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## Doing Good, Doing Well

Howard M. Erichson

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# Doing Good, Doing Well

Howard M. Erichson\*

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## I. INTRODUCTION

On the fiftieth anniversary of *Brown v. Board of Education*,<sup>1</sup> it is fitting that we should take account not only of what has become of school desegregation but also of the heroic public interest lawyer figure embodied by Thurgood Marshall. For his role as “the chief litigator for the civil rights movement,”<sup>2</sup> Marshall is widely regarded as a preeminent role model for public interest lawyers.<sup>3</sup> Descriptions

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\* Professor, Seton Hall University School of Law. The author thanks Kathleen Clark, Edward Hartnett, and Russell Pearce for their insights and comments and Julie von Bevern for her helpful research assistance.

1. 347 U.S. 483 (1954).

2. Luke C. Moore & Thelma Wyatt Cummings, *Justice Thurgood Marshall and His Legacy: A Living Legend's Unceasing Commitment to Justice and Equality*, 35 HOW. L.J. 37, 40 (1991).

3. Robert M. Bastress & Franklin D. Cleckley, *Tribute to a Champion: Thurgood Marshall*, 94 W. VA. L. REV. 1, 1 (1991) (“Reflection on Marshall’s career provides a sorely needed model for

of Marshall's career as a public interest advocate emphasize not only his ability to "use the legal system as a tool for social change,"<sup>4</sup> but also his personal sacrifice as a lawyer who persevered despite low pay.<sup>5</sup> The Marshall image thus encompasses the dominant elements of the prevailing conception of the public interest lawyer: advocacy for social change and commitment to the cause rather than to income.

For his work as a civil rights litigator and especially for his success in *Brown*, Marshall is viewed as a shining example of a lawyer who used his legal skills to advance the public good.<sup>6</sup> Indeed, in addition to the case's importance for school desegregation and equal protection, *Brown* holds a significant place in the history of the American legal profession as a symbol of litigation as a transformative force and as an inspiration to more than a generation of lawyers.<sup>7</sup>

Given the power of the Marshall legacy, it is no surprise that many scholars and attorneys invoke his name to describe lawyers working to advance their vision of the public good. Beatrice Dohrn, legal director of Lambda Legal Defense and Education Fund, has been

public interest-minded law students and lawyers"); Denis F. McLaughlin, *On Becoming a Lawyer*, 26 SETON HALL L. REV. 505, 510 (1996) (describing Marshall's role in *Brown* and urging students to "[t]ake a lesson in professional responsibility" from Marshall); Moore & Cummings, *supra* note 2, at 48 ("Those of us who would follow must be guided by his vision . . .").

4. Moore & Cummings, *supra* note 2, at 40.

5. Marshall's success as a lawyer always has been measured by his achievements, not by financial measures:

His accomplishments as a lawyer came at a personal sacrifice, as well. Not only did his work deny him the pace and relaxation of a normal law practice and keep him from home and family much of the year, but it also failed to pay him very well. The Legal Defense Fund during Marshall's years always operated on a shoestring. In 1951, for example, after thirteen years as the Fund's chief lawyer and in payment for yeoman services, his salary stood at \$8,748.30. As indicated by financial statements filed by federal judges, Marshall never did accumulate much in the way of assets, and his wealth was always well below that of his brethren on the Supreme Court. Thus, commitment, dedication, and sacrifice characterized Thurgood Marshall's career at the bar.

Bastress & Cleckley, *supra* note 3, at 5 (footnote omitted); see also Ralph S. Spritzer, *Thurgood Marshall: A Dedicated Career*, 26 ARIZ. ST. L.J. 353, 354 (1994) ("He had clients from the start, but in the depths of the depression few had means to pay anything of significance. No one, however, was turned away. At the end of the first year, expenses exceeded revenue. Soon, Marshall began to earn a reputation as a lawyer for the poor . . .").

6. The president of the American Bar Association recently described lawyering as "a calling to serve the public." Dennis W. Archer, *Lawyer Power*, A.B.A. J., Dec. 2003, at 8. "Lawyers as healers," he wrote, "can promote a model that emphasizes the greater good." He offered three examples of such lawyer-healers: Mohandas K. Gandhi, Franklin D. Roosevelt, and Thurgood Marshall. *Id.*

7. Stephen Yeazell captures this aspect of the historical significance of *Brown*: "*Brown* and the civil rights litigation movement helped create in several generations of lawyers a new belief in law and specifically litigation as a noble calling, as an avenue for social change." Stephen Yeazell, *The Civil Rights Movement and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (discussion draft at 1, on file with author).

called “the Thurgood Marshall or Ruth Bader Ginsburg for gay and lesbian civil rights.”<sup>8</sup> The American Bar Association’s Section of Individual Rights and Responsibilities annually honors “long-term contributions by other members of the legal profession to the advancement of civil rights, civil liberties, and human rights” with its Thurgood Marshall Award.<sup>9</sup> And Jay Sekulow, a leading anti-abortion advocate, has been called “the Thurgood Marshall of our movement,”<sup>10</sup> demonstrating that Marshall’s name is invoked for cause lawyering without regard to whether he would have supported a particular cause.

Despite political differences, it is understandable that Marshall’s name is used to describe these lawyers as advocates who devote themselves to pursuing social change above the pursuit of money. It seems more jarring, however, when lawyers in high-stakes contingent fee litigation describe themselves as following in the Marshall tradition of lawyer-activists. This is what has emerged at least in some segments of the mass tort plaintiffs’ bar. An asbestos plaintiffs’ lawyer whose website trumpets that she achieved the “largest net verdict in California history in an asbestos injury case” describes becoming a lawyer because of “my hero Thurgood Marshall.”<sup>11</sup> Typifying a host of lawyers who look to Marshall as an exemplar of the pursuit of “litigation as a noble calling,”<sup>12</sup> she describes her faith in the power of law to right injustices “[b]ecause of Thurgood Marshall and others like him” and its connection to her own practice:

As part of a law practice that encourages such passionate beliefs, I have had the privilege of representing asbestos victims and their families against huge companies

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8. Karen Dillon & Jim Schroeder, *The Public Sector 45: Forty-five Young Lawyers Outside the Private Sector Whose Vision and Commitment are Changing Lives*, AM. LAW., Jan./Feb. 1997, at 71 (quoting former Lambda lawyer Amelia Craig).

9. Section of Individual Rights and Responsibilities, American Bar Association, *Thurgood Marshall Award*, available at <http://www.abanet.org/irr/tmahistory.html> (last visited Jan. 5, 2005). The award description notes that Marshall “epitomized individual commitment, in word and action, to the cause of civil rights in this country.” *Id.* The ABA’s Thurgood Marshall Award is only one of dozens of awards given in Marshall’s name by bar associations and public interest organizations around the country. The Boston Bar Association, for example, honors legal work for the poor with its Thurgood Marshall Award, and the Association of the Bar of the City of New York gives its Thurgood Marshall Award to lawyers fighting capital punishment.

10. Dillon & Schroeder, *supra* note 8, at 71 (quoting Keith Fournier, executive director of the American Center for Law and Justice, a conservative Christian legal advocacy organization of which Sekulow is chief counsel).

11. Kazan, McClain, Abrams, Fernandez, Lyons & Farrise, *Simona A. Farrise: Overview; Verdicts*, at [http://www.kazanlaw.com/attorneys/farrise\\_s.cfm](http://www.kazanlaw.com/attorneys/farrise_s.cfm) (last visited Jan. 5, 2005).

12. Yeazell, *supra* note 7, discussion draft at 1.

that made and sold deadly asbestos products. I would never describe my work on behalf of asbestos victims and their families as "ordinary" or simply "a job."<sup>13</sup>

New Orleans trial lawyer Wendell Gauthier, in many ways the epitome of the mass tort plaintiffs' lawyer, was a central figure in litigation over the MGM Grand and San Juan Dupont Plaza hotel fires, the Union Carbide chemical leak in Bhopal, silicone gel breast implants, tobacco, and handguns.<sup>14</sup> When asked about his lawsuits against the firearms industry, he invoked Thurgood Marshall's legacy:<sup>15</sup> "We are taking the gun dealers to court because the political process has failed us," Gauthier said. "If lawyers hadn't launched *Brown v. Board of Education*, you would have never had school integration because it was so unpopular with lawmakers."<sup>16</sup> Undoubtedly, many people would be put off by hearing a wealthy contingent fee trial lawyer compare his role to that of the lawyers who "launched *Brown*." Gauthier does not fit the image of the self-sacrificing public interest crusader.<sup>17</sup> As one lawyer put it, "the gun suits are not *Brown*, the *Castano* lawyers are not Thurgood Marshall."<sup>18</sup>

One interesting aspect of mass torts is that they combine the disparate worlds of personal injury litigation and public interest law practice. The policy implications are manifest in so-called "social policy torts" such as tobacco and guns.<sup>19</sup> A moment's examination, however, shows significant public policy angles in all mass tort

13. Simon A. Farris, *supra* note 11, at Overview.

14. PETER HARRY BROWN & DANIEL ABEL, OUTGUNNED: UP AGAINST THE NRA 14, 16 (2003); Marcia Coyle, *Runners-Up*, NAT'L L.J., Dec. 26, 1994, at C11; Gregory Roberts, *Wendell's New War: Wendell Gauthier Has Made Millions for Victims of Fire, Plane Crashes, and Explosions. Now He's Taking on the \$100 Billion Tobacco Industry*, TIMES-PICAYUNE (New Orleans), May 29, 1994, at B1.

15. On Gauthier's role in the municipal gun litigation, see Howard M. Erichson, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation*, in *SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS* (Timothy D. Lytton ed., forthcoming 2005).

16. BROWN & ABEL, *supra* note 14, at 10.

17. Stephen Yeazell notes that critics of the plaintiffs' bar emphasize the lawyers' wealth and that the force of such criticism "comes from the implied contrast with the image presented by the *Brown* plaintiffs—ill-paid and heroic liberators." Yeazell, *supra* note 7.

18. Stephen Pomper, *Off Target: The Biggest Challenge to the NRA May Not Come from Trial Lawyers, but from Demographics*, WASH. MONTHLY, Jan./Feb. 2003, at 51. By "*Castano* lawyers," the author was referring to a coalition of lawyers who represented multiple municipalities in the gun litigation, and who previously had brought the *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), case, a nationwide class action against the tobacco industry. *Id.*

19. See Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 495 (2001) (describing a new class of public and private suits that use litigation as a way to effectuate legislative and social change).

litigation, including pharmaceutical product liability and environmental toxic torts. Because mass torts raise both public policy concerns and the potential for huge money damages and fees, cases involve competing motivations and breed intriguing alliances. Anti-smoking activists worked side by side with tort lawyers and state attorneys general. Anti-gun activists aligned with mass tort personal injury lawyers and big city mayors. With these alliances comes an odd convergence in which contingent fee lawyers fight for the public interest, government lawyers fight for money damages, and public interest lawyers fight for a share of the fees.

Rather than focusing on the differences between tort lawyers and activists as they ally with each other, this Article focuses on the motivations and explanations of the tort lawyers themselves. Positioned at the intersection of big-money practice and social change litigation, mass torts provide a useful study in multiple motivations. While financial incentives for plaintiffs' lawyers explain much of what happens in mass torts, policy objectives come into play as well, at least in the lawyers' rhetoric. Despite the obvious difficulty distinguishing reasons from rhetoric and rationalization, it is worth exploring the significance of mixed motives for lawyers who are committed to both policy objectives and the potential for large fees.

The idea that social change objectives partly motivate tort lawyers raises several interesting questions. First, the combination of monetary and policy goals arguably creates conflicts of interest. Just as mixed alliances create conflicting interests among groups, an individual lawyer's mixed motives can create lawyer-client conflicts of interest. In a mass tort case for money damages, if the plaintiffs' lawyers are driven partly by social change objectives and not solely by maximizing each client's recovery, and if different strategies would serve each of those goals, should that cause concern as a conflict of interest between the lawyers and their clients?

