INSTITUTIONS OF REPRESENTATION: CIVIL JUSTICE AND THE PUBLIC*

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Discussion of the distribution and delivery of legal services usually turns on the problem of civil justice for the poor. Our attention is so dominated by the problems of distributive justice for the poor that we ignore the more general problem of civil justice for the public.

In Western society the primary function of law has been the protection and regulation of property. Indeed, the earliest liberal conceptions of public life are founded on the premise that men gave up an utterly private life in order to enjoy the utilities provided by public protection for their persons and, even more important, the fruits of their labors—in Locke's (1689: Art. 123) phrase, "their lives, liberties and estates, which I call by the general name property." In the earliest liberal tradition, the holding of property is the foundation for participation in public life; accordingly, the principal end of the civil law is the definition and protection of property rights.

In our own day, the law continues to focus on matters of property, even though property can no longer be thought of as distributed among the individual members of the body politic. With the rise of the corporation, and the concentration of capital, much of the practice of law must of necessity be directed to the legal ordering of large scale organization. These transformations of property and legal practice suggest a critical question concerning legal services in the contemporary United States: Perhaps the lack of legal services for the poor is only a part of a much more general phenomenon. Has our legal system, by concentrating on the complex needs of our systems of property and large scale organization, given short shrift to the legal needs of all persons—poor or prosperous—in their roles as individual members of the public?

To suggest a simple affirmative answer to this complex question would constitute a gross overstatement. In the first place, as later sections of this paper will show, many individual citizens

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are rather deeply involved in the legal system in regard to matters affecting their property. Furthermore, citizens (in all strata) have considerable contact with attorneys about such matters. Finally, there are other contexts in which attorneys routinely represent the interests of members of the public.

Nevertheless, the issue deserves examination. Even more importantly, we need a sociological standpoint for viewing the problem in its social context, a standpoint providing more broad and inclusive perspectives than the relatively weak and limited theory that poverty is the obstacle to access to lawyers. Such a perspective can be provided by viewing legal representation as a set of organized institutions.

IMAGES OF REPRESENTATION

The study of the distribution and delivery of legal services usually involves assumptions or images concerning the character and quantity of the claims and problems that are "out there" to be serviced. How can we estimate the potential demand for legal services? The problem is perplexing and profound, and the solution, if there is one, is of great significance in shaping our conceptions of effective representation within our present legal system and our ideas about possible reform.

A limited but informative example will illustrate the complexity of the problem of measuring the demand for legal services. What portion of the American population could benefit from legal services in connection with problems of divorce, alimony, child support, and other domestic matters? In 1967 I undertook, in conjunction with Albert J. Reiss, Jr. and Howard Schuman, a survey of the attitudes about and experiences with law among a random sample of the citizens of the Detroit metropolitan area.[1] Among the previously unpublished findings of this study was the pattern of response to the query, "Have you ever wanted to go to a lawyer but didn't for some reason?" Nineteen percent of our respondents answered in the affirmative.

1. Several findings from this study were published by Mayhew and Reiss (1969). The findings of the Detroit study result from 780 completed interviews from an original sample of 957 households in the Detroit SMSA, a completion rate of 82 percent. The refusal rate was 12 percent, with the remaining noncompletion rate of 6 percent assigned to failure to locate a respondent after at least three call backs. The sampling design set the probability of selecting a Detroit city household at twice that (1:785) of a household outside the city limits (1:1570) so as to insure inclusion of more black citizens in partial analyses. There are 173 black and 349 white interviews in the city of Detroit and three black and 255 white interviews outside the central city. All estimates of proportions are based on the weighted sample of 1,038 residents: 859 white and 179 black.

Of those who answered "yes," less than six percent said that their problem involved some aspect of domestic relations.[2] Divorce, alimony, child support, and domestic problems accounted for about nine percent of contacts with lawyers and ranked sixth in frequency among all categories of legal problems brought to lawyers. This pattern did *not* vary by the income of the respondents. Fourteen percent of the sample had seen attorneys about such matters.

Let us compare this pattern of perceived need for legal services in domestic relations with the experience of legal aid agencies, which are known to be besieged by such cases. The data vary among cities, but those published by the National Legal Aid and Defender Association and the U.S. Office of Economic Opportunity (Stolz, 1968b; U.S.O.E.O., 1971) suggest that about forty percent of the clients of legal aid and neighborhood law offices are seeking help with domestic difficulties. From the relatively miniscule proportion of the Detroit sample who reported an unfulfilled need for legal counsel in this area, we could not easily predict that domestic matters would represent such a considerable proportion of legal aid cases.

At first glance, one might be inclined to attribute this disparity to the inadequacies of survey data. On the contrary, I believe the survey measured rather well what it set out to measure—*perceived* failure to secure legal counsel. The fifteen percent in Detroit who reported experiencing legal difficulties in the domestic area is comparable to Sykes' (1969) report that fourteen percent of his low income sample in Denver experienced similar difficulties in the five years preceding the study. Moreover, of the small number (less than 3 percent of the sample) in the Detroit study who had experiences with free legal aid, more than half reported that their legal aid was for domestic and personal matters. I do not doubt the reality of the substantial burden domestic matters place on legal aid offices but the caseload merely measures the way the public has come to *use* legal aid. Patterns of use reflect an interaction between the needs of the population and the social organization of the distribution of legal services.

Any given legal agency, be it a private law firm, a neighborhood law office, or a civil rights commission, in part receives and in part *generates* a clientele. The agency has a public definition, including a reputation for various competencies and incompe-

2. There were eleven such respondents, comprising one percent of the entire sample. Seven were white women, but the eleven cases appear to be randomly distributed by income.

tencies. There are both channels of access and barriers to access to every agency. The policy of the agency, indeed its mere existence, stimulates certain kinds of demands and discourages others. It is easy to forget this elementary proposition, lapsing into the easy assumption that the pattern of cases one receives fairly represents the problems of the population. A gross distortion of expectations is sometimes necessary to force recognition of this fallacy. In England, it was the fact that domestic problems reached 80 percent of the total case load of legal aid that shook official complacency about whether national programs were reaching their target populations (Zander, 1973).

Neither surveys of the experiences of the public nor the patterns of cases brought to legal agencies produce a particularly valid measure of the "legal needs" of the citizenry. Needs for legal services and opportunities for beneficial legal action cannot be enumerated as if they were so many diseases or injuries in need of treatment. Rather, we have a vast array of disputes, disorders, vulnerabilities, and wrongs, which contain an enormous potential for the generation of legal actions. Whether any given situation becomes defined as a "legal" problem, or even if so defined, makes its way to an attorney or other agency for possible aid or redress, is a consequence of the social organization of the legal system and the organization of the larger society—including shifting currents of social ideology, the available legal machinery, and the channels for bringing perceived injustices to legal agencies.

