawyering: Political Commitments and Professional Responsibilities 31, 37 (Austin Sarat & Stuart Scheingold eds., 1998). In its purist form, altruism is the “unselfish regard for the welfare of others.” Deborah L. Rhode, Pro Bono in Principle and in Practice, 53 J. Legal Educ. 413, 414 (2003). Yet altruistic behavior is rarely ever pure. Even public interest lawyers need to earn a living. Does that mean that they are something less than altruistic—or that we should understand altruism in different terms? Of course, public interest lawyers tend to earn less on average than their for-profit counterparts—a difference that economists might call the opportunity cost of engaging in a public interest law career. Does the fact that public interest lawyers make less money make them more altruistic?

Scholars in many disciplines have examined the underpinnings of altruistic behavior and
have concluded that the concept of altruism is itself a complex one. As Deborah Rhode has observed, “[s]ome branches of moral philosophy, joined by the rational choice school of economics, generally deny the possibility of wholly disinterested actions.” Rhode, Pro Bono, supra, 53 J. LEGAL EDUC. at 415. There are several complexities here. First, few human actions are compelled by a single motive. Even if altruism drives a lawyer, it would be difficult to trace the sole source of her actions to this motive alone. Second, lawyers who engage in public interest practice may receive non-pecuniary benefits from their altruism. That is, altruistic behavior is never completely altruistic—motives are generally “mixed.” Menkel-Meadow, supra, at 37-42. As Rhode further observes:

In describing the influences on altruism, researchers generally distinguish between intrinsic and extrinsic factors. Intrinsic factors include the personal characteristics, values, and attitudes that motivate decisions to help others. Extrinsic factors involve the social rewards, reinforcement, costs, and other contextual dynamics that affect charitable assistance. These factors are, of course, related. Individual motivations can be understood only in the context of larger forces that shape personal commitments and group identity.

Rhode, Pro Bono, supra, 53 J. LEGAL EDUC. at 418. Recall David Luban’s definition of a public interest lawyer, quoted above, as someone “for whom making money is not the primary purpose for taking a case.” Is it always possible to know when that is true?

Along these lines, consider the following reflection from a well-respected lawyer who is both a former federal judge and public interest lawyer. In addressing a group of law students, she asked them to look within themselves to honestly assess their reasons for desiring careers in public interest law:

[W]hat is the source of my altruism? Is it really concern for others or a thin disguise for other less laudable motives—a good resume (useful for those with political or judicial ambitions) or an opportunity to feel good about myself and superior, even controlling, toward those I serve without pay, a welcome contrast to some of the irritating demands of a paying client.

Wald, supra, at 4.

As this suggests, public interest lawyers, while acting altruistically to pursue the interests of others or a larger cause, may also be motivated by important intrinsic benefits or “psychic income” that brings great satisfaction to them. Note, The New Public Interest Lawyers, 79 YALE L.J. 1069, 1117 (1970). These benefits may include enhanced feelings of social worth, as well as feelings of greater control over both the substance of one’s work and one’s lifestyle. Neil K. Komesar & Burton A. Weisbrod, The Public Interest Law Firm: A Behavioral Analysis, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS, supra, at 80, 87-88. Overall, these benefits may outweigh the downsides of low-pay and other resource constraints associated with public interest practice. Empirical studies have tended to support this conclusion. One study from the 1990s found higher job satisfaction among public interest
lawyers than among private firm lawyers (though the highest job satisfaction was among law professors). Kenneth G. Dau-Schmidt & Kaushik Mukhopadhaya, The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession, 49 J. LEGAL EDUC. 342, 346 (1999). More recently, the first wave of the After the JD study—a nationally representative longitudinal study of lawyers admitted to practice in 2000—found a similar pattern, with public interest, legal services, and public defense lawyers expressing relatively high levels of satisfaction with the substance and social value of their work, in contrast to their big firm counterparts. Ronit Dinovitzer et al., After the JD: First Results of a National Study of Legal Careers 50 Table 6.2 (2004).

Public interest practice can also provide concrete career benefits. The 1970s public interest law study referenced earlier suggested that those who begin their careers in public interest law might enhance their subsequent career prospects in other sectors (government, teaching, and private practice) because of the public exposure, and even fame, that can come with high profile public interest work. Komesar & Weisbrod, supra, at 88. Another early study of public interest lawyers suggested that some of them viewed other external factors, such as “publicity, hobnobbing with Congressmen, [and] meeting celebrities” as adding value to their work. Note, supra, 79 YALE L.J. at 1140-41. Other research has documented how some lawyers use the professional capital accumulated through various forms of public interest practice to enhance their career trajectories in law firms, David B. Wilkins, Doing Well by Doing Good? The Role of Public Service in the Careers of Black Corporate Lawyers, 41 HOUS. L. REV. 1, 21-22 (2004), and in the wider world of government and politics. Yves Dezalay & Bryant G. Garth, Constructing Law out of Power: Investing in Human Rights as an Alternative Political Strategy, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 354, 354-55 (Austin Sarat & Stuart Scheingold eds., 2001).

Extrinsic benefits may not just serve as rewards that public interest lawyers reap from practice, but may also nudge lawyers to engage in public interest-oriented work in the first instance. The way that public interest law opportunities are structured can affect lawyer motivation to select those opportunities among other options. Specifically, if the opportunity costs of public interest jobs are reduced, the jobs themselves become more attractive. This is the rationale behind Loan Assistance Repayment Programs (LRAPs), which reduce the debt burden (and thereby increase effective take-home-pay) for public interest lawyers; fellowship programs also operate to overcome the financial deficits of public interest law by conferring the nonpecuniary benefits of professional status and prestige. Once lawyers begin public interest practice, there is some evidence that they are more likely to continue. The 1970s public interest law study, for instance, found that “Legal Services lawyers who left their jobs went disproportionately into government, other jobs outside of private practice (but not commercial establishments), or public interest jobs; or, if they went into private practice, they did more and a different kind of pro bono work or had lower-status practices.” Handler, The Pursuit of Legal Rights, supra, at 181.