Second, the multiple motivations of mass tort lawyers may suggest a redefinition of "public interest" lawyering. Among lawyers and law students, public interest law practice connotes low pay. If mass tort lawyers use the rhetoric of public interest to describe their work, should that lead to rethinking accepted notions of public interest practice?

The danger of the prevailing conception of public interest practice is that by excluding so much, it may undermine a sense of commitment to the public interest in the everyday work that lawyers do. If it is assumed that public interest lawyering is what lawyers do for little or no pay, then does that suggest that in the majority of lawyers' work—that is, in their standard fee-paying work—lawyers

simply pursue wealth and raw client interest without regard to whether their work advances the public good? Lawyers may find it convenient to convince themselves that they can be hired guns in their everyday work because public interest work is something entirely different. Public interest work, by this narrow conception, includes the work performed by the relatively small number of lawyers who comprise the public interest bar and the work performed by other lawyers during the relatively small number of hours they commit to pro bono practice.

Russell Pearce expresses this idea in terms of a retreat from an earlier conception of lawyers as public guardians.<sup>20</sup> He suggests that lawyers' commitment to the public good is an aspiration worth reviving, but he observes that efforts at promoting this commitment have failed.<sup>21</sup> For such efforts to succeed, Pearce argues, "commitment to the public good must be reconciled with the acknowledgement that law is a business."<sup>22</sup>

This is precisely where mass tort lawyers may provide a useful example, as they work at the intersection of social change advocacy and big-money entrepreneurial practice. On the other hand, there is reason to be skeptical that redefining the conception of public interest lawyering would alter lawyer conduct to any significant degree. Given the strength of self-serving bias as a cognitive matter, combined with lawyers' extraordinary ability to take moral refuge in the adversary system and the principle of moral nonaccountability, lawyers are likely to see the public good in their own work and unlikely to rethink basic commitments. Thus, while there is some appeal to rethinking accepted notions of public interest lawyering so that substantial fee-generating work is not excluded by definition, such rethinking may accomplish little.

Part I of this Article explores the possibility of multiple motivations of mass tort plaintiffs' lawyers, as well as the alliances among activists and trial lawyers that have emerged in several recent mass torts. Part II addresses the conflicts of interest that arise when considerations other than maximizing clients' recovery motivate lawyers. While such conflicts exist, a mix of monetary and policy motivations may reduce, rather than exacerbate, the lawyer-client

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20. Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 417-19 (2001) [hereinafter *America's Governing Class*]; see also Russell G. Pearce, *Retreat of the Elite: How Public Interest Law and Pro Bono Undermine Business Lawyers' Commitment to the Public Good*, AM. LAW., July 2001, at 79 [hereinafter *Retreat of the Elite*].

21. Pearce, *Retreat of the Elite*, *supra* note 20, at 79.

22. *Id.*

conflicts that inhere in mass representation. In mass collective representation, mixed motives more accurately reflect the combined interests of groups of similarly situated individual clients.

Part III turns to questions of professionalism, the prevailing conception of public interest lawyering, and the possibility of serving the public good while pursuing private gain. The standard conception of public interest law practice, although rarely articulated with precision, tends to focus on market-undervalued legal work.<sup>23</sup> While this definition makes sense for determining whether certain legal work ought to be subsidized, the prevailing conception may have an unintended consequence once internalized by lawyers and law students. Paradoxically, the prevailing conception of public interest lawyering may discourage lawyers in most of their work from considering the public good. In this sense, a vision of professionalism that acknowledges the possibility of significant private gain while serving the public interest may better serve the profession. On the other hand, self-serving bias may influence lawyers to view their own fee-generating work as public-serving. The benefit or harm of a broader understanding of public interest law practice depends on the extent to which, when lawyers perceive themselves as serving the public interest, they merely have persuaded themselves of the goodness of their own pursuit of wealth.

Mass tort plaintiffs' practice, situated at the crossroads of public law and private tort litigation, combines notable public policy objectives with unmistakable fee potential. Because it presents mixed motives for lawyers more palpably than most other areas of practice, it offers a useful starting point for thinking about fee-generating work in which lawyers seek to advance the public interest.

## II. MASS TORT LAWYERS AND POLICY MOTIVATIONS

In the past decade, mass tort litigation has gained controversial recognition as a public policy forum. As plaintiffs' lawyers have pursued claims concerning tobacco, handguns, lead paint, and health maintenance organizations ("HMOs"), the relevance of mass tort litigation to public policy has become impossible to ignore. Deborah Hensler describes these as "social policy torts."<sup>24</sup> Referring to lawsuits over guns, HMOs, and above all, tobacco, she notes the appeal of such social policy tort litigation to activists and trial lawyers: "To some advocacy groups, tobacco litigation seemed to offer a new

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23. See text accompanying notes 103-108, *infra*.

24. Hensler, *supra* note 19, at 495.



prescription for pursuing social change. To some lawyers, it opened new vistas for entrepreneurial activity.”<sup>25</sup>

Recognition does not necessarily imply acceptance. While some observers consider public policy mass tort litigation a welcome development, others view the development quite differently. To some, tort litigation serves as an integral part of American democracy and promotes corporate responsibility and product safety.<sup>26</sup> To others, public policy debates driven by entrepreneurial plaintiffs’ lawyers are antidemocratic and dangerous to society.<sup>27</sup> Both sides agree, however, that mass tort litigation brings public policy debates into the courtroom and places significant policymaking power in the hands of lawyers, judges, and juries.

It is misleading to draw too neat a line between public policy torts such as guns and tobacco, on the one hand, and other mass torts such as pharmaceutical cases, mass disasters, or mass toxic exposure, on the other. By its very nature as litigation over conduct allegedly causing widespread injury, all mass tort litigation carries significant public policy consequences. Twenty years ago, David Rosenberg recognized that mass tort litigation can be understood as a form of “public law” litigation.<sup>28</sup> With this observation, he linked mass torts to

25. *Id.*; see also Erichson, *supra* note 15 (addressing gun litigation in the context of public debate over gun control).

26. See CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA* 218-20 (2001). According to Bogus, product liability litigation accomplishes three purposes. First, it improves safety by “increas[ing] the manufacturer’s cost of distributing unreasonably dangerous products.” *Id.* at 218. Second, “the discovery process unearths facts that would otherwise remain within the dark recesses of the corporations,” and the risk of exposure alters both corporate and personal calculations for executives “debating whether to distribute dangerous products.” *Id.* at 219. Third, by allowing citizens as jurors to pass judgment on corporate decisions, it offers a means for the people to “participate in the affairs that affect them.” *Id.* at 219-20.

27. See, e.g., WALTER K. OLSON, *THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA’S RULE OF LAW* (2003). Referring to a series of mass torts including tobacco, handguns, breast implants, and asbestos, Olson argues that the lawyers of the mass tort plaintiffs’ bar have advanced their own wealth and power to the detriment of American democracy:

The new rule of lawyers brings us many evils, but perhaps the greatest is the way it robs the American people of the right to find its own future and pursue its own destiny. . . . [H]owever uncertain the results of democracy, however slow and clumsy its procedures, we can feel quite sure that it is a better course than agreeing to turn over our rights of self-government to a new class of unaccountable lawyers.

*Id.* at 314.

28. David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 851 (1984); see also JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATIONS, AND OTHER MULTIPARTY DEVICES* 41 (1995) (detailing the similarities between mass tort cases and public litigation). I have argued that the public law nature of mass tort litigation necessitates a more hands-on approach than most United States judges are comfortable employing. Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1985 (1999).

school desegregation and other impact litigation—the sorts of lawsuits that Abram Chayes primarily had in mind when he introduced his public law litigation paradigm eight years earlier.<sup>29</sup> Public policy implications are manifest in mass pharmaceutical product liability cases including fen-phen<sup>30</sup> and Bendectin,<sup>31</sup> litigation concerning mass disasters such as hotel fires and airplane crashes,<sup>32</sup> tort claims addressing mass human rights violations,<sup>33</sup> and toxic tort litigation involving polychlorinated biphenyls (“PCBs”),<sup>34</sup> the gasoline additive methyl tertiary-butyl ether (“MTBE”),<sup>35</sup> and numerous other substances.

Much of the recent commentary on mass tort litigation assumes that plaintiffs’ lawyers have an entrepreneurial mindset in which lawyers assess cost and likely investment return when evaluating litigation opportunities.<sup>36</sup> As with debate over the policy significance of mass tort litigation, observers are split on the soundness of financial incentives as driving forces for plaintiffs’ lawyers. Those who support the role of plaintiffs’ lawyers as private attorneys general, for the most part, view legal fees as an appropriate and effective mechanism for inducing plaintiffs’ lawyers to invest in

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29. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (noting that “school desegregation, employment discrimination, and prisoners’ or inmates’ rights cases” are the types of cases that display the features of public law litigation).

30. See generally ALICIA MUNDY, *DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN* (2001) (discussing lawsuits involving the diet drug combination fen-phen).

31. See generally MICHAEL D. GREEN, *BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION* (1996) (discussing policy implications of lawsuits against the manufacturer of Bendectin).

32. The public nature of legal representation for mass disaster victims has led some states to establish programs to provide legal assistance to victims in the wake of disasters. Jim Edwards, *Bar, State Join in Legal Aid Plan for Disaster Victims*, N.J. L.J., Feb. 2, 2004, at 1.

33. Class action lawyer Elizabeth Cabraser describes of the use of mass tort litigation to seek justice for victims of human rights violations, including victims of the Holocaust and victims of the Marcos regime in the Philippines. Elizabeth J. Cabraser, *Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System*, 57 VAND. L. REV. 2211 (2004).

34. Michael Grunwald, *Proposed Settlement in PCB Case Denounced*, WASH. POST, Mar. 24, 2002, at A6; Michael Grunwald, *Monsanto Held Liable for PCB Dumping*, WASH. POST, Feb. 23, 2002, at A1.

35. Dan Morgan, *Nursing a Fragile Energy Bill; Protection for Fuel-Additive Makers a Sticking Point in Senate*, WASH. POST, Nov. 24, 2003, at A5.

36. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 683-84 (1986) (“[O]ne better understands the behavior of the plaintiff’s attorney in class and derivative actions if one views him not as an agent, but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions.”).

cases that will advance the public good.<sup>37</sup> The same idea, though, is attacked by those who view civil litigation as a threat to business or as a circumvention of democratic processes.<sup>38</sup> Both sides, however, share an understanding that the driving force behind much civil litigation is the pursuit of fees by plaintiffs' lawyers<sup>39</sup> and, indeed, financial incentives for the lawyers explain a good deal of what goes on in mass tort litigation.

The pursuit of wealth, however, need not be the only explanation for why lawyers pursue particular litigation or how they go about it.<sup>40</sup> Just as lawyers in "public interest" litigation explain their involvement in terms of commitment to the cause,<sup>41</sup> similar

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37. See, e.g., Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 518 (2001) ("It is only the possibility of private attorneys general receiving a contingency fee that permits lawsuits to be brought to vindicate the public interest.").

38. See, e.g., WALTER K. OLSON, *THE RULE OF LAWYERS* 32 (2003) (criticizing those who "regard contingency fees – and the encouragement they gave to speculative litigation – not as a lesser evil that should be limited to the cases where it was necessary, but as something wholesome and beneficial in itself"); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 664, 706 (2003) (arguing that contingent fees are non-competitive, increase the volume of tort litigation, and require greater regulation).

39. This view is consistent with public opinion about lawyers. A consumer survey in 2001 found that 74 percent agreed that "[l]awyers are more interested in winning than in seeing that justice is served," and 69 percent agreed that "[l]awyers are more interested in making money than in serving their clients." Only 39 percent agreed that "[m]ost lawyers try to serve the public interests well." LITIGATION SECTION, AMERICAN BAR ASSOCIATION, *PUBLIC PERCEPTIONS OF LAWYERS: CONSUMER RESEARCH FINDINGS* 7 (Apr. 2002) (report prepared by Leo J. Shapiro & Assocs.).