For example, less than one percent of the women interviewed in the Detroit study said they had ever been discriminated against by reason of their sex—this despite both a general query and repeated questions about several forms that such discrimination might have taken! If the respondents had applied a higher level of legal and sociological imagination to the question, a much greater proportion could have truthfully answered in the affirmative, but the necessary attitudes and information for seeing such discrimination were relatively undeveloped. Nor were there any well developed channels for routing cases of such discrimination to the attention of attorneys and legal agencies.

A good example of the impact of the organizatiaon of the agency on the shape of the case load is found in the experience of the Buffalo Citizen's Administrative Service (Tibbles and Hollands, 1970). This agency achieved an interesting reversal of the usual pattern of relative exclusion of low income and minority groups from access to representation. The BCAS operated an

ombudsman-like service without any limitations on the income or race of the client. Complaints could be brought to a central office or generated in the neighborhood. By employing a staff of Black and Puerto Rican "neighborhood aides" (casefinders, really), the agency produced over 1,000 complaints in a little over a year; 66 percent of the clients were Black, 8 percent were Ruerto Rican and 60 percent received less than $5,000 per year income.[3] It is almost certain that this pattern represents a biased picture of the relations between government agencies and the various segments of the community. In the Detroit study, for instance, a larger proportion of whites than blacks reported problems with public agencies as among their most serious problems (Mayhew and Reiss, 1970:316). Though problems might differ from group to group, all groups and strata have problems with officialdom.

UNCRITICAL ASSUMPTIONS ABOUT REPRESENTATION

Research and thought about the distribution and delivery of legal services have been distorted by uncritical acceptance of a set of implicit assumptions about the process of legal representation—assumptions that can be characterized as complacent, atomistic, static, and unimaginative. There has been too little attention paid to the social organization of the institutions of representation. The common conception of the problem of representation is, in my view, fundamentally incorrect. The usual survey of legal needs, the actuarial approach to estimating the demand for legal services, and the typical attack on class bias in the law all assume, apparently, that there exists a set of felt needs within a population which is experiencing difficulties of one sort or another. It is further assumed that there are professional advocates (the bar) capable of representing these needs. Given these two assumptions, it is an easy step to a third: that the problem of distribution and delivery of legal service is a problem of facilitating the access of persons experiencing legal difficulties to qualified professionals. The main barriers to access, poverty and ignorance, are usually said to derive from low social status.

This approach is complacent and static for it implicitly assumes that the legal system could provide for adequate represen-

3. According to the authors the procedures of the agency did not, on the whole, produce trivial complaints. The methods clearly involved actively looking for cases: "The majority of complaints were not merely communicated in person to the neighborhood aides but were the product of contacts of the neighborhood aides with people in the community" (Tibbles and Hollands, 1970:1) ". . . The neighborhood offices never developed a continuous flow of walk-in business" (30).

tation of all claims by merely making legal services available to the indigent, or, in more vigorous versions, to persons of moderate means as well.[4] The possibility that our institutions of representation are poorly organized to provide adequate representation for a wide range of claims across a broad segment of the population is ignored (Mayhew and Reiss, 1969:317-318). Moreover, the approach is insufficiently sociological. While recognizing the important sociological variable of *status*, it fails to treat patterns of representation as products of *institutions*. Hence, it fails to appreciate the impact of institutions of representation on the flow of persons, claims, and information into the legal system.

I wish to propose an alternative approach. (1) There exists in the population an aggregate of interests and claims and potential problems; some are well understood by the members of the population, while others are perceived dimly or not at all.[5] (2) The legal system is institutionally organized and includes a set of institutions of representation. An institution of representation is an organized, established, routinized method of providing advocacy, representation, or other legal services to those who have legal needs, interests, and claims. (3) Each institution of representation possesses a peculiar set of biases; it is more likely to stimulate and provide for the representation of some claims than others. These biases are not random but structured. They reflect the social organization of the various institutions of representation of the legal system, and of the larger society.

SOURCES OF THE EMPHASIS ON POVERTY

The approach to the problem of representation as a problem of poverty has been influenced by constitutional developments in the criminal law and by liberal assaults on the problem of poverty. Insofar as thought about the distribution of legal services has been shaped by constitutional law, the problem of representation has been defined as a problem of poverty. The long line of decisions, stretching from *Powell v. Alabama* (1932) through *Gideon v. Wainwright* (1963), and *Douglas v. California* (1963)

4. Concern for persons of moderate means is relatively recent and, in view of the bar's longstanding conception of the problem of representation as a problem of indigency, amounts to a radical departure fom previous thought (Cheatham, 1963; Christensen, 1970; Meserve, 1971). Note however, one remarkable exception (Llewellyn, 1938).

5. Some readers may find the allegation that interests, claims and problems exist in an inchoate state, waiting for people to perceive them, rather idealistic, possibly even arrogant—implying that I know what people's problems are, even if they do not. It is not that I have more insight into others' problems than they do; it is that ongoing social life includes a process of recognizing problems, redefining rights, and seeing possibilities. These definitional processes are not purely mental or ideal; they involve reactions to a real social world.

to *Argersinger v. Hamlin* (1972) is founded on the premises that all citizens have rights deserving of protection, that criminal jeopardy is a critical juncture at which such rights require professional representation, and that poverty should not be a bar to such representation.[6] These ideals found further expression in the Allen report (see Solomon, 1966) and in the Criminal Justice Act of 1964.

The movement for the expansion and extension of legal services has been preoccupied with making such services available to the poor. Indeed, the term "pro bono," now used to describe a variety of legal work in the public interest, was originally employed to refer to work donated on behalf of the indigent (Marks, 1972:17). On the intellectual side, the movement has been dominated by the Cahns' (1964) plea for a legally oriented war on poverty, and by the imagery implicit in the title of Carlin *et al.*'s (1966) influential article on "Civil Justice and the Poor." (See also Carlin and Howard, 1965). On the practical side the ideology was incorporated in Title II-A of the Economic Opportunities Act of 1964 (78 Stat. 508, 42 U.S.C. Art. 2701-981, 1964). In all these traditions of thought and work, the emphasis has been on whether legal services available to the well-to-do are or should be also available to the poor, not on the more fundamental question of whether the legal system is adequately organized to represent any claims at all.[7] There may be a whole range of claims and interests that are not well protected for anyone. The first questions should be: Given our institutions of representation, what sorts of claims are likely to secure representation and which are not? The social status of those whose claims are represented and unrepresented is only one of a number of vital problems for study.

