

## Book Review

Alan K. Chen and Scott Cummings, *Public Interest Lawyering: A Contemporary Perspective*, New York: Aspen Pub., 2012, pp. 592, \$84.00.

Reviewed by Catherine Albiston

### I. Introduction

*Public Interest Lawyering* results from a decade-long effort by Alan K. Chen and Scott Cummings, two former public interest lawyers. The authors go beyond poverty practice and social justice litigation to evaluate public interest lawyering as a field of scholarly inquiry. Their book maps a mature field of study built on normative and empirical scholarship about the legal profession's relationship to the public interest and social change. This volume will be a tremendous resource for those who teach and write in this area for years to come. There is so much to admire it is difficult to know where to begin. Addressing all of the book's virtues would be an impossible task. Instead, I focus on three things the authors do especially well: defining public interest law, evaluating the pro bono contributions of the private bar, and canvassing the rich empirical research in the field. These particular virtues distinguish the book from its predecessors and contribute to its worth as a research tool and teaching resource. I close with thoughts evoked by the book about modes of public interest lawyering into the future.

### II. Three Virtues of This Volume

#### *A. Care in Defining Public Interest law*

The book opens by taking on the most difficult question in the field: defining public interest lawyering (5-32), a task that as often as not provokes heated debate about the practical and normative boundaries of the field.<sup>1</sup>

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1. See, e.g., Stuart A. Scheingold & Austin Sarat, Something to Believe In: Politics, Professionalism, and Cause Lawyering 5-6 (Stanford Law & Politics 2004); 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*, at 31, 33-37 (A. Sarat and S. Scheingold eds., Oxford Univ. Press 1998); Ann Southworth, Conservative Lawyers and the Contest over the Meaning of "Public Interest Law," 52 *UCLA L. Rev.* 1223, 1236-37 (2005); see generally Thomas M.

Are public interest lawyers only those who serve the poor? Does the label extend to counsel for underrepresented constituencies? Who counts as underrepresented? Racial minorities? Consumers? Tea Party members? Are these constituencies underrepresented because of systemic disadvantage or the failure of the democratic political process? Are they merely the current losers in political or ideological battles? Are lawyers who represent important causes, rather than clients, also engaged in public interest lawyering? Consider, for example, former ACLU director Melvin Wulf's statement that his organization's real client is the Bill of Rights (288). Who defines the public interest? Is it hopelessly indeterminate? Does the public interest mean anything other than the particular goals of an advocacy organization or activist lawyer? You can see the problem.

Rather than taking the common route by acknowledging the diversity of views and then choosing one "for the purposes of this book," the authors exhaustively review the literature about public interest lawyering's characteristics and defining features. They suggest that one way through the thicket is to view public interest lawyering as a response to systemic failures in the market, the political system and civil society (6-7). Market failures leave some people without representation because they are too poor to afford a lawyer or because their interests are too diffuse to overcome barriers to collective action so they may pool resources to obtain representation. Consumers, for example, may have widespread, diffuse, and relatively small individual claims that are too expensive to justify individual litigation, yet their aggregate injuries may be significant. Political failures, by contrast, occur when groups of citizens are excluded from equal participation in the political process (215) and legal action is needed to advance these groups' collective interests.<sup>2</sup> Civil society failures flow from citizen disengagement or lack of participation in governance. Although widely cited critiques by Theda Skocpol and Robert Putnam raise concerns about Americans' lack of civic engagement, scholars struggle to identify institutional solutions.<sup>3</sup> Some suggest that advocacy organizations, including public interest law organizations, are a rational and effective form of civic participation in a large, diverse society like the U.S (463-64).<sup>4</sup>

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Hilbink, *You Know the Type...: Categories of Cause Lawyering*, 29 *Law & Soc. Inquiry* 657 (2004); Legal Studies Division, Washington Legal Foundation, *In Whose Interest? Public Interest Law Activism in the Law Schools* (1990).

2. A classic example is the NAACP's successful challenge to the Texas Democratic Party's white-only primary rules in *Smith v. Allwright*, 321 U.S. 649 (1944). Drawing on conceptions of democracy in political theory, Eric Olin Wright suggests that "[I]n a politically just society, all people would have broadly equal access to the necessary means to participate meaningfully in decisions about things which affect their lives." *Envisioning Real Utopias* 12 (Verso 2010).
3. See generally Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon & Schuster 2000); Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civic Life* (Univ. Okla. Press 2003).
4. Debra C. Minkoff, *Producing Social Capital: National Social Movements and Civil Society*, 40 *American Behavioral Scientist* 606 (1997).