40. Analyzing the motivations of cause lawyers, Carrie Menkel-Meadow considers the psychology literature on prosocial behavior and notes that "at the individual level of motivation, humans seldom act from a unidimensional, single-purpose motivation. Thus, more interesting studies of human behavior are currently focused on the 'mixed motives' that are more accurate explanations of our behavior." Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 31, 38 (Austin Sarat & Stuart Scheingold eds., 1998).

41. Long-time civil rights lawyer Jack Greenberg describes his decision, early in his career, to remain at the NAACP Legal Defense Fund rather than accept a lucrative offer to join a private firm as an antitrust lawyer representing corporate interests. Although the offer was "attractive," Greenberg writes, "I have to care about what I do." JACK GREENBERG, *CRUSADERS IN THE COURTS* 91 (1994). He also describes a conversation he had with his colleague Louis Pollak, a civil rights lawyer who later became a law professor, dean, and federal judge:

One day as we worked together on an early phase of the school cases, Lou and I met at the Columbia law library and took a walk outside and speculated about how we hoped to spend our careers. We agreed that we would be happy if we could work at matters we cared about so long as we could earn five or six thousand dollars a year.

*Id.* at 160.

For a discussion of the many-faceted motivations of cause lawyers, see Menkel-Meadow, *supra* note 40, at 31-68. Menkel-Meadow defines cause lawyering as "any activity that seeks to use

explanations often can be heard from plaintiffs' lawyers in mass tort litigation, focusing on their contribution to the public good.

Self-serving declarations, of course, prove very little. Just because lawyers say they pursue cases because they believe in the righteousness of the cause does not make it true, and it is difficult to sort reasons from rhetoric and rationalization. When mass tort lawyers describe their work in terms of serving the public good, it is no doubt in part because they believe that the rhetoric of public interest serves their purposes and because they wish to rationalize self-interested conduct by attributing to themselves a noble cause. Rhetoric and rationalization, however, should not be dismissed as irrelevant. Not all lawyers describe their work in terms of social change or service to the greater good, as distinguished from service to their own clients.

Moreover, some of the rhetoric is backed up by litigation decisions that suggest genuine commitment to the policy objectives. In the tobacco litigation, for example, private lawyers Michael Ciresi, Roberta Walburn, and others represented the State of Minnesota along with attorney general Skip Humphrey. The lawyers stood to earn enormous fees by settling the matter, and they might have sought a more certain and more lucrative settlement by acceding to a confidentiality agreement. Nonetheless, they refused to settle on a basis that would have kept the documents secret. They agreed to settle only if the documents they had discovered would be placed in a document depository and made available to the public. As one of the tobacco industry lawyers recalls the negotiations, "Ciresi said, 'We've got to have immediate disclosure of the documents.'"<sup>42</sup> Antitobacco activist Richard Daynard describes the importance of this stance:

The documents in general come out because Skip Humphrey and Mike Ciresi refuse to settle their case unless the documents are going to be made public. I mean, we're talking about Profiles in Courage. Most of the other folks would have settled with a little bit of a nod, a fig leaf in the direction of document disclosure. . . . You had a

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law-related means or seeks to change laws or regulations to achieve greater social justice – both for particular individuals (drawing on individualistic 'helping' orientations) and for disadvantaged groups." *Id.* at 37. In a study of cause lawyering in Argentina and Brazil, Stephen Meili notes that the personal motivations of the lawyers, while multifaceted, "seem to fall into two discrete categories: a very personal and frequently moral desire to fight injustice, and a more public sense of their individual role in the transition to democracy; that is, a transition that includes adherence to the rule of law." Stephen Meili, *Cause Lawyers and Social Movements: A Comparative Perspective on Democratic Change in Argentina and Brazil*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 487, 501 (Austin Sarat & Stuart Scheingold eds., 1998).

42. DEBORAH CAULFIELD RYBAK & DAVID PHELPS, *SMOKED: THE INSIDE STORY OF THE MINNESOTA TOBACCO TRIAL* 385 (1998) (quoting R.J. Reynolds lawyer Arthur Golden).

combination of an attorney general who knew why he brought the case and a law firm that knew why they went in on the case, and it wasn't for the bucks.<sup>43</sup>

Rather than seeking to maximize the monetary recovery and their own fees, the lawyers took the path they thought was more likely to serve the public interest by making information on the tobacco industry publicly accessible.

Other plaintiffs' lawyers in the tobacco litigation have shared information and ideas with each other to an extent that cannot readily be explained in terms of each lawyer's self-interest. These actions make more sense in terms of commitment to the antitobacco cause. Daynard describes the "missionary group"<sup>44</sup> of lawyers involved in the Tobacco Trial Lawyers Association, including Woody Wilner, Madelyn Chaber, and Michael Piuze, as being "really committed to seeing that more and more cases get brought, even if they don't make a penny on the other cases being brought, because it should happen."<sup>45</sup>

Plaintiffs' lawyers in a wide range of mass tort cases describe their motivations in terms of policy objectives and are subsequently perceived as crusaders. In the mass tort litigation over Agent Orange, one of the leading plaintiffs' lawyers was Victor Yannacone, who Peter Schuck described as "a passionate partisan, a crusader who was personally and ideologically committed to subduing toxic chemicals in the interest of preserving ecological balance and human health."<sup>46</sup> Alex MacDonald, one of the leading plaintiffs' lawyers in the mass tort litigation over the diet drug combination fen-phen, describes his responsibility as an attorney as "awesome and holy."<sup>47</sup> MacDonald

43. Interview with Professor Richard Daynard, Director, Tobacco Products Liability Project (Boston, Apr. 26, 2002).

44. *Id.*

45. *Id.* Daynard leaves no doubt that he believes in these lawyers' commitment to the antitobacco cause: "There are a group of people who brought these cases, . . . before during and after, they've looked the tobacco companies in the eye, and they've seen the face of evil, and they want to really make sure these guys are held accountable in more than occasional cases." *Id.* His account of the Castano Group lawyers, who unsuccessfully brought a nationwide class action against the tobacco industry in the mid-1990s and then branched out into statewide class actions, is more mixed:

I think there were mixed motives in Castano. I think there were some people in Castano who were real believers, and some of them may still be. Some may still be. I think there were people in the Castano Group who just saw it as an investment. Some saw it as an investment and a good time – "should be fun, while we make a lot of money." But I think there were some real believers in there who I think are probably still good people and probably still would continue to do the right thing for the right reason.

*Id.*

46. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 43 (1986).

47. MUNDY, *supra* note 30, at 31. Like many lawyers who feel devoted to representing a particular set of interests in litigation, MacDonald cannot imagine representing the other side: "I

speaks about the class action settlement in the diet drugs litigation as a source of deep personal satisfaction.<sup>48</sup> A declaration of public-interestedness seems to have become the tort lawyer's standard explanation.<sup>49</sup>

The rhetoric of social change in mass tort litigation reached a crescendo in the third wave of tobacco litigation during the late 1990s, when mass tort lawyers teamed with state attorneys general to pursue government recoupment litigation against the tobacco industry. Deborah Hensler relates a comment of leading plaintiffs' lawyer Richard Scruggs at a conference on tobacco litigation: "Our purpose was to change the world."<sup>50</sup> Other tobacco plaintiffs' lawyers shared this fervor, sometimes with religious overtones, as with Mississippi trial lawyer Don Barrett, who played a leading role in the tobacco

don't know how my adversaries get up in the morning. I wouldn't do it. I'd drive a garbage truck before I represented a drug company." Interview with attorney Alex MacDonald (Boston, Apr. 26, 2002).

48. "Is it perfect? No. Did people give up some stuff? Yeah. But do I sit back with an element of pride? When I tell my grandchildren, 'you see this grid here, that for fifteen years allowed people with valvulopathy and all to get paid and they could move up to a higher level of compensation if their disease progressed' – I'm awfully proud I played a role in that." Interview with Alex MacDonald, *supra* note 47.

49. Even Texas trial lawyer Joe Jamail—probably known less for public-mindedness than for his litigation antics, *see* *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994), and his wealth, *see* *Special Report: The World's Richest People 2004*, FORBES.COM, available at <http://www.forbes.com/finance/lists/10/2004/LIR.jhtml?passListId=10&passYear=2004&passListType=Person&uniqueId=H8XP&datatype=Person> (last visited Jan. 5, 2005) – describes his own work as "the protection of the public interest." JOE JAMAIL, LAWYER: MY TRIALS AND JUBILATIONS 66 (2003). He adds, "If there is a distinction I believe justifies my existence on earth, it is this: I am personally responsible for three national recalls – by Remington Arms, Honda, and Parlodel drugs. They can engrave that on my tombstone." *Id.* The president of the Association of Trial Lawyers of America quoted the passage above by Jamail in a recent defense of trial lawyers, and he offered a litany of mass torts and other product liability cases as evidence that plaintiffs' lawyers serve the public good not only by serving the needs of particular clients, but also by changing the way business is done:

Reports of civil lawsuits that have resulted in more responsible business practices and a safer society would fill volumes. Consider these: A 1970 case of a four-year-old burned badly by highly flammable pajamas led to congressional action setting tougher standards. Injuries and deaths caused by the Dalkon Shield intrauterine device gave rise to litigation that forced the manufacturer, A.H. Robins Co., to remove its product from the market. As a result of a 1998 lawsuit brought by a Boeing employee who contracted leukemia after continual exposure to electromagnetic pulse radiation, the company implemented safety procedures to protect others. And most recently, after numerous lawsuits were filed seeking compensation for deaths linked to the dietary supplement ephedra, the FDA banned the product.

David S. Casey, Jr., *The Good That Trial Lawyers Do*, TRIAL, Feb. 2004, at 9.

50. Hensler, *supra* note 19, at 496 n.17. On another occasion, Scruggs described the purpose of the attempted nationwide settlement in 1997: "Everything is aimed at stopping kids from starting to smoke and ultimately remedying this enormous public health problem we have in this country." Panel Discussion, *The Tobacco Settlement: Practical Implications and the Future of Tort Law*, 67 MISS. L.J. 847, 854 (1998) (quoting Richard Scruggs).

litigation. According to one account, "Barrett said he had come to believe that he was doing God's work. He thanked the Lord that he had been given this opportunity to fight the wrongdoings of the tobacco companies; he was a crusader."<sup>51</sup>

Wendell Gauthier, the leader of the *Castano*<sup>52</sup> coalition of plaintiffs' lawyers in the tobacco litigation and the driving force behind the group's shift into gun litigation,<sup>53</sup> continued to devote himself to both the tobacco and gun cases even as he fought the cancer that claimed his life in 2001. "I was already in the fight against tobacco and was in the early planning stages for the gun litigation," Gauthier said in an interview reported in a book coauthored by one of his law partners:

I was leading these two legal armadas, which is one reason I kept my bout with cancer a guarded secret. Few outside of my family and close associates knew. Radiation and chemotherapy would have attracted attention to the disease and would, therefore, have hindered the two big causes that meant the most to me.<sup>54</sup>

The same book reports that Gauthier "viewed the fight for gun control as the crowning achievement of his career; he knew he was in pursuit of something far more important than money."<sup>55</sup>

Given the public policy significance of mass tort litigation, it naturally has bred alliances of trial lawyers and activists.<sup>56</sup> In litigation over handguns, lawyer-activists teamed up with mass tort plaintiffs' lawyers to pursue lawsuits against the firearms industry.<sup>57</sup>

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51. PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 22 (1998). Pringle describes Barrett as a devout Methodist who "believed the tobacco companies should be forced to be more socially responsible. Beating them up in court was one way to make them do their public duty." *Id.*

52. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996).

53. Gauthier organized and led the *Castano* Group, a coalition of over sixty plaintiffs' law firms that united in 1994 to pursue a nationwide class action against the tobacco industry and that shifted its attention to statewide class actions when the nationwide class was decertified, see *Castano*, 84 F.3d at 737. As the group's tobacco work faded, Gauthier persuaded roughly half of the lawyers to participate in municipal lawsuits against handgun manufacturers. See Erichson, *supra* note 15 (discussing the role of Gauthier and other private plaintiffs' lawyers in the municipal gun litigation).

