RE-VALUING LAWYERING FOR MIDDLE-INCOME CLIENTS

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INTRODUCTION

In this short Article I argue that we should assign more honor to lawyering for middle-income clients. By this I mean that we should hold in esteem careers involving lawyering for middle-income clients in much the same way we currently value careers in what is often referred to as “public interest” law. Instead of conceiving of a binary distinction between “public” and “private” interest law, we should think about jobs in the legal profession as falling on a spectrum, along which the public service dimension of a legal position is inversely related to the wealth and power of one’s clients. Thus, my proposed model would see more value in representing poor people than middle-income clients, but would also see more value in representing middle-income clients than wealthy and powerful ones, especially when one is representing middle-income clients against more powerful interests. This model, if adopted as an alternative prestige hierarchy among even a small group of the nation’s law students, could have important benefits in steering the many socially committed students who do not secure traditional “public interest” jobs to law practice settings other than large law firms representing the nation’s most powerful and

* Associate Professor of Law, American University Washington College of Law. The thoughts in this Article grew out of a series of panel discussions on topics related to public interest lawyering held at Washington College of Law in the spring semesters of 2000 and 2001, made possible through Dean Claudio Grossman’s generous support and funding. I wish to thank all of the participants in those events for stimulating presentations. I am especially indebted to Professors Richard Wilson and Richard Abel, and F. Paul Bland of the Trial Lawyers for Public Justice, from whose talks I have borrowed ideas for this Article. Sheila Siegal of the National Association of Public Interest Law generously provided information. I was also very fortunate to receive enormously helpful comments on earlier drafts of this Article from four of my colleagues who have been at the forefront in developing the “client-centered” lawyering theory: Robert Dinerstein, Binny Miller, Elliott Milstein, and Richard Wilson (though I fear I persuaded none of them of my point). Piper Nieters provided valuable research assistance. The ideas in this Article are influenced by my prior practice experience as a union-side labor lawyer, reflections on my professional socialization process at Yale Law School in the mid-1980s, and interactions over the past five years of teaching at WCL with many outstanding students struggling with the challenges of finding meaningful careers in law.
wealthy interests. At the same time, it would increase the quality and availability of legal services for middle-income clients.

I. A LACK OF ADEQUATE REPRESENTATION FOR MIDDLE-INCOME CLIENTS?

Increasing numbers of legal commentators are turning their attention to the question of whether middle-income clients have adequate access to legal representation. That question, indeed, is at the very heart of the issues addressed by this Symposium. It is, however, a difficult one to answer because the evidence points in somewhat contradictory directions. What is certainly undeniable—and sufficient for purposes of my argument—is that middle-income persons receive far less and lower quality legal services than do powerful and wealthy corporate clients. That fact is sufficient in itself to cause concern about whether the interests of the majority of Americans that make up the “middle class” are sufficiently represented in the legal process, and about the long term consequences of such an imbalance in the quality of legal representation on United States public policy.

A. Who is “Middle Class”?

Since the theme of this Symposium is “Lawyering for the Middle Class,” I must address as a preliminary matter the definition of the term “middle class.” In the United States, as in many societies, “class” is a heavily loaded term. Indeed, much of the difficulty I discuss below concerning how to characterize the social value of lawyering for the “middle class” undoubtedly stems from the many evocative connotations of this term.¹ Our ideas about class typically contain a host of bundled assumptions about how members lead their lives, the problems they face, and the values they share.² One commentator, for example, defines the middle class as those who have reached a certain educational level (usually at least a high school diploma), and who have health insurance, access to credit, confidence in their opportunities for economic advancement, and a commitment to saving and investing.³ Note how, under such a definition, the very

¹ See Deborah C. Malamud, Class-Based Affirmative Action: Lessons and Caveats, 74 Tex. L. Rev. 1847, 1854-55, 1869-94 (1996) (defining class as “a structured system of inequality” and exploring various definitions based on wealth, occupation, consumption, and extra-economic characteristics).


³ Toni Horst, Membership in the Middle Class, at http://www.dismal.com/todays_econ/te_012301_2.asp (last visited Aug. 29, 2001); see also U.S. Census Bureau, Income Inequality (Middle Class), at http://www.census.gov/hhes/income/midclass/midclsan.html (last visited Aug. 28, 2001) (explaining use of
term “middle class” connotes that group of Americans for whom the economic and political system is supposedly working. As I discuss below, however, a closer look at economic facts may belie the assumption that all is basically well for the middle class.

Demographers use a simpler and more literal definition of “middle class.” They typically define “middle class” as those persons living in households with annual incomes clustering around the median household income. Under this definition, the “poor” are the 20% of the population with the lowest household income (up to approximately $17,000 in 1999). The “middle” class are the next three quintiles—i.e., the second quintile or “lower middle” class, with household incomes up to approximately $32,000 in 1999; the third quintile or “mathematical middle,” with household incomes up to approximately $51,000 in 1999; and the fourth quintile, or “upper” middle class, with household incomes of up to approximately $79,000 in 1999. This leaves the highest quintile as the “upper class,” i.e., the top 20% of the population, which, astoundingly enough, earns almost 50% of all income.

The income-based definition described above fails to take into account important variables such as living expenses, assets, and debts—all of which play a key role in determining actual financial security. Nevertheless, because of its simplicity and wide usage, the demographers’ definition is the one I will use here. And since this is the definition I am employing, I will use the term “middle income” rather than “middle class” throughout this Article. In so doing I am referring to the middle 60% of the American population, living on annual household incomes of between $17,000 and $79,000 in 1999.

The income range for the middle class is far lower than many people assume. The fact is that the majority of Americans live on quite modest incomes and lack the discretionary spending power necessary to purchase expensive legal services in today’s market. But

quintile system to define middle class).


5. Tom Zeller, Calculating One Kind of Middle Class, N.Y. Times, Oct. 29, 2000, § 4 (Magazine), at 5; see also U.S. Census Bureau, supra note 4, at xii (updating figures for 1999).

6. U.S. Census Bureau, supra note 4, at xii.

7. Indeed, studies show that many upper-income Americans identify themselves as middle class even though their incomes far exceed this classification. See, e.g., Dan Radmacher, ‘Middle Class’ Poorer Than Thought, Charleston Gazette, Mar. 16, 2001, at A4. Newt Gingrich, for example, defined “middle class” as families with incomes of up to $200,000 per year, while Republican Congressman Fred Heineman defined “middle class” as those making between $300,000 and $750,000. S.M. Miller, Class Dismissed?, Am. Prospect, Mar. 21, 1995, at http://www.prospect.org/print/V6/21/miller-s.html (last visited Aug. 19, 2001); Sam Roberts, Another Kind of Middle-Class Squeeze, N.Y. Times, May 18, 1997, § 4 (Magazine), at 1.
whether middle-income persons receive “good enough” legal representation in today’s legal market is a more complicated question.

B. Do Middle-Income Persons Receive Adequate Legal Representation?

The evidence is mixed on the key question of whether middle-income persons receive adequate legal representation in today’s legal services market. On the one hand, demographic statistics indicate that the majority of American lawyers make their living in solo or small firm practices, and that the typical clients in this practice sector are nonwealthy individuals. According to the latest statistics, of the 74% of U.S. lawyers who were in private practice in 1995 (up from 68% in 1980), fully 47% were solo practitioners, compared to 49% in 1980 and 64% in 1960.8 Of the nation’s law firms, 42% are made up of ten or fewer lawyers.9 The data further suggest that these solo and small firm practitioners predominantly represent individual clients in “personal plight” matters.10 These demographic statistics thus evoke images of a large cadre of lawyers available to assist middle-income individuals with their typical legal needs, especially in lucrative areas such as contingency fee-based plaintiffs’ personal injury work. Lawyers also represent middle-class interests on the other side of these cases by handling defense work for the insurance companies responsible for covering the potential legal liabilities of middle-income drivers and home owners. Lawyers who are qualified to prepare simple wills and handle routine estate planning likewise seem plentifully represented in the large group of solo and small firm practitioners just described. Labor unions attempt to protect the employment-related rights of the American work force, and increasing numbers of employers, unionized or not, offer low-cost, pre-paid legal service plans as part of their employee benefits packages. Finally, franchise law firms catering to middle-income clients, such as Jacoby & Myers and Hyatt Legal Services, were burgeoning in middle-income communities only a short time ago. Thus, at least on the surface, legal services for middle-income clients would appear to be sufficient.