There is an alternative approach, at once more skeptical and

6. On the civil side, the indigency argument is used in *Boddie v. Connecticut*, 401 U.S. 371 (1971).

7. It is an interesting exercise to go through the arguments of say Carlin *et al.* (1966) and ask how many of the alleged failures of representation would apply equally, if not with more force, to the middle strata. The point has been well expressed by Hazard (1969: 708): "The legal wrongs of discrimination, fraud, and breach of warranty that the poor suffer are also suffered by the non-poor. Indeed, it is probable that wrongs of this kind are suffered more widely by low-middle income people than by the very poor; these wrongs are mostly associated with the market place and people with higher incomes are in the market oftener and deeper than people with lower incomes. Ralph Nader's beneficiaries are not the destitute." Hazard's shrewd guess appears to be borne out in Sykes' Denver study (1969) as well as the Detroit study (see Table 3 below). Conversely, even within the low income stratum, citizens view lawyers as most relevant for matters dealing with property. See the use of lawyers reported by Hallauer (1973) and the survey reported by Marks (1971).

sociological, which stresses not the mere presence or absence of representation, but the social and institutional organization of professional representation. Blumberg (1967a, 1967b), for example, refuses to take *one* apparent extension of legal services at face value. He insists that we look at the nature of the courts as formal organizations and the institutional relations between courts, lawyers, and clients. Viewing the problem from this perspective, he concludes that the criminal defense attorney is only in part an advocate. The "defender" is also a participant in the bureaucratic process of guiding defendants to a guilty plea in a system of "assembly line justice."[8]

The point can be generalized; other studies can be interpreted in an analogous way. Casper (1969) shows, in effect, that defendants in civil liberties cases were represented because organizations for their defense existed—on the one hand a radical bar interested in protecting radicals (including themselves and their friends) and, on the other, lawyers channeled to such cases by the American Civil Liberties Union. According to Casper, the former group saw the radical left as their clientele, and adjusted their defenses accordingly, while the latter group saw the abstract principles of justice as their real "clients" and individual defendants as mere vehicles for establishing legal points. In neither case did the client receive a defense oriented primarily to his particular interests. We may conclude from Casper's study that problematic representation is not necessarily peculiar, as some would imply (Sudnow, 1965) to governmentally provided defense. The organization of representation, whether governmental or private, will have an impact on the type of claims represented and on how representation is carried forward.

In sum, we should not start with a particular segment of the society and ask whether that segment is well, badly, or differentially represented. Rather, we should start with concepts of claims that could be protected and ask how these claims interact with the institutions of representation to produce patterns of institutionalized claims as well as lacunae of unrepresented interests.

INSTITUTIONS AND INSTITUTIONALIZATION

This essay is founded on a particular conception of the proc-

8. See also Newman, 1956; Skolnick, 1967; Sudnow, 1965; Cole, 1970; Feeley, 1973. It is possible that many authors, in their polemical zeal, have over-estimated the destructive impact of routinization on the adversarial character of the defense in plea bargaining. See Taylor *et al.*, 1973; Battle, 1973. The cited study (Casper, 1972) provides good evidence for this latter argument.

ess of institutionalization. The word institution refers to a practice or norm that is *established.* A pattern of conduct is institutionalized when it is built into social organization—into the routine expectations, habits, interests, and relationships within a social group. In previous studies (Mayhew, 1968; 1971), I have suggested that a norm becomes institutionalized when the following conditions are met: (1) *specific rules* or expectations governing conduct develop; (2) these rules or expectations are supported by a set of *ideological beliefs*;[9] (3) people come to have an *interest* in conforming to these expectations; (4) agents of the collectivity come to have *access* to the conduct of those who follow or violate the norms.[10]

Applying this analysis to legal representation, there are four conditions for the institutionalization of representation for any given right, claim, or interest:

(1) The right must be specified in such a way as to be palpable to those who possess it, experience its violation and advocate or protect it.

(2) Such persons must also define the right as substantial, defensible, and remediable if violated.

(3) There must be a set of persons with an interest in vindicating the right and another set of persons having an interest in the skilled legal representation of the former.

(4) The two groups, let us call them the bearers and the representors, must have access to each other. The classic problem of the access of the poor to lawyers can be treated under this heading, but the problem of access is more profound; poverty is not the sole, or even the principal barrier to access. Representation of a given right becomes institutionalized only when appropriate cases routinely come to the attention of representors and viable representors come to the attention of bearers. Access is controlled by many factors other than income. For example, if any sphere of conduct (let us say the purchasing of homes in a given jurisdiction) is legally organized, then the participants (in this case buyers and sellers) will routinely come into contact with attorneys. Thus, transactions in real property, wills, and

9. By some definitions of the word, both of the first two conditions of institutionalization involve "ideology." In this paradigm, I employ an analytical distinction between the process of transforming general principles of value or right into specific, definable claims and the concomitant process in which (once such claims are defined) particular persons come to see themselves as having these claims and feel able to pursue them. The term "ideology" is reserved for the latter process.

10. Access is a condition of institutionalization because it is requisite for social control.

estates accounted for nearly half of all citizen-lawyer contact in the Detroit study.

In sum, representation exists as an institution only when there is a social organization to provide routine and established support, and when cases are regularly routed into legal channels by an established social structure. A corollary proposition is that the form and quality of that representation depends on the character of the underlying social organization.

Specification. The first condition of institutionalization is adequate specification of the right that is to be represented. The importance of specification underlines the inextricable link between institutions of representation and the law itself, both substantive and procedural. Access to an attorney is useless if the law is insufficiently developed to protect ones' claim. Specification of rights and claims through legislation, litigation, and the creation of remedies and forums is an essential precondition to institutionalization. Alternatively stated, it is misleading to object to an allegation that a given type of claim is not well represented on the grounds that the problem is really one of substantive law—that it is the law (rather than the lawyers) which fails to protect the claim. The operant meaning of such a statement might well be that to establish such a claim would be very expensive and risky. Recognition of this operant meaning forms one of the foundations for the militant stance within some legal assistance programs: to represent the poor is not just to give them assistance with their individual problems; it is necessary to develop rights and actions that can be used repeatedly on behalf of other potential claimants (Hannon, 1969; Finman, 1971).