The use of extrinsic rewards to nudge altruistic behavior can also be seen in other contexts. Notably, law firms that factor pro bono service into billable hour requirements and promotion decisions are generally more likely to see higher rates of pro bono participation, since the cost of pro bono service (in terms of time away from billable cases) is reduced. Deborah L. Rhode,
PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 139-40 (2005). But does the lure of extrinsic benefits undermine the altruistic foundations of public interest lawyering? As Deborah Rhode puts it: “[I]f law firms give full billable hour credit for unpaid public service, or law schools give academic credit for such work, does that undercut its moral foundations?” Rhode, Pro Bono, supra, 53 J. LEGAL EDUC. at 416. Thomas Hilbink, reflecting on the role of altruism among cause lawyers, has this response:

[T]he idea that the presence of (professional or pecuniary) self-interest as a motivating factor might remove one’s work from the category of cause lawyering altogether is firmly laid to rest [by the literature]. To conclude otherwise would require cause lawyers to be ascetics in every way, not even deriving pleasure from helping others. Thus, the line between cause lawyering and noncause lawyering lies somewhere near the fulcrum between pure altruism and pure self-interest.

Thomas M. Hilbink, You Know the Type . . . : Categories of Cause Lawyering, 29 LAW & SOC. INEQUALITY. 657, 670 (2004); see also Rhode, Pro Bono, supra, 53 J. LEGAL EDUC. at 416 (“it is desirable to encourage actions taken primarily out of concern for others, but . . . pure selflessness is an unrealistic ideal.”).

Why are you interested in public interest law? Would you consider yourself to be motivated by altruism? By self-interest? By a mix of the two? Do you think it matters? How?

2. Moral or Political Commitment

Another way of understanding the role of motivation in public interest lawyering is to distinguish lawyers who pursue their practices because of a conscious moral or political commitment to a particular cause. Such lawyers are motivated by something other than simply representing clients in a professionally competent manner. As Scheingold and Sarat have written, “cause” lawyering “conveys a determination to take sides in political and moral struggle.” Scheingold & Sarat, Something To Believe In, supra, at 5. They argue that legal work constitutes cause lawyering only if it is carried out with the intent of pursuing such causes. Id. at 3; see also Ann Southworth, Professional Identity and Political Commitment among Lawyers for Conservative Causes, in The Worlds Cause Lawyers Make: Structure and Agency in Legal Practice 83, 85-86 (Austin Sarat & Stuart Scheingold eds., 2005) (arguing that cause lawyering entails “[a] self conscious commitment to the cause.”). Thus, a lawyer might go to work for a nonprofit immigrant rights organization because she believes U.S. immigration policy is regressive and inhumane, and she wants to use her practice to improve the basic living conditions for immigrant workers and their families. This would distinguish her from a lawyer who opens a private immigration law practice because he views this as an opportunity to pursue a new and profitable client market.

Of course, the line between lawyering for clients and for causes is a blurry one. Although cause lawyering attempts to avoid the definitional ambiguities of public interest law—which Scheingold and Sarat call a “notoriously slippery concept”—the concept itself raises its own tensions. Scheingold & Sarat, Something To Believe In, supra, at 5. A key issue is just
how ample the notion of “cause” is. Hilbink, supra, at 669. For example, in recent years, plaintiffs’ lawyers has begun filing mass tort cases against tobacco companies, gun manufacturers, and other large corporations, and have pursued these cases both for pecuniary gain and also expressly for social policy reasons. As one commentator suggests:

[T]he multiple motivations of mass tort lawyers may suggest a redefinition of ‘public interest’ lawyering. Among lawyers and law students, public interest law practice connotes low pay. If mass tort lawyers use the rhetoric of public interest to describe their work, should that lead to rethinking accepted notions of public interest practice?

See Howard M. Erichson, Doing Good, Doing Well, 57 Vand. L. Rev. 2087, 2091 (2004). Would mass tort lawyers qualify as public interest lawyers under David Luban’s definition above?

If motivation is a key element in defining public interest lawyering, how would you characterize the following lawyers:

**Example 1**: Ann is a lawyer at the ACLU where she is constantly on the lookout for cases to vindicate the First Amendment right to freedom of speech. When she finds a potential client, she makes it clear that the ACLU litigates cases to judgment—in other words, she is not interested in settling, but rather wants to get law on the books. She admits to having little interest in the details of her clients’ situations, caring instead about what their cases stand for.

**Example 2**: Bishop is a lawyer at Parker & Dolan, where he represents a large tobacco company against health-related lawsuits. He says that, although he does not smoke himself, he believes that it is a matter of individual choice and that the plaintiffs are not entitled to recover against Altria for their own voluntary smoking. He believes that the company is right to protect itself against the suits, which he views as shakedowns by greedy plaintiffs’ attorneys.

**Example 3**: Cecilia is a lawyer at legal aid who took the job because she believes that everyone is entitled to access to justice, irrespective of whether they have money to pay. She regularly represents poor clients filing for bankruptcy, which she personally finds morally repugnant, but she believes that they deserve zealous representation like everyone else.

**Example 4**: Dominik is a lawyer at a big law firm where he represents a range of different corporate clients on general litigation matters. He steadfastly disclaims any interest whether the clients are “right or wrong.” But he believes that by representing whatever client comes to him, he serves an important social function by bringing disputes into the judicial arena where they can be resolved in a civil and nonjudgmental way by the courts. He believes that by being a lawyer, he validates the authority of law and legal institutions, which are hallmarks of a functioning democracy.
Are any of these lawyers “cause lawyers”? Are all of them? If so, does the concept become the exception that swallows the rule? What isn’t cause lawyering? How much does it matter, as Sarat and Scheingold suggest, that lawyers are taking sides in political struggle? What types of struggle matter?

In light of the boundary issues raised by the focus on motivation, some scholars writing in the cause lawyering tradition have reframed its meaning. Consider the following definition:

"Cause lawyering is any activity that seeks to use law-related means or seeks to change laws or regulations to achieve greater social justice—both for particular individuals (drawing on individualistic ‘helping’ orientations) and for disadvantaged groups. [Essentially, it is] lawyering for the good."

Menkel-Meadow, *The Causes of Cause Lawyering*, supra, at 37 (emphasis added). Does this modify the definition of cause lawyering offered by Scheingold and Sarat? How? Professor Menkel-Meadow speaks of “social justice” and doing “good.” Are these categories self-evident or meaningful? How? Is Menkel-Meadow’s definition different from the definitions of public interest lawyering, like Aron’s above, which are focused on underrepresentation?

