CIVIC JUSTICE THROUGH CIVIL JUSTICE:
A NEW APPROACH TO
PUBLIC INTEREST ADVOCACY
IN THE UNITED STATES *

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Why should anyone care about “access to justice?” The term is
certainly grand. But what does it mean? Beyond the level of rhetoric,
the topic seems to be about such recondite matters as the law of
standing, methods to pay for legal services, or the organization of the
courts. Are these things that matter to anyone except lawyers? And
what does access have to do with justice?

Two views on this question might be contrasted. The skeptic will
argue that this is just technical stuff, tinkering with the routine
machinery of social life: the title, then, is piffery. The opposite view
takes the claim at face value, asserting that these technical matters
affect justice in basic ways.

We believe both these views to be substantially correct. On the
one hand, many of the technical developments are truly marginal:
they have to do with “justice” only in the most impoverished sense
of the word. On the other hand, behind the aspiration for improved
access lie basic issues of power and equality in society. These issues
tie “access” to the strong sense of justice.

These views may seem paradoxical, but they are not. We believe
that behind all the technical details of standing, attorneys fees, legal
services systems, etc. lies an aspiration for what we shall call civic

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justice. Civic justice means a full opportunity for all citizens to participate in the life of the commonwealth. The simple idea that all citizens must have full and equal opportunities to participate in the public realm is the basis of democratic theory and republican practice. Yet we know that this ideal is hard to realize in the conditions of complex, industrial societies. The reforms in legal machinery which we are concerned with reflect efforts to realize this ideal. The key to the paradox, therefore, is to unravel the relationship between the civil justice of improved "access," and the civic justice of enhanced participation.

We shall examine some institutional innovations in the United States which fall within the area of "improved access to justice." These institutions have sought to provide more effective representation for what we call "interests without groups." In our society, as in many others, the legal and governmental system has given recognition to a series of interests, such as those in environmental protection and fair treatment in the marketplace. The recognition of environmental, consumer and similar rights seems similar to earlier movements in which the state guaranteed rights of producers, labor and other organized interests. But there is a crucial difference: in the case of the newer rights, while there are discernible interests, there is no organized interest group. No one represents consumers the way trade associations represent producers and unions defend the interest of labor.

When the state seeks to protect interests without groups, it confronts problems very different from those encountered when it seeks to protect the more traditional interests of organized sectors of society. Effective protection of any interest means much more than giving formal guarantees of rights. These rights must be translated into tangible benefits, and this can only occur in the day-to-day operation of government and private entities regulated by government.

2 For a discussion of the situations in which the state may seek to protect "interests without groups," see D. Trubek, L. Trubek & J. Becker, Legal Services and the Administrative State: From Public Interest Law to Public Advocacy, in INNOVATIONS IN THE LEGAL SERVICES (Meisenheim, Verlag Anton Hain, 1980).

In the more traditional areas, this process of translating formal guarantees into effective protection involves a complex interaction between the state and social institutions. In such areas, organized representatives of protected interests play a crucial role in assuring that rights become realities. By constant monitoring of state decisions, advocacy for favorable outcomes, and bargaining with government and other affected private groups, the interest group fosters the transformation of rights into realities. If, however, such groups do not exist, government may be hampered in its efforts to protect the interest: where social organization is weak, government alone may be incapable of effective action. From this situation comes the demand for new institutions to remedy the imbalance. Public interest law firms and similar advocacy organizations have tried to represent such "interests without groups," as substitutes for the private organizations that represent more easily organizable interests.

Our purpose is to examine public interest law and similar movements from this point of view. Our thesis is simple. In complex societies, interests can only be protected by continued and effective participation in the ongoing stream of governmental decisions. Public interest law and its analogues are reforms in civil justice that seek to ensure such participation for interests that are not represented by organized private groups: public interest law, therefore, reflects an aspiration for civic justice.

It is our view that public interest law firms — or analogous institutions — are often necessary if the goal of effective participation is to be realized. But we believe that such reforms are rarely, if ever, sufficient to achieve this goal. The public interest law movement helped put the issue of participation on the agenda of American politics. Public interest law firms are contributing to the defense of interests without groups. But the current efforts are insufficient to achieve effective participation. If the ideal of civic justice is to be realized, public interest law must be supplemented and reformed. The search for more complete and effective approaches to participation is the task for the 1980's.
I. The Classic Public Interest Law Approach to Representing Interests Without Groups

The 1960's was a period of social ferment in the United States, in which challenges to many institutions were raised and reforms proposed and tried. Public interest law was one such reform. Numerous public interest law firms and similar advocacy institutions were established. They worked on behalf of the environment, consumers, women, minorities, juveniles, and similar interests. 5

A. The Ideology of Public Interest Law

Public interest law covers many substantive areas. The firms come in many shapes and sizes, and the lawyers pursue diverse strategies. Yet common to most public interest law efforts was a set of ideas and assumptions that we shall call the "classic" public interest law approach to the participation of unorganized interests.

