CRITICAL LAWYERING: TOWARD A NEW PUBLIC INTEREST PRACTICE

BY
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I. INTRODUCTION

The practice of public interest law is ready for a change. While the public interest idea has its roots in older traditions of lawyer professionalism, the movement was inspired by the work of organizations like the ACLU and the NAACP. Current public interest practice, which I define as the practice of law for social change, was born in the 1960s and took institutional shape in the 1970s. As we look ahead to the 1990s, it is clear that public interest lawyers need a new vision to orient and sustain them. This commentary outlines such a vision, which I call "critical lawyering." Critical lawyering acknowledges the contradictions and difficulties of working for social change within the conventional framework of the legal system.

My vision comes from my experience as a public interest practitioner for over a 20 year period. I have worked in a variety of public interest practice settings, including a small public interest women's rights group; a private minority rights agency; a mixed private and pro bono law firm; and a state-based, multi-issue public interest law firm associated with a law school clinic. For some time now, I have also directed the clinic. I have also worked on minority, health, elderly, and consumer issues and women's rights, concentrating on the state level.

My work has shown me first hand the strengths and weaknesses of traditional public interest practice. My consciousness about the use of law for social change has changed over the years. My initial views were formed when I attended law school in the late 1950s: these ideas framed my approach in the early years of my practice in the late 1960s and early 1970s. These attitudes reflected ideals of professionalism and pluralism; my practice focused on government reforms and interest group politics. As the 1970s progressed, I became dissatisfied with these ideas. In order to continue working in the public interest sector and to increase my effectiveness, I rethought my practice and my goals. This rethinking was spurred by my work as a teacher, influenced by my concentration on state level questions, and inspired by generations of law students who have brought new questions and visions to our practice. My experience has given me the courage to propose a reconceptualization of the role of the public interest practitioner and, in this essay, I will describe how public interest law can be a practice of critical lawyering.

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This new concept of public interest practice is grounded in a more critical vision of law and society. It recognizes that lawyering for social change and on behalf of subordinated groups presents challenges far greater and more complex than the public interest lawyers of the 1960s imagined. Critical legal practice, as I define it, involves two elements: seeking to empower oppressed groups and individuals, *and* initiating a trajectory of change towards a more just society. Attorneys can empower people in two ways: first, individually, within a supportive attorney-client relationship; second, through the process of organizing groups and encouraging them to speak out in the public sphere. My view of a just society, however, goes beyond formal equality and redistribution. Lawyers alone can't create a just society, but they can take actions to put society on a trajectory toward fundamental change. Both empowerment and transformative strategies are crucial, and critical practice should involve both. But it is also important to see them as distinct and independent objectives for social change lawyering.

II. Dimensions of Critical Lawyering

In my practice, I have found that critical lawyering has six dimensions. Lawyers should encourage participation, personalize the issues, be skeptical of bureaucracy, be unbiased in approach to advocacy arenas, organize with other lawyers and apply feminist and anti-racist analyses. Each is useful in analyzing what cases or issues to emphasize, planning strategy and choosing work partners. Thinking about these dimensions when a new issue arises has helped me to ensure that my work involves both aspects of critical practice—*empowerment* and *transformation*.

A. *Encourage Participation*

Critical lawyers should involve their clients in practice decisions. Traditional public interest lawyers tended to orient their advocacy toward court victories; they considered advocacy a professional task. While they often discussed strategies with clients, their view of client participation was limited. Critical practice recognizes that a broader view of participation is essential. Critical lawyers should seek client participation to raise client consciousness of the law's impact and to develop proposals that will continue to work and ensure empowerment. Participation includes client involvement in actual advocacy and in devising the goals that the lawyers will pursue.

An example from my practice illustrates this principle. A major issue confronting the elderly is provision of adequate long-term care. In a recent controversy in Wisconsin, insurance companies offered nursing home insurance as the solution. At first glance, many considered this an attractive option. Consultations with the constituency groups and individuals my organization represents, however, revealed the pitfalls of this plan because the insurance would favor nursing homes over other long-term care options. With our constituents, we devised a counter-proposal more suited to the needs and desires of the elderly. Wisconsin has, for several years, had a very successful community-based,

individualized, tax-funded case-management system for long-term care. This was developed for younger disabled people but has been widely used for the elderly in the state. This "Community Options Program," which operates at the county level, has been extremely popular with elderly clients, as well as elderly advocacy groups. After many meetings with elderly groups, we decided to push for an expanded Community Options Program (COP), in which individuals decide for themselves what community-based services they need to remain in their own homes, e.g., chore service, home health aides, etc. We issued a position paper which opposed nursing home insurance and proposed funding for the community-based, individualized alternative.