Focusing on commitment to a cause as the *sine qua non* of public interest lawyering may have important, unintended consequences for actual legal practice. As Professor Erichson has suggested, “[t]he danger of the prevailing conception of public interest practice [as primarily what lawyers do for little or no pay] is that by excluding so much, it may undermine a sense of commitment to the public interest in the everyday work that lawyers do.” Erichson, *supra*, at 2091; see also Russell G. Pearce, *Lawyers as America’s Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer’s Role*, 8 U. Chi. L. Sch. Roundtable 381, 417-19 (2001). In other words, distinguishing two sectors of the legal profession, defined largely by level of financial compensation, may suggest to lawyers with more lucrative practices that they need not concern themselves with the social good because that is not their role. Pearce, *Lawyers as America’s Governing Class*, supra, at 418. A more expansive definition of public interest work might encourage private, profit-making lawyers to think about their practices in a broader context and to think about their role as professionals in contributing to the public good. That result, however, need not necessarily flow from such a broader definition. As Erichson observes:

"[T]here is reason to be skeptical that redefining the conception of public interest lawyering would alter lawyer conduct to any significant degree. Given the strength of self-serving bias as a cognitive matter, combined with lawyers’ extraordinary ability to take moral refuge in the adversary system and the principle of moral nonaccountability, lawyers are likely to see the public good in their own work and unlikely to rethink basic commitments."

Erichson, *supra*, at 2092. Do you agree?

Moreover, focusing on commitment to causes shifts the discussion away from the political legitimacy of the cause itself—and the group that advocates on its behalf. Should groups
that promote deregulation and are supported by corporations that benefit from the legal positions espoused be placed in the same category as groups that promote regulation to benefit the poor? If yes, then does the label “cause lawyer” extend to any lawyer whose work is animated by any personal or political conviction—no matter who it ultimately serves? If not, then does cause lawyering have to rely on an implicit political theory of the good society that it purports to reject as a basis of defining legal advocacy?

Ethical issues also may arise from redefining public interest lawyering to reflect lawyers’ moral or political motivations. This may occur because the lawyer has a broader social agenda she is trying to pursue that extends beyond the interests of her immediate client.

To the extent mass tort plaintiffs’ lawyers are motivated by policy objectives such as improving product safety, fostering corporate responsibility or, for that matter, by any considerations other than maximizing their clients’ recovery, do lawyer-client conflicts of interest arise? A conflict arises if a lawyer’s commitment to social change objectives constrains the lawyer's ability or willingness to pursue the client's goals.

Id. at 2102. Do you think this poses a conflict? We will return to the ethical dimensions of this type of lawyering in Chapter 8.

3. Seeking to Change the Status Quo

From a motivational perspective, public interest lawyering may also be associated with a lawyer’s pursuit of changes to the status quo. Austin Sarat and Stuart Scheingold emphasize this aspect in describing cause lawyering as that “directed at altering some aspect of the social, economic, and political status quo.” Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 4 (Austin Sarat & Stuart Scheingold eds., 1998). Another scholar similarly suggests that cause lawyers “apply their professional skills in the service of a cause other than—or greater than—the interest of the client in order to transform some aspect of the status quo.” Lisa Hajjar, From the Fight for Legal Rights to the Promotion of Human Rights: Israeli and Palestinian Cause Lawyers in the Trenches of Globalization, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 68, 68 (Austin Sarat & Stuart Scheingold eds., 2001). In contrast, conventional lawyers “tailor their practices to accommodate or benefit the client within the prevailing arrangements of power.” Id. But what, exactly, does it mean to work toward changing the status quo, and how does that differ from arguing your client’s claim within the current power structure?

Is “changing the status quo” an ideologically neutral criterion, or is it really just code for liberals who wish to change things in our society? Thomas Hilbink raises this baseline question:

What constitutes the status quo or prevailing distributions of power? Does U.S. affirmative action policy constitute the “status quo”? If so, are recent efforts by right-wing lawyers to eradicate affirmative action in higher education challenges
to the prevailing power distribution? Or does such lawyering represent an attempt to maintain persistent racial inequality in the United States?

Hilbink, supra, at 660. Similarly, consider the abortion debate. At least for now, the Supreme Court continues to recognize that the Constitution forbids governmental prohibition of a woman’s right to choose to terminate a pregnancy before the fetus becomes viable. *Roe v. Wade*, 410 U.S. 113, 154 (1973). On the other hand, the Court has become increasingly tolerant of laws that regulate abortion in ways that make it more difficult for a woman to obtain an abortion, so long as the state does not prohibit it altogether or impose an undue burden on a woman’s right to choose an abortion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion). Suppose lawyer A works for an organization advocating the overruling of *Roe v. Wade*. What about lawyer B who is part of a nonprofit firm that works vigorously to sustain *Roe*, while lobbying federal and state legislatures to relax what he views as burdensome regulations that limit women’s access to abortion, but do not violate the *Casey* standard? What constitutes the status quo here and does it affect whom we view as engaged in public interest lawyering?

These questions force us to ask what the political and temporal baselines of the “status quo” are and whether it is meaningful to associate status quo challenges with public interest law. Conventional legal practice often, if not always, involves seeking changes to the status quo. A lawyer may seek judicial enforcement of a contract that is not presently being performed. A tort plaintiff may request compensation for unpaid expenses related to injuries resulting from a tortfeasor’s negligence. Of course, one could also conceive of the lawyers’ jobs in these cases as restoring the status quo (making the existing contract work; making the plaintiff whole). But a plaintiff who initiates litigation is almost always trying to change the status quo in the sense that she wants a court to enforce her rights. Many types of law practice that some people would recognize as public interest lawyering, such as legal services attorneys representing indigent clients and environmental lawyers trying to get the government to enforce its own pollution standards, arguably are not involved in seeking changes to the status quo. Are they engaged in public interest lawyering even if not engaged in social change? Or could you characterize their activities as social change oriented? Consider Hilbink’s perspective on these questions:

The work done by some poverty lawyers . . . appears to benefit the client within what Hajjar calls “the prevailing arrangements of power.” The cause, as delineated by such lawyering, aims not to challenge the system but to help individuals get the best outcome they can within that system. However, the work of [such] lawyers . . . can be reframed as a cause dedicated to “improving the condition of some identifiable portion of the low income community and other disadvantaged citizens.” Even if this involves no more than fulfilling unmet legal *needs*, of balancing the scales of justice—a procedural rather than a substantive goal—it can still be characterized as a cause that challenges the status quo of the lives of the individuals represented. . . .

Yet even in cases . . . where the values of the cause hew to the expressed ideals of
the state, lawyers’ actions in support of so-called mainstream values can constitute cause lawyering. This is because in a reality where “lawyers hold the state to its promises,” lawyering serves not simply to uphold the status quo—where such promises are regularly and systematically ignored or neglected—but rather to force the state to a new place where rights are honored or, at the very least, recognized. The actual status quo, after all, does not look like the promise it pretends to have fulfilled. In this light, proceduralist lawyering constitutes a deviant strain by pursuing the ends of the rule of law because the state does not in practice support such ends.