This approach was based on a critique of the American political system. The critique took as a given that it was essential to provide greater protection to the rights of citizens in their roles as consumers, and users of the environment, and to categories like children, women, etc. It concluded that the operation of the American system of "plurality" bargaining hampered, rather than helped, the effort to protect these interests. Pluralism was supposed to ensure democracy, but it did not. While pluralist politics worked well for organized groups, who could bargain with each other and with government for rights and privileges, it worked against such unorganized interests, which were excluded from a decision-making process open only to people who could speak for organized constituencies.

The solution to the problem of diminished pluralism was to reform the system. Since the unorganized were excluded, they had to be given equal access. 6 Access, in turn, was defined as legal representa-
1. The Public Interest Law Firm

The public interest law firm concept had existed prior to the 1960's. But the late 1960's and early 1970's witnessed a dramatic increase in the number of firms, and the areas of public interest law activity. By 1975 there were over 90 public interest law firms collectively employing over 600 attorneys. Most of these tended to be small offices with a staff of 3-6 attorneys, but fully devoted to public interest cases. Some focused on single issues, e.g., the Sierra Club Legal Defense Fund (environment), while others chose a broader range of activities. Firms like California's Public Advocates, and the Washington, D.C. Center for Law in the Public Interest worked in such diverse fields as consumer protection, mental health, employment discrimination, etc. 10

Funding for these organizations came predominately from three sources: foundations and private contributions, government grants and contracts, and attorney fee awards. However, the foundations and private contributions constituted the principal source of support for the movement. During the years 1972-1975 they provided for 74 percent of public interest law funding, while 22 percent came from government and 1 percent from fee awards. 11 Large national foundations, principally the Ford Foundation, were the major source of funding.

2. Public Interest Law Efforts by Private Law Firms

The private law firms which do public interest work can be roughly divided into two categories: those which are primarily private firms and do public interest work on a pro bono basis, and those which are primarily interested in public interest law and do private work as is necessary to “get by.”

The pro bono services of private firms range across a wide spectrum from solo practitioners to pro bono departments in large law firms. These efforts, however, are limited, and only a small portion of pro bono work can be described as sustained representation of unorganized interests. 12

10 COUNCIL FOR PUBLIC INTEREST LAW, supra note 5, at 100-32.
11 Id. at 226-31.
12 J. Handler, E. Hollingsworth & H. Erlanger, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (New York, Academic Press, 1978). This study estimates that an average of

The “private” public interest law firms are firms which concentrate on public interest law, but because they are self-supporting also do traditional private law work. These firms do a mixture of work — some fully subsidized or pro bono public interest work, some partially subsidized public interest work where reduced fees are offered, and some private-income-generating work. Any funding requirements not filled by the income-generating work are filled either by personal subsidies in the form of reduced salaries, or court-awarded attorney’s fees. Many firms also maintain viability by reliance on a key client such as a teachers union or the ACLU.

In 1975 there were some 44 such firms employing over 160 attorneys which spent more than half their time on public interest law issues. Nearly all of these firms were founded since 1969, and tended to be small. 13

3. Governmental Advocates

The final major development in public interest law has been the establishment of governmental advocates. These have taken different shapes in different jurisdictions. The most comprehensive program is the New Jersey Public Advocate, which represents a variety of interests including the environment, the elderly, mental patients, and consumers of utility services. Other states have government advocates for more specific functions. Wisconsin’s Office of the Public Intervenor, for example, represents only environmental interests. Similarly, on the federal level, there are some specific programs such as the Public Counsel of the Interstate Commerce Commission, who speaks for consumers of transportation services. Funding for governmental advocates comes from public revenues. 14

13 COUNCIL FOR PUBLIC INTEREST LAW, supra note 5, at 133-40.
14 Trubek, supra note 6; Senate Committee on Governmental Affairs, 97th Cong., 1st Sess., Study on Federal Regulation: Public Participation in Regulatory Agency Proceedings 17-22 (Comm. Print, 1977).

only 6.4% of billable hours was spent by members of the American Bar on pro bono work. Moreover, only 13% or less of that time can be described as devoted to advocacy for minorities and unorganized interests. Id. at 92 et seq.
C. The Current Status

These three institutional forms of the classical approach had emerged and taken shape by the mid-1970’s. Through numerous lawsuits and other advocacy efforts they had won significant victories for the groups or interests they sought to represent. But these victories did not spur further institutional growth. By 1975 it was apparent that the movement could not progress unless new sources of support for public interest law activity were developed. In that year the Council for Public Interest Law issued a report entitled Balancing the Scales of Justice: Financing Public Interest Law in America. The report described the history of the movement, set forth its successes, outlined the need for expanded and more permanent sources of financial support, and recommended a strategy for further growth.

This strategy reflected the Council’s adherence to the classic approach. Public interest law was seen as legal representation. Representation was to be provided by subsidized lawyers; these lawyers would work principally in non-profit, autonomous public interest law firms, but also in government advocacy units organized along similar lines, and in mixed commercial-public interest firms. The work of these lawyers would be subsidized. It was assumed that these attorneys could not secure significant support from individuals or groups concerned with defending the interests they sought to represent, since no individual had a large enough stake in any action to justify paying for an attorney, and no group could be formed to represent the interest. As a result, subsidies were essential. This support would come primarily from four sources:

1. continued support by organized private foundations,
2. increased support from the Bar,
3) expanded use of attorneys’ fees to compensate counsel who brought successful public interest suits, and
4) Government.  

