2014

What's Money Got to Do With It?: Public Interest Lawyering and Profit

Kathryn A. Sabbeth
University of North Carolina School of Law, sabbeth@email.unc.edu

Publication: *Denver University Law Review*

WHAT'S MONEY GOT TO DO WITH IT?:

PUBLIC INTEREST LAWYERING AND PROFIT

KATHRYN A. SABBETH†

ABSTRACT

Definitions of "public interest lawyering" influence financial support, regulation of lawyers, and professional identity. This Article examines three contexts in which legal institutions have operationalized the concept of public interest lawyering: tax exemptions, exceptions to solicitation prohibitions, and fee-shifting statutes. The Article critiques the common conception of public interest lawyering as work provided by non-profit organizations or through volunteer activities outside the mainstream market for legal services. It argues that interpreting public interest lawyering as a market exception not only is incomplete but also threatens the viability of important work.

TABLE OF CONTENTS

† Assistant Professor of Law, University of North Carolina at Chapel Hill. Many thanks to Tamar Birckhead, Al Brophy, Patricia Bryan, Alan Chen, John Conley, Scott Cummings, Tom Kelley, Joan Krause, Holning Lau, Gregg Polsky, Anna Roberts, David Udell, David Vladeck, Mark Weidemaier, Deborah Weissman, Mark Weisburd, and workshop participants in the Duke-UNC Junior Faculty workshop and the Southeastern Law Schools Junior-Senior Conference for helpful conversations during the development of this piece. Thanks also to Jeff James, Yolanda Fair, Nicholas Hill, and Nikki Shaffer for skillful research assistance and to UCLA Law School for research support.

Public interest lawyers are too busy acting in behalf of the public interest to worry a great deal about how it is defined.

—Stuart A. Scheingold[1]

INTRODUCTION

Public interest lawyering[2] is a term we all know and an activity we all support in principle.[3] Yet, upon inspection, its definition remains obscure.[4] A common conception is that public interest lawyering is distinct from commercial, profit-generating practice.[5] The profession identifies public interest lawyering as work with discounted value in the regular market for legal services.[6] For the past few decades, the phrase "*pro bono publico*" has been used to signify services provided for free or at a reduced rate.[7] From pro bono requirements[8] to public interest loan assis-

1. STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 185 (Univ. of Mich. Press 2d ed. 2004) (1974).

2. This Article will use the terms "public interest lawyering," "public service lawyering," and "pro bono lawyering" interchangeably.

3. For a description and critique of the broad support for professionals engaged in public interest lawyering, see Dennis G. Jacobs, Chief Judge, U.S. Court of Appeals for the Second Circuit, Remarks Before the Rochester Lawyers Chapter of the Federalist Society: Pro Bono for Fun and Profit 4 (Oct. 6, 2008) (transcript available at http://www.fedsoc.org/publications/pubid.1178/pub_detail.asp).

4. *See* David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 210 n.1 (2003) ("By 'public-interest law,' I do not mean 'law practiced on behalf of the public interest.' That usage would make the phrase completely tendentious, because people disagree fundamentally over what the public interest is.").

5. *See* Howard M. Erichson, *Doing Good, Doing Well*, 57 VAND. L. REV. 2087, 2106–10 (2004) (describing how the legal profession constructs the dichotomy between public interest lawyering and financial earnings).

6. The Model Rules of Professional Conduct describe "*pro bono publico*" as "a professional responsibility to provide . . . services to those unable to pay." MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012). The services are to be provided "without fee or expectation of fee," or at a "substantially reduced fee." R. 6.1(a), (b). A statutorily-awarded fee for pro bono activity should be donated, at least in part. R. 6.1(a) cmt. 4.

7. *See* Erichson, *supra* note 5, at 2108–09 (highlighting that "pro bono publico" has come to mean "lawyering for no fee" rather than lawyering "for the public good").

8. *See, e.g.*, *In the Public Interest: Pro Bono Requirement*, TUL. U. L. SCH., http://www.law.tulane.edu/PublicInterest/index.aspx?id=12020 (last visited Feb. 12, 2014) (defining "pro bono work" as services "on behalf of indigent persons or with non-profit, public interest organizations that serve the community"); *Public Service: JD Requirement*, U. PA. L. SCH., https://www.law.upenn.edu/publicservice/pro-bono/jd-requirement.php (last visited Feb. 12, 2014)

tance programs,[9] institutions have relied on non-profit status or the absence of fees as a key indicator of lawyering for the public good. A handful of scholars have pointed to private, for-profit firms whose work complicates the picture,[10] but leaders of the profession continue to perceive a dichotomy between public interest lawyering and profit, and they continue to perpetuate that perspective.[11] This Article builds on previous scholars' research to question whether profit should play a role in assessing the public value of lawyers' work. Further, this Article suggests that interpreting public interest lawyering as a market exception not only is incomplete, but, moreover, it threatens the viability of important categories of work.