9. Carson, supra note 8, at 8. Thus, the common impression that most lawyers work in large firms is something of an illusion, created by the much greater visibility and power of lawyers in these practices. In fact, only 23% of U.S. lawyers work in firms of more than 100 lawyers. Id.

Beneath the surface, the picture of whether middle-income individuals receive adequate legal representation is far more murky. A growing body of literature questions the quality of the legal services available to middle-income clients, in personal injury as well as other practice areas. The franchise law firm movement appears to be facing serious financial difficulties: Jacoby & Meyers has dissolved and Hyatt Legal Services has shrunk dramatically. Many other so-called legal clinics have decided to concentrate almost exclusively on personal injury work.

Survey research seeking to measure the availability of legal services to various income populations casts further doubt on the common impression that middle-income populations are adequately served in today’s legal market. This research suggests that middle- and low-income clients are more similarly situated with respect to the availability of adequate legal representation than might be supposed. The best known of these research projects is a 1993 survey conducted by the American Bar Association’s (“ABA”) Consortium on Legal Services and the Public. Using the same income percentiles to define “low-” and “moderate-income” households as those I offered above for the “poor” and “middle income” categories, the researchers conducting this survey concluded that existing provider arrangements were failing to meet the legal needs of both low- and moderate-income groups, emphasizing that “[w]hat is most striking is the similarity in the profiles of the legal needs of the two income groups.” These researchers further reported that, “for both low- and moderate-income households, the most frequent response when facing a situation having legal implications was to attempt to deal with

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14. Id.

15. The survey defined “low-income” persons as those in the bottom income quintile (i.e., the lowest 20%) and “moderate-income” persons to cover the next three quintiles. ABA Consortium on Legal Services and the Public, Legal Needs and Civil Justice: A Survey of Americans: Major Findings from the Comprehensive Legal Needs Study 1 (1994) [hereinafter Major Findings of ABA Legal Needs Survey].

16. Id. at 5.
the matter on their own,” and that “nearly three fourths of the legal
needs of low-income households and nearly two thirds of legal needs
of moderate-income households were not taken into the civil justice
system in 1992.” 17

Surveys of legal needs in a number of states have reached similar
conclusions. In 1996, the Maryland State Bar Association’s Moderate
Income Access to Justice Advisory Task Force, administered by
Professor Michael A. Millemann of the University of Maryland Law
School, conducted a legal needs survey which found that “72 percent
of Maryland’s middle-class citizens ... no longer contact a lawyer
when faced with a legal problem” and that “[c]ost is a major factor” in
this phenomenon. 18 Such evidence has led many experts across the
country to call for greater recognition of a crisis in the provision of
legal services to middle-income populations. 19

Other experts have leveled valid criticisms, on various grounds,
against such attempts to measure legal needs through survey research.
These grounds include failure to recognize the way in which legal
needs are “socially constructed” and omission of harms that require
collective or structural solutions (e.g. environmental harms) from the
list of legal needs surveyed. 20 But even with these limitations, the
survey data provide a starting point, suggesting that middle-income
persons face significant and growing problems of access to the legal
system.

17. Id. at 12; see also ABA Consortium on Legal Services and the Public, Agenda
(presenting the same information in graph form). An earlier comprehensive survey
reached similar findings. See generally Barbara A. Curran, The Legal Needs of the
since they are the most recent.

18. Janet Stidman Eveleth, Is Middle Class America Denied Access to Justice?, 29
Md. B.J. 44, 45 (1996). Professor Millemann’s Maryland task force proposed
establishing a private network of attorneys, “rather than public funding, to enhance
middle-class access to the justice system,” and called on law schools to expand
coverage of substantive law, ethics, and practice management issues related to
providing legal services to middle-income constituencies through such private
provider arrangements. Id. at 47.

19. See, e.g., Cramton, supra note 11, at 541-62 (describing evidence of lack of
legal services of adequate quality for “ordinary Americans”); Alan W. Houseman,
Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All, 17
Yale L. & Pol’y Rev. 369 (1998) (discussing how a number of leaders in the civil legal-
assistance movement have recently suggested that legal-services programs should
serve both the very poor and those with moderate incomes); Hon. Denise R. Johnson,
The Legal Needs of the Poor as a Starting Point for Systemic Reform, 17 Yale L. &
Pol’y Rev. 479, 480, 483-84 (1998) (providing sitting family court judge’s observations
concerning lack of access to justice by, and resulting legal problems of, persons of
both moderate and low income levels).

20. See, e.g., Deborah L. Rhode, The Rhetoric of Professional Reform, 45 Md. L.
Rev. 274, 281-82 (1986) (noting problematic nature of legal needs surveys and citing
other critiques).
Other data point to growing similarities between low- and middle-income persons, especially in relation to both groups' economic instability. Research conducted in the 1990s shows that the line between being middle and low income is far more tenuous than might be supposed. A growing middle-income debt crisis means that many apparently middle-income persons who lack substantial family assets or other backup sources of financial support are separated from poverty by only a few paychecks.\textsuperscript{21} High rates of divorce and family dissolution continue to have catastrophic financial consequences for many women and children, so that women and children in the middle-income category frequently find themselves falling into poverty after divorce.\textsuperscript{22} Nor are middle-income men necessarily secure in their financial status. Research on economic dislocation in the 1990s documents an "income squeeze" in the male occupational sector, as more jobs become concentrated in the top and bottom of the income scale and fewer jobs remain "in the middle for those with modest educational attainments."\textsuperscript{23} Indeed, this growing tendency for substantial movement of individuals between the low and middle income categories was one of the many reasons the ABA Legal Needs Survey report so strongly argued against a "dual conception of the legal needs of low- and moderate-income households."\textsuperscript{24}

In sum, once our standard assumptions about whether the legal system is working for middle-income Americans are tested against current economic and survey data, our sense that the legal system is working "well enough" for most middle-income persons becomes far less certain. Available evidence shows that the line between low- and middle-income persons, and the divergence in their legal interests and problems of access to the legal system, are in many respects far less than might be supposed. At the very least, what is clear is that the legal interests of wealthy and powerful clients, especially corporate

\textsuperscript{21} See Teresa A. Sullivan et al., The Fragile Middle Class: Americans in Debt 113-14 (2000) (discussing high debt burdens as a cause of the growing inability of middle-class persons to weather crises such as unemployment or illness).

\textsuperscript{22} See Katherine S. Newman, Falling from Grace: The Experience of Downward Mobility in the American Middle Class 202-28 (1988) (discussing adverse financial consequences of divorce on middle-class women and children). The prevailing wisdom used to be that a man's standard of living was likely to improve after divorce, see id. at 202 (citation omitted), but recent research suggests that men's economic standing may also be rendered more precarious by divorce. See Sullivan et al., supra note 21, at 241 (stating that "most researchers agree that divorce has serious financial consequences for men and women").

\textsuperscript{23} Sullivan et al., supra note 21, at 31; see also Thomas L. McMahon et al., Hollow in the Middle: The Rise and Fall of New York City's Middle Class (1997), available at http://www.council.nyc.ny.us/finance/middleclass.htm (last visited Aug. 14, 2001) (documenting declining share of income received by previously middle-income households in New York City as a result of changes in City's economic and social structure).

\textsuperscript{24} ABA Final Report, supra note 17, at 25.
entities, are receiving far more and far better legal representation than are those of individual clients of modest financial means.

Given the large number of lawyers who represent middle-income clients, it is disturbing that the majority of individual Americans face problems of inadequate quality in legal representation. Part of the problem, of course, lies in the stark fact of vast differentials in financial resources—it is always easier to buy high quality professional services if one can pay huge amounts for them. But that is not the whole explanation. Doctors, for example (working in a very differently organized profession, to be sure), readily provide quality care to both wealthy and middle-income clients. I argue below that another key part of the problem is the existence in the legal profession of a dominant status hierarchy that defines lawyering for middle-income clients as a low-prestige career path.