This strategy for increasing financial support has not been fully successful. None of the four sources identified in the report have produced the amount of support that was hoped for, and only government appears to offer any hope for continued large-scale financing. The movement has not developed a solid financial base. A few firms maintain adequate levels of support. Most, however, must struggle to survive. Few new firms have been started in recent years.

The slowdown in the growth of public interest law can be attributed to several factors. Success has generated opposition from various sectors adversely affected, but principally from business. Young lawyers are not as willing as they once were to accept below-market remuneration. But the major factor has been the lack of adequate financial support. Let us look at the reactions of the several financing sources.

1. Foundations

Originally, the most important source of funding for the public interest law movement was the large national foundation. The Ford Foundation, especially, made a major commitment in this area. In recent years, however, these foundations have begun to cut back. Few new firms have received foundation support in the last few years. And Ford and other major foundations have announced their intention of phasing out direct support for public interest law.

2. Bar Support

Support from the organized Bar has been tepid. The American Bar Association (ABA) has continued to endorse public interest law

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[10] See COUNCIL FOR PUBLIC INTEREST LAW, supra note 5.
[12] COUNCIL FOR PUBLIC INTEREST LAW, supra note 5, at 6-10, and Chapter IV especially at 306-08. This rationale can also be seen in statements by one large source of the subsidy, the Ford Foundation. They note in their 1974 Annual Report (at 10): “Public interest law firms, eleven of which have been assisted by the Foundation, represent individuals and groups who, though neither indigent or handicapped in the usual sense, have substantial collective and class interests that would otherwise go unrepresented.”
[19] COUNCIL FOR PUBLIC INTEREST LAW, supra note 5, at 341-61.
[22] This observation was noted by the Council for Public Interest Law, supra note 5, at 219-21, and was confirmed in telephone interviews with the Ford, Carnegie and Rockefeller Foundations on June 20, 1979. The comment from the Spokesman at Ford is typical: “Our public interest law programs are continuing, but at reduced levels. We hope to phase many of them out as they become self-sustaining.”
verbally but has given little concrete support. Indeed, when given an opportunity directly to support the movement, the ABA refused. In 1977 the Carnegie Foundation granted $250,000 to the Council on Public Interest Law on condition that ABA members contribute twice that amount to the same fund through a dues check-off system. The challenge was never met. The ABA failed to establish the required check-off system: as a result, the Carnegie grant was cancelled. 23

A few local Bars have provided modest support to public interest law. For example, the Washington, D.C. Bar has a $10.00 dues check-off for public interest law; this yielded $105,000 in 1978. A similar system has been established by a few other local Bars, notably Los Angeles County which raised $60,000 in 1978 by a $5.00 check-off. However, when we realize that it costs $25,000-40,000 per year to support one public interest lawyer and related services, and that the D.C. and Los Angeles experiences are the exception, rather than the rule, we can see that the organized Bar as a whole has failed to give meaningful support to public interest law.

3. Attorneys’ Fees

The Council believed that court-awarded attorneys’ fees could become a major source of funding for public interest firms. These awards, it was reasoned, would compensate lawyers who brought successful court actions to protect the rights of unrepresented groups. 24 Although attorneys’ fees are available in some areas of public interest practice, they are the exception, not the rule. 25 The Council’s hopes to revive and expand attorneys’ fees after the Alyeska Pipeline decision never materialized. In that case, the United States Supreme Court held that attorneys’ fees would only be available if explicitly provided by statute or under very narrow traditional equity concepts. 26

Although there were some minor inroads made on the severe restrictions imposed by Alyeska, the decision remains basically unshaken. While Congress passed the Civil Rights Attorneys’ Fees Awards Act of 1976 to allow some relief from Alyeska for civil rights cases, the Act does not eliminate all the problems involved in using attorneys’ fees to support public interest practice. 27 Moreover, it does not affect at all many areas of public interest practice, such as consumer and environmental law. The boldest challenge to Alyeska has come in California. In Serrano v. Priest, 20 Cal. 3d 25 (1977), the State Supreme Court held that Alyeska was not controlling in California state courts, and that “private attorneys general” could collect fees from the state if they prevailed in important cases affecting many citizens. The legislature codified this private attorney general concept in § 1021.5 of the California Code of Civil Procedure. The future of the California reforms, however, is uncertain. Despite the Serrano decision, the legislature has refused to appropriate money to pay fee awards to the public interest lawyers who won this case. 28

Attorney’s fees are limited to specific types of cases, and thus are unavailable in many “public interest” areas. Moreover, even when available, fee awards are rarely a satisfactory technique for financing public interest practice, since the amount of the award granted, if any, is uncertain. Courts have substantial discretion in determining