54. BROWN & ABEL, *supra* note 14, at 288-89.

55. *Id.* at 74.

56. These alliances between mass tort plaintiffs' lawyers and activists share some features with the alliances that have emerged between mass tort plaintiffs' lawyers and government entities, most prominently in the tobacco, handgun, and lead paint litigation. See Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 17-18 (2000) (discussing government entities' use of private lawyers to pursue lawsuits for recoupment of government funds spent due to dangerous products or substances).

57. Erichson, *supra* note 15.

Dennis Henigan of the Legal Action Project, the litigation branch of the Brady Center to Prevent Handgun Violence, forged alliances with private law firms that represented both municipal plaintiffs and individual plaintiffs in gun lawsuits.<sup>58</sup> Similar alliances were formed in the tobacco litigation. The consortium of private lawyers that filed the *Castano* tobacco class action<sup>59</sup> worked closely with Richard Daynard, a long-time antitobacco activist and law professor who founded the Tobacco Products Liability Project.<sup>60</sup> Daynard served on the Castano Group's executive committee and discovery committee.<sup>61</sup> The Trial Lawyers for Public Justice, an organization that links trial lawyers with social change litigation opportunities, represents a broader alliance between the plaintiffs' bar and the public interest community. "He has managed to bridge the gap between commercial trial lawyers and public interest lawyers," one lawyer says of the group's executive director.<sup>62</sup> These alliances between the private plaintiffs' bar and the community of social change activists or cause lawyers allow for cross-fertilization of ideas and encourage lawyers to think of their work in terms of multiple motivations and objectives.<sup>63</sup>

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58. *Id.*; Peter J. Boyer, *Big Guns*, THE NEW YORKER, May 17, 1999, at 53, 54-67; BROWN & ABEL, *supra* note 14, at 18.

59. *Castano v. Amer. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996).

60. See PRINGLE, *supra* note 51, at 6 (describing Daynard as "a veteran antitobacco activist [who] had been made an honorary member of Gauthier's group because of his encyclopedic knowledge of tobacco litigation and his legendary steel-trap mind."). The administrator of the Castano Plaintiffs' Legal Committee describes traveling to Daynard's office in Boston to photocopy documents from his files. Although the professor's files were "totally disorganized," she and her Castano Group companions—relative newcomers to tobacco litigation—learned the benefit of allying with someone who had been an antitobacco activist for years. In Daynard's files, they found "huge amounts of documents," which they copied and promptly began to code, early in the litigation process. "People had been sending him documents for years, from every tobacco case." Interview with Suzanne Foulds, Administrator, Castano Plaintiffs' Legal Committee (New Orleans, Jan. 7, 2002).

61. Interview with Richard Daynard, *supra* note 43.

62. Dillon & Schroeder, *supra* note 8, at 67-68 (quoting attorney Alan Morrison of Public Citizen Litigation Group, speaking about Trial Lawyers for Public Justice executive director Arthur Bryant).

63. The convergence of "public interest" lawyering and mass tort plaintiffs' practice involves not only litigation alliances, but also individual career spans. One prominent example is Bill Lann Lee, who joined the class action firm Lief Cabraser Heimann & Bernstein after twenty-five years practicing civil rights law at the NAACP Legal Defense and Education Fund, the Asian American Legal Defense and Education Fund, the Center for Law in the Public Interest, and as the Clinton Administration's Assistant Attorney General for Civil Rights. In the firm's press release announcing the decision, Lee connected his commitment to public interest with the firm's practice: "Class actions enable large groups of people to obtain justice. They also compel an industry or employer to undertake reforms for their workers and the public." Press Release, Lief Cabraser Heimann & Bernstein, Former Top Justice Department Official Bill Lann Lee



## III. DUAL OBJECTIVES AS A CONFLICT OF INTEREST

A. *Multiple Motivations as Potential Lawyer-Client Conflict*

To the extent mass tort plaintiffs' lawyers are motivated by policy objectives such as improving product safety, fostering corporate responsibility or, for that matter, by any considerations other than maximizing their clients' recovery, do lawyer-client conflicts of interest arise? A conflict arises if a lawyer's commitment to social change objectives constrains the lawyer's ability or willingness to pursue the client's goals.<sup>64</sup> Among the fundamental building blocks of legal ethics is the principle that the client decides the objectives of the representation.<sup>65</sup> Put differently, in a lawyer-client relationship, the client is the principal and the lawyer is the agent. When a lawyer's own policy agenda becomes a driving force in the representation, it may create a conflict.<sup>66</sup>

Peter Schuck describes such conflicting agendas in the Agent Orange litigation, which involved claims by veterans against chemical companies based on exposure to a defoliant used during the Vietnam War. Schuck relates two versions—the lawyer's and the client's—of a conversation in which attorney Victor Yannacone asked his client, Vietnam veteran Frank McCarthy, what the veterans hoped to accomplish in the litigation:

In Yannacone's version, McCarthy said the veterans wanted four things: "We want to turn the American people around so that the Vietnam combat soldier will no longer be abused and dishonored. We want to get the benefits that we are entitled to. We want to

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Joins Law Firm of Lief Cabraser Heimann & Bernstein (Oct. 29, 2001), *available at* [http://www.lieffcabraser.com/lee\\_press.htm](http://www.lieffcabraser.com/lee_press.htm).

64. As a general rule, a lawyer may not represent a client if "there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer." MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2004).

65. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation, and . . . shall consult with the client as to the means by which they are to be pursued."). The comment explains, "Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations." *Id.* cmt. 1.

66. Geoffrey Miller raises this concern with regard to public interest class actions:

Public interest attorneys receive compensation in the form of the psychic reward that accompanies a feeling of promoting the good of society. This public interest motivation may induce counsel to act out of political or ideological beliefs that can come into conflict with the interests of the class. The reasonable plaintiff will prefer that counsel not seek to further her own political or ideological objectives if the outcome is not optimal for the class.

Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 618 (2003).

find out what is killing us. And we want the American taxpayer not to have to pay for injuries the chemical companies caused." McCarthy claims to have had somewhat more limited goals: "Yannacone has always seen the [Agent Orange case] as a public interest litigation," he recalls. "To us it was and still is a remedial measure" designed to compel the chemical companies to pay for medical testing and treatment and compensation for the veterans and their families.<sup>67</sup>

The difference between treating the litigation as "public interest litigation" and as "a [compensatory] remedial measure" is the heart of the conflict of interest.<sup>68</sup> Not only did the lawyer-crusader Yannacone<sup>69</sup> treat the matter as public interest litigation, but also, according to this account, he convinced himself that his clients shared his objectives.

A number of litigation scenarios can demonstrate the conflict between a public interest orientation and a compensation orientation. First, divergent objectives naturally lead to different preferences for remedies. Whether by adjudication or settlement, there may be questions of whether to pursue injunctive relief, money damages, or both. A person committed to the cause may give greater weight to injunctive remedies. A person seeking to maximize monetary recovery may give less weight to injunctive remedies or, in a class action or other context requiring court approval, may even prefer to include illusory injunctive remedies combined with significant money damages.

Second, while defendants often prefer to keep discovery and settlements confidential, plaintiffs' responses to defendants' confidentiality demands depend on their objectives. Plaintiffs seeking maximum recovery generally acquiesce in defendants' requests for confidentiality in both discovery and settlements, because confidentiality has a value to defendants and some of that value is passed on to plaintiffs. Discovery flows more easily after a discovery confidentiality agreement, and settlement confidentiality elevates the dollar values that defendants are willing to negotiate. Confidentiality agreements, however, by preventing information from becoming public, may interfere with the social change or public safety objectives of cause lawyers. A committed cause lawyer pursuing the litigation as a way to achieve social change would be loath to agree to keep discovery or settlement secret, if disclosure would advance the cause.

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67. SCHUCK, *supra* note 46, at 44.

68. *Id.*

69. *See supra* text accompanying note 46.

*B. Multiple Motivations as Conflict Mitigation in Mass Representation*

Given the analysis above, it may appear that plaintiffs' attorneys who are motivated not merely by the pursuit of monetary recovery and high fees, but also by policy objectives, carry a conflict of interest. In most mass representation, however, rather than creating or exacerbating conflicts, multiple motivations tend to reduce them. To minimize lawyer-client conflicts of interest in mass representation, a lawyer with multiple motivations is preferable to a lawyer who cares only about maximizing recovery and fees. Multiple motivations better reflect the mix of objectives held by a mass of clients. To assume that every plaintiff seeks only to maximize individual net monetary recovery is to oversimplify plaintiffs' objectives.

Just as plaintiffs in school desegregation cases and other impact litigation often view the cause rather than the individual benefit as their primary objective, sometimes disagreeing among themselves as to the particular objectives, so do some mass tort plaintiffs. In virtually every mass tort, some plaintiffs become actively involved in the cause and relate to the litigation more as crusaders than as potential beneficiaries. In the product liability litigation over the morning sickness drug Bendectin, for example, plaintiff Betty Mekdeci, whose son was born with birth defects, saw herself as a crusader.<sup>70</sup> Similarly, in the mass tort litigation concerning the diet drug combination fen-phen, plaintiff Mary Linnen asked her lawyer to promise her that he would "[d]o everything [he] [could] to get these drugs off the market."<sup>71</sup> Carla Sickles, another fen-phen plaintiff, said that she did not care whether she won the lawsuit as long as the word got out about the dangers of the drugs.<sup>72</sup> In the Agent Orange litigation, although attorney Yannacone and client McCarthy may have had different objectives,<sup>73</sup> other clients shared Yannacone's vision of the lawsuit as public interest litigation. Schuck describes another of the plaintiffs, Michael Ryan, as "a crusader not so much on behalf of veterans as against what he sees as the growing chemical contamination of the world. 'It is too late for the veterans and their children,' he says. 'It is their—our—grandchildren I want to save.'"<sup>74</sup>

Indeed, the public policy agenda of some mass tort plaintiffs can create a lawyer-client conflict of interest that is the mirror image of the conflict described above. An entrepreneurial lawyer who has

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70. GREEN, *supra* note 31, at 111.

71. MUNDY, *supra* note 30, at 17.

72. *Id.* at 151.

73. *See supra* notes 67-69.

74. SCHUCK, *supra* note 46, at 48.

invested time and resources into mass tort litigation has a powerful incentive to increase both the likelihood and the monetary value of settlement. These goals may conflict with the public interest objectives of some of the plaintiffs themselves.<sup>75</sup> In the Agent Orange litigation, leadership of the plaintiffs' case passed from Victor Yannacone, with his public interest orientation, to mass tort lawyers who were better able to finance the litigation.<sup>76</sup> When these lawyers settled the case for \$180 million, client Michael Ryan wondered, "Is it a lawyers' case or the clients' case?"<sup>77</sup> The settlement permitted the defendants to disclaim any wrongdoing, which, for many veterans, defeated the central purpose of the litigation.<sup>78</sup>

In the aggregate, clients have multiple motivations. Thus, the conflict of interest problems in mass representation include not only lawyer-client conflicts, but also conflicting objectives among the clients themselves.<sup>79</sup> In these client-client conflicts over litigation goals, mass torts resemble social change litigation in which plaintiffs, despite their alignment on issues of liability, may diverge on questions of the most appropriate remedy. As I have argued at length elsewhere, client-

75. The conflict between a client with public interest objectives and a lawyer driven to maximize fees comes up not only in private civil litigation, but even more directly in cases with public entity clients represented by private contingent fee lawyers. Erichson, *supra* note 56, at 35-40 (raising concerns about the use of private contingent fee lawyers for government lawsuits, including potential conflicts between entrepreneurial incentives and the public good). Conflicting interests between contingent fee lawyers and public clients matter most when determining negotiated or adjudicated remedies:

Even when the AG is a faithful agent of the public interest, the contingency fee lawyers may not be faithful agents of the public-regarding AG. In the context of *parens patriae* litigation along the tobacco model, contingency fee lawyers' pursuit of their own private interests may lead them to engage in one or more of three troublesome courses of conduct [including] favoring monetary relief over nonmonetary relief, even when public interest considerations support the nonmonetary relief . . . [and] endeavoring to have the government plaintiffs grant the defendant nonmonetary benefits in return for monetary recovery for the plaintiffs, even when doing so is not supported by public interest considerations.