The authors do an admirable job grappling with the democratic tensions inherent in defining and justifying public interest lawyering. The debate over democratic legitimacy in particular raises complicated issues for lawyers interested in bringing about social change (223–24). On the one hand, scholars such as Francis Zemans argue that public interest litigation is a direct form of political participation, accessible to the ordinary citizen, and therefore, consistent with democracy.<sup>5</sup> On the other hand, some (mostly conservative) critics argue that policymaking through the courts circumvents representative democracy and allows litigants to make important choices about governance without electoral accountability.<sup>6</sup> The distinction between lawyering for social change and interest-group politics never has been easy to draw, but the authors do an excellent job detailing and discussing characteristics that might demarcate public interest lawyering. These characteristics include the need to represent otherwise excluded viewpoints; the ability to and desirability of challenging government overreach; the relative power disadvantage between parties; the altruistic motivation of the attorneys or their moral commitment to a cause; the physical location in which the lawyer practices, including an organization's nonprofit status; and the overarching goal of social change (8–32). Not all of these criteria, the authors note, necessarily speak to the failures of market, politics, or civil society.

Focusing on these systemic failures works well analytically to sharpen the debate over what we might mean by public interest lawyering. It also, however, could be viewed as an implicit argument that properly operating market and political institutions are the appropriate venues for social struggle; only when these avenues break down may public interest lawyers legitimately step into the breach. Anarchists, revolutionaries, opponents of capitalism and even some critical legal scholars may find this approach unsatisfying because it leaves unchallenged the very market, political, and dare I say legal institutions that they view as the source of injustice and inequality.<sup>7</sup> Indeed, social movement scholars long have discounted public interest lawyering as elite contention within the existing system, rather than the more radical social activism of storming the barricades or suffering arrest and imprisonment for breaking unjust laws.<sup>8</sup> I find this argument too dismissive; it certainly doesn't

5. Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 *Am. Pol. Sci. Rev.* 690 (1983).
6. Kenneth F. Boehm, & Peter T. Flaherty, *Why the Legal Services Corporation Must be Abolished*, *The Heritage Foundation Background*, Oct. 18, 1995, at 1; Institute for Educational Affairs, *The Heritage Foundation, Perspectives on Public Interest Law: Issue 2 of Occasional Papers / Foundation Officers Forum* (1981); Jefferson Decker, *The Conservative Legal Movement and American Government, 1971–1987* (2009) (unpublished Ph.D. dissertation, Columbia University) (on file with the author).
7. See Dragan Milovanovic, *Review Essay: Critical Legal Studies and the Assault on the Bastion, Social Justice*, Spring 1988, at 162 (reviewing Roberto Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 561 (1983)).
8. Doug McAdam, *Political Process and the Development of Black Insurgency, 1930–1970*, xxix, 184–85 (2d ed., Univ. of Chicago Press 1999); see Martin Luther King,

feel elite or mainstream to be the public interest lawyer in private negotiations, Congress, or court. Nevertheless, there is an important normative tension here between hewing to professional values and working toward transformative social change.

The authors are well aware of this tension. In later chapters of the book, they explore the tensions and contradictions of combining activism with professional obligations and roles (293-97, 306-07, 356-67, 370-72). They draw on an excerpt from Nancy Polikoff's article, "Am I My Client? The Role Confusion of a Lawyer Activist," to explore whether a lawyer can and should combine the professional role of dispassionate counselor with the lawyer's own active participation in the movement (293-97). The authors also explore more generally the role of lawyers in broader social movements (461-63). At the end of this rich discussion, the authors wisely resist providing a tidy model for public interest lawyering that reconciles radical advocacy with legal representation. Throughout the volume, however, readers will find fodder for discussion about how, and whether, radicalism and public interest representation can be combined. I see this as a very desirable characteristic of a text on public interest lawyering.

#### *B. Attention to Public Interest Lawyering by the Private Bar*

A second virtue of this book is how it recognizes that public interest lawyering occurs in the private bar, as well as in nonprofit public interest law organizations. The literature long neglected the contributions of private pro bono and hybrid public interest-private practice firms to public interest lawyering. That has begun to change.<sup>9</sup> In my opinion, we do a disservice to our students by portraying public interest lawyering as separate and different from traditional private practice. This portrayal risks relieving private practitioners from any sense of personal responsibility for the public interest (34), and too often relegates public interest lawyering to the less prestigious margins of the profession.<sup>10</sup>

This volume directly challenges the perception that public interest lawyering primarily occurs in nonprofits. It documents the substantial contribution that private lawyers make to pro bono representation and to access to justice. As the authors note, this is a relatively new trend in the profession. Many large

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Letter from Martin Luther King, Jr. to Fellow Clergymen, April 16, 1963, Letter from Birmingham Jail, *available at* [http://mlk-kppoi.stanford.edu/index.php/resources/article/annotated\\_letter\\_from\\_birmingham](http://mlk-kppoi.stanford.edu/index.php/resources/article/annotated_letter_from_birmingham).