23 The 1978 Annual Report from Carnegie indicates that the grant was paid, but later cancelled. A telephone interview on June 26, 1979, with Paul Rodriguez of the ABA Chicago Office confirmed the fact that the program was never approved.
24 Council for Public Interest Law, supra note 5, at 348.
25 Although there are some 90 federal statutory provisions for fee awards, they cover only isolated cases. See Subcommittees on Constitutional Rights of the Senate Committee on the Judiciary, Civil Rights Attorneys’ Fees Awards Act of 1976, Source Book: Legislative History, Texts and Other Documents, at Appendix A (Washington, D.C., 1976). For example, major legislation, such as the National Environmental Policy Act is not covered at all, while other acts such as the Clean Air Act are covered only in part. See Comment, Citizen’s Association of Georgetown v. Washington: Awarding Attorneys’ Fees in Citizen Suits to Enforce the Clean Air Act, 125 University of Pennsylvania Law Review 1402 (1977); Sands, Attorneys’ Fees as Recoverable Costs, 63 American Bar Association Journal 510 (1977).
27 Pub. L. No. 94-599 (1976). Beyond its inherent substantive limit to civil rights, this Act like most fee awards acts does not allow recovery of fees from the federal government. See, for example, Huffman, Circuit Rules Cut Government Fee Payments Under 1976 Act, 17 Legal Times of Washington 3 (October 1, 1979); Lipson, Beyond Alyeska – Judicial Response to the Civil Rights Attorneys’ Fees Awards Act, 22 St. Louis University Law Journal 243 (1978). General efforts to repeal the governmental exception to fee awards have not received much support. In the 95th Congress, bills H 2035, H 4903, H 10,105 never even received committee attention. See CCH CONGRESSIONAL INDEX, 1977-1978 Current Status of House Bills, where none of the three bills were listed among those given attention.
28 Telephone interview with Lois Salabury of Public Advocates, Inc., San Francisco, California, June 20, 1979. Also note the restrictive decisions of the California Supreme Court in County of Inyo v. City of Los Angeles, 144 Cal. Rptr. 71 (1978).
whether to award fees, and in setting the amount of fees awarded. 29
To successful plaintiffs, fee awards may be too little or too late. To
unsuccessful plaintiffs, they are rarely available at all. Firms relying
on these fees must take substantial risks and wait a long time to
determine if their gamble pays off. To do this, they must have other
sources of funding. While a few firms in specialized areas may be
able to rely principally on such fees, in most areas attorneys’ fees are,
at best, a useful supplement to other sources of support for public
interest practice. If these are unavailable, the firms are in serious
trouble.

4. Governmental Support

The Council for Public Interest Law also recommended various
types of governmental support for public interest work. 30 It urged
increased funding for the Legal Services Corporation, especially its
efforts at collective advocacy for the poor. It encouraged more provi-
sion of legal services in categorical programs designed to help groups
such as the elderly, prisoners, juveniles, and the mentally impaired.
It urged the creation of what we have called “public advocates,” i.e.,
governmental agencies charged with representing unrepresented
interests. And the Council suggested federal funding to reimburse citizen
groups which participate in administrative agency proceedings.

There are some promising efforts to provide public funding. The
least successful has been the effort to expand the idea of public ad-
vocacy. Two state-level experiments in this area which had emerged
in the late 1960’s and early 1970’s were the Wisconsin Office of the
Public Intervenor and the New Jersey Department of Public Advo-
cacy. 31 The Public Advocate is a cabinet officer with a large legal
staff that provides both group and individual representation. This
Department has brought numerous cases on behalf of many different
unorganized interests. The Wisconsin Office has a narrower mandate

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29 Compare, for example, Scheff v. Beck, 452 F. Supp. 1254 (D. Colo. 1978), where the
award was based on $35.00/hour, and Craig v. Beto, 453 F. Supp. 905 (S. D. Texas 1978),
where the award was based on $60.00/hour. Courts have also reduced recovery to the extent
the parties prevailed, e.g., Jones v. Diamond, 394 F. 2d 979 (5th Cir. 1979), and if the courts
feel the time spent was excessive, e.g., Cole v. Tuttle, 462 F. Supp. 1016 (N. D. Miss. 1978),
where the court awarded fees for only 116 of 228 hours.

30 Council for Public Interest Law, supra note 5, at 345-47.
31 For details see Trubek, supra note 6; D. Trubek, L. Trubek & J. Becker, supra note 2,
at 30-32.

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the Public Intervenor is an Assistant Attorney General who pro-
vides comprehensive collective advocacy for environmental in-
terests. While these experiments have proven quite successful, ef-
forts to expand these offices or to introduce the concept in other
states have generally failed. An effort to create an independent
government advocate for the consumer interest at the federal level
was decisively defeated in 1978, after heavy lobbying by business
interests. 34

In other areas, there has been increased government funding.
The Legal Services Corporation budget has grown substantially.
Government agencies concerned with specific groups, such as the
elderly and the developmentally disabled, have recognized the need for
legal services to complement other aspects of their programming.
For example, under the Developmentally Disabled Assistance and
Bill of Rights Act, all states administering assistance to the develop-
mentally disabled (DD) must establish “Protection and Advocacy”
(P&A) systems to provide legal aid to protect the rights of develop-
mentally disabled persons. 35 Further, some regulatory and other
administrative agencies have provided funds to facilitate appearances
by representatives of affected, but unrepresented groups in agency
rule-making hearings. 36 This system of citizen intervention financing