David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 324-25 (2001).

76. SCHUCK, *supra* note at 46, at 84, 109.

77. *Id.* at 169.

78. Schuck describes the reaction of some of the veterans to the class action settlement:

For many like the Ryans, as Yannacone continually proclaimed, this defeated the central purpose of the Agent Orange case, which had always been to publicize, palliate, and in some sense justify the veterans' sufferings by allowing them to tell their story, find an authoritative explanation for their conditions, and assign moral and legal responsibility. Compared to this goal, the prospect of monetary compensation, although important, was for these veterans decidedly subsidiary.

*Id.* at 171.

79. Similar conflicts arise among class members in class actions. See Miller, *supra* note 66, at 622-625 (discussing conflicts between the class representative and absent class members) and at 626-686 (discussing conflicts between class representatives).

client conflicts of interest inhere in the representation of multiple plaintiffs in mass litigation, and to a certain extent such conflicts should be tolerated in order to provide plaintiffs with the benefits of collective representation.<sup>80</sup> While plaintiffs' lawyers who engage in mass collective representation should disclose the potential client-client conflicts to their clients at the outset of the representation and should obtain their clients' informed consent,<sup>81</sup> some conflicts inevitably emerge among a mass of clients. These inherent conflicts do not necessarily render mass representation improper.<sup>82</sup> The good lawyer understands that individual clients within the aggregate have a variety of objectives<sup>83</sup> and strives to serve the group's interests as effectively as possible while preserving the core of client autonomy.<sup>84</sup>

#### IV. PUBLIC INTEREST, PROFESSIONALISM, AND THE PURSUIT OF WEALTH

##### *A. Defining Public Interest Lawyering*

The prevailing conception of "public interest" lawyering defines it, in large part, in terms of the lawyer's financial self-sacrifice. Public interest lawyers are thought to be lawyers who give up personal pecuniary gain in order to devote their legal work to the public good – lawyers who "have followed their hearts, not necessarily their wallets, into careers that they are convinced will make a difference in the world."<sup>85</sup> Just as Thurgood Marshall devoted his law practice to a cause that he believed in despite low pay and personal sacrifice,<sup>86</sup> so have many others who are considered to be public interest lawyers.<sup>87</sup>

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80. Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 543-79 (2003).

81. *Id.* at 558-67.

82. *Id.*

83. For an analysis of issues concerning individuals within mass aggregate litigation, especially as they relate to individually-retained plaintiffs' attorneys and the allocation of fees, see generally Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996).

84. Erichson, *supra* note 80, at 530.

85. Dillon & Schroeder, *supra* note 8, at 80.

86. Bastress & Cleckley, *supra* note 3, at 5.

87. See, e.g., Dillon & Schroeder, *supra* note 8, at 71 (Luke Cole upon graduation from Harvard Law School, wanted to do environmental law work on behalf of impoverished minorities and "finally persuaded the San Francisco-based California Rural Legal Assistance Foundation to give him an office and a phone – but no salary."). Another public interest lawyer was complimented for his self-sacrificing commitment: "He forgoes the monetary rewards to do what he thinks is right." *Id.* at 85 (quoting plaintiffs' lawyer Fred Baron, speaking about attorney Brian Wolfman of Public Citizen Litigation Group).

But where is it written that public interest lawyers must take a vow of poverty? I do not mean this purely as a rhetorical question. It is worth examining how and why the legal profession defines public interest in a way that suggests that large fees are inconsistent with public interest lawyering.

For law students, the most widely examined definitions of public interest practice may be the definitions included in law school loan forgiveness programs.<sup>88</sup> The University of Virginia Law School's loan forgiveness program, for example, explicitly defines "public service employment" in terms of the amount of compensation.<sup>89</sup> The program provides funds to cover law school loan payments for graduates "who enter public service employment" and earn less than \$60,000 per year. It initially defines public interest as follows: "Public-service employment is defined broadly to include jobs with federal, state or local governments, legal aid offices, prosecutors, public defenders, public interest organizations, and legal reform groups that qualify as nonprofit organizations."<sup>90</sup> Significantly, however, the program's definition—broad as it is—is not limited to the listed job types, but extends to in-state private practitioners who meet the compensation criterion:

The program's definition of public-service employment also includes those in private practice in the Commonwealth of Virginia who earn less than \$60,000 per year in a private firm on the assumption they are quite likely to be practicing in an underserved area and therefore performing a public service.<sup>91</sup>

Similarly, New York University Law School describes its loan repayment program as "designed to assist J.D. graduates who choose careers in the public service or other low-paying fields of law."<sup>92</sup> Harvard Law School's program applies to graduates who pursue public interest, public sector, or low paying private sector work.<sup>93</sup>

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88. See generally AMERICAN BAR ASSOCIATION COMMISSION ON LOAN REPAYMENT AND FORGIVENESS, *LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE, THE FINAL REPORT* (2003) [hereinafter ABA COMMISSION REPORT ON LOAN REPAYMENT AND FORGIVENESS] (describing public interest loan repayment programs at fifty-six law schools, as well as related federal and state programs), available at <http://www.abanet.org/legalservices/downloads/lrap/lrapfinalreport.pdf>.

89. University of Virginia School of Law, *Virginia Loan Forgiveness Program*, available at <http://www.law.virginia.edu/home2002/html/publicserv/loanforgive.htm> (last visited Jan. 5, 2005).

90. *Id.*

91. *Id.*

92. New York University School of Law, *Melvyn and Barbara Weiss Loan Repayment Assistance Program*, available at <http://www.law.nyu.edu/depts/financialaid/lrap/index.html> (last visited Jan. 5, 2005).

93. Harvard Law School, *Financial Aid: Low Income Protection Plan*, available at <http://www.law.harvard.edu/students/finaid/lipp/> (last visited Jan. 5, 2005).

Academic accounts similarly link public interest law practice to the amount of compensation. Carrie Menkel-Meadow, in her analysis of the attraction to cause lawyering, describes her interest in “seeking to understand what motivates a lawyer to undertake work that is less well compensated than traditional private legal work and that may involve some personal, physical, economic, and social status risks.”<sup>94</sup>

To see the legal profession’s habit of equating public interest with financial sacrifice, one need only look at the profession’s use of the phrase “for the public good” (*pro bono publico*). When did lawyers come to equate “for the public good” with lawyering for no fee?<sup>95</sup> According to Judith Maute, who has examined the history of *pro bono* legal representation, until the 1950s the phrase “*pro bono publico*” was used in the general sense to refer to “the broad concept of what was within the public interest” rather than to uncompensated legal representation.<sup>96</sup> The phrase, according to Maute, was first used to refer to uncompensated public interest legal representation in 1944. A dissenting Third Circuit judge wrote that the attorneys in the patent

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94. Menkel-Meadow, *supra* note 40, at 37; see also John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 181, 182 (Austin Sarat & Stuart Scheingold eds., 1998) (adopting, for his study of cause lawyers in private practice in Pittsburgh, a definition that incorporates “Menkel-Meadow’s notion that by engaging in this kind of work, the cause lawyer incurs personal, physical, economic, or social status risks.”). Menkel-Meadow notes that there are exceptions: “Not all cause lawyers are self-sacrificing. The literature almost always assumes income and prestige deprivation, but often cause lawyers may make more money in some forms of organized cause lawyering (class actions, plaintiffs’ personal injury work) and many gain fame and prestige by what they do.” Menkel-Meadow, *supra* note 40, at 59 n.57.

95. To be more precise, the profession’s modern usage of the phrase “*pro bono publico*” includes representation without fee as well as some instances of representation for a substantially reduced fee. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 6.1(b)(2) (2004) (including, as a secondary means of compliance with the ethical obligation of *pro bono publico* service, “delivery of legal services at a substantially reduced fee to persons of limited means”).

96. Judith L. Maute, *Changing Conceptions of Lawyers’ Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 113 (2002). Maute refers to a number of early cases that use the phrase in its general sense. *Id.* at 113-114, 113 n.123. Two of the cases Maute cites, in turn, refer to Lord Coke’s 1584 decision in *Heydon’s Case*, 3 Co. Rep. 7a, 7b (1584), in which Coke laid out four considerations for construing a statute, one of which is

“to make such construction as shall suppress the mischief, and advance the remedy, and to suppress the subtle inventions and evasions for continuance of the mischief, and *pro private commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.”

Lord Coke’s use of the term thus relates to construing a statute in light of the statute’s purpose for the good of the public. Other early cases similarly used the term in its straightforward meaning. In the 1828 case of *Brandon v. Planters’ & Merchants’ Bank of Huntsville*, for example, the court noted the requirement that treasure trove must be shared with the king for the public good: “Treasure trove in England is a part of the king’s prerogative, or at least of his revenue. The finder was required to divide with the king *pro bono publico*.” Maute, *supra*, at 113-14 (quoting *Brandon v. Planters’ & Merchs.’ Bank of Huntsville*, 1 Stew. 320, 331 (Ala. 1828)).

case at issue should not have been awarded fees because their service was voluntary and they were “to be thought of as having primarily acted *pro bono publico* of their own volition.”<sup>97</sup> She notes, however, that the term “pro bono” was used by the ABA Legal Ethics Committee in the 1930s to refer to representation of low-income persons for free or for reduced rates.<sup>98</sup>

The Oxford English Dictionary (“OED”) defines the phrase in its simple translation: “*pro bono publico*, for the public good. Now freq. used as a signature to an open letter (as to a newspaper).”<sup>99</sup> The OED offers several examples of the term’s use, including this one from James Joyce’s *Ulysses*: “Someone . . . ought to write a letter *pro bono publico* to the papers about the muzzling order for a dog the like of that.”<sup>100</sup> None of the references suggest uncompensated legal representation.<sup>101</sup>

Suffice it to say that in most of its use until recent decades, the phrase “*pro bono publico*” simply meant “for the public good.” It did not, for the most part, refer to legal work for no fee. Modern usage of the term in the legal profession, however, refers to legal work in the public interest—particularly representation of poor or otherwise underserved client bases—for little or no fee.<sup>102</sup>

97. Maute, *supra* note 96, at 114 (quoting *Root Ref. Co. v. Universal Oil Prods. Co.*, 147 F.2d 259, 262 (3d Cir. 1944) (Jones, J., dissenting)).

98. *Id.* at 115, 115 n.134 (citing, *inter alia*, ABA Comm. on Prof’l Ethics & Grievances, Formal Op. 148 (1935)).

99. 12 THE OXFORD ENGLISH DICTIONARY 529 (2d ed. 1989).

100. *Id.* (quoting JAMES JOYCE, *ULYSSES* 306 (1922)).

101. *Id.* Interestingly, one of the OED’s references for “pro bono publico” does foreshadow the term’s use to describe uncompensated legal representation, although one cannot glean this meaning from the dictionary’s entry itself. The earliest use of the term offered by the OED is an eighteenth century English case reporter, with the following entry in the dictionary: “1726 GILBERT *Cases in Law & Equity* (1760) 113 It is *pro bono publico*, in which they are included.” *Id.* The entry appears to use the phrase *pro bono publico* simply as a general term referring to the public good, but examination of the source reveals a foreshadowing of the meaning the phrase would later develop. The particular case report to which this entry refers is *Regina v. Cobbold* (K.B. 1713), in GILBERT, *CASES IN LAW & EQUITY* 111 (2d ed. 1792). *Cobbold* involved the issue of whether an informer may also be a witness or whether a conflict of interest exists because an informer has an interest in obtaining a portion of the forfeiture. It was objected that such a prohibition would discourage prosecutions “for a Man will not be at the Trouble to cause an Information to be made, unless he may have Part of the Penalty.” *Id.* The answer to that objection, according to the report in Gilbert’s volume, was that people will serve as informers for the public good, regardless of whether they receive part of the penalty: “Answer, Men are presumed to love the Laws of their Country, and the Execution of them, it is *pro bono publico*, in which they are included.” *Id.* at 113. Thus, although the OED’s reference to Gilbert appears only to offer the phrase in its denotation of “for the public good,” the report of the *Cobbold* case in fact uses the phrase to describe conduct undertaken for the public good without personal compensation.