9. *See, e.g.*, Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. Rev.* 1 (2004); Deborah Rhode, *Pro Bono in Principle and in Practice: Public Service and the Professions* (Stanford Univ. Press 2005); Rebecca L. Sandefur, *Lawyers' Pro Bono Service and American-Style Civil Legal Assistance*, 41 *Law & Soc'y Rev.* 79 (2007); Robert Granfield & Lynn Mather, *Private Lawyers & the Public Interest: The Evolving Role of Pro Bono in the Legal Profession* (Oxford Univ. Press 2009).
10. *See* John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* 171 (rev. ed., Northwestern Univ. Press 1994).

firms and even some private companies institutionalized pro bono programs for their lawyers in response to decreasing governmental support for legal services work; legislative restrictions on federal funded legal aid offices; increased demand from nonprofit organizations for co-counsel relationships with private lawyers; and the desire by junior associates for meaningful public interest opportunities (170–73). Large firms now contribute extensively; Steven Boutcher reports that law firms in the AmLaw 200 contributed more than 3.75 million pro bono hours in 2005 alone.<sup>11</sup>

Although the authors view these trends as positive for access to justice, they do not romanticize pro bono representation by private lawyers. They take an unflinching look at the challenges and conflicts that arise in this context, including: declining large firm commitment to private pro bono during economic downturns; accepting only those pro bono clients who avoid public controversy and minimize positional conflicts with for-profit clients; selecting cases based on lawyers' interests rather than community needs; and the lack of expertise among private lawyers in poverty or cause issues (173–81). Thus, the book provides rich comparative material for considering how public interest lawyering faces different challenges and constraints in private and nonprofit settings. The discussion makes an important contribution to this literature and to the field.

The material on private pro bono reflects the high quality scholarship of Scott Cummings, a leading scholar on how the private bar contributes to public interest lawyering.<sup>12</sup> The book provides a vital discussion of the many venues through which the legal profession increases access to justice and serves the public interest. By broadening the perspective on pro bono, the authors renew the idea that public service is a professional obligation of all lawyers, not a task delegated to a few (54–56).<sup>13</sup> Indeed, if the profession wishes to preserve its legitimacy and autonomy, it must consider access to justice and ethical lawyering beyond the interests of individual clients.

### *C. Review of the Rich Empirical Research in the Field*

A third truly impressive aspect of this volume is the authors' extensive review of empirical research in the field to illustrate their points and to raise important questions about public interest lawyering. Empirical research about

11. Steven A. Boutcher, *The Institutionalization of Pro Bono in Large Law Firms: Trends and Variation Across the AmLaw 200*, in Granfield & Mather, *supra* note 9, at 135, 144.

12. *See, e.g.*, Cummings, *supra* note 9; Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 *Fordham L. Rev.* 2357 (2010); Scott L. Cummings, *Access to Justice in the New Millennium: Achieving the Promise of Pro Bono, Human Rights*, Summer 2005, at 6–10.

13. Louis Brandeis took this approach, arguing that private lawyers representing corporate clients should serve as “lawyer for the situation,” providing guidance to their clients to make decisions consistent with the public interest and to be sensitive to the societal implications of their conduct. *See* the Chen and Cummings discussion of Brandeis’ view of the moral obligation of lawyers to use their powers to protect the public interest (54–56).

public interest lawyering has grown dramatically in recent years, along with the trend toward empirical legal studies more generally. Some of this research examines key questions or assumptions relevant to the profession. To what extent do cause lawyers defer to the preferences and goals of their clients, as professional ethics require? How do cause lawyers resolve ethical issues when the interests of the client and the cause diverge? How do the narratives of clients and lawyers about public-interest claims differ and why? These are classic issues in public interest law practice, and the authors do a terrific job of bringing to bear empirical research to think them through (especially in Chapters 6 and 7).

Those teaching from this volume may wish to press their students as to whether these questions are unique to public interest lawyers. Isn't it possible these same questions occur for lawyers representing private clients, too? Defense firms, for example, may have a financial interest in prolonging litigation, a stake that may conflict with their client's desire to minimize litigation costs and resolve a case quickly. Private clients of traditional lawyers may feel that the legal narratives of their cases do not resemble their understanding of the problems they bring their lawyers, just as public interest clients do. Indeed, the broader research about the legal profession shows agency problems and role conflict in for-profit as well as nonprofit settings.<sup>14</sup>

In this way, the book by Chen and Cummings presents an opportunity to explore how many of these issues may be characteristic to lawyering, in general, and not limited to nonprofit public-interest practice. This may seem strange—to draw on a book about public interest lawyering to challenge the received wisdom that its practitioners differ in important ways from ordinary lawyers. But one way to undercut the claim that public interest lawyering is contrary to professional norms is to ask if private lawyers actually conform to these purported norms. Perhaps private lawyers look more like their public interest counterparts than first appears. That's a ripe topic for future empirical research and this book provides a solid foundation for such study.