The COP example illustrates both aspects of participation: elderly advocates developed the plan with the clients and the proposal required client involvement in the creation of individual support packages. While this kind of participation seems necessary, traditional public interest lawyers often lost sight of the central importance of client-generated strategies.

B. *Personalize the Issue*

Critical lawyers should frame issues in human terms. Lawyers, including public interest practitioners, tend to think in terms of "causes of action" and technical solutions. But this approach keeps the issue and the advocacy within a narrow, professional arena. To be effective, public interest lawyers have to break out of the this arena into a broader public space and make moral and emotional connections. For example, critical lawyers should view the media as a major resource. Lawyers can use the media to more effectively demonstrate the human implications of policies and laws, especially if the media tells the story from the client's perspective.

Knowledge about inequitable treatment, greedy corporations and unfair government is largely communicated through the media and popular culture. Critical lawyers can use newspaper coverage to identify an issue for the public and create public debate. For example, several years ago, my public interest center concluded that the lack of health care financing for the uninsured was a major social policy disaster. After we alerted her to the issue, a newspaper reporter did a series on the uninsured. She went to emergency rooms, welfare offices and nursing homes to find the hidden uninsured. Her series in a city-wide newspaper, with pictures, human interest stories, and analysis, put the issue on the agenda in Wisconsin. Now, following Wisconsin's lead, other state and national policy-makers have made the problem of providing health care for the uninsured a central issue.

The public has little interest in a dry, process-oriented presentation of issues accompanied by bureaucratic acronyms and abstractions. When advocates and their constituencies frame an issue in a dramatic and compelling form, the media will often do the rest. For example, efforts by advocacy groups have resulted in pivotal cultural events, such as street theater by homeless people, Broadway plays on AIDS victims or T.V. sitcoms like Murphy Brown's episode on recycling. Such events not only catch the public's attention but also

stimulate continuing media interest in the issue. Moreover, participating in the dramatization of the issue can empower the clients themselves.

Especially in discussions with lawyers and government officials, public interest lawyers should emphasize the effects policies have on people. Decision-makers will conceptualize the problem and the solutions differently when faced with real people and multi-dimensional needs. For example, my public interest center worked on the implementation of the Wisconsin Family and Medical Leave Act[2] to help parents balance family and work responsibilities. We urged government officials and business attorneys to look beyond procedural requirements and understand the stress felt by parents with work and childcare responsibilities. At conferences on the Family and Medical Leave Act, our lawyers analyzed each complaint filed under the Act. They described the human dilemmas behind the complaints rather than the technical statutory analysis. This allowed the audience of lawyers and business people to see the issue as a human problem, not merely an interpretation of an abstract set of rules. By showcasing people who use the Act and presenting the tensions and difficulties they face, we captured the sympathy of the endorsing agency and helped regulated businesses understand people's real concerns.

These efforts with the family and medical leave policies are transformative in that they seek to expand the Act to encourage businesses and unions to make more "family-sensitive" decisions. These efforts have also fostered client empowerment because our advocacy techniques involved clients telling their stories and presenting a multidimensional view of their concerns.

C. *Don't Trust Bureaucracy*

Public interest lawyers of my generation often thought the way to deal with a social problem was to create another agency or get new staff for an existing agency. Traditional public interest lawyers believed that a new director or new agency with a new mission—for example, providing health care for all—would create and carry out the solution that the advocates wanted. These lawyers thought that if they could frame a statute that gave agencies a mandate to bring about desired change and get it passed, their work ended. This was a very seductive image and many public interest lawyers were seduced. Too often, the bureaucratic structures abandoned the lawyers that created them. For example, I supported the creation of a state agency to regulate hospital rates, with the goal of controlling hospital costs to insure services for patients who lacked resources. No sooner was the agency created than hospital interests co-opted it. As a result, the agency clearly favored hospital interests and ignored the interests of needy clients. Moreover, the regulators actually discouraged participation of the clients and advocates who had been instrumental in the creation of the agency.