Hilbink, supra, at 669. Does challenging the status quo offer good basis upon which to rest public interest law? How do you think it compares to representation rationale? To cause lawyering?

C. Institutional Criteria: Practice Site and Advocacy Approach

Are public interest lawyers defined by where they work and what they do?

1. Practice Site

From the early era of public interest law, the movement was associated with lawyering in nonprofit organizations, whose very purpose it was to produce external benefits beyond the groups’ membership. See Weisbrot et al., supra, at 20-21 (focusing on public interest lawyering in the voluntary sector). This was, in part, a function of the funding stream available. In the era before robust fee-shifting laws, foundation funding to nonprofit, charitable organizations was seen as the financial model upon which the movement would build—following the Ford Foundation’s lead in seeding the first public interest law organizations in the 1970s. See Trubek, Public Interest Law: Facing the Challenge of Maturity, supra, at 417-18. In fact, lawyers associated with nonprofit groups viewed private lawyers with suspicion as too beholden to the bottom line to engage in transformative practice. Louise Trubek & M. Elizabeth Kransberger, Critical Lawyers: Social Justice and the Structures of Private Practice, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201, 202 (Austin Sarat & Stuart Scheingold eds., 1998).

This suspicion may still linger. One might think that attorneys who work in a for-profit enterprise, whether it is a law firm or a business, cannot be public interest lawyers because they are ultimately pursuing their self-interest in the form of monetary gain. A recent empirical study distinguishes what it calls “Public Interest Law Organizations” (PILOs) from private law firms:

PILOs differ from private law firms in that their primary goals focus on social justice or social change through law reform, rather than profit. Despite the legal profession’s commitment to and recognition of the need for pro bono services, law practice in the private sector is profit driven. For lawyers in solo and small firm practice, large private law firms, and the corporate context, empirical studies
show that the practice of law is a business that must be organized to ensure 
economic survival. PILOs are different precisely because the economic 
imperative is secondary to the organization’s purposes. To be sure, PILOs must 
have sources of income to pay salaries and operating expenses, but they are not 
driven by the same profit motive as firms in private law practice. Rather than 
being controlled by the profit motive, however, PILOs may be constrained by 
restrictions that accompany funding from the federal government.

PILOs must engage in extensive fundraising activities to fund litigation costs. 
This diverts significant time and energy from other objectives. Dependence on 
charitable funding may undercut PILO lawyers’ professional independence, as 
they must be sensitive to the wishes and agendas of those that fund their work.

Nielsen & Albiston, supra, at 1596-97.\footnote{Although the authors of this study limit their examination to PILOs, they do not argue that public interest lawyering cannot be done by lawyers in private firms. Id. at 1602 n.52.}

As detailed in later chapters, it is true that a number of the most prominent public interest organizations have been nonprofit enterprises. However, lawyers across different types of 
practice sites, some in the private sector, associate themselves with public interest law.\footnote{We consider practice settings more extensively in Chapter 4.} How much weight should we place on organizational affiliation in deciding what counts as public interest lawyering? In addition to nonprofit advocacy groups, there are important government 
agencies at the federal, state, and local level through which attorneys may advance the public 
good. Lawyers employed by private law firms may contribute substantial numbers of hours of 
pro bono work to nonprofit groups and causes, and firms may even devote some of their 
attorneys’ time to public interest work. Scott L. Cummings, The Politics of Pro Bono, 52 UCLA 
L. Rev. 1, 4-7 (2004). Moreover, social change may occur through coalitions of organizations, 
public and private, for-profit and not. Even nonprofit organizations may work in collaboration 
with networks of lawyers from private firms to accomplish their goals.

Is focusing on the structure and objectives of organizations helpful in defining public 
interest lawyering? Or is it too limiting? Should we think of public interest lawyering as an activity within the exclusive domain of a particular type of lawyer in a specific setting (the full-time staff attorney at a nonprofit public interest group) or as an activity that can (and should) be 
done by different types of lawyers in different locations (public or private) with different degrees 
of effort (full-time versus part-time) and motivation?

2. Legal Skill

Does public interest lawyering presume the use of certain types of tactics and skills? Nonlawyers routinely engage in meaningful and effective advocacy for marginalized groups. 
Schoolteachers, social workers, health care professionals, and countless others do work that
enriches and improves our society on a daily basis. Of course, what public interest lawyers do is often no better (or no worse) than what other socially committed professionals do, but it is distinguished by how they do it: applying special skills learned through a professional education in law.

The definition of public interest law activity from the Handler, Weisbrod and Komesar study includes as one of its three essential components that the conduct involve “the use of law instruments, primarily litigation.” Weisbrod et al., supra, at 22. Indeed, any basic definition of lawyering would likely include the use of skills such as legal research, fact investigation, negotiation, client counseling, litigation skills such as brief writing, deposition taking, and trial and appellate argument, or transactional skills, such as drafting documents for the creation of nonprofit organizations or laying the legal groundwork community economic development. As we will explore in greater detail in Chapter 5, lawyers may employ a number of different lawyering strategies to achieve social change. Not all of these activities, however, may depend on professional legal training. For example, is a lawyer’s work organizing the constituent group she represents for political action or protest a type of public interest lawyering? What about lobbying or other types of legislative advocacy work? Or what about a lawyer who decides to hold a press conference at a low-income housing project to highlight a landlord’s inattentiveness to basic maintenance and safety concerns? Are these activities public interest lawyering?

D. Exercise: Who Is a Public Interest Lawyer?

The following narratives are a series of reflections we could imagine coming from lawyers in a range of settings about their commitment to the public good. Which ones would you classify as public interest lawyers? Why? For the ones whom you do not consider to be public interest lawyers, what are your reasons?

Larry Ryan, Partner, Whitney & Phillips (250-person private law firm)
I graduated from law school about fifteen years ago. When I was in school, I participated in a lot of “leftie” organizations, such as the public interest society, which did some poverty work in the clinic. I enjoyed that and I still consider myself to be interested in using law for good things. Since I joined the firm, I’ve done a couple of pro bono matters helping battered women get protective orders. Still, my main work is products liability defense for large pharmaceutical companies, and I enjoy it a lot. It is intellectually stimulating, professionally rewarding, and, yes, I get paid a lot of money. But I actually feel like I’m doing good for society. I know this sounds weird, but the way I see my work, there are an awful lot of frivolous lawsuits against drug manufacturers. I see my role as vigorously defending the companies where the suits have little or no merit. In that way, I help keep my clients’ costs down so that they can use that money for innovation—maybe even find a cure for cancer. Also, I see my work as helping to maintain lower drug prices for poor consumers. I see my firm’s work lobbying on behalf of tort reform in the same light, though I’m a little less comfortable with that. That’s a good thing, right? How can it not be?