It must be recognized at the outset that the common conception of public interest lawyering as free or low-cost legal services is not the product of a historical accident; it reflects an intentional emphasis on access to representation.[12] The access perspective starts from the premise that a core public obligation of the legal profession is to provide equal access to the legal system without regard for any client's status or viewpoint.[13] Many have interpreted public interest lawyering to mean increas-

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(defining "pro bono" as "uncompensated, voluntary work that yields a public benefit," including work "with community, government, or non-profit organizations" or individuals "unable to pay for legal services"); *Pro Bono*, VINSON & ELKINS, http://www.velaw.com/overview/ProBono.aspx (last visited Feb. 12, 2014) (defining pro bono work as "free legal service . . . to those in need"); *Pro Bono News: NY Firm Adopts Internal Mandatory Pro Bono Policy*, LEGAL SERVS. NOW (ABA Div. for Bar Servs. & Div. for Legal Servs.), Jan. 7, 2005, at 1, *available at* http://www.americanbar.org/content/dam/aba/publishing/legal_services_now/legalservices_sclaid_lsn_docs_LSN200501.authcheckdam.pdf (announcing firm's mandatory pro bono policy requiring free services to indigent clients).

9. *See* HEATHER WELLS JARVIS, EQUAL JUSTICE WORKS, FINANCING THE FUTURE: RESPONSES TO THE RISING DEBT OF LAW STUDENTS 12, 21 (Cindy Adcock et al. eds., 2d ed. 2006), *available at* http://www.equaljusticeworks.org/sites/default/files/financing-the-future2006.pdf; Philip G. Schrag & Charles W. Pruett, *Coordinating Loan Repayment Assistance Programs with New Federal Legislation*, 60 J. LEGAL EDUC. 583, 587–90 (2011).

10. *See, e.g.*, ALAN K. CHEN & SCOTT L. CUMMINGS, PUBLIC INTEREST LAWYERING: A CONTEMPORARY PERSPECTIVE 169–200 (2013); Scott L. Cummings & Ann Southworth, *Between Profit and Principle: The Private Public Interest Firm*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 183 (Robert Granfield & Lynn Mather eds., 2009); Louise Trubek & M. Elizabeth Kransberger, *Critical Lawyers: Social Justice and the Structures of Private Practice*, *in* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES 201, 201 (Austin Sarat & Stuart Scheingold eds., 1998).

11. *See infra* Parts I and II.

12. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 3 (1989) ("Public interest law is the name given to efforts to provide legal representation to interests that historically have been unrepresented or underrepresented in the legal process. Philosophically, public interest law rests on the assumption that many significant segments of society are not adequately represented in the courts, Congress, or the administrative agencies, because they are either too poor or too diffuse to obtain legal representation in the marketplace."); Oliver A. Houck, *With Charity for All*, 93 YALE L.J. 1415, 1448–50 (1984) (describing "access for unrepresented issues to the judicial system" as the rationale for and definition of public interest practice); Louise G. Trubek, *Public Interest Law: Facing the Problems of Maturity*, 33 U. ARK. LITTLE ROCK L. REV. 417, 421–22 (2011) (describing the Ford Foundation's use of "'market failure' economic literature" to justify the development of non-profit, public interest law firms).

13. *See* Erichson, *supra* note 5, at 2119 n.140; *see also* John D. Colombo, *The Role of Access in Charitable Tax Exemption*, 82 WASH. U. L.Q. 343, 362–63 (2004) (articulating an access-based vision of public interest law).

ing access to the legal system for those persons or interests that are "underrepresented" in the regular market for services.[14] Persons may be underrepresented because they cannot afford to pay market rates for representation, or interests may be underrepresented because, though important for the public at large, they are not attached to economic incentives sufficient to attract private litigants. Providing free or low-cost services to these underrepresented persons and interests corrects for failures of the market.

The access perspective embodies an important equality aspiration and should not be abandoned, but, without more, the emphasis on access to services results in an incomplete definition of public interest lawyering.[15] All lawyers serve the interests of some portion of the public,[16] but few would suggest that all lawyering is public interest lawyering.[17] Under the access perspective, the absence of market incentives or sufficient subsidies creates a scarcity of lawyers for certain persons and interests, and the provision of free or low-cost services to fill that gap is therefore a public service, like an act of charity.[18] While market undervaluation could be one part of the equation, recommending subsidies wherever there is a shortage of funding,[19] market undervaluation does not tell us which work is substantively worth funding, beyond the notion that all lawyering has social value and should be distributed evenly.[20] Notably, the emphasis on access suggests that all lawyering is equally valuable and that even distribution of legal services promotes social equality (or some other, more important, social goal).