102. BLACK’S LAW DICTIONARY 1221 (7th ed. 1999); MODEL RULES OF PROF’L CONDUCT R. 6.1 (2004).



The legal profession's current use of the terms "public interest" and "*pro bono publico*" reveals that the prevailing conception of public interest work is based on an implicit determination of market undervaluation. In other words, legal work is considered public interest work if the market level of compensation does not adequately reflect the perceived social good that the work produces. Market-undervaluation suggests the need for subsidies. In law practice, such subsidies take various forms. Student loan repayments, summer fellowships, and job grants provide monetary subsidies. The ethical obligation to do *pro bono* work provides a subsidy in the form of uncompensated lawyer time and resources. There also are intangible subsidies. To the extent certain legal work commands respect and admiration because of its status as public interest work, the lawyer receives what might be called an "honor subsidy." And an intangible subsidy can be seen also, in the personal satisfaction that many lawyers experience from working in the public interest.<sup>103</sup> These tangible and intangible subsidies increase the appeal for lawyers to undertake legal work that serves the public good but otherwise would fail to attract sufficient lawyers because the market compensation is lower than the work's social value.

For purposes of allocating subsidies, market-undervaluation serves as a suitable definition. Obviously, public interest loan repayment and grant programs should be designed to provide funds for students who pursue relatively low-paying jobs.<sup>104</sup> The entire point of such programs is to counteract income imbalances to permit students a wider range of choices that serve the public good. High-paying law practice jobs do not need the financial assistance of law schools to attract well-qualified applicants. It makes eminent sense to reserve such funds for socially useful jobs whose low pay renders the jobs infeasible as a practical matter for students who graduate law school with heavy debt loads.

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103. Some critics advance a more cynical view of the motivations of public interest lawyers, as well as a more skeptical view of the possibility of achieving social change through litigation. Public interest lawyers, on this view, are attracted to litigation as a reform mechanism based largely on their personal aspirations. "[M]ovement lawyers are said to be motivated by glory, status, and prestige to expand their reputations by engaging in legal duels from which they might emerge victorious." Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in *CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES* 261, 262-63 (Austin Sarat & Stuart Scheingold eds., 1998) (describing, but not entirely adopting, the views of these critics).

104. See, e.g., ABA COMMISSION REPORT ON LOAN REPAYMENT AND FORGIVENESS, *supra* note 88 (discussing rising law student debt and the growing disparity between private sector and public service compensation and the resulting need for loan repayment assistance programs to enable students to pursue careers devoted to public service).

Similarly, the ethical obligation to engage in pro bono work<sup>105</sup> makes sense as a subsidy of lawyer time to serve otherwise underrepresented client bases.<sup>106</sup> Part of the allure of pro bono work is the satisfaction lawyers get from providing legal services to those who otherwise would be unable to afford them. The intangible rewards of pro bono practice—what I described above as the personal satisfaction and honor subsidies<sup>107</sup>—are nicely captured by one large firm partner who describes the choice he made at age fifty-five to give up some of his compensation and to devote 40 percent of his billable hours to pro bono work: “Do I really need all the money I’d be making if I continued to work full time, or can I give that up for the intangible rewards of working in the public interest?”<sup>108</sup>

The prevailing conception of public interest lawyering, linked to low compensation or market-undervaluation, works well for determining subsidies, but it may be too narrow a definition for other purposes. In particular, it may be too narrow a conception for purposes of understanding a more general duty to serve the public good, a responsibility that is frequently urged as a central component of lawyer professionalism.

### B. Lawyer Professionalism

Roscoe Pound famously defined a profession as a group “pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood.”<sup>109</sup> For present purposes, there are two things worth noting in Pound’s definition. First, it links professionalism with serving the public interest. The professional lawyer, by this definition, is a public interest lawyer. “It is of the essence of a

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105. MODEL RULES OF PROF’L CONDUCT R. 6.1 (“Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.”).

106. The Model Rule and its comment emphasize that pro bono work, for the most part, should serve those who otherwise would be unable to afford representation. *Id.* (“In fulfilling this responsibility, the lawyer should: (a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to: (1) persons of limited means or (2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means.”); *id.* cmt. 2 (“Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee.”).

107. *See supra* text accompanying note 103.

108. Alicia Upano, *Creating Second Acts in Legal Careers*, N.J. L.J., Aug. 11, 2003, at 22 (quoting Skadden, Arps, Slate, Meagher & Flom partner Douglas Robinson).

109. ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

profession," Pound wrote, "that it is practiced in a spirit of public service."<sup>110</sup> Second, the definition relegates money-making to secondary status. The professional lawyer, according to Pound, is not one who pursues wealth as a primary objective. Lest there be any doubt, he added that "[p]ursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose."<sup>111</sup> Thus, according to Pound, the true professional often renders services without compensation, "and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward."<sup>112</sup>

Descriptions of lawyer's professional duties dating back to a century before Pound likewise centered on public-spiritedness, and similar ideas dominate more recent discussions of professionalism. The two most influential statements of nineteenth century American legal ethics—David Hoffman's *Resolutions in Regard to Professional Deportment* and George Sharswood's *Essay on American Ethics*—both included strong notions of professional obligation to the public good.<sup>113</sup> More recently, the American Bar Association's Commission on Professionalism, in addition to adopting Pound's definition, offered an additional definition by sociologist Eliot Freidson that included the idea that "the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good."<sup>114</sup> The Commission urged lawyers to remain focused on public service and not to be distracted by the pursuit of wealth: "All segments of the Bar should . . . [r]esist the temptation to make the acquisition of wealth a principal goal of law practice."<sup>115</sup>

110. *Id.* at 9.

111. *Id.* at 5.

112. *Id.* at 10.

113. Pearce, *America's Governing Class*, *supra* note 20, at 388-91. Pearce links early notions of lawyer professionalism to Federalist No. 35's description of the learned professions as comprised of virtuous and independent members of a governing class. *Id.* at 386-88, 390.

114. ABA Comm. on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, Informal Op. 10 (1986), reprinted in 112 F.R.D. 243, 261 (1987) [hereinafter ABA Comm. on Professionalism] (quoting New York University sociologist and ABA Commission member, Eliot Freidson). A decade later, the ABA released a report on legal education and lawyer professionalism, which adopted the following expanded version of the Pound definition: "A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service: and engaging in these pursuits as part of a common calling to promote justice and public good." *Teaching and Learning Professionalism*, 1996 ABA. SEC. OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, PROFESSIONALISM COMM. 6.

115. ABA Comm. on Professionalism, *supra* note 114, at 265. Similarly, Judge Harry Edwards has emphasized "public spiritedness" as one of the highest ideals of the legal profession. "[A]s a part of their professional role," Judge Edwards wrote, "lawyers have a positive duty to

The tension between the pursuit of wealth and professional obligations emerges often in debates over lawyer advertising. As Justice Blackmun wrote in 1977 while striking down a ban on lawyer advertising, "At its core, the argument [that advertising erodes professionalism] presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar. We suspect that few attorneys engage in such self-deception."<sup>116</sup> By contrast, Justice O'Connor, who has supported relatively broad restrictions on lawyer advertising, has justified her position by invoking the professional ideal that lawyers' primary goal should be public service rather than the pursuit of wealth:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market. There are sound reasons to continue pursuing the goal that is implicit in the traditional view of professional life. Both the special privileges incident to membership in the profession and the advantages those privileges give in the necessary task of earning a living are means to a goal that transcends the accumulation of wealth. That goal is public service, which in the legal profession can take a variety of familiar forms.<sup>117</sup>

Thus, to Justice O'Connor, the professional goal of public service is linked to the "ethical obligation to temper one's selfish pursuit of economic success."

In an earlier pair of advertising cases, the Supreme Court emphasized the distinction between fee-driven work and public interest work. The same day that the Court decided *Ohralik v. Ohio State Bar Association*, which upheld a categorical ban on certain types

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serve the public good." Harry T. Edwards, *A Lawyer's Duty to Serve the Public Good*, 65 N.Y.U. L. REV. 1148, 1150 (1990).

United States lawyers are not alone in worrying about the tension between money-making and devotion to the public good; similar concerns resonate across different legal cultures. See, e.g., Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT'L L. 573, 639 (2000) ("The Nigerian legal profession is at a mortal risk of irrelevance chiefly because of its obsession with materialism. Materialism has eclipsed the obligation to public good, widely celebrated as one of the distinguishing features of the legal profession. Commitment to the public good has disappeared from the moral horizon of the legal profession. Lawyers are far less concerned with promoting the public good than with enriching themselves."); see also Neta Ziv, *Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928-2002*, 71 FORDHAM L. REV. 1621, 1643 (2003) (noting that Israeli legal ethics rules "are generally silent about lawyers' substantive ethical obligations to the public good, including third parties and society at large," but recent developments have given greater emphasis to public interest lawyering in Israel).

116. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 368 (1977). Justice Blackmun concluded, "Since the belief that lawyers are somehow 'above' trade has become an anachronism, the historical foundation for the advertising restraint has crumbled." *Id.* at 371-72.

117. *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 488-89 (1988) (O'Connor, J., dissenting).

of client solicitation,<sup>118</sup> the Court also decided *In re Primus*,<sup>119</sup> which permitted solicitation of clients by lawyers “seeking to further political and ideological goals through associational activity, including litigation.”<sup>120</sup> The Court saw a clear distinction between legal work for ideological goals and legal work for pecuniary gain. The Court found “no basis for equating the work of lawyers associated with the ACLU or the NAACP with that of a group that exists for the primary purpose of financial gain through the recovery of counsel fees.”<sup>121</sup> In drawing a line between *Ohralik*, a personal injury case, and *Primus*, a civil rights case, the Court reinforced the perception that public interest work is something apart from most law practice. The Rules of Professional Conduct have incorporated this distinction, prohibiting solicitation “when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain.”<sup>122</sup> The ABA comment to the rule explains that the prohibition is not justified “in situations in which the lawyer is motivated by considerations other than the lawyer’s pecuniary gain.”<sup>123</sup> Taken together, the Rule and Comment appear to treat motivations as an either/or matter: either the lawyer is motivated by pecuniary gain, or the lawyer is motivated by other considerations. Such a binary view of lawyer motives is problematic not only because it oversimplifies human motivations<sup>124</sup> but also because it unwittingly undermines a central theme of professionalism—that even in their standard fee-generating work, lawyers should be driven in part by commitment to the public good.<sup>125</sup>

### C. Redefining Public Interest Lawyering

While acknowledging that views on lawyer professionalism are far from uniform—there are fundamental disagreements concerning the proper balance between zealous client representation and

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118. 436 U.S. 447, 468 (1978).

119. 436 U.S. 412 (1978).

120. *Id.* at 414.

121. *Id.* at 431. *But see id.* at 442-43 (Rehnquist, J., dissenting) (arguing that the neat distinction between politically expressive litigation and other litigation is untenable).

122. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2004).

123. *Id.* R. 7.3 cmt. 4.

124. *See supra* notes 36-41 and accompanying text.