II. PRESTIGE HIERARCHIES IN THE LEGAL PROFESSION

This section investigates two status hierarchies that exist in the legal profession: a dominant hierarchy that defines lawyering for corporate clients as the highest prestige career and lawyering for individuals as a low prestige track; and an alternative hierarchy that assigns honor to lawyers who do what is defined as “public interest” work, but excludes lawyering for middle-income clients from this rubric. These hierarchies, working together, contribute to the devaluation of the work of lawyers who represent middle-income clients, and thus perpetuate conditions that fail to recognize lawyers who carry out the legal profession’s core function of helping real people with real problems and thus provide “access to justice” to the majority of Americans.25

A. The Dominant Prestige Hierarchy

The classic study of the legal profession’s dominant status hierarchy is John Heinz and Edward Laumann’s Chicago Lawyers.26 Heinz and Laumann set out to explore a number of questions about the Chicago bar’s organization, but over the course of their study began to focus on a thesis that emphasized the division of the bar into two distinct “hemispheres.”27 One of those spheres consisted of lawyers who represented corporations and other large organizations and their top representatives. Lawyers who worked in this sphere had high social prestige. The other sphere consisted of lawyers whose practices

25. I take this phrase from the series of conferences Professor Elliott Milstein organized on this topic across the country during his term as President of the Association of American Law Schools (“AALS”) in 2000-2001.
27. Id. at 127-36.
primarily involved representing individuals. This sphere had lower prestige. Heinz and Laumann found that lawyers working for higher prestige firms representing large organizations tended to have been recruited from more elite schools, made more money, and generally came from different socioeconomic and ethno-religious backgrounds. They maintained professional and social contacts predominantly within their own professional status group and had greater access to powerful figures in the community.

The dominant status hierarchy in the profession, in other words, privileges work for corporations and de-privileges work for individual clients. This status hierarchy is perpetuated in many ways. One is the frequently invoked claim that “the best” lawyers prefer corporate law work because individual client representation is not as “interesting” as the “sophisticated” work corporate lawyers do. This idea is a classic illustration of how prestige hierarchies are socially constructed through the transmission of subtle but powerful messages across professional generations.28 No neutral standard of judgment compels the conclusion that corporate law is intrinsically more “interesting” than other fields.29 To a lawyer who has been trained to appreciate the complexity of her role, there are a host of fascinating, complex issues involved in most client representations.30 Nor is it necessarily true that work for individual clients is by definition not sophisticated or complex from the perspective of procedural or substantive law. Plaintiffs’ lawyers are, after all, on the opposite side of the same complex litigation that corporate defense lawyers are handling, in a host of areas including products liability, labor, pension, and employment law. Moreover, plaintiffs’ law firms typically staff cases far more thinly than large corporate law firms do, so that plaintiffs’

28. This is certainly a claim I heard my professors make when I was a student at Yale Law School in the mid-1980s. Cf. Robert V. Stover, Making It and Breaking It: The Fate of Public Interest Commitment during Law School 77-79 (1989) (reporting his finding that the practicing bar played larger role in conveying this message than did law faculty, but noting arguments to the contrary (citing Duncan Kennedy, Legal Education as Training for Hierarchy, in The Politics of Law: A Progressive Critique 51-52 (David Kairys ed., 1982))).

29. Indeed, many of my law students report that they find courses such as criminal law, tort law, and family and matrimonial law, in which they read cases involving individuals’ life dramas, much more interesting than corporate law. It seems to me that these students are unlikely to find corporate law fascinating in practice if they disliked the subject in law school, as I sometimes point out to them. I think we could find many opportunities to invite students to reflect more seriously on what areas of law they find most engaging, not only through clinical and legal ethics teaching but also through the substantive law curriculum. It is worth noting, for example, that case books often use engaging cases involving ordinary individuals’ legal problems to illustrate developments in legal doctrine.

lawyers typically bear greater responsibility, much earlier in their careers, than do their large firm counterparts.

To be sure, some of the work lawyers perform for individual clients is routine. Studies of lawyers in the individual client sector frequently emphasize this point.31 But such studies are not comparative; they do not measure the extent to which the same can be said for corporate law work. Indeed, researchers studying lawyers who work for large corporate law firms provide similar reports of miserable lawyers chained by golden handcuffs to jobs they do not enjoy.32 The problem of lawyer dissatisfaction thus is not confined to one or the other of the Heinz and Laumann hemispheres. Although large firm lawyers do enjoy significant quality of work life advantages on tangible matters such as availability of resources and access to power,33 judgments about what legal work is “interesting” involve intangibles heavily laden with socially constructed values.

31. See, e.g., Jerry Van Hoy, Franchise Law Firms and the Transformation of Personal Legal Services 77 (1997) (citing literature on this point).

32. See, e.g., Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 11 (2000) (“Doing litigation’ in the style to which junior attorneys have become accustomed often means endless cycles of scut work.”); William C. Kelley, Jr., Reflection on Lawyer Morale and Public Service in An Age of Diminishing Expectations, in The Law Firm and the Public Good 90 (Robert A. Katzmann ed., 1995) (discussing sources of large-firm lawyer discontent); see also Wendy R. Leibowitz, The New Fatalism, Am. Law., Oct. 1994, at 7 (reporting on mid-level associates’ “misery” in large law firms); David H. Maister, The Missing Element: Fun, Conn. L. Trib., July 11, 1994, at 25 (discussing partners’ dissatisfaction with large law firm practice); Ruth Marcus, New Lawyers Grab Big Bucks, Bergen Rec., June 14, 1987, at 1 (describing corporate law firm life in New York City: “[T]he hours are brutal. The work can be deadly dull, poring over stacks of documents; researching obscure points of law for briefs that more senior lawyers will write; spending late nights at the printers’ proofreading prospectuses.”); Scott Olson, Majority Would Consider Job Changes, Indianapolis Bus. J., Jan. 29, 2001, at 3 (reporting on ABA survey finding that: “The most obvious sign of dissatisfaction came from those attorneys at law firms with at least 200 attorneys, in which more than 80 percent indicated they might leave their position in the next two years. In contrast, 57 percent of lawyers at firms with no more than four attorneys feel the same disgruntlement.”).

33. Thus I do not mean to paint an overly rosy view of solo and small firm life. Studies of such practices reveal many problems, including financial stress (especially stress related to income fluctuation and variable cash flow, as is typical of many small businesses) and increasing competitive pressures forcing lawyers to give less individualized attention to clients. See, e.g., Caroll Seron, The Business of Practicing Law: The Work Lives of Solo and Small-Firm Lawyers 16 (1996); Jerry Van Hoy, supra note 31, at 14-15, 26-50. Van Hoy reports that franchise law firms delegate down to the paralegal level or lower as much work as possible. This is a problem that need not necessarily lead to lawyer dissatisfaction—indeed, to my mind it should have the opposite effect—but Van Hoy reports it as one of many negative features described by lawyers in the field. An unanswered question, though, is whether some of the problems with lawyer satisfaction may be at least partially attributable to a status hierarchy that defines these positions as jobs of last resort, see id. at 88-90, so that the field may attract lawyers who are unlikely to enjoy the kinds of highly detailed, sometimes tedious, work required of lawyers in a great many settings.
B. An Alternative Hierarchy: "Public Interest" Law

There is an alternative prestige hierarchy in the profession, especially at many law schools, that confers special honor to some alternative careers focused on helping people in need who cannot pay for legal representation. The label generally assigned to the kinds of careers that are valued in this sense is "public interest" law. That term, very much like the term "middle class," is enormously overloaded with evocative connotations and layers of history, as I will discuss below.