Beyond the view that serving any subset of the public is a public service, however, there remains a question as to which categories of lawyering should be specially recognized as public interest lawyering.[21]

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14. Scott L. Cummings, *Privatizing Public Interest Law*, 25 GEO. J. LEGAL ETHICS 1, 1–2 (2012) (internal quotation mark omitted); Luban, *supra* note 4, at 210 n.1.

15. *See* David R. Esquivel, Note, *The Identity Crisis in Public Interest Law*, 46 DUKE L.J. 327, 342–43 (1996).

16. Conservative lawyers see themselves as protecting important public interests. For example, the lawyer opposing an environmental group might believe she is the protector of jobs for loggers, just as the anti-New Deal lawyers believed they were fighting oppressive governmental overreach. *See* Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1251–52 (2005).

17. *See* Comment, *The New Public Interest Lawyers*, 79 YALE L.J. 1069, 1071 n.3 (1970).

18. *See* Houck, *supra* note 12, at 1419–20, 1448 (describing the development of public interest law organizations as "public charities" that improve "access" for "underrepresented" and "underfinanced interests").

19. *See* Erichson, *supra* note 5, at 2110 (suggesting that defining public interest lawyering in terms of low pay or market underrepresentation is appropriate for subsidies).

20. *See* Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617 (1986) (proposing that as long as the lawyer does not facilitate unlawful conduct, "what the lawyer does is a social good," even if it may not be morally good); *cf.* David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 644 (1986).

21. Austin Sarat and Stuart Scheingold prefer the term "cause lawyering." *See* STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3–7 (2004). They argue that the term "public interest" begs the question of

Which lawyering has a special social value? This question raises controversy, particularly in a democratic society with a constitutional framework that purposefully embraces government neutrality and avoids defining a substantive conception of public good.[22]

Nonetheless, institutions do construct definitions of public interest lawyering on a regular basis, and should do so on the basis of candid and thorough deliberations. The definitional question tackled in this Article is not purely academic; it carries implications for professional identity, regulation, and financial support. With respect to the identity of the profession, it pushes us to consider what kind of professional work is in the public interest and what is expected from the profession as a whole. [23] With respect to regulation of the profession, this inquiry could inform whether to hold public interest lawyers to higher standards and when, if ever, to exempt them from professional requirements that hamper their work.[24] Lastly, the definition carries implications regarding financial support,[25] including grants from governmental or private sources, loan repayment or forgiveness by law schools or lenders, summer stipends for students, and entire years of salaries paid by corporate law firms that defer their incoming classes and encourage recent recruits to pursue work in the public interest.[26] Grappling with the definition of public interest lawyering means considering which behavior the profession should encourage when it confers reputational advantages and formal awards, and which behavior it should require when it adopts pro bono mandates.[27]

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defining the public and what is in the public's interest, and leaves unexamined the tension between serving private clients and serving the public good. *Id.* at 5–6. Cause lawyering is clear about its chief priority: commitment to social, political, or economic principles, such that serving the client is but one component of serving the cause. Cause lawyering literature has made an enormous contribution in shifting moral and political commitments from the margins to the core of legal ethics, and it has been radical in suggesting that service to a client could be secondary to another purpose. Moreover, it has been thoughtful in focusing on attorneys' motivations, rather than any pecuniary indicator, to distinguish cause lawyering. Yet the inclusiveness of this framework is also its weakness: it fails to indicate which kinds of lawyering activities are in the public interest, beyond recognizing those activities the lawyers performing them say should be so recognized. *See* Luban, *supra* note 4, at 210 n.1 (defining public interest lawyers with two limiting criteria, one based on lawyers' motives and the other based on representing the underrepresented, with the latter criterion excluding "self-styled" public interest lawyers who represent well-funded corporate interests). This Article suggests that legal institutions need to make substantive determinations as to which work deserves special support, based on priorities defined by those institutions.

22. MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 25–54, 71–79 (1996).

23. *See infra* Part I (describing implications for professional identity); *see also* Lincoln Caplan, *An Existential Crisis for Law Schools*, N.Y. TIMES, July 15, 2012, at SR10.

24. *See infra* Part II.B (describing exception to solicitation prohibition).

25. *See, e.g.*, *infra* Part II.A (describing tax benefits), II.C (describing fee-shifting provisions).