Specification is a necessary but *not* a sufficient condition of institutionalization. It is bootless, for example, to attempt to control the process of plea bargaining by specifying a series of explicit waivers of rights (Hobbs, 1971) to be made in the presence of the trial judge. Waivers do not, in fact, ensure that false or irrelevant pleas will be excluded. Defendants (and their attorneys) consider the entire series of waivers to be a staged, rehearsed ritual—just part of what one must go through in order to cop a plea (Casper, 1972). The requirements, by themsleves, have no apparent impact on the institutional organization of plea bargaining. They neither alter the structure of interests for any of the participants nor create new opportunities for the expression of interests; they do not change the participants' opinions of the system; they do not provide to the courts any real access to the process of plea bargaining. When the other conditions

of institutionalization are not altered, mere specification of new rules is without effect.[11]

Ideology. The second condition of institutionalization is a belief among participants in the legal process that the right in question can and ought to be represented. Ideologies about rights are deeply entwined with our ideas about the utopian and the realistic. For attorneys, the sense of what is utopian and what can be attempted is, in turn, entwined with ideas about the professional role. Adherence to a traditional professional model implies severe limitations to legal action: the attorney must tell the client what can and cannot be done, and must serve the client's interests by helping and encouraging him to be realistic—to settle for the possible or the expedient. The "new breed" lawyer who seeks reform, "new voices for new constituencies" (Ford Foundation, 1973), and the redress of injustice, emphasizes the creative side of law—the possibility of specifying new rights as a foundation for new institutions. The traditional ideology supports the status quo; indeed, it is a component of the institutional order. The activist ideology encourages the process of institutionalizing new protections.

The critical questions regarding ideology among the citizenry involve the public sense of the relevance and effectiveness of legal advice and representation. The Detroit study produced evidence suggesting that the biggest obstacle to more use of lawyers is not inadequate income but an absence of the perception that seeing a lawyer would be useful or appropriate. Those who felt the need to see a lawyer usually found one.[12] It is true that nineteen percent of the sample reported an occasion when they wanted to see a lawyer but did not. Nevertheless (more to the point), the ratio of situations wherein a lawyer was actually used to situations of perceived failure to use a lawyer was 9 to 1 among *both* low and middle income respondents.

For example, 35 percent of the Detroit sample reported one or more problems with government agencies. Among those who

11. The impotence of the exclusionary rule as a control on police practice is another case in point (see Oaks, 1970). To suppose the mere laying down the rule is enough is to be oversold on the bureaucratic model of organization (see Feeley, 1973).

12. Sykes (1969:261) found this to be true even in his low income sample in Denver; 78 percent of those with a felt need had gone to see a lawyer about the matter. Here are some ratios (compiled from the Detroit study) of actual use of lawyers to felt unmet need for a lawyer in several specific areas: estate problems, 70:1; contractual disputes, 52:1); problems with public benefits, 21:1; domestic problems, 11:1; insurance claims, 8:1); traffic tickets 5:1; purchase of expensive objects, 5:1; problems in the neighborhood 4:1; landlord-tenant problems 2:1; job related problems 2:1; wills 3:1.

considered one of these problems to be among the two most serious[13] they had experienced (in the realm of problems we studied),[14] only 13 percent had consulted a lawyer. However, only one percent of the entire sample reported that they had wanted to see a lawyer about this type of problem but had not! This handful constitutes less than 4 percent of those who experienced problems with public organizations. Even though this is one of the class of problems wherein the respondent is most likely to describe his satisfaction or dissatisfaction with the outcome of the problem as a matter of vindication of his "lawful rights" (see below p. 413), only a miniscule proportion regarded lawyers as a fruitful source of help or redress.[15] These data suggest that programs designed merely to find lawyers for people—e.g. the lawyer referral service (Christensen, 1970: 173-205)—are of limited potential.

Interests. Representation of a class of legal claims requires a set of interested parties and a set of professionals with an interest in providing service. This observation is often taken for granted: it is assumed that persons with claims or problems are aware of their interests and that attorneys, motivated by fees, will provide the service. In fact, the structure of interests in representation is more complex.

For our purposes, the principal source of complexity arises from the distinction between the concrete pressing problems of individuals—problems arising from events in their daily lives—and the interests of various groups and segments of society. Whether collective problems and the interests of groups come to be manifest in the concrete and immediate interests of individuals is problematic. Indeed, it is well known that these interests often conflict and that attorneys must then decide where their loyalties lie. Casper (1969) in his study of representation in loyalty and security cases, found that only two of the 23 lawyers studied thought of the individual defendant as the principal client. The others perceived their client as either the radical

13. By this definition of "serious," 67 percent of those who had problems with governmental agencies considered these problems serious.

14. In addition to problems with public agencies, we studied problems in the neighborhood, landlord-tenant problems, problems with discrimination, and problems with the purchase of expensive objects.

15. On the contrary, some segments of the public appear to view a lawyer as someone to see only when it is absolutely necessary, even when the lawyer's services are inexpensive or free. Hallauer (1973) found this attitude among the participants in the Shreveport prepaid legal services plan. This finding is consistent with my argument that the legal system reaches out and pulls people unwillingly into participation rather than vice versa.

movement or the public interest in the specification and protection of civil liberties.[16]

The interests of individuals are often less broad, abstract and long term than the interests implied in conceptions of social justice. Some data developed in the Detroit study suggest that the interests of individuals—interests that develop from the frictions of daily life—are not usually interests in abstract justice. The individual facing a problem tends to be more interested in the necessity of resolving a practical difficulty than in vindicating a right. Citizens were asked to recount their worst problems in five possible areas of difficulty—relations in the neighborhood, landlord-tenant relations, the purchase of expensive objects, relations with public agencies (including the police), and discrimination. We developed case histories of 1,302 of the problems defined by the respondents as their "most serious." Respondents were asked how they had wanted to see the problem settled. Very few answered that they sought justice or the recognition of their rights. Most said they sought resolution of their problems in some more or less expedient manner (see Table 1). The proportion of "justice seekers" ranged from zero in the

TABLE 1 PERCENTAGE OF SERIOUS PROBLEMS FOR WHICH RESPONDENT SOUGHT "JUSTICE" OR VINDICATION OF LEGAL RIGHTS BY PROBLEM AREA; WEIGHTED SAMPLE DETROIT SMSA, 1967

Problem Area	Number Reporting Serious Problem	Percentage Seeking Justice
Neighborhood	437	2%
Landlord-Tenant	92	0%
Expensive Purchases	408	4%
Public Organizations	257	9%
Discrimination	108	31%

landlord-tenant area to 31 percent in cases involving discrimination, an area permitting relatively easy use of phrases including the words "justice" and "rights." Even when given (in a closed-ended question) an opportunity to choose directly between the law and expedience in explaining the grounds of their satisfac-

16. Nevertheless, scholars do overlook this problem in their analysis. Horowitz (1972:947) in his review of Marks' recent volume on *pro bono* work (Marks et al., 1972) complains, ". . . the authors conspicuously avoid the more perplexing problem of lawyers whose zeal the establishment finds excessive. They fail to discuss the fact that lawyers seeking reform through litigation often do more than articulate their clients' interests; they often make judgments as to whether society should vindicate those interests. Indeed, some times they may even determine what those interests are." (See also Douglas, 1971:90.)

tion or dissatisfaction with the outcomes of their problems, respondents chose practical rather than legal terms by ratios varying from 1.7 to 1 to 7.1 to 1 depending on the area involved.