Even more interesting, at least to me, was the authors' review of empirical research showing how public interest lawyering has expanded and changed. The authors make a significant contribution with their discussion of research about the rise of public interest law firms on the political right (100-15). To their credit, they resist the temptation to exclude conservative cause lawyers from the definition of public interest lawyering; instead, they give this development careful and appropriate attention. They show that conservative public interest lawyers exhibit a diversity of causes and intra-movement divisions similar to their progressive counterparts (112-15). They note how the growing ideological diversity of public interest law organizations raises important issues about the interaction between politics and cause lawyering (95-96, 116-21).

14. See, e.g., Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *Law & Soc'y Rev.* 457 (2000).



In short, the book is a treasure trove of empirical work on public interest lawyering. The literature it reviews spans a range of topics, from the macro of public interest law firm organization to the micro of lawyer-client relations. This feature truly sets it apart from other volumes about this field.

### III. The Changing Reality of Public Interest Lawyering

It seems fitting to conclude by raising important questions about the models and philosophies of public interest lawyering so meticulously explored in this book. There are many ways to slice the field based on lawyers' activities including, direct services and impact litigation; litigation, community economic development or community organizing; and legislative and policy advocacy and test litigation. There also are many contested models for public interest lawyers' relationships with their clients, including, to name a few, conventional client-lawyer relations; client-centered lawyering; or grassroots community lawyering oriented toward empowerment. Those teaching from this book will appreciate the authors' careful attention to how each of these forms speaks to core values of client autonomy, lawyer accountability and legitimacy and access to justice (275-79, 281-90, 292-302, 318-27). Important trade-offs occur among these models of representation; the materials in this volume lay the foundation for a rich discussion of those choices.

That said, the understandable need to draw out the distinctive features of these models for teaching purposes tends to emphasize the differences among them rather than to evaluate how these differences were socially constructed. Many divides in the field reflect a history of conflict and struggle. They tell of political opposition to public interest representation and the Legal Services Corporation, hostility toward cause lawyers taking advantage of "activist judges" to make policy, and frustration on the part of powerful and dominant interests with advocates' success in the courts.<sup>15</sup> These struggles shaped the field through outside forces rather than internal reflection and the models or modes of lawyering reflect these pressures.

Those teaching with this volume may wish to ask students whether the models and modes of public interest lawyering advanced by scholars are enduring categories or the product of how the field developed. To take just one example, legal services lawyers' apparent emphasis on direct services rather than open pursuit of social-change litigation is as much a matter of politics and self-preservation as it is a philosophical position on the practice of public interest law. Indeed, in the early days of the Legal Services Corporation, lawyers adopted an explicit law reform strategy that included complex litigation on novel legal theories, class actions and extensive appellate litigation, including 70 cases before the U.S. Supreme Court between 1967 and 1973.<sup>16</sup> Their

15. See Catherine R. Albiston & Laura Beth Nielsen, *Funding the Cause: How Public Interest Law Organizations Fund Their Activities and Why it Matters for Social Change*, *Law & Soc. Inquiry* (forthcoming 2013), available at <http://onlinelibrary.wiley.com/doi/10.1111/lsi.12013/pdf>.

16. *Id.* at 4.

remarkable success, however, created a backlash from business interests and powerful political actors who sought to limit their ability to pursue social change.<sup>17</sup> In the 1980s, legal service organizations came under attack. Congress dramatically cut funding and imposed severe restrictions on the activities of legal services lawyers, which changed their practice dramatically.<sup>18</sup>

This history gives context to these categories, which embody the struggles that accompanied the development of the field. The divide between direct services and impact litigation, from this perspective, is less a natural cleavage than the product of political backlash in which powerful actors used the state to restrict the scope of social change litigation on behalf of poor clients. This history shows how political forces shaped the models of public interest lawyering that we see today.

Wise teachers also might ask students to discuss how modern dynamics are breaking down the barriers among these models of public interest lawyering, and, perhaps, creating new ones. Indeed, the book concludes with a call for more integration among the various strategies employed by public interest lawyers (515-24). What would an integrative vision of public interest lawyering look like? As professors, how might we teach such a thing? Throughout the book, the authors provide numerous examples indicating that practice is moving in this direction. They note how pro bono representation has become integrated into private practice through big firm programs and small firm low bono representation (170-200). They also note how lawyers increasingly integrate litigation strategies with community organizing, legislative advocacy and other tactics. Lawyers also are developing new strategies, such as community economic development (233-44). Modern public interest lawyers need to think outside the box to continue to serve their clients, communities and causes. This volume is a tremendous resource for making that happen.

17. *Id.* at 4, 5-6.

18. *Id.* at 5-6.