Until recently, many of my proposals on health involved creation of oversight agencies designed to develop health care provisions. However, I have

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[1] WIS. STAT. § 103.10 (1990).

rethought that approach. I am thinking much more in terms of creating community programs that will provide health care directly, using both public and private dollars, plus whatever citizen energies we can mobilize. We can use the programs created in local communities to see what actually works. Then, we will be better able to describe what we want for the state as a whole.

This constitutes a major change in our approach. In the past, when we concentrated exclusively on the development of the agency which would figure out "the answer," we looked towards the bureaucratic "quick-fix." We avoided figuring out what would actually work for the clients.

But the lesson is clear. Until we redirected our energies away from government and beyond bureaucracy, we could not begin to focus on developing feasible programs. We overlooked community resources that were already available for mobilization. For example, community health centers and public health primary care programs can provide client-focused, cost-effective services for the uninsured. These resources are often closer to the problem and so are better equipped to foster empowerment and strategies for more radical restructuring of the health care industry.

D. *Don't Privilege Any Advocacy Arena*

Law reformers often debate the effectiveness of litigation versus legislation and individual case representation versus class actions. Traditional public interest lawyers have preferred using the test case or statute that will set a new principle and have often disdained direct service to clients. Taking this position, traditional public interest lawyers assumed that direct service was tainted by the "system" and could never bring social change. In contrast, they assumed test cases were a purer approach to law reform, and that this constituted public interest lawyering beyond the system. They based these assumptions on a belief that the legal process itself did not replicate inequities in access. Law reformers see the professional arena as self-contained, their victories as self-enforcing, and, as we have seen, the bureaucracies as trustworthy. Critical lawyering recognizes that every arena contains opportunities for, and obstacles to, change. Rather than privileging any one arena, critical lawyering involves expanding professional boundaries. The critical lawyer looks for any opportunity to empower clients and transform society.

I have found that successful critical legal practice can start anywhere. Public interest lawyers should seize an issue, case or client that has resonance in the community and move from there. My public interest law center represents many thousands of individual senior citizens. From our experience in individual cases, we developed enough credibility and knowledge to enable us to advocate systematic changes like the Community Options Program for long-term care. Had we proposed that solution without having gained the ideas through providing individual representation, our proposals would have received scant attention. Also, the simple fact that we actually talked to many potential recipients gave us great credibility. Industry rarely comes to the legislature with first hand evidence.

On the other hand, sometimes we start at the legislative level and move to individual cases. For example, our work in the Family and Medical Leave Act, which provides unpaid leave for families, started with legislative work. After dramatizing the issue for the public, we provided direct information to employees and representation of cases before administrative agencies.

E. *Organize*

Public interest lawyers generally understand that they will be more successful in representing their clients' interests when their clients are well organized. Due to lack of resources, difficulty in perceiving inchoate client strengths, and professional distance, however, advocates rarely follow through on this understanding. This presents perhaps the most challenging task for social change lawyers because our professional education does not promote organizing skills and the value of community work. Also, resources for advocates to do organizing work are especially limited. Critical lawyers should join with and encourage client organizations whenever they arise.

Nevertheless, critical lawyers themselves *can* take leadership in organizing. Public interest lawyers must do more to create an advocacy community so that we can learn from each other and more effectively promote transformative strategies. Frequently, advocacy success stories involve lawyers getting together to plan, strategize jointly and support each other. Most public interest practitioners work in small firms or in solo practice. Without the support of other practitioners and possible coalitions, public interest lawyers are personally isolated and professionally less persuasive. The Chicago public interest community has done excellent work maintaining and promoting civil rights legislation through coordination among law school clinics and public interest advocates. Plaintiff trial lawyers in product liability cases have found success through networking. They exchange pleadings, opinions, evidence and briefs; some have newsletters! Legal services groups have used networking, but other public interest lawyers seem to have less understanding of the need for lawyers to work together to further community interests.

F. *Apply Feminist and Anti-Racist Analysis*

Traditional public interest lawyers working in areas other than civil rights and women's rights did not address the systemic nature of the subordination of women and minorities in America. Critical lawyers have come to understand the structural persistence of racism and sexism and to recognize it in our advocacy. We have seen that our failure to look specifically at the effect of advocacy solutions on women and minorities may have unwittingly contributed to their continued subordination.