TABLE 2 REASONS FOR RESPONDENTS' SATISFACTION-DISSATISFACTION WITH OUTCOMES OF SERIOUS PROBLEMS BY PROBLEM AREAS; WEIGHTED SAMPLE DETROIT SMSA, 1967

	Problem Areas				
Outcomes	Neighborhood	Landlord-Tenant	Expensive Purchases	Public Organizations	Discrimination
Percent Satisfied					
"Got lawful rights"	8**	5	10	21	4
"Got what I wanted"	18	12	22	7	9
"Got best I could"	29	17	17	14	13
Percent Dissatisified					
"Did not get lawful rights"	3	8	11	10	25
"Nothing done"	30	45	21	33	33
Percent Other Responses*	12	13	19	15	16
TOTAL	100	100	100	100	100
Ratio expedience/ "lawful rights"	7.1	6.7	2.8	1.7	1.9

* Includes unresolved, ongoing problems.
** Figures are all percentages.

Access. Rights are represented only when there are channels linking the representor and the represented. The most important sociological insight into access is captured in Black's (1973) distinction between reactive and proactive legal action. Applied to strategies of representation, the distinction suggests this question: does the advocate wait (reactively) for clients to bring their claims to him, or does he proactively search for clients with problems, either to serve a special class of clients more vigorously, or to discover vehicles for pressing strategic points of law? Each strategy has its own selective biases. As we shall see (p. 418 ff. below), the various proactive approaches produce caseloads which reflect such features as the organizational capacities and ideological appeal of claimant groups who, in turn, may or may not represent the most pressing needs or the most oppressed victims. The reactive or passive approach relies upon the channels that exist within an established social structure, producing a caseload shaped by everyday troubles and the estab-

lished rules of legal practice. Few cases are produced that might challenge institutionalized conceptions of the normal and feasible uses of lawyers. Moreover, as suggested above, "serving the clients' interests" as clients (quite properly) perceive them ordinarily implies compromise, settlement with minimum delay and expense, and taking what one can get.

The force of this observation extends beyond the realm of a private practice built around matters of property or personal injury. The conservative features of the passively created caseload are found in the work of specially designed enforcement agencies as well. Mayhew (1968:152 ff.) found that Blacks brought cases alleging discrimination against firms that were already integrated. Fisher and Ivie (1971:17) found that the vast bulk of cases brought to both traditional legal aid offices and OEO Legal Services offices in three cities were far removed from the "cutting edge of poverty law." Hallauer (1973) found that the participants in a (union-organized) prepaid legal services plan used such services primarily to resolve questions of property rights.

The development of strategic cases oriented toward change and the promotion of group interests requires the proactive development of new channels of access to the legal system. The obmudsman project in Buffalo (described above) is a good example of a concerted attempt to establish new channels of access (Tibbles and Hollands, 1970). The private bar has not created such channels. To the extent that strategic cases are developed, the moving force has usually been private political associations or, in a few cases, militant government agencies (Mayhew, 1968; Finman, 1971).

Tensions within the components of institutionalization. Each of the four conditions of institutionalization is attended by tensions that account for some of the important dynamics of the process of representation:

1. In relation to specification there is a tension between establishing new rights and undermining some established rights in the process of creating new ones.

2. In relation to ideology, there is a tension between a concept of legal representation as service to the community (considered as an aggregate of individuals) and a concept of legal representation as advancing political and social ends.

3. In relation to interests, there is a potential conflict between protecting individual clients and advancing collective interests.

4. In relation to access, choices must be made between allocating resources to the development of stragetic cases[17] or to the equally important need to handle a mass of passively received cases.

Given the repetition of a similar basic problem in the various components of institutionalization, we should not be surprised to find that the components interact to produce two diverse cycles of representation (cf. Mayhew, 1968:283-84). On the one hand, there is a *cycle of complacency.* An ideology defining the lawyer as part of an institution for professional service calls for a passive stance, allowing the cases to come as determined by established social structure. In consequence, few cases are other than routine. Those that are not are easily perceived as outside of the established set of legal protections and can be refused as cranky or utopian. "Experience" then shows that the legal system is doing a good job.[18] Hence, it is not necessary to face the difficult problem of resolving conflicts between individual and group interests.

On the other hand, there is the *cycle of controversy.* The militant lawyer seeks strategic footholds and joins (or creates) an organized network for finding important cases. In consequence, clients become involved in issues and conflicts transcending their own immediate needs and, perhaps, the obligation to provide service in regard to daily problems is slighted. Attacks upon established patterns of legal practice involve the attorney in confrontations with established power.[19] The consequent rebuffs confirm the sense that important rights are ignored and that great segments of the population are excluded from the corridors of power.[20]

PROBLEMS IN THE ORGANIZATION OF REPRESENTATION

Current patterns of distribution and delivery may be examined in terms suggested by the concept of institutionalization.

17. Some militant "poverty lawyers" even spend time developing "legal theories that could be used to advance the interests of the poor . . . even before there were concrete cases in which they might be asserted." (Finman, 1971:1015).
18. I do not mean to imply that ordinary attorneys never accept responsibility for doing extraordinary work. A survey conducted by Maddi and Merrill (1971) showed that most attorneys accept a certain amount of *pro bono* work. Nevertheless, see Lochner, 1975.
19. In this connection see Hannon, 1969; Finman, 1971; Stumpf *et al.*, 1971; Marks *et al.*, 1972.
20. The cycle of controversy may be less stably self-reinforcing than the cycle of complacency, since controversy carries sanctions that might discourage the less hardy breed of controversialist.

Private practice for fees. Traditional private practice for fees remains the main organizational form for distributing lawyers' skills. The resources for this form of delivery come from the financial stakes that are protected or secured by the attorney. Preble Stolz (1968a) summarized the institutional organization of private practice well.

> Most legal matters are easily converted into dollar values, although there are important exceptions . . . But most legal rights relate to property, and most property rights have a dollar value. Legal problems are not fungible; and, in a very large part how much time a lawyer devotes to a problem depends on how much the client is willing to spend, which in turn depends on how much money is involved (931).

Business and corporate law is clearly organized around the institution of property. The institution of property also channels most of the contact between citizens and attorneys. The Detroit study found that half of all contacts between citizens and attorneys concerned wills, estates, and the transfer of real property. When we further consider the profound penetration of property rights in questions of divorce, landlord-tenant disputes, advice to small businessmen, and tax problems, we see support for the conclusion of that study:

> The legal profession is organized to service business and property interests. The social organization of business and property is highly legalized. Out of this convergence emerges a pattern of citizen contact with attorneys that is heavily oriented to property (Mayhew and Reiss, 1969:313).