Bonnie McCarthy, Staff Attorney, Stop Abortion Rights Now (SARN)
My faith is extremely important to me and has been a huge part of my life. When I went to law school, it seemed like most of the other students were not only not religious, but also even disdained or mocked religion, as if an intelligent person couldn’t have faith. When I graduated, I went to work for a medium-sized law firm doing insurance defense, but the work wasn’t satisfying. I made a lot of money, but I didn’t really connect with my clients at all. I felt morally at sea. Then I got this job, and I do fulfilling work to stop the practice of abortion. While I respect the acts of those in the movement who carry out lawless acts to stop abortion, I prefer to use the legal system. I really see myself as a modern-day Thurgood Marshall, using the legal system to help those whom the law doesn’t even recognize as people. I lobby for strict abortion regulations in the state legislature in order to protect unborn lives. I engage in litigation in abortion cases, including helping states to defend laws such as the partial-birth abortion ban. It is my life’s mission to use my law degree for good.

**Stephanie Wilson, County Prosecutor, Drug Crime Unit, major urban area**

I went to law school to make a difference and to give back to my community. As an African-American woman, I have seen the devastation that drugs can visit on a community. The American criminal justice system may not be perfect, but it is the best tool we have to protect children in the poor neighborhoods of our big cities. I regard myself as changing the world, one drug dealer at a time, and the fewer dealers on the street, the safer our communities become. Do I feel conflicted about the fact that most of the defendants in my cases are young, African-American men? Sure I do. But what’s the alternative? This is a way I can use my legal skills to accomplish at least some change until we see more money funneled into communities for drug treatment and education programs—if that ever happens.

**Adam Lefkowitz, Community Political Activist**

I was a union organizer before I went to law school. I guess organizing is just in my blood. I am not practicing law in the conventional manner. I spend most of my time doing grassroots organizing of community action groups to advocate for fair wages and decent and safe workplace conditions for the working class. Ultimately, my goal is to accomplish real change for people who live in these communities. Though I don’t use my legal analysis and advocacy skills in the same way as courtroom lawyers, the law as a discipline still strengthens my ability to do policy analysis and political action. While I admire those lawyers who go into the courtroom to advance social causes, I don’t really think they do much good in the long run. Anyway, many of them are totally disconnected from their clients. It’s as if they don’t have real clients. They’re just pushing a cause and using clients as figureheads. I really know, and work side-by-side with, my “clients.” I’ve even been thrown in jail with them a few times during direct actions. I think I have a better understanding of their needs and the real issues that face them. My organizing work is fulfilling in ways that putting on a suit and arguing against the bad guys in court could never be.

**Sylvia Manzanares, Staff Attorney, Environmental Protection Agency, Region 8 Compliance Assurance and Enforcement Division**

Although those in the public interest community sometimes look at the government as their
adversaries, the government and its lawyers can also do good things that would not happen if we relied only on private enforcement. At the EPA, I use my legal training to monitor corporate compliance with clean air and water standards. I go to court where necessary to enforce federal environmental regulations. This activity is essential to maintaining a clean and healthy environment. I know that some people think working for the government is a kind of cop-out because it’s not the same as being on television like all the Sierra Club lawyers, but I think I am actually more effective in my own way by ensuring environmental health in our region. Plus, I earn a little more than most lawyers who work for nonprofit environmental organizations.

Frederick Gates, III, Legal Aid Staff lawyer

I grew up in an affluent, white, suburban community and had all the benefits that my clients will never have. My parents instilled strong values about helping those who are less fortunate than we are and that has stuck with me. As I grew up, I always knew I wanted to work in the trenches as a legal aid lawyer. I remember thinking how cool it would be. I was inspired when I saw Robert Redford in the film *The Candidate*. He plays the son of a wealthy former governor, and when you first see him he is a legal aid lawyer representing migrant workers in central California. His sleeves are rolled up and he is hard at work and is totally devoted to his clients. I thought to myself, “That’s what I want to do with my life.” I don’t make much money, but for me it’s all about helping others. I do receive some financial support from my family, which helps a lot.

IV. Application: Why Does the Definition Matter?

Although it has engaged scholars in many different fields, the debate over the definition of public interest lawyering is not purely an academic one. Tangible consequences flow from how we define public interest lawyering, and how lawyers and organizations engaged in such activity define themselves. First, how public interest law is defined affects how society views the legal profession and its relation to the public good. Specifically, how public interest law is understood may affect the nature and scope of professional regulation—both for public interest lawyers and the profession at large. Second, the definition of public interest may affect how it is funded. In terms of organizational support, one of the most important structural mechanisms facilitating the existence of public interest law groups is the Internal Revenue Code, which provides substantial tax benefits to qualified charitable organizations. How the Code defines such organizations—and how other funders do as well—significantly influences their financial viability. In terms of individual lawyer support, many law schools now have LRAPs that help law graduates to pay their student loans if they pursue employment that serves the public interest. Defining which types of employment qualify for such programs presents important challenges for law schools. The final part of this chapter explores how the definition of public interest law matters in these contexts.

A. Professional Role

What is the significance of defining a distinct segment within the profession as “public
interest law”? If the profession defines certain lawyers as public interest lawyers and others as “regular” lawyers, it may influence professional regulatory standards or measures of performance are necessary. For example, public interest lawyers may be held to a different standard than other practicing lawyers in soliciting clients in cases of social significance. Moreover, as Chapter 8 discusses in more detail, there may be other regulatory implications, particularly around conflicts of interests and fees.

Is it important that a sector of public interest law exist for the legitimacy of the profession? Scholars define a profession as an occupational field whose members use specialized knowledge obtained through intellectual training tailored to the field. See, e.g., Richard A. Posner, Professionalisms, 40 ARIZ. L. REV. 1, 2 (1998). That specialized knowledge has several implications. Because members of a profession possess such knowledge, they are in a position to make decisions for lay people who must trust the professionals and have no independent way of evaluating the quality of their services. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 9 (7th ed. 2005). To protect consumers from abuse, professions typically self-regulate through a code of professional conduct; and to distinguish themselves from mere commerce, professions usually mandate their members use their expertise to serve the public interest. The issue is how professionals enact their public interest obligation.