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.\(^{34}\) Some define it as "cause" lawyering.\(^{35}\) Others think of it as lawyering specifically with a left wing or politically progressive agenda.\(^{36}\) Still others define the term as encompassing jobs in the public and nonprofit sectors.\(^{37}\) 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. Indeed, as I will discuss further from an historical perspective, the assumption that "public interest" law involves lawyering in arrangements funded through means other than client-paid fees is a strong but virtually unexamined precept in many "public interest" circles. There is, however, no principled basis for this requirement, which tends to exclude from recognition the many lawyers throughout our history who, while organized in "private" law practice arrangements, have worked on the same kinds of legal issues as "public interest" lawyers.\(^{38}\)

\(^{34}\) See, e.g., Edgar S. Cahn & Jean Camper Cahn, Power to the People or the Profession?—The Public Interest in Public Interest Law, 79 Yale L.J. 1005, 1006-07 (1970) (arguing that public interest law should confine itself to representing the poor and disenfranchised). The Cahn's view is discussed in greater detail below. See infra notes 56-57 and accompanying text.

\(^{35}\) See, e.g., Austin Sarat & Stuart Scheingold, Cause Lawyering and the Reproduction of Professional Authority: An Introduction, in Cause Lawyering: Political Commitments and Professional Responsibilities 3-16 (A. Sarat & S. Scheingold eds., 1998) [hereinafter Cause Lawyering] (discussing the complexity of defining cause lawyering).

\(^{36}\) See, e.g., David R. Esquivel, Note, The Identity Crisis in Public Interest Law, 46 Duke L.J. 327, 348-50 (1996) (arguing that public interest lawyers are usually committed to a substantive vision of where society should be headed).

\(^{37}\) See, e.g., National Association for Law Placement, Jobs & J.D.'s: Employment and Salaries of New Law Graduates—Class of 2000, at 109 (2001) (defining public interest employment as "positions funded by the Legal Services Corporation and others providing civil legal services as well as positions with private non-profit advocacy or cause-oriented organizations, . . . non-profit policy analysis and research organizations and public defenders").

The very use of language to divide up the world of law practice into "public" and "private" spheres renders invisible the contributions of such lawyers.\textsuperscript{39}

The most commonly cited definition of "public interest" law attempts to dodge the problems inherent in the approaches mentioned above by offering a neutral, "catch-all" definition. This definition conceives of "public interest" lawyering as lawyering for "under-represented" interests, thus seeking to avoid value judgments about what interests are worthy of being represented. The Council for Public Interest Law states:

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.\textsuperscript{40}

Many leading public interest advocates have adopted this definition, equating public interest lawyering with lawyering for interests that lack adequate representation in the legal process.\textsuperscript{41}

This definition, in my view, best fits with contemporary notions of interest group pluralism. Interest group pluralism holds that no class or interest group in our society necessarily has the upper hand in discerning the "public interest," but that better public policy is made to the extent that all affected constituencies are given a voice in the processes through which public policies are made. Lawyers who

\textsuperscript{39} Joel Handler and his co-authors provide an example of such erasure in their study of the career paths of legal services lawyers. Investigating the commonly held notion that most legal services lawyers end up renouncing their commitments to social justice by going into private practice, Handler discovered that what was actually happening was that:

some young [former legal services] lawyers have chosen not affiliation with traditional law firms, but a practice with more of a mix of working class, poor people, and minorities. . . . Their path is working at the community level, helping the lower classes with their problems, and gradually building strength at the local level. Some lawyers have articulated this view; others have chosen this style of practice as a matter of taste. They are unwilling to sell their professional careers to the upper classes.

Joel F. Handler et al., Lawyers and the Pursuit of Legal Rights 11-12 (1978); see also id. at 156-65 (summarizing these findings in more detail).

\textsuperscript{40} Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 6-7 (1976); see also Model Rules of Prof'l Conduct R. 6.1 (2001) (using similar concept focusing on under-representation to define interests to whom lawyers owe a pro bono obligation).

subscribe to this view of "public interest" lawyering recognize that they are not representing the "public interest" per se in serving as advocates for under-represented clients, but that, by zealously representing the private interests of members of such client groups, they are helping in the end to advance the public interest by ensuring that all affected voices are heard.

This, indeed, is one of the central insights of the client-centered lawyering movement in clinical education. Theorists of this approach advocate a strong focus on zealously representing the interests of poor and disenfranchised clients as those clients define those interests. This literature thus provides an important breakthrough in clarifying the difference between lawyer-centered conceptions of "public interest" lawyering—i.e., those in which lawyers decide on an agenda and then find ostensible clients through which to promote it—and client-centered conceptions that seek to work with clients to ascertain, clarify, and promote under-represented clients' self-defined interests.

But the use of the term "public interest" to capture such ideas as client-centered lawyering for under-represented interests is puzzling: if this is what we mean by "public interest" lawyering, why do we not simply use the term "under-representation" lawyering? And if we mean "under-representation" lawyering when we use the term "public interest" lawyering, why do we often hesitate to include in our idea of "public interest" lawyering the work of lawyers who provide legal services in modest fee-for-service arrangements to middle-income clients in areas where there appear to be significant problems of under-representation? These creative, fee-based projects often do


43. Here I am thinking, inter alia, of union-side labor law, plaintiffs' employment discrimination firms, and criminal defense practices for nonwealthy defendants. See, e.g., Michael J. Kelly, Lives of Lawyers: Journeys in the Organizations of Practice 145-63 (1994) (analyzing struggles of criminal and civil rights practices); Debra S. Katz & Lynne Bernabei, Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power, 96 W. Va. L. Rev. 293 (1993-94) (describing plaintiffs' side employment law firm). A host of other innovative "fee-for-service" arrangements also fall in this category. One is the Law School Consortium Project, aimed at supporting solo and small-firm lawyers and in order to help them meet the legal needs of low- and moderate-income individuals and communities. Recognizing the "crucial role private practitioners play in the provision of legal services," this project provides a host of resources, including networking, referrals, mentoring, technology and management training, and community outreach projects. See Law School Consortium Project Description at http://www.lawschoolconsortium.net (last visited Aug. 14, 2001).
not seem to make it onto our students' radar screens as they search for socially meaningful career options in law. One wonders why we do not bring in lawyers such as these, who are creatively pioneering ways of combining a paying practice with "doing social justice," to speak in our classes and be held up for honor, rather than continuing to applaud the usual, highly visible, large and powerful firms for establishing pro bono departments that do minuscule amounts of public interest work while bringing in huge revenue defending the nation's wealthiest interests? If anything, the taking of modest fees suggests that lawyers might be more disciplined in representing clients' self-defined interests. I suggest below that layers of concealed history underlie our continued use of the phrase "public interest" lawyering ostensibly to refer to "under-representation" lawyering.

C. Some History Underlying the Concept of "Public Interest" Law

This section explores some of the history that explains why "public interest" law has come to be understood as excluding the representation of middle-income interests in modest fee-for-service arrangements. I will focus on two historical periods in which conceptions of "public interest" lawyering were actively debated: the early twentieth century, sometimes referred to as the Progressive Era (circa 1890-1920), and the 1970s "public interest" lawyering movement. In both those periods, the dominant conception of "public interest" law ignored the importance of fee-for-service models.