Whatever the disadvantages of this arrangement in providing adequate representation in other arenas, it has two advantages that must not be overlooked in any realistic analysis: (1) the organization of private practice around property provides resources for the support of legal representation; (2) the market nexus provides an automatic device for rationing the services of attorneys. Whatever sort of organization provides legal services, the resources must come from somewhere. Such resources are never unlimited; if a free market does not ration them, something else will.

Even within the arena of disputes regarding property we cannot assume that market calculations will always permit property owners to make effective claims for legal protection. Consider the case of a Black family that has purchased a home from a "blockbusting" speculator for $10,000 more than the speculator had paid a frightened white family ten days before. The purchaser might have a claim under the Fourteenth Amendment (or under 42 U.S. Code 1982), a claim worth more than $20,000 when the interest on the excess price is included, but given the

difficulty of establishing such a claim, and the expense of standing up to the formidable remedies available to the seller, what family of moderate means could afford to press the matter? See MacNamara, 1971; *Baker v. F and F Investment* 420 F.2d 1191; Fitzgerald, 1975).

Alternatives to rationing by fees. The claims of justice notwithstanding, some mechanism always operates to limit the possible legal claims that might be made. Lawyers will not, indeed cannot, work (or incur legal costs) without recompense. As one radical lawyer in a "communal" practice put it, "Because I will not insist on $17,500 must I work for $100 a month?" (He apparently settled for about $5,000 a year. See Douglas, 1971). To the degree that we move away from a system of sale to the highest bidder we move to an alternative basis of rationing. Some appear to suppose that the alternative basis is a set of principles, ideals, and criteria established by the professionals who select their *pro bono* work (Marks *et al.* 1972:273). Sometimes this is the case: public interest law firms, or public interest sections of private firms, or attorneys working on released time (or taking cases for nothing) substitute their considered judgment for the impersonal judgments of the market. More often, rationing decisions are built into organizational structures; that is, decisions are made according to conventional, routine criteria in the context of bureaucratic constraints.

Plea bargaining is a famous example. The routinization and stereotyping involved in the mass processing of accused criminal offenders by public and private counsel substitutes bureaucratic routine for market rationing. Scarce resources are rationed by development of a smoothly operating organization for categorizing, routing, and disposing of cases. The officials who govern the bureaucratic process may or may not know or use explicit criteria of value.[21] Similar organizational forces operate in other areas of practice—other systems for rationing resources. Particular cases are selected from the enormous array of possible cases by a routine social process rather than explicit criteria; thus, at one level "public interest lawyers" seem to be making informed policy decisions about what sorts of cases deserve their attention. At another level there is a complex infrastructure of "brokers" who are channelling cases to the lawyers (Marks *et al.*, 1972: 117-150). The brokers are voluntary associations, which in turn,

21. In effect, the first order rationing is accomplished by political agencies, which decide to grant more or less money to the organization of defense, thus establishing one of the most important of the bureaucratic constraints referred to in the text.

have a complex network of ties to the constituencies and communities they service.

Even ordinary private practice for fees is regulated by professional norms; it is not, presumably, "just a business," but an institutionally regulated profession, responsive to social needs—to the constraints of public interests summarized by Parsons (1954) in the concept of "collectivity-orientation." Accordingly, professional attorneys are expected to do some *pro bono* work for little or no fee, necessary work that does not pay for itself by economic criteria. As Lochner (1975) has shown, such no fee and low fee work as practitioners incorporate into their practice is not rationally selected by criteria of ethical or legal value, but reflects a network of social ties between clients, attorneys and the intermediaries who bring cases to the attention of the profession. As we would expect, the consequence of this system is that socially isolated or segregated groups do not gain access to attorneys.[22]

The embedding of the channelling of cases in a complex social structure has two important implications:

1. The array of cases represented in both *pro bono* and private practice is an organizationally selected subset of the rights and claims that might possibly be represented; and

2. The attorney's presumed "independence" is always subject to possible intrusions. Since the lawyer is involved in the various organizations that channel cases to him, there is a possible conflict of interest between representation of the individual client and the needs of the referring agency, the agency that employs the attorney, or other parties.[23] For example, when the ACLU refers a case, is the goal to get the client off or to make a legal point? Casper's (1969) study suggests considerable devotion to the latter endeavor. When a rationing process is located in an organization—be it a public defender's office, an OEO law

22. The institutional *regulation* of private practice for fees—modelled on and reflecting the ideal of the "free professional"—has other important consequences. Constraining access of attorneys to potential clients by restrictions on solicitation, advertising and other proactive devices reinforces the tendency of private practice for fees to reflect not only the economic values of various claims but also the established patterns of contact between attorneys and clients.

23. This potential conflict of interest is, of course, the principal foundation of the traditional argument that law must be practiced by attorneys on behalf of individual clients. "Third party intermediaries" of any kind must be excluded, including all forms of group practice, in order to protect the ethical standards of the profession. For a good treatment of this problem and a proposed modification of the traditional concept see Christensen, 1970:225-296. Marks *et al.* (1972:261-263) point out that private firms are especially sensitive to possible conflicts of interests between their *pro bono* clients and their bread and butter private clients.

office, a public interest firm or segment of a private firm, a community organization, or a political group—that organization will have an impact on the priorities of representation.

The expansion of rights. The problem of rationing is exacerbated by the relatively inexhaustible possibilities of the expansion of rights. It is in the very nature of legal practice to create rights. Through the process of specification, that is by affirming new rights through the manipulation of the symbols of normative order, the creative lawyer generates large classes of aggrieved parties.[24] Although the analogy may be imperfect, the physician does not invent diseases in quite the sense that the attorney produces legally aggrieved parties.[25] Moreover, such newly aggrieved parties are usually viewed as people who, morally, had a right to be aggrieved all along. It is precisely this process of creation that is particularly expansive: the long series of appellate battles, the costs of delay, and of fending off counter suits. To cite once again the case of the Black contract buyers, only organization on a substantial scale could permit the one thousand victims of inequitable home purchase contracts to face the costs and hazards of legal action (MacNamara, 1971). (It is interesting to note that no one appears to have thought of championing the white sellers who had sold too cheap.)

The analogy between medicine and law breaks down when insurance enters. Insurance is based on actuarial experience with a relatively fixed and forseeable set of problems (see Stolz, 1968a). The character of the claims to be protected must be established in advance. Insurance cannot finance the sort of high cost, high risk claims involved in the case of the contract buyers. (The Contract Buyers League was told by some thirty law firms that there was no legal avenue of redress.) Insurance cannot easily and quickly adapt to a rapidly changing body of legal rights and avenues of redress. I suspect the massive institutionalization of prepaid legal insurance would be a conservative influence, tending to limit our sense of the redressable grievance and deny the attorney's creative role.