125. While the theme of commitment to the public good pervades discussions of lawyer professionalism, *see supra* text accompanying notes 109-115, views differ substantially on the extent to which lawyers should focus on the public good as compared to loyal and zealous representation of their clients, *see infra* note 126.

attentiveness to the public good<sup>126</sup>—this Article proceeds on the basis of the widely accepted views that public-spiritedness is, on the whole, a virtue for lawyers, and that increasing lawyers' commitment to the public interest would do more good than harm. With that objective in mind, it may be useful to rethink the prevailing conception of public interest lawyering for purposes other than subsidies. If lawyers are to become more comfortable with the notion that commitment to the public good should pervade their work, then perhaps "public interest" should not be used to refer only to a relatively small segment of practice. And if such a rethinking is in order, then perhaps mass tort lawyers, as stark examples of lawyers who pursue fees while speaking the rhetoric of social change, offer a juxtaposition that can facilitate reconsideration of the prevailing conception.

### 1. Reconciling Public Interest with the Business of Practicing Law

Defining public interest work in terms of lack of compensation may have an unintended consequence in its effect on the attitudes of lawyers whose work does not fall within the narrow definition. Therefore, a departure from a one-size-fits-all definition may be in order. For purposes of determining subsidies for legal work representing underrepresented client bases, the prevailing conception of public interest practice as market-undervalued legal work functions well. But for purposes of professional identity, a broader conception of public interest work that does not depend upon undercompensation may be preferable.

Russell Pearce has advanced the important and counterintuitive argument that the growth of the public interest bar in the 1960s and the rise of the pro bono duty in the 1970s encouraged elite business lawyers to abandon an earlier sense of obligation to the public good.<sup>127</sup> On the growth of the public interest bar, Pearce

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126. Compare, e.g., MONROE H. FREDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS (3d ed. 2004) (advancing an advocacy perspective); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976) (same) with DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988) (advancing a moral activist perspective); WILLIAM SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS (1998) (advancing a competing vision, focused on legal merit and justice rather than on subjective morality). See generally Paul R. Tremblay, *Moral Activism Manqué*, 44 S. TEX. L. REV. 127, 136-47 (2002) (discussing the intellectual history of the "moral activism project").

127. See Pearce, *America's Governing Class*, *supra* note 20, at 417-19 (discussing the impact of the development of the public interest bar); *id.* at 419-20 (discussing the impact of the rise of the pro bono duty); see also Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, in CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201, 202-03 (Austin Sarat & Stuart Scheingold eds., 1998)

describes the 1960s rise of “a new segment of the bar”<sup>128</sup> whose members “followed the model of the NAACP’s Charles Hamilton Houston and Thurgood Marshall in identifying themselves as advocates promoting particular visions of social justice.”<sup>129</sup> The effect of the development of the public interest bar on the professional self-identity of other lawyers, as Pearce describes it, is indirect but nonetheless significant:

The creation of the public interest bar undermined the governing class perspective in two significant ways. First, the use of the term “public interest” to describe the work of public interest lawyers indicated that these lawyers, and not big business lawyers, were responsible for the public good. This view became dominant in the legal community.<sup>130</sup>

It is reasonable to extend Pearce’s insight beyond the elite business bar. To the extent that lawyers and law students internalize a conception of public interest as a bounded area of practice, as the exception rather than the norm, that understanding may diminish their sense of personal responsibility to advance the public good in the ends and means of their law practice.

With regard to the pro bono duty, Pearce argues that in the 1970s, the rise of pro bono as a distinct ethical obligation<sup>131</sup> led to an abandonment of a broader sense of duty to the public good:

The pro bono duty thus provided elite lawyers with an opportunity to consider themselves in compliance with their public obligations while at the same time abandoning the governing class role. By defining a narrow sphere of public interest practice separate from the lawyer’s remunerative representation of big business, pro bono permitted lawyers to compartmentalize their public service obligations and avoid the governing class tension of mediating between client interests and the public good.

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(describing the effort to obtain support for public interest nonprofit organizations and the concomitant devaluation of private practitioners’ potential contribution to cause lawyering).

128. Pearce, *America’s Governing Class*, *supra* note 20, at 417.

129. *Id.*

130. *Id.* at 418; *see also* Pearce, *Retreat of the Elite*, *supra* note 20 (“The very term ‘public interest law’ suggested that these lawyers, and not big-business lawyers, were the guardians of the public interest.”). Pearce mentions several ways in which this attitudinal shift manifested itself:

For example, when commentators described the public interest work of big firms, they only mentioned the pro bono work that was either in direct support of public interest lawyers or the same kind of work as that done by public interest lawyers, not representation of business clients. Similarly, when commentators gauged entering law students’ commitment to the public good, they referred to the number of students who planned to pursue careers in public interest law. When many students instead chose big firm practice, commentators described this as a failure of commitment to the public good.

Pearce, *America’s Governing Class*, *supra* note 20, at 418 (footnotes omitted).

131. “The governing class ideal had long included the belief that providing free legal services to those who could not afford them was one component of the lawyer’s duty to promote the public good. During the 1970s, lawyers began to focus on supplying free legal services as a separate ethical duty and to refer to this obligation as the lawyer’s pro bono duty.” *Id.* at 419 (footnotes omitted).

While representing paying clients, elite lawyers could be “hired guns.” They would fulfill their public interest obligation through pro bono work, often involving assistance to full-time public interest lawyers.<sup>132</sup>

Just as the presence of a distinct public interest bar permits lawyers to regard the public good as something only a small portion of lawyers advance, the presence of a distinct pro bono obligation permits lawyers to regard the public good as something most lawyers advance in only a small portion of their practice.

Thus, while others contend that rising commercialism in law practice has brought a decline in professional commitment to the public good, Pearce urges a different understanding of the relationship between professionalism and the business of practicing law. In his view, efforts to reinvigorate lawyers’ commitment to the public good have failed because they have tried to detach professionalism from business. For such efforts to succeed, he suggests, “commitment to the public good must be reconciled with the acknowledgement that law is a business.”<sup>133</sup>

To pick up on Pearce’s suggestion, if commitment to the public good is to be reconciled with the business of practicing law, then the notion of public interest lawyering must not be unduly confined to particular practice areas or narrowly drawn policy goals. Policy objectives may play more or less central roles depending on the nature of the representation, but whether lawyers handle school desegregation cases, mass torts, or other matters, and whether they represent plaintiffs or defendants, do transactional work, or work in-house, the practice of law includes opportunities to serve the public good.

A broader conception can encompass every area of practice as a plausible realm of public interest lawyering. A line from a well-known retaliatory discharge case helps drive this point home. In a case brought by a former in-house attorney at General Dynamics Corporation, the Supreme Court of California described the important work done by in-house corporate lawyers. The court described in-house attorneys’ “advisory and compliance role, anticipating potential legal problems, advising on possible solutions, and generally assisting the corporation in achieving its business aims while minimizing entanglement in the increasingly complex legal web that regulates

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132. *Id.* at 420.

133. Pearce, *Retreat of the Elite*, *supra* note 20, at 65; see also Russell G. Pearce, *The Professional Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) [hereinafter *The Professional Paradigm Shift*].



organizational conduct in our society.”<sup>134</sup> In deciding to allow in-house attorneys to pursue claims for retaliatory discharge, the court noted that “their professional work is by definition affected with a public interest.”<sup>135</sup> The line is a powerful reminder that all lawyering potentially concerns the public good. If working in the legal department of a *Fortune 500* company is “public interest” work, then so is virtually every other job in the legal profession. Some lawyering is addressed more explicitly to the public interest, but the practice of law “is by definition affected with a public interest.” With respect to this view, whether the lawyer’s primary motive is money or a social cause, it is appropriate for the lawyer to feel a responsibility to the public good even in fee-based private practice work.

This professional norm, stated most broadly, suggests that lawyers should share a commitment to the public good in their legal work, including substantial fee-generating work. This broad norm, however, may describe two quite different commitments, focusing either on ends or on means. The first is a commitment to the public good in the lawyer’s selection of work. In the clients and causes a lawyer chooses to represent, a lawyer shows a commitment to serving the public interest through legal representation. The second is a commitment to the public good in the way the lawyer goes about her work. By taking seriously professional duties that serve the public interest but conflict with the lawyer’s narrow self-interest, a lawyer demonstrates a professional concern for the public good.

The rules governing lawyer conduct embrace the second version, at least in part, but eschew the first. Duty to the public good in the means by which lawyers pursue their work—that is, the duty in certain circumstances to place the public interest ahead of both the lawyer’s and client’s personal interests—characterizes many of the specific obligations embodied in rules governing lawyer conduct. These duties include the duty of candor to the tribunal,<sup>136</sup> the duty not to destroy or conceal evidence,<sup>137</sup> the duty of honesty in dealing with third parties,<sup>138</sup> and the duty to refrain from asserting nonmeritorious claims or defenses.<sup>139</sup> But the dominant strain of modern legal ethics doctrine is more hostile to the idea that lawyers’ duty to serve the public interest extends to the choice of which client objectives should

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134. *Gen. Dynamics Corp. v. Superior Court.*, 876 P.2d 487, 491 (Cal. 1994).

135. *Id.* at 498.

136. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2004).

137. *Id.* R. 3.4; *see also* FED. R. CIV. P. 26(g), 37.

138. MODEL RULES OF PROF’L CONDUCT R. 4.1 (2004).

139. *Id.* R. 3.1; *see also* FED. R. CIV. P. 11.

be served. The principle of “moral nonaccountability”<sup>140</sup> is embodied in the rule that a lawyer’s representation of a client “does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”<sup>141</sup> While a number of scholars have advanced powerful arguments against the principle of moral nonaccountability,<sup>142</sup> for the most part the profession has resisted embracing a general duty to the public interest in the causes and clients that lawyers choose to represent.

Mass tort lawyers, with their headline-generating fees and their public interest rhetoric, implicitly challenge two tenets. First, by their expressions in word and deed of commitment to public interest policy objectives,<sup>143</sup> they implicitly challenge the notion that public interest lawyering is restricted to undercompensated work. Second, as private practitioners who proclaim commitment to the broader causes of the clients they represent and express aversion to representing the other side,<sup>144</sup> they implicitly challenge the principle of moral nonaccountability.

Thus, if one wishes to rethink accepted notions of public interest lawyering, mass tort lawyers provide a useful focal point, in part because mass tort fees have gained such notoriety in the most widely publicized cases. Mass tort practice can serve the public interest by accomplishing worthwhile policy objectives, but it is not, to say the least, generally perceived as undervalued in terms of market compensation. A definition of public interest lawyering that includes mass tort plaintiffs’ practice thus cannot focus on undercompensation. Mass tort lawyers earn substantial fees while describing themselves as serving the public interest through social change advocacy. In this regard, mass tort plaintiffs’ lawyers display an odd resemblance to the elite business lawyers of an earlier era, whom Pearce describes as

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140. See LUBAN, *supra* note 126, at xix-xx, 7 (describing the “standard conception of the lawyer’s role” in terms of (1) partisan zeal for the client’s interests and (2) moral nonaccountability). Luban refers to Murray Schwartz, who used the term “principle of nonaccountability,” and Luban renames Schwartz’s “principle of professionalism” to refer to “partisanship.” *Id.* at 7 (citing Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978)).

141. MODEL RULES OF PROF’L CONDUCT R. 1.2(b) (2004).

142. See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS’ ETHICS* (1998); Russell G. Pearce, *Model Rule 1.0: Lawyers are Morally Accountable*, 70 *FORDHAM L. REV.* 1805 (2002).

143. See *supra* Part II.

144. See *supra* note 47.

lawyers that "made a lot of money and considered themselves servants of the public good."<sup>145</sup>

A clearer understanding of the difference between defining public interest lawyering for purposes of subsidies and defining it for purposes of the professional duty to the public good may assist in overcoming the obstacle that Pearce identifies—the need to reconcile the professional ideal of commitment to the public good with the professional reality of law as a business.<sup>146</sup>

## 2. Public Interest Lawyering and Self-Serving Bias

A more inclusive conception of public interest lawyering, however, with little else to confine its definition, collides with the human tendency to convince oneself of the truth of what serves one's self-interest. Lawyers may believe their work serves the public good because it serves themselves. Thus, redefining public interest practice to encompass highly compensated, multiple-motive work may accomplish little. Rather, it may simply indulge lawyers' tendencies to convince themselves of the moral goodness of their most lucrative fee-generating work. There is reason, at least, to be skeptical that reconceptualizing public interest work would have any appreciable impact on lawyer conduct. At worst, such a redefinition could relieve some lawyers of their sense of commitment to market-undervalued public interest work through pro bono work or career choices.