The American Association of Retired Persons ("AARP") is another pioneer in conceiving of creative new ways to provide legal services at moderate cost to middle-income persons. One AARP program involves "unbundling" legal services, so that consumers can purchase for moderate fees discrete tasks from a network of carefully screened lawyers. See Wayne Moore & Monica Kolasa, Legal Services Delivery Model: AARP's Legal Services Network: Expanding Legal Services to the Middle Class, 32 Wake Forest L. Rev. 503, 507-08 (1997); see also Forrest S. Mosten, ABA Law Practice Management Section, Unbundling Legal Services (2000) (describing initiatives to lower cost of legal services by separating out discrete tasks for which lawyer's services are needed). Other practitioners are experimenting with private practice arrangements that offer sliding-scale services to middle-income persons. See Louise G. Trubek, The Worst of Times... And the Best of Times: Lawyering for Poor Clients Today, 22 Fordham Urb. L.J. 1123, 1126 (1995); Trubek & Kranzberger, supra note 38, at 203-16 (describing various lawyers in private practices aimed at providing services to "disadvantaged individuals and groups"). A Los Angeles coffee house, the "Legal Grind," offers customers a cup of espresso and a fifteen minute consultation with an attorney for twenty dollars. Its founder aims the service at middle-income people who do not qualify for free legal aid but lack the income to pay lawyers' regular fees. Individuals needing additional assistance receive referrals to lawyers willing to take their cases for a set fee, contingency fee, or no fee. See Bob Pool, Coffee and a Living Will, Please, L.A. Times, Feb. 17, 2001, at B3; see also American Bar Association Standing Committee on the Delivery of Legal Services, Innovative Programs to Help People of Modest Means Obtain Legal Help, available at http://www.abanet.org/legalservices/delmodesthelp.html (last visited Aug. 20, 2001) (listing many other innovative programs designed to make legal services more readily available to people of average means).
1. The Early Twentieth Century

One illuminating examination of early twentieth century ideas about public interest law is Clyde Spillenger’s research on Louis Brandeis, whose many pro bono legal undertakings prior to his appointment to the U.S. Supreme Court mark him as one of the nation’s most important early “public interest” lawyers.\(^{44}\) Spillenger explores Brandeis’s approach to his “public interest” cases and shows that Brandeis equated pro bono representation with not accepting fees from his clients, even when they could well have afforded to pay.\(^{45}\) Spillenger argues convincingly that the reason Brandeis refused to accept fees in these cases was his view that not accepting fees liberated him from his clients’ interests and allowed him to advance his own views of what the public interest entailed.\(^{46}\) Spillenger critiques Brandeis’s desire for such independence:

There was a downside to Brandeis’s independent and directive approach to lawyering—an unwillingness to submit to the discipline of engagement with others (in particular, “clients”) that the act of representation necessarily imposes.... But the question of how, indeed if, one is to act in concert with others in such a world complicates the choice of Brandeis as a model for lawyering. In any relational context—and the realms of politics and lawyer-client interaction obviously qualify as such—one person’s “freedom” or “autonomy” can come at a sacrifice of the power that others are able to assert.\(^{47}\)

In prior research I have explored some of the historical dimensions of the development of our present conceptions of “public interest” practice. I briefly summarize some of that research here, because it so heavily influences my argument calling for rethinking the social value we assign to lawyering for under-represented interests in private practice situations.

In a two-part project, I investigated the interface between legal ethics rules and the early legal work of the NAACP. One article examined how this work consisted of a mix of contributions from African-American lawyers, who pioneered new case litigation strategies in local communities around the country, and elite, mostly white lawyers sitting on the NAACP’s first national legal committee, who attempted to coordinate and build upon those grassroots experiments to push forward a national civil rights litigation agenda.\(^{48}\)

\(^{45}\) Id. at 1477-78.
\(^{46}\) Id. at 1479.
\(^{47}\) Id. at 1449.
This arrangement was, needless to say, fraught with many tensions over matters including control of cases and strategy, fund raising and finances, questions about race discrimination against African-American lawyers in the courts and within the NAACP, and issues related to African-American versus white control over an organization dedicated to advancing the cause of African-American civil rights.

One of the most interesting tensions was between the practice settings and orientations of the African-American lawyers in local communities and elite white lawyers affiliated with the national office. The African-American lawyers typically ran legal practices consisting of a mix of paid work for individuals and African-American businesses and fraternal organizations and cases testing and promoting key civil rights issues, for which they might or might not receive fees. The white lawyers on the national legal committee, on the other hand, came from elite New York City law practices and saw their work for the NAACP as a pro bono service contribution. Like Brandeis, these elite white lawyers defined “public interest” work as work for which lawyers received no legal fees. The African-American lawyers did not share such a purist conception, because receiving some fees for their work where possible was crucial to keeping their practices afloat.

A second article traced the way the elite NAACP national legal committee lawyers’ conception of “public interest” work ended up being embodied in the U.S. Supreme Court’s jurisprudence. In its decision in *NAACP v. Button*, the Court carved a distinction between “public interest” litigation, in which lawyers enjoy First Amendment protection from prosecution for certain kinds of ethics violations, and litigation for private or pecuniary motives, in which lawyers do not receive the constitutional protections granted to core political activity. The *Button* decision gave rise to a bright line in the U.S. Supreme Court’s legal ethics jurisprudence between “public” and “private” interest legal work. But none other than Justice Marshall, former legal director of the NAACP, wrote a concurrence in one of

51. Compare Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding the state bar’s prosecution of a personal injury lawyer for having aggressively solicited teenage clients involved in a car accident in violation of state bar rules prohibiting lawyer solicitation), with *In re Primus*, 436 U.S. 412 (1978) (invalidating South Carolina’s prosecution, under disciplinary rules almost identical to those of Ohio, of an ACLU lawyer who had offered her services for free to a woman who had undergone involuntary sterilization); see also Florida Bar v. Went For It, Inc., 515 U.S. 618, 634-635 (1995) (applying lower level of First Amendment scrutiny applicable to commercial speech to uphold constitutionality of state bar rules that prohibited lawyers from soliciting personal injury clients by mail within thirty days of an accident).
these cases suggesting that the Court’s approach ignored the public interest dimensions inherent in paid legal work for clients who might not otherwise have received legal services.\(^{52}\) Marshall does not mention his own experience as a public interest lawyer in his concurrence, but it is surely telling that the Justice on the Court with the strongest public interest background is the one who cautioned against adopting an overly narrow conception of the “public interest” dimension of fee-for-service lawyering for under-represented client populations.

In yet another forum, I suggested that such an overly rigid conception of the difference between “public” and “private” interest lawyering is likewise reflected in the current Model Rules’ definition of the pro bono obligation.\(^{53}\) That definition defines core pro bono work as work for no fee conducted on behalf of under-represented persons or interests.\(^{54}\) I argued, however, that there is no good conceptual reason why pro bono—literally work “for the public good”—must at its core be limited to unpaid work. Indeed, I suggested, the very phrase “public interest” has an archaic, early twentieth century ring. The term belongs to a period prior to the rise of modern conceptions of interest group pluralism. Contrary to the mind set of contemporary anti-foundationalist post-moderns, the term appears to assume that there is a readily discernable, unitary “public interest” to pursue through law, an idea abandoned long ago by most lawyers about most subjects outside a limited range of fundamental rights of political participation.

In short, my research suggests that one source of our present day binary conception of “public” versus “private” interest law is the historical origins of that conception in the model of elite lawyers’ limited, unpaid pro bono work. The bulk of those lawyers’ time was spent on highly paid legal work for wealthy clients. They therefore did not have to develop—and indeed, in some ways scorned—models of lawyers making a reasonable living in private sector practices motivated by “public interest” commitments. There is, nevertheless, a long history, ignored within the dominant conception of “public interest” law, of such lawyers organizing themselves in fee-for-practice arrangements.\(^{55}\) It is a history worth reviving in order to help law graduates formulate alternative models of sustainable practice today.

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55. To cite just a few examples of literature exploring these practice settings in various historical periods, see, e.g., J.L. Chestnut, Jr. & Julia Cass, *Black in Selma: The Uncommon Life of J.L. Chestnut, Jr.* (1990) (recounting career of solo southern civil rights lawyer who began law practice in the late 1950s); J. Clay Smith, Jr., *Emancipation: The Making of the Black Lawyer, 1844-1944* (1993) (describing civil
2. The 1970s

Another historical source of our present conception of "public interest" work is the 1970s poverty law movement. In a classic article published in the Yale Law Journal, for example, poverty law movement leaders Edgar and Jean Cahn argued strenuously against a conception of "public interest" law that included middle-class concerns. They asserted:

Given the current unresponsiveness of the political system to ethnic minorities, the allocation of public interest law resources to majoritarian, middle-class, white concerns is contrary to the public interest. The political system can respond to these concerns without siphoning off the limited, special and constitutionally distinctive resources of the legal profession.56

Similar statements can be found throughout the Cahns' article.57 Whether viewed as defining the movement's future direction or reflecting its established path, the Cahns' position appears to have had a profound impact on the dominant conceptions of "public interest" law, especially in the law schools and law school clinics with which movement leaders such as the Cahns were closely associated.