Consider the following observation by Sarat and Scheingold:

Legal professions everywhere both need and at the same time are threatened by cause lawyering. They need lawyers who commit themselves and their legal skills to furthering a vision of the good society because this “moral activism” puts a humane face on lawyering and provides an appealing alternative to the value-neutral, “hired-gun” imagery that often dogs the legal profession.

AUSTIN SARAT & STUART SCHEINGOLD, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 3, 3 (Austin Sarat & Stuart Scheingold eds., 1998). What does this observation suggest? How is the profession potentially “threatened” by cause lawyering? Are the benefits Sarat and Scheingold refer to merely a form of public relations for the legal profession? A salve to the multitude of jokes about lawyers’ lack of honesty and ethical behavior? Or is there something more significant about how these lawyers affect or even transform the profession itself?

In contrast, some commentators have criticized the effort to cabin public interest lawyers off from the rest of the profession. The relegation of the pursuit of justice to a particular subset of lawyers might suggest, for example, that justice is not the responsibility of all members of the bar, undermining in some respects the idea that part of what defines a profession is that its members have a responsibility to serve the broader public interest. See, e.g., Robert W. Gordon, Portrait of a Profession in Paralysis, 54 STAN. L. REV. 1427, 1443-44, 1454 (2002) (“The devolution of the public role onto separate corps of officials and other specialists cannot substitute for its performance by private lawyers.”). Along these lines, do you agree with the following observation?
One of the basic ideals of the legal profession is that of public service. While the very need for the public interest firm stems from the failure of the bar to conform to that ideal, the public interest firm may end in killing it. For example, the mere existence of legal aid has allowed many attorneys who previously did free work to now refer that work to legal aid and, with a clear conscience, focus on paying clients. The danger with the assertion that there are two kinds of legal practice—public interest and private interest—is that the public interest law firm may become the institutionalized conscience of the bar. For the traditional practitioner, justice may become, even more than it is today, “someone else’s” problem.

Kenney Hegland, Beyond Enthusiasm and Commitment, 13 Ariz. L. Rev. 805, 808 (1971).

B. Funding

1. Organizational

All charitable organizations, including public interest law organizations, rely in part on qualifying as tax-exempt institutions under the federal tax code. As a practical matter, therefore, public interest organizations that sustain themselves on charitable donations must be careful to engage in activities that conform to those permitted for their particular category of tax-exemption so that they may pursue their missions. There are multiple categories of tax-exempt status under the Internal Revenue Code. The following case illustrates some of the issues that can arise depending on what type of activities an organization undertakes.

REGAN v. TAXATION WITH REPRESENTATION OF WASHINGTON
461 U.S. 540 (1983)

Justice REHNQUIST delivered the opinion of the Court.

Taxation With Representation of Washington (TWR) is a nonprofit corporation organized to promote what it conceives to be the “public interest” in the area of federal taxation. It proposes to advocate its point of view before Congress, the Executive Branch, and the Judiciary. This case began when TWR applied for tax exempt status under [26 U.S.C.] § 501(c)(3) of the Internal Revenue Code. The Internal Revenue Service denied the application because it appeared that a substantial part of TWR’s activities would consist of attempting to influence legislation, which is not permitted by § 501(c)(3).

[Section 501(c)(3) grants exemption to: “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . , or
for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.” (emphasis supplied).

TWR then brought this suit . . . seeking a declaratory judgment that it qualifies for the exemption granted by § 501(c)(3). It claimed the prohibition against substantial lobbying is unconstitutional under the First Amendment and the equal protection component of the Fifth Amendment’s Due Process Clause.

TWR was formed to take over the operations of two other non-profit corporations. One, Taxation With Representation Fund, was organized to promote TWR’s goals by publishing a journal and engaging in litigation; it had tax exempt status under § 501(c)(3). The other, Taxation With Representation, attempted to promote the same goals by influencing legislation; it had tax exempt status under § 501(c)(4) [which grants exemptions to “Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, . . . and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.”] Neither predecessor organization was required to pay federal income taxes. For purposes of our analysis, there are two principal differences between § 501(c)(3) organizations and § 501(c)(4) organizations. Taxpayers who contribute to § 501(c)(3) organizations are permitted by § 170(c)(2) to deduct the amount of their contributions on their federal income tax returns, while contributions to § 501(c)(4) organizations are not deductible. Section 501(c)(4) organizations, but not § 501(c)(3) organizations, are permitted to engage in substantial lobbying to advance their exempt purposes.

In this case, TWR is attacking the prohibition against substantial lobbying in § 501(c)(3) because it wants to use tax-deductible contributions to support substantial lobbying activities. To evaluate TWR’s claims, it is necessary to understand the effect of the tax exemption system enacted by Congress.

Both tax exemptions and tax-deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual’s contributions. The system Congress has enacted provides this kind of subsidy to non-profit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying. In short, Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities that non-profit organizations undertake to promote the public welfare.

It appears that TWR could still qualify for a tax exemption under §
501(c)(4). It also appears that TWR can obtain tax deductible contributions for its non-lobbying activity by returning to the dual structure it used in the past . . . .

TWR contends that Congress’ decision not to subsidize its lobbying violates the First Amendment. It claims, relying on Speiser v. Randall, 357 U.S. 513 (1958), that the prohibition against substantial lobbying by § 501(c)(3) organizations imposes an “unconstitutional condition” on the receipt of tax-deductible contributions. In Speiser, California established a rule requiring anyone who sought to take advantage of a property tax exemption to sign a declaration stating that he did not advocate the forcible overthrow of the Government of the United States. This Court stated that “[t]o deny an exemption to claimants who engage in speech is in effect to penalize them for the same speech.” Id. at 518.

TWR is certainly correct when it states that we have held that the government may not deny a benefit to a person because he exercises a constitutional right. . . . But . . . [t]he Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public monies. This Court has never held that the Court must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right.

This aspect of the case is controlled by Cammarano v. United States, 358 U.S. 498 (1959), in which we upheld a Treasury Regulation that denied business expense deductions for lobbying activities. We held that Congress is not required by the First Amendment to subsidize lobbying. Id. at 513. In this case, like in Cammarano, Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying. We again reject the “notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State.” Id. at 515 (Douglas, J., concurring).

TWR also contends that the equal protection component of the Fifth Amendment renders the prohibition against substantial lobbying invalid. TWR points out that § 170(c)(3) permits taxpayers to deduct contributions to veterans' organizations that qualify for tax exemption under § 501(c)(19). Qualifying veterans' organizations are permitted to lobby as much as they want in furtherance of their exempt purposes. TWR argues that because Congress has chosen to subsidize the substantial lobbying activities of veterans' organizations, it must also subsidize the lobbying of § 501(c)(3) organizations.