32 For further study on the Public Intervenor in Wisconsin see P. Dubois & A. Christ-
enson, Public Advocacy and Environmental Decisionmaking: The Wisconsin Pub-
lic Intervenor (Madison, Wisconsin, Center for Public Information, Inc. 1977).
33 Telephone interview with Margaret Riley of the New Jersey Office of the Public Advo-
cate, June 20, 1979.
34 D. Trubek, L. Trubek, & J. Becker, supra note 2, at 28-29; Green, supra note 19.
35 Pub. L. No. 94-103, § 113 (2) (A) (1975). For a general description see H. Ehringer,
36 The most extensive program is that established to finance citizen participation in
This program and a similar program for the Environmental Protection Agency’s enforce-
ment of the Toxic Substances Control Act are the only two Congressionally authorized
programs. However, several federal agencies have found implicit authority to compensate
intervenors and have done so. These agencies include the Food and Drug Administration,
the Civil Aeronautics Board, the Federal Energy Administration, the Consumer Products
Safety Commission, the National Highway Traffic Safety Administration, the Federal Energy
Regulatory Commission, the Nuclear Regulatory Commission, and the National Oceanic and
Atmospheric Administration. The status of these programs is not clear since there is some
dispute over the authority agencies have to compensate intervenors without Congressional
authorization. For an explanation of this situation see Administrative Law — Fee Reim-
bursement for Public Interest Intervenors, 66 Georgetown Law Journal 931 (1978). This
potential limitation on agencies is especially serious given the lack of willingness on the
part of Congress to pass general citizen intervention financing, such as S. 270 in the 95th
Congress.
has provided support for some public interest law firms and similar groups. 37

These developments suggest that the public interest law movement is now in a transitional phase. The original models of public interest representation were developed with heavy foundation support. The effort to continue this pattern, and add Bar funding and attorney's fees to the support base, have been relatively disappointing. Government, however, has been more responsive to the needs identified by the movement. In this new era, it is necessary to rethink both the institutional forms through which representation is provided for interests without groups, and the advocacy strategies employed for this purpose.

The prospects for extensive government support of public interest law are uncertain. The largest program at the federal level—citizen intervention financing at the Federal Trade Commission—has drawn strong criticism, and its future is unclear. Moreover, it is highly unlikely that government will support the classic public interest law firm approach. Rather, if substantial government funding is forthcoming, it is likely to be in a form that will require substantial changes in public interest law's approach to advocacy for interests without groups. These changes will affect institutional forms and advocacy strategies. In the remainder of this paper we shall address the new challenges facing the movement for citizen advocacy in general, and public interest law in particular.

II. LIMITS OF THE CLASSIC APPROACH

The public interest law firm and its public sector analogues constituted what Cappelletti and Garth have called the "second wave" of the access to justice movement in the United States. 38 If this was a

wave, it has now partially receded. Much has been accomplished. The issue of representation for interests without groups has been put on the agenda. Some new institutions have been created, and have provided effective advocacy. Some of these institutions, both in the public and private sectors, will remain as permanent aspects of the American legal and governmental scene. But the original momentum has been lost. Some of the funding sources that contributed to the rise of public interest law have evaporated. Government has taken an interest in this type of activity, but has yet to make a firm and comprehensive commitment to supporting efforts to increase participation of the unrepresented and unorganized.

The present moment presents an opportunity for those who have championed public interest law. But it is an opportunity that demands hard thinking and careful evaluation of what has been done. It is our view that we must develop new ideas based on a more comprehensive analysis of the problem of protecting interests without groups. Such rethinking is necessary if the movement is to secure the kind of government support that is essential. Public interest law was a reform in civil justice developed by lawyers who were primarily concerned with civic justice. Unfortunately, the movement has failed to secure deep and widespread support from the organized legal profession, which might have been expected to accept the need for improved access to civil justice. Thus we must try to rethink public interest law directly as an experiment in civic justice. We must ensure that projects and programs provide the most effective possible participation of representatives of interests without groups, and that the reforms can be explained to those who do care about participation and equality, but who are not basically interested in civil justice per se.

Public interest law saw that diminished pluralism denied civic justice. To deal with this, the movement emphasized two responses. First, legalism—the effort to use the courts to create and enforce rights benefiting unrepresented groups. Since legislatures had enacted numerous statutes that provided some formal rights for consumers, environmentalists, minorities and similar groups, and courts seemed willing to develop and even add to these rights, litigation provided an opportunity to translate formal entitlements into concrete gains. 39 Secondly, public interest lawyers sought direct access

37 Senate Committee on Governmental Affairs, supra note 14, at 98-113. This report indicates that in the first several years many citizens and groups were benefited, including public interest law firms such as the Center for Public Representation, the Center for Auto Safety, the New York Public Interest Research Group, San Francisco Consumer Action, and many others. A recent accounting of the first four years of the FTC program shows that over $2 million has been given over to individuals and groups. See Public Participation Under Attack, 11 National Journal Reports 1678 (October 1979). However, this article goes on to note that the system of citizen intervention financing at the FTC has come under attack from business groups. This development combined with the limits on expanding such programs elsewhere (see note 35 supra) makes the future of citizen intervention financing uncertain.