24. The expansive potential of rights is sometimes referred to as the "elasticity of demand" for legal services (Christensen, 1970). This terminology is useful in order to fit the problem of distribution into an economic model. However, the economic term "elastic demand" does not adequately convey the volatile potential inherent in a system founded on the manipulation of symbols. Suppose an illegal subpoena is served on the president of a voluntary organization with 1,000,000 members, asking for the membership list. The demand for legal services may not increase much, but there have certainly been an enormous number of litigable rights created in a hurry.

25. On similarities and differences of medical and legal practice see Rueschmeyer, 1964.

Indeed, insurance studies use the phrase "moral hazard" (Auger and Goldberg, 1973). Moral hazard refers to the risk of changing the conduct of an insured party by reason of his insurance policy. It refers, in effect, to the risk that holding the policy might encourage using the policy, where the same action would not be undertaken in the absence of insurance. Such conduct no doubt plays havoc with actuarial tables, but I would have thought that encouraging the use of lawyers was one of the very purposes of legal insurance.[26]

Insurance and American pluralism. The development of legal insurance programs *through organizations* may permit a more flexible and differentiated use of such schemes. Recent developments in group legal services suggest that a variety of types of associations may form viable vehicles for programs of legal services. The growth of legal services in recent years has been phenomenal, especially in California. On July 1, 1971, 177 group legal service programs were registered with the California State Bar Association. By July 1, 1973, the number had increased to 493 including 244 labor unions, as well as various teachers' associations, public employee associations, credit unions, small business associations, and fraternal and veterans groups.[27]

We should reserve the right to remain skeptical as to the achievements of these programs until they have been carefully studied. Approximately ninety percent of the programs provide for only an initial consultation with an attorney and, should additional legal services be required, a discount on the "standard" fee. Moreover, in many instances the push to development has been from lawyers rather than from the groups themselves. A few lawyers, in search of channels of business, can account for a rather large increase in the total number of programs.

On the other hand, some of the programs contain components of genuine insurance. The program of the California Teachers' Association, for example, provides only for consultation on most matters, but pays full costs on legal matters related to employment. Such programs suggest the possibility of important specializations in schemes for legal service. It is impossible to provide insurance to promote every sort of conceivable litigation.

26. "Moral hazard" also comprehends the impact of insurance on the supplier of the service. Auger and Goldberg (1973) argue that in the case of medical insurance, the control of the conduct of the insured is not difficult. Hypochondria can be controlled. The problem is in controlling the providers, in this case the doctors. What is the equivalent of hypochondria in the legal sphere? Who shall judge whether the client's moral claims are imaginary? In this connection, do medical insurance plans ever include psychiatric care?

27. Information provided by the California State Bar Association.

But it is possible to provide deep protection in specialized areas of particular importance to the members of the association.

"Prepaid" programs in which the costs of a relatively wide range of representation are paid in advance also provide opportunities for specialization. Whereas the Shreveport plan (Roberts, 1971; Hallauer, 1973) produced a rather conservative pattern of use—(only about 16 percent usage in the first year, and these cases focused in the traditional arena of property), a more recent program in Columbus, Ohio has generated a specialized focus of interest. The members of a largely black laborers' union have accepted a substantial dues check-off (10 cents an hour) to finance a program permitting up to 80 hours of free legal services annually. Usage was very high, approximately 40 percent, with more than half focused on representation in relation to minor criminal offenses.[28] The plan is apparently conceived as being (in part) a source of protection from police harrassment. Programs of this sort would appear to point the way towards a possible tie between group legal service and the structure of American pluralsim, with various groups taking responsibility for providing for protection and legal development in arenas close to their own interests. This form of rationing might decentralize decisions about priorities away from a group of self appointed guardians of the public interest and into the hands of a variety of organizations and associations.

Practice in the public interest. In referring to "self-appointed guardians of the public interest" I did not mean to maintain that attorneys and interest groups should never step in to advocate unrepresented interests. The theory of institutionalization suggests that such proactive work is a condition of the development of representation. On the other hand, placing responsibility for the development of priorities in the hands of the public interest law firm, or the government, or the Ford Foundation, presents serious problems of legitimation. The professional model of representation, wherein the advocates work for the person who pays the bills, is very deeply institutionalized. Such a conception easily legitimizes the representation of property rights within the cash nexus. However, when we want to alter the priorities of the market, and establish representation at government expense, or at foundation expense, or at the expense of a well funded private group, the question arises whether they make the right decisions on behalf of their moneyless, indeed sometimes faceless, clientele.

28. Information provided by Mr. Phil Murphy, Staff Director, ABA Committee on Prepaid Legal Services.

It is difficult to legitimize the representative function outside of the cash nexus. The problem has diverse manifestations: Clients in public defenders' offices assume that they are not well represented because they are not paying anything for it (Casper, 1973; 23 ff);[29] who appointed the Sierra Club arbiter of an optimal environment? When is a class action an authentic pursuit of an important group interest and when is it a suit to generate funds for the lawyer who dreamed up the suit? (See *Eisen* v *Carlisle and Jacqueline*, 479 F. 2d 1005, 1973). Are public interest lawyers entitled to the traditional presumption that they are not involved in the case *per se* and hence have no autonomous responsibility for public outcomes? (See Hazard, 1970).

The difficulties are manifest in a recent glowing report of the Ford Foundation on the activities of public interest law firms (Ford Foundation, 1973). The authors do not seem to be able to decide what it is that public interest law firms represent. At times they seem to assume unabashedly that the public interest is everyone's interest, in some Rousseauian sense of the general will. At other times, the public interest consists in the otherwise unrepresented interests of constitutencies without access to the legal system. Another definition identifies the public interest as conformity to legislative will.[30] Finally, the authors confess, again without any apparent embarrassment, that "most public interest lawyers are reformers, pressing hard for change." (38).[31]

The problem is serious, especially because it is easy to fall into simple acceptance of the seductive proposition that it is always in the public interest, and in the interests of fair play, to provide representation where none was provided before. Such a proposition is manifestly incorrect, for, insofar as there are conflicts of interest in society, better representation of one interest implies alteration in the *relative* strength of other claims. Nor

29. Cf. Brakel, 1973 on clients' perception of free legal services and a Judicare program.

30. The advantage of this definition is that it suggests the possibility that public interest lawyers can claim that they are private attorneys general and qualify for court-awarded legal costs. See *LaRaza Unida v. Volpe*, 57 F.R.D. 94 (1972). However, a recent Supreme Court case would seem to undermine such hopes—see *Alyeska Pipeline v. Wilderness Society*, 43 LW 4561 (1975).