Generally, statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. Statutes are subjected to a higher level of scrutiny if they interfere with the exercise of a fundamental right, such as freedom of speech, or employ a suspect classification, such as race. Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. . . .
We have already explained why we conclude that Congress has not violated TWR’s First Amendment rights by declining to subsidize its First Amendment activities. The case would be different if Congress were to discriminate invidiously in its subsidies in such a way as to “aim[] at the suppression of dangerous ideas.” Cammarano, supra, 358 U.S. at 513, quoting Speiser, supra, at 519. But the veterans’ organizations that qualify under § 501(c)(19) are entitled to receive tax-deductible contributions regardless of the content of any speech they may use, including lobbying. We find no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect. The sections of the Internal Revenue Code here at issue do not employ any suspect classification. The distinction between veterans’ organizations and other charitable organizations is not at all like distinctions based on race or national origin.

We have no doubt but that this statute is within Congress’ broad power in this area. TWR contends that § 501(c)(3) organizations could better advance their charitable purposes if they were permitted to engage in substantial lobbying. This may well be true. But Congress – not TWR or this Court – has the authority to determine whether the advantage the public would receive from additional lobbying by charities is worth the money the public would pay to subsidize that lobbying, and other disadvantages that might accompany that lobbying. It appears that Congress was concerned that exempt organizations might use tax-deductible contributions to lobby to promote the private interests of their members. See 78 Cong. Rec. 5861 (1934) (remarks of Senator Reed); Id., at 5959 (remarks of Senator La Follette). It is not irrational for Congress to decide that tax exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying.

It is also not irrational for Congress to decide that, even though it will not subsidize substantial lobbying by charities generally, it will subsidize lobbying by veterans' organizations. Veterans have “been obliged to drop their own affairs and take up the burdens of the nation,” Boone v. Lightner, 319 U.S. 561, 575 (1943), “subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.” Johnson v. Robison, 415 U.S. 361, 380 (1974).

The issue in this case is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not.

[A concurring opinion by Justice BLACKMUN is omitted].

* * *

As Regan indicates, federal law offers two distinct tax benefits for some charitable
organizations—exempting the organization’s own income from taxes and, probably more significantly, permitting individuals who donate to such organizations to deduct their contributions from their own taxable income. See 26 U.S.C. § 170(c); see also Oliver A. Houck, *With Charity for All*, 93 Yale L.J. 1415, 1428 (1984) (“For the majority of public charities, the exemptions from income tax afforded under section 501(c)(3) are not nearly so important as these deductions available under section 170 to their donors.”).

As a policy matter, does it make sense for federal tax law to allow tax deductions for donations that subsidize some types of public interest lawyering, such as law reform litigation, but not other types, such as lobbying and partisan political action? Why or why not? May the federal government choose which groups to provide tax benefits to in order to subsidize those groups’ missions? Do you agree with the Court’s rejection of TWR’s argument that allowing veterans’ groups that receive tax exemptions to lobby is a form of viewpoint or content discrimination in violation of the First Amendment? Could Congress constitutionally draw distinctions among other types of advocacy groups?

As discussed in Chapter 5, public interest lawyers and organizations can accomplish their goals through a variety of strategies, including litigation and traditional political activity. The Code’s clear distinction between these two types of activity affects the structure and financial viability of public interest organizations. Regan holds that the federal government is permitted to choose to subsidize law reform activity, but not political activity, even if the two are directed at the same substantive goals. Public interest groups thus must carefully monitor the distinction between activities that qualify them for tax-exempt status.

The IRS sometimes investigates and even rescinds tax-exempt status for organizations that are suspected of engaging in prohibited political activity. Often when this occurs, there are suspicions that the IRS’s actions are themselves motivated by partisan considerations. In a well-known instance of this, in 1966 the IRS ruled that donations to the Sierra Club were no longer tax-deductible after the Club took out full-page newspaper advertisements urging protection of the Grand Canyon. Houck, *supra*, at 1436. More recently, the IRS audited the NAACP after its President, Julian Bond, gave a speech criticizing President Bush before the 2004 election, though it ultimately allowed the NAACP to retain its tax-exempt status. Michael Janofsky, *Citing Speech, I.R.S. Decides to Investigate N.A.A.C.P.*, N.Y. Times, Oct. 24, 2004, at A12; *N.A.A.C.P. Cleared of Tax Violation*, N.Y. Times, Sept. 1, 1996, at A14. Nonetheless, the distinction between educational activity or public interest law reform activity and political action has held up over time, and organizations now typically divide themselves into two distinct branches, a § 501(c)(3) organization to carry out law reform work and a § 501(c)(4) organization that undertakes traditional political work.

It is not self-evident that even a public interest organization that confines its activities to legal work would necessarily qualify for the exemption under § 501(c)(3). That section requires that a group must be organized exclusively for the purpose of “religious, charitable, scientific, testing for public safety, literary, or educational activities,” none of which encompass litigation or other legal work. 26 U.S.C. § 501(c)(3) (2006). Older, more established organizations qualified for exemptions on the ground that they served “educational purposes,” even if those purposes were sometimes furthered through litigation. Houck, *supra*, at 1446 & n.134. In 1970, however, just as many new public interest law organizations were applying for tax-exempt
status, the Internal Revenue Service (IRS) announced that it was suspending the granting of exemptions to such firms while it studied its own standards. *Id.* at 1444. The announcement prompted outcry from members of Congress, the organized bar, and public interest groups, and after a little more than a month, the IRS reversed its position and stated that it would again issue exemptions to public interest law organizations. *Id.* at 1445-46.

The IRS later clarified its view of the tax status of public interest law organizations in its official rulings. IRS Revenue Ruling 75-74 concludes that “A public interest law firm that provides representation in cases it selects as having significant public interest and for which representation by traditional private law firms is not economically feasible is operated exclusively for charitable purposes and qualifies for exemption under section 501(c)(3) of the Code.” The ruling elaborates on this understanding as follows:

Organizations meeting the [IRS procedural] guidelines . . . are recognized as charities because they provide a service which is of benefit to the community as a whole. They provide legal representation on issues of significant public interest where such representation is not ordinarily provided by traditional private law firms. In this way, the courts and administrative agencies are afforded the opportunity to review issues of significant public interest and to identify and adjudicate that interest.