38 See generally Cappelletti & Garth, supra note 6.

39 See generally J. Handler, supra note 5.
to policymaking arenas, hoping by their presence in agency
rulemaking procedures and other settings to offset the effect of
spokesmen for industry and other organized groups. 40

These efforts yielded notable gains. Courts have issued numerous
orders favoring the public interest lawyer's clients. And the presence
of new voices in policy arenas has had an effect on agency decisions.
But there were disappointments as well. Often court orders proved
difficult to enforce, as they required continuing monitoring of
numerous field-level decisions. 41 And often the courts, in the end,
shied away from direct confrontation with agency decisions.
Moreover, public interest lawyers found themselves at a distinct dis-
advantage in discretionary decision-making processes. 42 While they
were often able to make persuasive arguments for their clients, they
lacked the ability to stay with issues which require years to resolve,
and which ultimately involve action in a series of arenas, ranging
from the courts to the legislatures. However valid the idea of adva-
cacy equalization may be, the scope of activities it entails proved to
be far beyond the capabilities of most public interest firms. 43

The recognition that legalism will yield limited gains, and that
advocacy equalization requires resources far beyond those currently
available to the public interest law movement, brings into focus
the inherent limitations of the classic public interest law firm. As
an institutional response to the problem of representing interests
without groups, the public interest firm depends on the viability
of legalism and resource equalization. These private institutions,
staffed and controlled by lawyers and working outside of govern-
ment, are best at providing skilled legal argumentation at key
points in the governmental process. While such argumentation may
be necessary, it is rarely sufficient to secure significant, permanent
gains for unorganized groups. Yet the public interest law firm
structure or the analogous government public advocate does not
readily lend itself to the other types of activities needed for suc-
cessful advocacy.

The public interest law movement has taught us a great deal
about how government works and does not work. But it has not
provided a complete solution to the institutional problems of ef-
fective participation in America. That challenge remains.

III. TOWARD A MORE COMPREHENSIVE STRATEGY FOR PARTICIPA-
TION

The challenge is immense. A full treatment would require us to
deal with many aspects of social life and government, and their in-
teractions. Our intentions here are much more modest. We describe
some promising current trends in participation, related to, but going
beyond the classic model of public interest law. In these trends we
discern the elements of a new strategy for representation of interests
without groups in American government. We seek to call attention
to these possibilities.

A. New Trends In Consumer Participation

Our examples are drawn from the "consumer" area, but we use
this term in a broad sense to include interest in fair treatment in the
marketplace and fair treatment in the distribution of govern-
ment-funded goods and services. The consumer area constitutes a classic
element of an interest without a group. While there are consumer
organizations in the United States, they are generally weak and un-
derfunded. The degree of private organization falls far short of the
importance of the interest. Consumers are not brought together by
any social or occupational ties. Each has a small interest in consumer
protection in the marketplace, but no one consumer can afford to support costly advocacy services. In addition, consumers of government services such as health care or other social services tend to be dependent on the bureaucracies they hope to challenge – and dependency discourages organization or confrontation. Thus, this area is a paradigm of the general problem of participation of unorganized interests in government decision-making.

There have been public interest law activities in both these "consumer" fields. Ralph Nader is the leading example of the public interest advocate for marketplace regulations. Specialized institutions, such as the DD Protection and Advocacy System, have been created to provide legal representation to "consumers" of social welfare programs. In addition to these legal services efforts, however, there are five major developments which are changing the environment in which advocacy for interests without groups occurs. In these trends, and in strategies to expand the linkages between various institutional innovations, we see the promise of greater civic justice.

The major trends we see in the "consumer" area are: increasing citizen activism, the growth of mixed citizen-government planning boards in the human services area, appointment of consumer representatives in government regulatory bodies, government concern for strengthening citizen advocacy groups, and the emerging direct relations between consumer advocates and business.

1. Citizen Activism

Perhaps the most dramatic example of citizen activism in the United States is the taxpayers revolt, which has used the classic progressive institutions of initiative and referendum to secure a direct voice in the expenditure of government funds. In addition to mass movements like this, we discern a growing willingness by individuals to complain to government and business when they are dissatisfied with products and policies. These efforts are evidence of popular dissatisfaction with existing structures of government, and proof of popular capacity for participation.

The new wave of citizen activism presents a challenge to government, and the response of public officials is mixed and confused. Increased citizen militancy is a threat and an opportunity. Public officials see this new activism as a threat to their ability to plan and control public decisions, and seek to curb or deflect the militant efforts. At the same time, they recognize that the dissatisfaction which it reflects and the energy it manifests can be exploited to secure support for policies and for electoral careers. Indeed, many of the promising recent developments in civic participation stem from the confused efforts of public officials simultaneously to curb, channel, co-opt and join this wave of citizen militancy.

2. Citizen-Government Planning in Human Services Delivery Systems

Another promising development is the human services council. In many areas where government is involved in providing and financing social welfare activity, planning and advocacy councils have been set up to bring affected consumers together with government and firms that provide services. These councils have responsibilities for planning and monitoring social welfare policy in a specific area. They also advocate for improved and expanded programs. By bringing consumers into the planning and monitoring process, the council improves the communication between the relatively unorganized consumer groups and government, and gives consumers a better idea of how government works. This system has been relatively effective in the operation of programs for the developmentally disabled and the handicapped.