Not all leaders of the 1970s activist lawyering movement shared the Cahns' view that lawyering for the middle class should be excluded from the public interest lawyering umbrella. Another extremely thoughtful piece of the same era embraced the opposite view.58 Authored by Charles R. Halpern, then an attorney at the Center for Law and Social Policy, this article called for a new kind of public interest law that would be broader than traditional poverty law, explaining:

The public interest lawyers... define their role more broadly than the poverty lawyers. First, the public interest lawyers believe that the poor are not the only people excluded from the decision-making process on issues of vital importance to them. All people concerned with environmental degradation, with product safety, with consumer

56. Cahn & Cahn, supra note 34, at 1005.
57. See, e.g., id. at 1043 (observing that "'racism by inadvertence'... now takes its most ironic form in the new crusade over pollution"); id. at 1044 ("At a time when the political system has become less responsive, if not outright hostile, to the grievances of ethnic minorities, the only profession specially protected in an advocacy role cannot justify its dereliction by regrouping under the righteous banner of essentially majoritarian concerns.").
protection, whatever their class, are effectively excluded from key decisions affecting those interests. Second, the public interest lawyers are beginning to move in an area that had only been tangentially touched by the poverty lawyers—that domain where corporate power shapes governmental power, where decisions affecting large numbers of citizens are often quietly made.59

Here Halpern seems to be assuming that public interest lawyers would organize themselves primarily into nonprofit centers such as the Center for Law and Social Policy, noting that, even though clients could afford to pay some fees for legal services, those fees would not be enough to finance the kinds of broad attacks on corporate power he was contemplating.60 But he clearly recognized, writing almost thirty years ago, the importance of developing "mixed" funding mechanisms including a combination of foundation support, private donations, court-awarded attorneys fees, and client fees.61

Halpern’s view—focusing on the similarity between middle-income and poor people’s powerlessness in the face of corporate power—is reflected to some extent in the environmental and consumer lawyering movements of today.62 But it is not, for the most part, reflected in the dominant conception of “public interest” law in the law schools. Instead, the Cahn’s view—focusing exclusively on the needs of the poorest and most disenfranchised members of our society—predominates. This perspective seems eminently defensible in some contexts, especially in decisions about how law schools should allocate the limited resources of their clinical programs. Ethically, it makes perfect sense to devote these resources to the clients who need them most. But it is a far less sustainable viewpoint, in my estimation, when read as a call for how to define the kinds of lawyering we want to honor. This is especially true today, when so few avenues for 1970s style “public interest” lawyering exist.

The Cahnhs, writing in the late 1960s and early 1970s, do not seem to have been concerned about the long-term economic viability of core poverty law practices. In today’s very different economic and political climate, fiscal realities seem much more important.63 This is true for a

59. Id. at 120.
60. Id. at 125.
61. Id. at 125-27.
63. A second reason for questioning the Cahnhs way of thinking is that the past thirty years have not necessarily borne out the Cahnhs claim that poor and middle-income people have fundamentally divergent legal interests. As one environmental justice activist diplomatically put it, the Cahnhs analysis dismissing environmental issues as too middle-class and ignoring their impact on the poor, was “underdeveloped in 1970.” Luke W. Cole, Empowerment as The Key to Environmental Protection: The Need For Environmental Poverty Law, 19 Ecology L.Q. 619, 671 n.228 (1992). Reflecting the continuing power of the Cahnhs analysis, however, Cole hastens to add the following disclaimer: “Nothing in this article should
host of reasons. First, there are far too few traditional “public interest” jobs to go around. The latest employment statistics report that one percent of U.S. lawyers hold legal aid and public defender positions, down from two percent in 1980.54 The figures for recent law graduates are little better. The National Association for Law Placement reports that fewer than three percent of graduating law students in the class of 2000 went into “public interest” employment.55

Second, a number of complex variables skew law students’ career decisions away from traditional “public interest” law. Among such factors are value changes many students undergo as a result of professional socialization.66 Another factor is the soaring cost of law school education, so that students today often graduate with educational debt many times greater than they did thirty years ago.67

be taken as a call to focus further legal or other attention on white, middle-class concerns.” Id. The research and survey results I have cited above suggest that the Cahns’ optimism that the political enfranchisement of middle-income Americans would protect their legal interests may have been too rosy. See supra Part I.B. Despite politicians’ pandering to middle-class interests at election time, in many respects majoritarian political processes do not appear to have worked to the benefit of middle-income Americans, especially where their interests collide with the those of the wealthy and powerful. Defending this proposition would obviously take me far beyond the scope of this Article, but it bears mentioning that the mere existence of a democratic political system does not mean that the legal system will work in the majority’s interests.

54. Carson, supra note 8, at 10.
55. National Association for Law Placement, supra note 37, at 13, 109 (reporting that 2.7% of graduating law students went into public interest employment). For this organization’s definition of public interest employment, see supra note 37.
56. Leading research concludes that the reasons for law students’ abandonment of the public interest commitment with which they enter law school include law school socialization, changing expectations and values in evaluating career options, and receipt of information about the job market that makes students pessimistic about their chances of obtaining public interest positions. See, e.g., Stover, supra note 28. There has been, in fact, a friendly ongoing debate among researchers about whether law school socialization or legal job market factors best account for the dramatic declines in the public interest career plans of law students as measured over the course of their law school careers. Compare Stover, supra note 28, at xix, with Howard S. Erlanger & Douglas A. Klegon, Socialization Effects of Professional School: The Law School Experience and Student Orientations to Public Interest Concerns, 13 Law & Soc’y Rev. 11 (1979) (arguing that job market, not law school socialization, is the most important factor causing students to turn away from public interest careers); see also Robert Granfield, Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers, 4 S. Cal. Rev. L. & Women’s Stud. 53, 74 (1994) (“One of the most common accounts offered by students for not taking public interest jobs was that they had exorbitant loans to pay back.”).
57. In the decade between 1987 and 1997 alone, the cost of law school tuition more than doubled for both public and private schools. National Association of Public Interest Law, Financing the Future 9 (2000), available at http://www.napil.org/SUBSO/Report2000/REPORTEXEC-FM.html (last visited Oct. 2, 2001) (providing tuition figures). In 1997, the cost of law school tuition alone for private schools was $19,256, id. at 9, and tuition has only continued to rise since then. According to Access Group, a non-profit organization providing financing to graduate students and the leading provider of private law school loans, the median amount of total loans for law students in the class of 1998 was almost $70,000; thus, half of those law students
On top of this, the gap between starting salaries in “public interest” and corporate law jobs has increased by a factor of ten since the 1970s: whereas in the 1970s an approximately 40% pay differential separated entry level legal services jobs from jobs in law firms ($25,000 versus $35,000), in the 1990s, this difference was closer to 300% ($35,000 versus $140,000).

Whatever the reasons for the minuscule number of “public interest” lawyers, I fear that we are doing a disservice to our students, and to society more broadly, by allowing a narrow conception of “public interest” law to shape law school programs, such as career planning and externship programs, designed to help students find viable practice options after graduation. It is simply impractical to tell law students that doing socially valuable work requires getting a job in the public or nonprofit sector, a goal that fewer than 3% will attain. While I wholeheartedly agree that it would be better to send our law school graduates into poverty law practices, in reality that is not where the jobs are, or where they are likely to be in the foreseeable future.

Nor is there any principled reason why lawyering in fee-for-service arrangements—i.e., in the private sector, where 74% of all lawyers work—necessarily clashes with our contemporary pluralistic understanding of the social benefits of “under-representation” lawyering. To be sure, lawyers who represent poor people do not take fees from their clients, but this is because their clients cannot afford to pay. The fact that traditional poverty law programs take no

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graduated with debt burdens higher than $70,000 in 1998. See Access Group Memorandum, Aug. 29, 2000 (on file with author).

68. Richard Abel, Evaluating a Public Interest Scholars Program (Apr. 21, 2001) (unpublished manuscript presented at panel discussion entitled Public Interest Law in Comparative Perspective, held at American University Washington College of Law, on file with author).