31. Cf. the statement of one such advocate that his goal is "to use legal skills to strengthen radical groups within the community to help the political consciousness and power of emerging political groups." (Douglas, 1971:89). When this advocate goes on to say that his *pro bono* agency "believes that there are other considerations than getting the client off or doing well in the courtroom. The value to the community and the individual client derived from political mobilization around a particular issue may be far greater than establishing one person's innocence" (90), we are forced to wonder, as suggested above, who is the client?

is it plausible to suppose that new forms of representation merely serve to equalize. Bosselman (1971), in an article provocatively titled "Ecology v Equality: The Sierra Club Meets the NAACP," notes that the interests of environmental groups are not necessarily the same as the interests of lower status groups, and the outcome of a given planning controversy may depend on which side gets there first with their "public interest" lawyers.[32] (Ironically, the authors of the aforementioned Ford Foundation report saw the landmark case of *La Raza Unida and the Sierra Club* v *Volpe*, N.D. Calif. No. 1166-71, as involving a "surprising" coalition) (Ford Foundation, 1973:27).

Free legal services. The distribution of free legal services raises similar problems. A simple rhetorical example illustrates the point: is it fair to provide low income tenants with free legal services to fight a landlord who is but a small step above them on the economic ladder, and who must pay full freight for his legal services? Landlords are not a homogeneous class. Many working class persons gradually and (barely) acquire modest real estate holdings (Yale Law Journal, 1973:1495-1511).

Let us consider the equities of free legal services in connection with some data from the Detroit study. As stated earlier, 19 percent reported that they had wanted to go to a lawyer but, for some reason, had not. The distribution of respondents on this variable by income is shown in Table 3. Note that the percent who wanted but did not receive legal counsel rises sharply at $7,000 per year ($5,000 for white male respondents), and is

TABLE 3 PERCENTAGE OF ALL RESIDENTS WHO WANTED TO BUT DID NOT SEE A LAWYER BY FAMILY INCOME: WEIGHTED SAMPLE OF DETROIT SMSA, 1967

	Percentage Wanted to But Did Not See Lawyer*	
Income	All Respondents	White Males Only
0 to $2,999	14**	12
$3,000 to $4,999	14	10
$5,000 to $6,999	15	32
$7,000 to $9,999	26	26
$10,000 to $14,999	21	21
$15,000 to $24,999	20	14
Over $25,000	12	18
All Income Groups	19	20

* N = 34
** Figures are all percentages.

32. Cf. the Illinois abortion case described by Marks *et al.* (1972:268: 269), in which one group of public interest lawyers appeared on be-

higher for middle income groups than low income groups. Table 4 shows the distribution by income for the reason given for not seeking legal advice. Note that the proportion of those wanting to see a lawyer but not doing so because of a sense of inadequate funds is highest at the poverty level, drops at low to moderate income levels, and falls to 0 at $15,000. As income rises, respondents begin to attribute their failure to see a lawyer to other things: "The need just wasn't pressing enough" or "it wasn't worth the cost." Apparently, as income rises, the respondent is

TABLE 4 PERCENTAGE OF RESPONDENTS WHO ATTRIBUTE LACK OF LEGAL COUNSEL TO LACK OF FUNDS BY INCOME: WEIGHTED SAMPLE OF DETROIT SMSA, 1967

		Percentage Attributing Failure to Receive Counsel to Lack of Funds*	
Income	Percentage of All Residents	Percentage of Those Reporting Wanting to See Lawyer	N
0 to $2,999	8**	56	10
$3,000 to $4,999	5	36	5
$5,000 to $6,999	5	35	6
$7,000 to $9,999	7	26	16
$10,000 to $14,999	6	30	18
Over $15,000	0	0	0
All Income Groups	5	29	55

* N = 136
** Figures are all percentages

forced to make the calculation as to whether legal services will bear the cost. It is difficult to construct a justification for the organization of legal services around the principle of distribution by pure economic calculation in some strata and free distribution in others.

Problems in the distribution of legal services should not be exempt from the fundamental question, Is it worth it? As Hazard has tersely remarked, "Due process, a procedural aspect of adjudication and preadjudication, costs money that could plausibly be spent otherwise" (Hazard, 1965:4). And so it is with all legal services. As matters now stand, "Is it worth it?" tends to be asked only in private forums. Perhaps more public discussion is in order. Sometimes the answer might be No. What we must

half of women's rights and another on behalf of the rights of unborn children.

avoid is a society in which the answer is usually No, simply by default.[33]

CONCLUSION

The cases that come to the attention of the legal profession constitute a small portion of the problems and conceivable claims that might merit legal advice and protection. The particular distribution of cases coming to the legal profession reflects the institutional organization of the legal system, not merely the inability of those who think they want lawyers to pay for them.

Reactive organization for the distribution of legal services selects claims on a conservative basis, even in agencies designed to protect new claims and new segments of the community. On the other hand, *proactive* organizations for the distribution of legal services shifts the rationing of services away from established routines and interests but puts forward, as a substitute principle of rationing, the values, aims, and organizational networks of political activists. Political activists find it easy to slip in to biased and simplistic conceptions of unrepresented interests, limited by their particular goals—only the poor, or minorities, or the environment are seen as underrepresented.

Hence, it is the responsibility of both scholars and the legal profession to take a broad and imaginative approach to the problem of legal services—to be aware of the wide (and sometimes conflicting) range of interests involved in concrete disputes and, more generally, in the institutions of our society. It is necessary to be sensitive to the diversity of the potential interests that might be represented and the diversity of forms such representation might take. The idea that only a special segment of the public remains unprotected—a segment disadvantaged by "an ethos born of poverty, isolation, and past non-use of the legal system" (Marks, 1971:10) is both naive sociology and unambitious jurisprudence.

CASES

Alyeska Pipeline Svc. Co. v. Wilderness Soc'y, — U.S. —, 43 LW 4561 (1975).
Argersinger v. Hamlin, 407 U.S. 25 (1972).
Baker v. F and F Investment Co., 420 F.2d 1191 (7th Cir. 1970).

33. In this context "default" includes failure to find a political champion within the community of public interest lawyers. Note Marks *et al.* (1972:23) insightful analogy: "We cannot say that the goals or priorities of the rejected groups have less pertinence simply because they lack lawyer approval: the situation may be analogous to the unpopular client who can pay."

Douglas v. California, 372 U.S. 353 (1963).

Eisen v. Carlisle and Jacquelin, 479 F.2d 1005 (2d Cir. 1973).

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