3. Interest Representation on Regulatory Boards

In recent years, there has been increased interest in using consumer representatives on decisional boards, particularly in the occu-

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44 This is an example of the problem of collective action, about which much has been written. See M. Olsen, The Logic of Collective Action (Cambridge, Harvard University Press, 1971); Trubek, supra note 6, at 470-72.

45 Nader, of course, has been a general spokesman for participatory reform.


48 We are in need of more systematic research on the phenomena of citizen activism and reactions to it.

49 This system has been described in detail in H. Erlanger, A. Christenson, D. Hermanson & D. Trubek, supra note 4, at Chapter 2.
pational licensing area. California has taken the lead in mandating consumer representatives on licensing boards for doctors, nurses, optometrists, architects, and other licensed professions. Other states have followed California's example. Moreover, the concept of consumer representation has been extended to the private sector. Health insurance plans in the United States are usually run by doctors and hospitals—the providers. Recently, several states have required that a substantial number of consumer representatives be placed on the boards of these corporations.  

4. Government Efforts to Strengthen Private Consumer Advocacy Groups

The current push for financing citizen intervention in all regulatory decisions is an indication that policymakers do perceive a need to institutionalize the type of advocacy public interest law has sought to provide.  

Citizen intervention financing is a technique whereby citizens who participate in administrative agency decision-making (primarily rulemaking) are compensated for the cost of preparing and presenting their testimony. The Magnusson-Moss Act, which governs the Federal Trade Commission, allows the Commission to compensate advocates for interests that, absent such support, would not be able to present their views. Other agencies have established similar programs. In May 1979, President Carter issued a memorandum to the Executive Department in which he indicated that he wanted them to develop a plan and to implement a procedure for citizen intervention financing. Moreover, attempts have been made to expand this technique to private regulatory agencies. Thus, the Federal Trade Commission staff has recommended that a similar program be created for private products standard-setting boards.

Another means of strengthening private advocacy groups which is being considered is to reduce the barriers inherent in organizing groups with diffuse interests. Wisconsin just passed legislation establishing a Citizens Utility Board (CUB). This board would be a non-profit public corporation charged with representing and advocating the interests of the utility consumers of Wisconsin before any administrative or judicial proceeding, and before legislative bodies. In addition, it is charged with advising utility customers of utility costs, and energy conservation. Until the prerequisites for an elected board are met, an interim board is to be nominated by the Governor and appointed by the state Senate. Once the corporation reaches 1,000 members and $10,000, board members are to be elected on a geographic basis for staggered three-year terms by the corporation members. To become a corporation member a person must be age 18 or older and contribute between $3 and $100 to the corporation per year. The bill provides that all Class A investor-owned utilities must allow the corporation four opportunities within two years to have information about itself and how to contribute to it made available. This will accompany the normal utility billing. Thus, the CUB statute reduces the costs of forming an organization to represent a diffuse interest by establishing an organizational framework and then informing the consumers whose interests are affected by that organization in a way which enables them to support it.

In many respects, the new CUB in Wisconsin follows the Nader-proposed residential utility consumer's action group (RUCAG), especially with regard to establishing the organizational framework of the corporation. However, there are major differences between the

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50 See The Impact of Consumer Members on Regulatory and Licensing Boards in Wisconsin (Madison, Wisconsin, Center for Public Representation, Inc., January 1980).
54 Wisconsin AB-2 (1979 Session), Chapter 74, Laws of 1979, signed into law November 21, 1979. The act provides for the creation of § 199 of the Wisconsin Statutes, and for ongoing study of the board.
55 See Lefitz & Rogel, Consumer Participation in the Regulation of Public Utilities: A Model Act, 13 HARVARD JOURNAL ON LEGISLATION 235 (1976); D. Trubek, L. Trubek & J. Becker, supra note 2, at 33-35. The greatest similarities between the RUCAG proposal and the CUB bill are in the organization and purpose of the corporation. Both proposals establish non-profit public corporations with boards of directors elected on a geographic basis with staggered three-year terms. Under both arrangements an interim board is appointed, and similar detailed election requirements are established. Both arrangements provide for staff, quarterly board meetings and an annual members meeting. The only organizational differences are that the RUCAG proposal allows 16-year-olds to become members, whereas CUB pushes the age minimum up to 18 years, and the CUB bill provides for a more explicit role for an executive director to manage the staff and business aspects of the corporation.
56 The scope of their duties and powers are even more similar. Both under RUCAG and CUB the corporations are charged with representing consumers at administrative, judicial, and legislative forums. In addition, under both arrangements the corporations are given information-gathering and dissemination powers. Finally, both corporations are prohibited from becoming involved in partisan politics.
two plans with regard to informing the consumers and soliciting members. The RUCAG proposal provided for a more comprehensive, direct, and continuous method of publicizing the corporation and obtaining financing from members. Specifically, under RUCAG all public utilities were obliged to participate. In addition, the proposal called for the utilities to provide a means for utility customers to add a direct contribution to each month’s utility bill which would go to the RUCAG Corporation. While lack of this key feature may hurt the Wisconsin CUB, the passage of the bill can still be viewed as a positive step taken to strengthen citizen advocacy groups.