"Self-serving bias," as used in social psychology and behavioral economics, describes a bundle of human tendencies to perceive reality in one's own favor.<sup>147</sup> In the context of litigation, Linda Babcock and George Loewenstein have demonstrated that people have a tendency "to conflate what is fair with what benefits oneself."<sup>148</sup> They conducted experimental research using the context of a personal injury tort case and found that when subjects were positioned with

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145. Pearce, *America's Governing Class*, *supra* note 20, at 413. Pearce adds that the elite lawyers did not apologize for their incomes: "They explained their large profits not as the rewards of business conduct but as 'incidental' to their professionalism and the deserved reward of the invisible hand of reputation." *Id.*; see also Pearce, *The Professional Paradigm Shift*, *supra* note 133, at 1245 (explaining how the "Professionalism Paradigm" legitimized great financial success for lawyers).

146. Pearce, *Retreat of the Elite*, *supra* note 20.

147. Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 110-111 (1997). The self-serving bias includes the tendency of most people to rate themselves above average in a variety of desirable skills or attributes, as well as the tendency to attribute one's successes to ability but one's failures to bad luck. *Id.*

148. *Id.* at 110.

differing interests, the subjects arrived at significantly different perceptions of fairness for the outcome of the case.<sup>149</sup>

In light of Babcock and Loewenstein's findings, legal ethicist Paul Tremblay has discussed the problem that self-serving bias poses for the moral activism project that various scholars have sought to advance.<sup>150</sup> Given "how deeply the self-serving bias affects one's view of a contested litigation matter,"<sup>151</sup> Tremblay analyzes the effect such bias has on lawyers' interactions with their own clients. He suggests that it predisposes lawyers to accept their clients' explanations and thus renders most lawyers disinclined to challenge the morality of their clients' conduct.<sup>152</sup> The lawyer, on this theory, "assesses any moral questions that might arise through an '[e]gocentric interpretation[] of fairness.'" <sup>153</sup> Tremblay describes the effect of self-serving bias on practicing lawyers:

You find yourself representing the good guys more often than you expected before you joined that firm, and more often than the critics seem to think. If only they knew the full story. If your clients are not unambiguously right, there are enough arguments and unresolved fact disputes that prevent you from concluding that your client is the ogre that he might appear to be from a distance. When the stakes are high, one may seem to need fewer of those ambiguities and less strenuous arguments to persuade one that he is in a gray area. In gray areas, who is to say which version is truly right?<sup>154</sup>

Given the likelihood of self-serving bias in lawyers' perceptions of their own work, a revised conception of public interest lawyering presents three concerns. First, as mentioned above, a more inclusive definition for nonsubsidy purposes may fail to accomplish anything worthwhile in terms of actual commitment to the public good, because lawyers will tend to view their own work as socially useful, rather than shift their efforts to more socially beneficial work. Psychological research asserts that "[w]hen individuals face tradeoffs between what is best for themselves and what is morally correct, their

149. *Id.* at 111-14. It is worth noting that Babcock and Loewenstein's research findings strongly suggest that the subjects disagreed in their sincerely held beliefs, not merely in their instrumental use of fairness as an argument. When instructed to guess how much money a judge awarded in the case and informed that they would be paid a premium for guessing accurately within a range, the subjects nonetheless reached significantly different predictions that correlated with their assigned self-interest in the experiment. *Id.* at 112-13. As Tremblay notes, the research "demonstrates not posturing by the respective sides about how best to package a case, but instead honest, sincere beliefs about a predictive, factual judgment." Tremblay, *supra* note 126, at 171.

150. Tremblay, *supra* note 126, at 170-75.

151. *Id.* at 171 (citing Babcock & Loewenstein, *supra* note 147, at 110-111).

152. *Id.* at 171-72.

153. *Id.* at 172 (quoting Leigh Thompson & George Loewenstein, *Egocentric Interpretations of Fairness and Interpersonal Conflict*, 51 *ORG. BEHAV. & HUM. DECISION PROCESSES* 176, 178 (1992)).

154. *Id.* at 178.

perceptions of moral correctness are likely to be biased in the direction of what is best for themselves."<sup>155</sup> To the extent this is true, then it is questionable whether most lawyers will seriously rethink the extent to which their fee-generating work serves the public good.<sup>156</sup>

Second, if lawyers are encouraged to view their fee-generating work as public interest work as long as it pursues socially constructive objectives, they may be more inclined to take ethically questionable steps, on the idea that in pursuit of public good, the ends justify the means. As Tremblay notes, "[S]ometimes you need to be aggressive when justice is on your side. Indeed, the moral activists say exactly that. Once aggressive, technicality-exploiting practices are justified for the good guys, the important question then becomes *identifying* the good guys."<sup>157</sup>

Third, encouraging lawyers to think broadly about their practice as public interest work may have the effect of discouraging commitment to the market-undervalued work that is in greatest need of subsidies. Why should a public-minded lawyer do public interest work for a pittance, if instead the lawyer can do public interest work for a fortune? Put differently, in the context of highly compensated work that may or may not serve the public good, self-serving bias redirects intangible subsidies that should be earmarked for market-undervalued legal work. To the extent lawyers can persuade themselves and others that their work serves the public good, they benefit to some extent from the intangible subsidies of honor and personal satisfaction that ordinarily accompany public interest work.<sup>158</sup> These intangible subsidies are not finite goods, but even so, there is a risk that if lawyers can get the intangible benefits of public interest work while getting the very tangible fees of private practice, they may be less inclined to devote their work in whole or in part to the market-undervalued public interest work that has a better claim on subsidies.

155. Babcock & Loewenstein, *supra* note 147, at 120.

156. Tremblay makes a similar point with regard to lawyers' unwillingness to engage clients in discussion of the morality of their conduct:

[T]he moral activism project, despite its brilliance, seems to have had very little influence on the lives of practicing lawyers. I suggest here that the failure of moral activism is not the fault of the project's sensibility, but instead follows from the way that busy lawyers working in complicated settings understand and come to believe facts about the world.

Tremblay, *supra* note 126, at 182-83.

157. *Id.* at 178 (footnote omitted).

158. See *supra* text accompanying notes 104-108 (discussing tangible and intangible subsidies for public interest law practice).

Ultimately, whether a redefinition of public interest lawyering would do more good or harm depends largely on two variables. First, it depends on the extent to which such a redefinition helps lawyers reconcile money-making with their professional duty to the public good. If lawyers conceive of public interest as an aspect of every law practice, rather than as a distinct area of practice for a small band of the exceptionally virtuous, then they increasingly may keep the public good in mind in both the ends and means of their everyday work. Second, it depends on the extent to which such a redefinition helps lawyers persuade themselves that their self-interested conduct serves the public good. If lawyers tend to view both the ends and means of their fee-generating work as serving the public interest, then market-undervalued public interest work may lose some part of its appeal to broad segments of the bar.

## V. CONCLUSION

At the beginning of the semester, I hand out index cards and ask my law students why they came to law school and what career plans they may have. A fairly common response is reflected in an index card I received this year:

I came to law school to learn how to help other people. I want to help people with problems they cannot solve on their own. Right now I want to get a big firm job, but after I take their money and clerk, I want to work in public interest.<sup>159</sup>

The desire to “take their money” in a big firm job before moving on to work in “public interest,” as announced by this student, differs from others more in its candor than in its underlying sentiment.<sup>160</sup> I suppose one could find it heartening that the student wishes to do public interest work. Despite the laudable long-term plan, however, I cannot help being disheartened as I read the student’s unstated assumption that the ordinary private practice of law is all about accumulating wealth rather than about helping people or serving the public good. I worry that too many practicing attorneys share this sense that law practice is merely a livelihood while public interest work is something that others do.<sup>161</sup>

When law students, lawyers, and others speak of public interest work as something apart from ordinary law practice, they

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159. Student index card, Professional Responsibility, Fall 2003 (on file with author).

160. An equally candid but ultimately less public-minded response was offered by a student who had left a career in public service to become a lawyer: “I’ve already helped people, now it’s time to make \$.” Student index card, Civil Procedure, Fall 2003 (on file with author).

161. Deborah Rhode cites a study that found that only 20 percent of lawyers believe that their work contributes to the social good. RHODE, *supra* note 142, at 8.

mean it in the most positive sense. It is an expression of appreciation for the contributions and sacrifices of those lawyers who seek to advance the public interest as their primary objective, despite personal cost. From this perspective, Thurgood Marshall is not only an individual lawyer-hero,<sup>162</sup> but he also is emblematic of a class of lawyers who devote their practice to the public good and who are perceived by many lawyers as a breed apart.<sup>163</sup> A lawyer may look at the public interest bar with the distant appreciation that comes from knowing he has no intention of following in those footsteps. It is fitting humility, perhaps, that most lawyers do not see themselves as Thurgood Marshalls. But one wonders if the profession might be better off, and the public better served, if more lawyers tried to see themselves as following in Marshall's footsteps, in the sense of sharing commitment to the public interest through the practice of law.

While other lawyers humbly excuse themselves from public interest practice, mass tort plaintiffs' lawyers—not a group particularly known for humility—proclaim their commitment to such goals as consumer protection, product safety, and corporate responsibility, and declare that they are turning to the courts just as Marshall did in *Brown*. In so doing, they call attention to the possibility that lawyers can pursue social change objectives while earning substantial fees. They also illustrate the broader point that outside of traditional realms of public interest practice, commitment to the public good can be part of the multiple motivations that drive lawyers. It is misleading to divide lawyers into those who pursue good and those who pursue wealth. In reality, the line is not so neat, and if the professional norm of public service is to be reconciled with the professional reality of law as a business, it is important not to oversimplify the motivations of lawyers who seek simultaneously to make money and to accomplish socially useful objectives.

The prevailing conception of public interest law practice, like the modern usage of the phrase "*pro bono publico*," reinforces the distinction between lawyering for a livelihood and lawyering for the public good. Public interest lawyering need not be defined the same way for all purposes. Defining public interest lawyering as work that

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162. See *supra* text accompanying note 3. For a nicely balanced introduction to lawyer-hero stories, acknowledging both the usefulness of hero exaltation and the danger of succumbing to nostalgia, see W. Bradley Wendel, *Symposium Introduction: Our Love-Hate Relationship with Heroic Lawyers*, 13 WIDENER L.J. 1 (2003).

163. One poverty lawyer in Pittsburgh describes the perception of cause lawyers in the general legal community as one of vaguely affectionate bemusement: "We've been around so long that the bar is starting to get used to us. They probably just think we're a bit strange to give up money to take these cases. But generally we're not disliked or viewed as a threat." Kilwein, *supra* note 94, at 197.

serves the public good to a greater extent than recognized by market levels of compensation—that is, as market-undervalued legal work—makes sense for purposes of determining subsidies such as loan repayment assistance and the ethical duty to engage in pro bono work. Market-undervaluation works less well, however, as a definition of public interest lawyering for purposes of professional self-perception. Indeed, the prevailing conception of public interest practice may have the paradoxical effect of diminishing the profession's overall level of commitment to the public good.

On the other hand, lawyers are likely subject to the human tendency to perceive fairness in accord with self-interest. It is not difficult for most lawyers to view their own practice as sufficiently consonant with the public good so that a professional norm of public-mindedness would not require them to modify their practice. Therefore, even if one accepts that the prevailing conception of public interest practice has the unintended consequence of leaving others less committed to the public good, it remains questionable whether a reconception of public interest practice would have any appreciable effect on either the ends that lawyers choose to pursue or the means by which they choose to pursue them.



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