For example, in our work on behalf of the elderly on long-term care issues we initially failed to see how certain policy solutions might harm women as a group. If legislation emphasizes keeping older people at home, women will likely end up as caretakers. This will affect working women and increase the pressure for women to return to unpaid work in the home. When my public

interest law center realized this, we redesigned some proposals. Now we emphasize creating resources to assist women caretakers and avoid forcing a choice between care and career. For a family choosing home-based care, we seek to make home health aides paid for by the state or private insurance available so family members can continue their work outside the home. We are demanding paid caretaking leave so that caretakers can miss work for caretaking without facing an employer's penalties. Our work with unions seeks to secure adequate pay and working conditions for home health workers; and we are seeking state or insurance based compensation plans at market rates for family caretakers who choose to work full-time providing long-term care. Without an analysis of the policies' effects on women, we would short-circuit the ability of women to empower themselves in the workplace and at home.

Closer attention to racism and the persistence of racial inequality has had a similar impact on our thinking and our practice. Two examples illustrate the impact of critical race thinking on my center's activities. We have long advocated a right to health care for all in Wisconsin. Initially, we advocated for a universal health care program based on state financing and private insurance. But, once we began to look closely at the different impacts of programs on subordinated groups, we began to see that a universal plan would not necessarily deal effectively with the problem of minorities in the inner city.

For example, in the Milwaukee inner city, very few clinics exist and almost no minority physicians work in them. A universal plan for health care might have little impact in this area, because no delivery system exists. Thus we shifted our emphasis to highlight the need for neighborhood clinics and specialized services *as well as* universal financing plans. We proposed legislation to create such clinics, believing them necessary components of providing adequate health care for all. Once again, critical analysis moved us away from universal and bureaucratic plans to more decentralized and participatory approaches.

A similar set of issues arose when we examined drug treatment plans. Here, both race analysis and feminist analysis applied. In the last year, the state has embarked on a general effort to develop more drug treatment centers in Wisconsin. When we looked at the program's impact in Milwaukee, however, we found that because the programs had few minority counselors, they had little sensitivity to the needs of minorities. In addition, lack of child care availability excluded many minority women with children from participation. Along with a local coalition of black health advocates, we have sought to dramatize this issue and to press for the creation of more culturally sensitive programs, participation of more minority counselors, and increased day care availability for these groups.

III. Conclusion: Living in the Contradiction

Critical lawyering requires careful attention to each of the six dimensions outlined. Public interest lawyers should constantly remember the need for participation, personalization, organization and anti-racist and feminist analysis.

Critical lawyers must avoid the lure of professional discourse, privileged arenas and bureaucratic "quick-fixes." But it is not enough to foster participation, personalize issues, reject bureaucratic solutions, explore all arenas, encourage organization and pay special attention to the impact of policies on women and minorities within client groups. We as critical lawyers must also learn how to live in the contradiction. We have to learn to deal with the central paradox of our peculiar vocation: helping bring about basic change and social mobilization while working within a legal system rooted in the status quo and oriented towards professional decision-making.

What does it mean to "live in the contradiction?" Three points help answer this question. First, as public interest lawyers, we should never assume we have the answers or that we can solve social problems. Critical lawyering demands constant criticism of our work, our interaction with others and our workplaces. Second, we must understand that no definite solutions or final victories exist. Agencies we helped create one day became enemies the next day as they interpreted statutory gains away and ignored or overruled successful cases. Nevertheless, if we do our work, some empowerment will take place in each case and some movement along a transformative trajectory will occur. Admittedly, we must look hard to recognize these positive moments, and we cannot despair when the inevitable setbacks occur. Finally, we have to care about our own workplaces and not let the pursuit of ideal goals in legislation or litigation blind us to the need to constantly make our everyday work life exemplary for the world we want to create. Public interest law practice should reflect the same goals we seek for our clients. For example, increased attention to race and gender issues should be paid.

These three elements of living in the contradiction are related. Self-criticism is necessary to maintain an exemplary workplace, and to help lawyers avoid false hopes and premature despair. A supportive workplace helps create an environment conducive to self-criticism and enables us to act on the insights that criticism generates. To sustain their hope and energy, critical lawyers must seek an understanding of the complex and contradictory nature of public interest practice.

Critical lawyering presents a sober and realistic outlook at the possibilities of lawyering for social change. It requires recognition that advocates for subordinated groups will win few easy victories. It forces us to insist that all actions foster empowerment. It demands a view of how our advocacy will lead to fundamental change. Critical lawyering requires public interest lawyers to move beyond the professional arena into a wider public space and beyond bureaucracy towards decentralized, participatory approaches to social problems.