5. Direct Contact Between Consumer Advocates and Business

Finally, there has been a beginning of direct consumer-business linkages without any direct government encouragement. There is an organization of consumer organizations which has been meeting regularly over a three-year period with the American Telephone and Telegraph Company to discuss mutual consumer problems at the operating company level as well as the national AT&T level. 66 Apparently, the direct interactions are an effort on the part of business to find out consumers’ concerns, and to deal with consumer groups in a non-regulatory, non-confrontational posture.

B. A Strategy for More Effective Representation

The trends we have identified create the potential for more effective representation of such “interests without a group” as those of consumers of private goods and public services. The issue is what strategies should be adopted by those who wish to transform this potential into a truly effective system of interest representation. We advocate a strategy based on three key elements:

1) recognizing that there is a potential system for effective advocacy,
2) strengthening the separate elements of the system, and
3) establishing linkages between these elements.

Here we sketch briefly the elements of this strategy.

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66 An example of how this can work in the area of Development Disabilities is given in H. Erlanger, A. Christenson, D. Hermanson & D. Trubek, supra note 4, at Chapter 3.
2. Strengthening the Elements

This system derives its potential power from its several elements. It would be misleading to suggest that any of these elements is currently very strong or well-institutionalized. To ensure an effective system, each component part must be strengthened. Citizen activists must learn how to make more effective use of opportunities to object to existing policies, and to demand new ones. Opportunities for individual complaints must be enhanced, and information about who is complaining and what their grievances are must be collected more systematically, and disseminated more widely. Consumer representation on government boards must be expanded, both in the number of representatives and their technical capabilities. Consumer involvement in business must go beyond conferences and advisory groups to full participation in corporate decision-making.

3. Establishing Linkages Between the Elements

Finally, much more must be done to establish linkages between the elements of the system. The essence of the strategy we suggest is that what one element of the system (e.g., isolated activists) may lack, others (e.g., external advocates and governmentally appointed consumer representatives) may supply. To ensure that this occurs, the several elements must be linked together more closely. Among the most promising “linkages” are the following.

a. Linking consumer representatives on government bodies with external advocacy groups and individual advocates

Since consumers are predominantly not an organized group, consumer representatives are not necessarily drawn from some established consumer group or advocacy unit. Linking the inside “representative” to existing external groups, therefore, will increase the clout of the internal representative by giving him or her a constituency, while giving the external group more insight into current issues. For example, if consumer representatives on DD councils are linked to outside consumer groups such as the state associations of retarded citizens, and to public interest law activities such as the P&A System, they may be more effective within the council.

Similarly, the outside individual consumer concerned with agency policy should be linked to the inside representative. If individual consumer complainants are channeled to the inside representative, the latter will secure additional information about the problems of the unorganized interest he “represents,” and can speak with more authority within the agency.

b. Linking the individual complainant with external advocacy groups

One of the major barriers to forming groups to represent interests such as that of consumers is that everyone shares this interest to a small degree, but few feel it intensely. And it is difficult to identify and contact those who are most concerned, and thus who would be the potential militants of a private group. While those individuals who complain to government about some policy are not the only potential recruits for an external advocacy group, they are the most likely. Thus, if mechanisms could be developed to link individual complainants to existing external advocacy groups, both would be strengthened.

c. Linking consumers who deal with business with external advocacy groups and government consumer representatives

Business has recognized the need for consultation with consumers. This creates a danger and an opportunity. The opportunity is that consumers will have direct contact with business, and need not rely exclusively on contacts with government. The danger is that business will develop a set of token consumer representatives who will simply be co-opted. The maintenance of strong links between consumer spokesmen who deal with business and general consumer advocacy groups is a way to exploit this opportunity and avoid this danger.

In the same sense, it is important that consumer representatives in government maintain close contact with those who deal with business. Otherwise, the consumer voice can be divided and thus diminished.
IV. Conclusion

We have argued that public interest law was a notable reform in civil justice. Designed to offer legal services for “interests without groups,” this movement quickly identified its goal as civic justice—i.e., effective participation by such groups in the decision-making process. While public interest law did serve to provide “new voices for new constituencies,” it did not develop an institutional structure or reform strategy adequate for effective realization of the goal of civic justice. This is not to say that public interest law is a failure, or that it is not needed. Rather, it suggests that a more comprehensive strategy is required. Such a strategy will build on the experience of public interest law, but go beyond it.

We have suggested that such a strategy must be based on several elements. It must include:

— external professional advocacy resources, of the type provided by public interest law,
— individual activists,
— internal interest representatives who participate directly in decisions of government or business,
— external constituency groups, and
— new government decisional processes that formally incorporate spokesmen for unorganized interests.

Further, these elements must be carefully linked, so that the action of each reinforces the action of the other. By developing the elements of this system, and strengthening the linkages between these elements, we may be able to effectively break the impasse of a diminished pluralism and achieve the participatory goals originally articulated by the public interest law movement. 57

The time may be ripe for such efforts. The malaise of American government has brought the issue of diminished pluralism decisively to the fore. If we can develop concrete strategies, the 1980’s may witness significant progress toward civic justice in the United States.