Charitability rests not upon the particular positions advocated by the firm, but upon the provision of a facility for the resolution of issues of broad public importance . . .

Charitability is also dependent upon the fact that the service provided by public interest law firms is distinguishable from that which is commercially available.

REV. RUL. 75-74, 1975-1 C.B. 152.

Which of the criteria for distinguishing public interest lawyering from other types of lawyering (discussed earlier in this chapter) are germane to the IRS’s definition of what qualifies as public interest law? Does the IRS’s definition make sense to you?

C. Individual

As a response to the impediment that heavy debt burdens impose on law students graduates, many law schools have created LRAPs—and the federal government has recently created a national program as well. These programs allow qualified students to borrow money to pay off their student loans and, often, forgive those loans if the student remains in qualifying employment for a minimum period. They are designed to promote public interest law careers (and are discussed in more detail in Chapter 8). In doing so, they have to make choices about what types of employment qualify a student for LRAP assistance. These important questions are often discussed by law school administrators and students as they establish new LRAP programs
or modify existing ones. In turn, the law schools’ definitions can effectively shape the pool of lawyers who can afford to pursue careers in public interest, and thus present another tangible context in which the definition of public interest lawyering is meaningful.

Most LRAP programs start with a basic definition for “qualifying” or “eligible” employment. Some schools refer directly to the IRS standards discussed in the previous section. Others focus on the type of work and the fulfillment of otherwise unmet legal needs. The University of Maryland School of Law, for example, defines qualifying public interest work as follows:

"Employment with a nonprofit organization whose primary purpose is to serve or advocate on behalf of individuals or organizations, whose interests, for various economic, political or social reasons, are not adequately represented by the private sector or the government. Priority is given to those graduates providing direct legal services to low-income clients."

University of Maryland Public Interest Loan Repayment Assistance Program Application, http://www.law.umaryland.edu/students/resources/ tuition/loan_repayment.html.

Many law schools’ LRAP programs include government employment of various types within the definition of qualifying employment. Read the terms of the University of Georgia’s LRAP program:

"A person is employed in the field of public interest law within the meaning of this charter if the employment requires a Juris Doctor degree and the person is employed to do legal work by (1) an organization described in subsection 501(c)(3) or 501(c)(4) of the Internal Revenue Code, (2) a local, state or federal government entity, including the military, or (3) a private practice where the practice is limited (or substantially limited) to clients comparable to those served by government supported and non-profit legal services organizations. The Law School will determine whether or not a particular job meets these qualifications. A judicial clerkship is not employment in the field of public interest law."

University of Georgia School of Law, Downs’ Loan Repayment Assistance Program Charter, Section 2(b), http://www.law.uga.edu/downs-loan-repayment-assistance-program-charter (last visited August 7, 2012).

For a very broad definition of qualifying employment, consider the most recent version of Stanford Law School’s LRAP requirements:

"The Program mandates that employment be (a) law-related, (b) public interest in spirit and content; (c) at least part-time (defined as .5 FTE pursuant to the employer’s personnel policies) and (d) must be a paid position. “Law-related” means that the position must substantially utilize the legal training and skills of the graduate. “Public interest” work is defined as: (1) work for an organization..."
qualifying for tax exemption under Internal Revenue Code § 501(c)(3) or 501(c)(4) or 501(c)(5); or (2) work for a governmental unit, which includes federal, state, or local government (work performed for a foreign government may also qualify, but is subject to approval by the LRAP Committee); or (3) work for private employers (including self-employment or contract employment), at least fifty percent of which involves providing legal services on a pro bono, reduced, or court-awarded fee basis to persons or organizations that would otherwise not be able to obtain comparable services. In the case of private public interest employment, eligibility shall be determined by the LRAP Committee on a case-by-case basis dependent upon the participant's ability to verify the nature of his or her work and the percentage performed on a pro bono, reduced, or court-awarded fee basis.


Stanford’s program also permits students who take judicial clerkships to qualify for LRAP if they take public interest positions immediately following their clerkships, and for some students who go into clinical law teaching to qualify as well. Id. Why do you suppose Stanford’s program includes even those working for private employers?

In contrast, Yale Law School has a loan assistance program that is tied purely to income, not to the type of practice.

COAP [Career Options Assistance Program] is open to all Yale Law School graduates. Graduates may join the Program at any time within ten years of graduation.

Eligibility is based upon the graduate’s income and debt level, not the type of employment. Examples of employment areas from which we expect to draw participants include, but are not limited to, (1) local, state, and federal government, (2) private not-for-profit public interest law practice, (3) low wage private law practice, (4) non-legal not-for-profit organizations serving the public interest, and (5) academic jobs. The political or ideological orientation of the graduate, employer or work is not a factor in determining eligibility. . . .


What types of legal needs might Yale’s program support that other schools’ LRAP programs do not? Overall, what do you think explains the differences among these programmatic definitions? Do you think it is fair that the definitions vary? The recently enacted
federal loan assistance program promises loan forgiveness after a specified period for graduates employed by a government organization, nonprofit 501(c)(3) group, or other nonprofit organization (not a labor union or partisan political group) engaged in public interest law services. Should that be the standard that all schools follow?

VI. EXERCISE

Suppose that you are the director of a large philanthropic foundation that was established to support different types of social welfare organizations. Your board of directors has decided to prioritize funding to organizations that use lawyers to accomplish social change on behalf of undocumented immigrants. The following organizations have submitted grant proposals to your foundation:

1. A nonprofit organization that seeks to hire lawyers to represent undocumented workers in class action impact litigation cases seeking enforcement of claims for unpaid wages under federal and state law.

2. A large private law firm that wants to use the funds to establish an in-house pro bono center focusing on the rights of undocumented immigrants and to train its associates to provide legal representation to undocumented immigrants in obtaining basic social services, such as education, housing, and health care from local governments.

3. A state agency that wishes to increase the resources devoted to investigating and enforcing (through staff attorneys) wage claims on behalf of undocumented immigrant workers who perform labor for which their employers do not pay the promised compensation.

4. A small private law firm, located in an urban area where there are a large number of undocumented immigrants, that wants to create a specialized practice representing such persons in a wide variety of cases, including immigration work, wage claims, and family law matters, using a sliding scale fee structure that charges clients on the basis of their ability to pay.

5. A nonprofit workers center that wishes to organize undocumented immigrants to engage in protest and other direct action tactics to draw negative publicity to employers who fail to pay promised wages and public officials who fail to take action to regulate such employers.

Which of these groups do you think qualify as public interest law organizations? Why?