69. Trubek and Kransberger offer the following historical insight into the origins of the public interest law tenet that client representation should take place solely in nonprofit organizational forms:

To develop… new institutions and jobs and obtain the financial support they required, the founders [of the public interest lawyering movement of the 1960s and 1970s] stressed the unique capabilities of the public interest bar: they argued that the nonprofit structure, supported by public and private gifts and grants of law school budgets, was essential for effective lawyering for social change. To gain status in the legal profession and secure jobs, they claimed, only full-time specialists in nonprofit settings could do the job.

As a result of the legal services and public interest professionalism project, the potential contribution of private practitioners to social change lawyering was devalued; in order to argue for separate, publicly supported practice settings, the social mission of the private sphere was downplayed. Thus, the two separate spheres of public interest law and private practice emerged.

Trubek & Kransberger, supra note 38, at 202.

70. The U.S. Census Bureau defines the poverty line based on the level at which a family’s income is no longer sufficient to purchase food for a nutritionally adequate diet (a definition that has itself been criticized as failing to account for the rising share
fees from clients does not explain why conceptions of "public interest" law today should exclude from their rubric all fee-for-service forms of practice—including, most significantly for our purposes, lawyering for middle-income clients in practice settings that depend all or in part on charging modest client fees.

III. A NEW ALTERNATIVE HIERARCHY

If the issue presented is how might we re-envision our conception of social honor in law so as to avoid the trap of binary thinking contained in the "public" versus "private" interest dichotomy, it seems to me that we should develop and promote an alternative model of honor in practice that does not rest on a public/private distinction. I sketch one very preliminary approach to this challenge here.

My proposal begins with the assertion that it is misleading to encourage students to think about their career choices in terms of a simplistic "public" versus "private" interest dichotomy. As William H. Simon and others have shown convincingly, there is no such thing as pure "public interest" practice. Even in core "public interest" jobs, lawyers struggle with the unavoidable problem of inadvertently imposing their own ideas and interests over the desires and self-defined interests of their clients.71 Thus, no responsible ethics teacher, to my mind, leaves unchallenged some progressive law students' tendencies to think of "public interest" work as ethically "pure." Students should appreciate that all lawyers face difficult moral dilemmas.72 Along with this awareness comes a more nuanced sense of family expenditures on housing and child care and shrinking portion of family budgets spent on food). See Kathryn Porter, Proposed Changes in the Official Measure of Poverty, at http://www.cbpp.org/11-15-99wrel.htm (last visited Aug. 14, 2001). At this less-than-subsistence level, people obviously can spend nothing on legal services. For this reason, legal services programs for the poor, which typically set their eligibility requirements at 125% of the poverty level, quite appropriately do not charge even modest client fees.

71. See William H. Simon, The Dark Secret of Progressive Lawyering: A Comment on Poverty Law Scholarship in the Post-Modern, Post-Reagan Era, 48 U. Miami L. Rev. 1099, 1102 (1994) ("The dark secret of progressive lawyering is that lawyers cannot avoid making judgments in terms of their own values and influencing their clients to adopt those judgments.").

72. These potential ethical problems in public interest law include, not only lawyer blindness to or inadvertent domination of clients' wishes, but a host of potential conflict of interest problems, such as those among client groups, between client interests and those of non-client groups or the "public interest" more broadly, between clients and funding organizations' interests, and between clients' and lawyers' personal interests and convictions. See, e.g., Ellman, supra note 41; Peter Margulies, Multiple Communities or Monolithic Clients: Positional Conflicts of Interest and the Mission of the Legal Services Lawyer, 67 Fordham L. Rev. 2339 (1999); Deborah L. Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183 (1982); William B. Rubenstein, Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns, 106 Yale L.J. 1623 (1997); White, supra note 42.
of the balancing of ethical considerations involved in all practice options.

Simon offers his proposal for incorporating an alternative ethical vision into law practice in his book, *The Practice of Justice*, where he builds from his important critical insights that all lawyering involves a mix of public and private interest considerations to construct an affirmative platform that calls on lawyers to explicitly incorporate public interest considerations into all client representations. Thus Simon would have lawyers calibrate their actions in representing their clients so that "considering the relevant circumstances of the particular case, [those actions] seem likely to promote justice."74

Simon's argument that lawyers should seek to further the "public interest" over the interests and expressed desires of their clients has been, needless to say, an extremely controversial proposition.75 For one, this idea conflicts with our pluralistic notion that no one class in society—including lawyers—has a special ability to discern what "the public interest" is. I have found it impossible to sell Simon's affirmative model (though not his critical insights) to my students. Indeed, the longer I teach legal ethics, the more convinced I become that the "a-ha" moment in the socialization of law students from lay persons to ethical lawyers occurs when students first truly grasp the meaning of lawyers' obligations of fidelity and loyalty to their clients. The idea that a lawyer, once having agreed to accept a client representation, must be a zealous advocate for her client regardless of her own conflicting personal or political convictions is far too deeply embedded in our conceptions of lawyers' role morality to be dislodged easily. It is this conception of lawyers' role morality that leads us, for example, to hold up for honor (correctly, I think) lawyers who champion the unpopular causes of powerless and despised clients such as indigent criminal defendants.76

It thus seems to me that there is something amiss in Simon's proposal that lawyers should go to work for whatever clients they please, but then attempt in their representations to ensure that their clients adhere to what the "public interest" dictates. Far better, in my

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74. Id. at 138. For some history on the background of the "duty to do justice" view, see Susan D. Carle, Lawyers’ Duty to Do Justice: A New Look at the History of the 1908 Canons, 24 Law & Soc. Inquiry 1 (1999).
76. One such recent example is Professor Michael Tigar's defense of Terry Nichols, Timothy McVeigh's accomplice in the bombing of the federal building in Oklahoma City that killed or maimed scores of innocent individuals, including children attending day care in the building. Tigar's brilliant defense of Nichols, saving him from the death penalty, epitomizes the moral honor involved in a lawyer serving as a zealous advocate on behalf of a powerless, despised client. See Michael E. Tigar, Persuasion: The Litigator's Art passim (1999) (describing strategy in representing Nichols and strategies lawyers use for representing unpopular clients generally).
view, would be to place more emphasis on the choice of practice setting as an important point of moral decisionmaking.\footnote{77} We should, in other words, as one speaker helpfully urged my students last spring, promote a vision of ethical law practice that encourages students to make career decisions based on an evaluation of the overall moral tenor of their chosen paths in the law.

A key aspect of evaluating career options in this way is choosing what type of client base to represent. Thus, my proposal would be as follows: we as legal ethics teachers and theorists should urge our students to conceive of their career options as falling on a spectrum, along which the moral honor in representing a particular client base will tend to be inversely related to the social, political, and economic power of those clients.\footnote{78} This proposal explains why "the best"—or most ethical and admirable—lawyers would work with unmitigated zealousness for less powerful clients against more powerful ones. There is, according to this model, generally more honor in representing less powerful clients than in representing more powerful ones, especially when representing less powerful clients' interests against the interests of the more powerful. This accounts, for example, for our ethical sense that defending an indigent murderer is "public interest" work, while defending a corporate executive from criminal wrongdoing is not.

Admittedly, there are potential problems with my proposal that cannot be fully worked out in this brief Article.\footnote{79} To take one

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\footnote{77} I have sometimes puzzled about why legal ethics scholars such as Simon do not focus more on the ethical choices involved in selecting a practice setting. Here I think an ethicist such as Simon, teaching as he does in one of the country's elite law schools (Stanford), might forthrightly recognize that (unfortunately, to his mind) an overwhelming number of his students go into corporate law practices. He and others appear to be thinking, either consciously or unconsciously, about how to reach their own student base. But statistics show, as discussed above, that the majority of lawyers do not go into large firm corporate law practices, and even in elite law schools a sizable group of students yearn (or used to, anyway) for practice experiences motivated by commitments more engaging than receiving fat paychecks.

\footnote{78} Colleagues who read earlier drafts of this Article pointed out that my formulation leaves out pro bono work for large law firms and may overemphasize the value to the public interest of the work many smaller law firms perform. I intend, however, to offer this provocative suggestion: that there may be more value in working for middle-income clients in a small firm setting than in doing even significant amounts of pro bono work in a corporate law firm whose pro bono projects are sustained by the fees of enormously wealthy and powerful clients whose interests dictate the types of pro bono work the firm will accept.

\footnote{79} My proposal does not, for example, easily encompass government lawyers, who (in theory at least) are representing "the People's" interests. Government lawyers may in some situations vastly overpower their adversaries, while in other situations government lawyers may have far fewer resources than their opponents, as in the recent Microsoft antitrust litigation. See Joel Brinkley & Steve Lohr, U.S. v. Microsoft 328 (2001) (quoting comment of lead trial counsel for the United States David Boies that "[t]he government has some power, but Microsoft has at least as much"); John Heilemann, Pride Before the Fall: The Trials of Bill Gates and the End of the Microsoft Era 122 (noting that Microsoft General Counsel Bill Neukom
example, my proposal may not neatly classify some “cause” lawyers whose “clients” are amorphous or not easily categorized by economic class, such as the National Abortion Rights Action League and the National Right to Life Committee. But the fact that not all lawyering arrangements fit neatly within my model does not detract from its usefulness in reconceptualizing an important category of lawyer-client relationships. Most important for purposes of this Article are the benefits to both law students and middle-income clients of a sliding-scale lawyering model in which honor and esteem rise as the socioeconomic and political clout of one’s client base falls. My model creates far broader opportunities for students to find practice settings that would allow them to give life to the ethical commitments that drew them to the practice of law as a way of achieving ends more valuable than perpetuating the interests of the powerful and wealthy.

I realize that my very preliminary and intentionally provocative proposal for reconfiguring our conceptions of the moral honor involved in different practice settings is likely to meet many objections. Before concluding I address a few of the most obvious. First is the argument that it is simply impossible to disrupt the current status hierarchy that grants the highest prestige to corporate law jobs. To some extent this is true. As theorists have shown so persuasively, the processes that produce social hierarchies are extremely resistant to purposive manipulation. But the evidence also indicates that these entrenched hierarchies are currently in flux, and thus suggest possibilities for productive intervention.

In a recently published article, Heinz and Laumann, the same sociologists who originally developed the two hemispheres concept to describe the legal profession’s status hierarchy, modified their conclusions somewhat based on the results of a 1995 survey. Joined by several other leading legal sociologists, Heinz and Laumann reported that the new data did not support their thesis of two sharply divided spheres of corporate and personal services practice as starkly as their data from the 1970s had. They attributed the difference in part to improvements in their data collection methods. But Heinz and Laumann also concluded that the differences in their survey results over the span of two decades captured significant changes in the profession. Most significant was a trend towards increasing

“presided over a squadron of lawyers three times the size of the DOJ’s”).

80. Bourdieu shows how social classes battle for resources using cultural images. See generally Bourdieu, supra note 2 (demonstrating the deep and tenacious hold of class hierarchies generally). Similarly, Abel’s work on monopoly theory and the legal profession shows how insider groups work to form prestige ideas that exclude outsider groups. See Abel, supra note 10, at 112-26.

81. See supra notes 26-27 and accompanying text.


83. Id. at 754-55.
specialization: lawyers are now subdivided into smaller, more specialized clusters of practice areas less clearly separated by the broad distinction between corporate and personal client types. They also reported that, overall, their data were "less orderly" and "more unstable" than in 1975.

The results of the latest Heinz and Laumann survey showing the profession in a period of instability are consistent with the findings of other leading researchers who have been studying developments in the profession, especially changes resulting from the influx of large numbers of women and other traditional outsiders. Some evidence suggests, for example, that women lawyers tend to have somewhat different priorities in balancing work versus family and the prestige against the "social worth" of a job, suggesting possible pressure points for further change in the structure of legal work. Although it is far from certain what, if any, progress will result from such pressure, the evidence depicts a profession in a period of increasing change, in turn suggesting opportunities for shaking up its entrenched status hierarchies.

I do not mean to be presenting a naive argument that we as law professors have the power to transform the legal profession's hierarchy. Powerful forces—including huge differentials in financial compensation—uphold it, and similar hierarchies are evident in other professions. My proposal does not depend, however, on changing the dominant prestige hierarchy, but only on intervening in the construction of the alternative one currently conceived of as "public interest" practice. Here I draw from ideas Professor Richard Abel presented at a talk he gave at American University last spring. Abel,

84. They found that lawyers working in specialties dealing with personal problems of individuals—such as divorce, employment, general family practice, and personal injury—tended to have fewer business clients than lawyers specializing in fields of law needed by individuals with more money—such as probate and residential real estate. Id. at 758-59. In the latter fields, lawyers are now more likely to represent both wealthy individuals and businesses. Id. at 764.

85. Id. at 760.

86. See, e.g., Carrie Menkel-Meadow, Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering, 44 Case W. Res. L. Rev. 621 (1994) (discussing potential implications of influx of women in law and research suggesting that women’s balancing of prestige/money versus social worth of jobs may tend to be different than men’s); Nelson, supra note 8, at 359-65, 374-80 (discussing demographic changes in gender and racial makeup of the profession). Recent figures showing that more women than men are now applying to law school suggest that this feminization of the legal profession is likely to continue. See, e.g., Ted Gest, Law Schools’ New Female Face, U.S. News & World Rep., Apr. 9, 2001, at 76.

87. See, e.g., Menkel-Meadow, supra note 86 (examining implications of women’s potentially different value structures); Stover, supra note 28, at xxii (measuring significantly higher interest in professional altruism among women than men).

88. Thus it is more prestigious in medicine to work at a teaching hospital than a medical clinic, as it is in accounting to work for one of the “big eight” firms than to do individual tax returns for H&R Block.
himself a poverty lawyer in the 1970s, noted that in the heyday of the “public interest” law movement of the 1970s, becoming a “public interest” lawyer was considered a high prestige alternative to entering a law firm. Programs such as the highly competitive Reginald Heber Smith (“Reggie”) scholarships helped to support these alternative notions of prestige. Abel suggests that the construction of such alternative prestige structures should likewise be an important consideration in the design of “public interest” law scholarship programs today.

Abel’s insight seems to me an extremely important one. While it is unrealistic to think that the dominant mentality in the legal profession will change to one in which representing individuals is more prestigious than representing corporations, it seems far more feasible to imagine intervening in the creation of alternative hierarchies that assign prestige to helping real people with real problems and making a real difference in their lives. That hierarchy, I am arguing, should assign value—and hence prestige—to lawyering for middle-income clients.

CONCLUSION

In sum, the success of my proposal does not depend on all law students, or even many law students, adopting the value structure I am proposing here. Just as in the creation of an alternative elite for core “public interest” practice, the plan need only reach a small minority of law students to make a difference. It would not target students whose political interests or intellectual tastes lead them to find corporate law practice appealing. The group it would target is that subset of students who come to law school with a strong commitment to helping improve people’s lives through law, but who cannot find sustainable “public interest” employment after graduation. My alternative conception of honor would say to those students: if you find yourself unable, for whatever combination of reasons, to secure core “public interest” employment, consider the alternatives available in the vast spectrum of private sector opportunities that lie between core “public interest” work and work for corporate law firms; consider finding interesting, morally sustainable practices that present opportunities to provide legal services to the less powerful, in whatever kinds of struggles you find most intriguing, rather than opting to represent the interests of the wealthy.

89. See Abel, supra note 68; see also Stover, supra note 28, at 115 (arguing that there is a need for “subcultural support” for students interested in “public interest” law).

90. Such “public interest” scholars programs have been instituted in a number of law schools across the country, including American University, Fordham, and UCLA.
This approach would help students avoid feeling trapped in an all or nothing world, by illuminating the wide array of possible choices and balances to be struck in finding morally sustainable practice settings. It might also, coincidentally, help to mitigate the apparently growing problems in the provision of high quality legal services to middle-income persons.