26. PRO BONO INST., LAW FIRM DEFERRED ASSOCIATES AND PUBLIC INTEREST PLACEMENTS: SURVEY REPORT AND PRELIMINARY ASSESSMENT 4 (2010), *available at* http://www.probonoinst.org/wpps/wp-content/uploads/deferred_associates_survey_2010.pdf; COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 217–338 (1976) (describing funding sources for public interest law).

27. States have begun experimenting with pro bono requirements. New York is the first to adopt one. 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 520.16 (2013).

This Article calls for renewed efforts to fashion positive visions of public interest lawyering defined by more than the absence of resources. A central question is whether public interest lawyering means any representation that increases access to legal services or, instead, law practice that promotes particular substantive values. This Article argues that the former approach is incomplete. Rather than use profit status, fee restrictions, or client indigency as a litmus test of public value, we should come to terms with what our public values are. To be clear, this Article does not suggest that there can or should be one universal definition of public interest lawyering, but that public interest lawyering does have substantive, "institutionally specific"[28] meanings, and legal actors must take responsibility for how they apply the term. This will require making conscious choices about priorities and not shying away from the normative and practical implications of those choices.[29]

The Article proceeds as follows. Part I situates public interest lawyering within the identity of the legal profession as a whole. Part II describes three contexts in which legal institutions operationalize public interest lawyering: (a) tax benefits for public interest lawyering; (b) a public interest exception to the legal profession's prohibition of solicitation of employment; and (c) fee-shifting statutes that provide special funding for public interest lawyering. Part III draws comparisons between the three contexts and analyzes what they reveal about the larger definitional project. Fee-shifting statutes stand in contrast to the other two settings. In fee-shifting statutes, elected officials have recognized substantive definitions of public interest lawyering, acknowledged that successful public interest practice requires financial support, and created a mechanism to facilitate public interest lawyering for profit. Part IV challenges the definition of public interest lawyering in opposition to profit. It highlights empirical research that reveals alternative models of public interest practice. Part IV suggests that there are inherent benefits of supporting fee-based and for-profit forms of public interest work. Further, economic strength and economic power are necessary to engage in certain categories of public interest work. Fee-shifting statutes could offer one realistic source of that strength and power, but judges' percep-

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28. As Alan Chen and Scott Cummings explain in their new book:

> [T]he use of "public interest law" as a label for a distinctive form of lawyering . . . retains its power not because there is an Archimedean point by which we may judge the public interest across the divisions of politics and culture, but rather precisely because it claims a higher political ground, asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms.

CHEN & CUMMINGS, *supra* note 10, at 7.

29. *See* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2128 (2000) (suggesting, in the context of judges' fee decisions, that reliance on market measures of the value of lawyers' work is a method of attempting to avoid making substantive value assessments); *see also* Sandel, *supra* note 22 (arguing for articulation of substantive public good).

tions of public interest lawyering as charity currently threaten the effectiveness of these statutes. Ultimately, the view of public interest lawyering as services provided exclusively by non-profit organizations or volunteer activities, outside the market for services, threatens the viability of lawyering in the public interest.

I. A PUBLIC PROFESSION, WITH SOME AMBIVALENCE

Mainstream discourse treats public interest lawyering as an exception to the practice of law. This begins in law schools, before lawyers have even entered practice, when their professional identities are still nascent. It can be seen in how many law schools maintain separate "Career Services" and "Public Interest" offices.[30] It can be seen in how well-meaning faculty and administrators encourage students to pursue pro bono projects as an extracurricular activity, conveying the impression that "pro bono" means a volunteer activity on the side.[31] Law graduates regularly take this conception of pro bono with them into the profession.[32] They develop an impression of their profession distinct from public interest lawyering, which they view as an act of charity for when they have the time and inclination.

Some scholars have argued that constructing the notion of public interest lawyering as an exceptional form of practice can harm the image of the profession.[33] Sarat and Scheingold have suggested that, during periods of public criticism of or suspicion about the profession, the American Bar Association has made special efforts to embrace and highlight the public interest work of its members, and it has done so with success.[34] Including public interest activities within the scope of lawyering, and

30. *See, e.g.*, *Careers*, HARV. L. SCH., http://www.law.harvard.edu/current/careers/index.html (last visited Feb. 17, 2014) (Office of Public Interest Advising separate from Office of Career Services); *Office of Public Interest and Community Service*, GEO. L., http://www.law.georgetown.edu/careers/opics/index.cfm (last visited Feb. 17, 2014) (Office of Public Interest and Community Services separate from Office of Career Services); *cf. Public Interest Career Services*, YALE L. SCH., http://www.law.yale.edu/academics/publicinterestcareerservices.htm (last visited Feb. 17, 2014) (specialized counseling for public interest careers available within Career Development Office).

31. *See, e.g.*, Standing Comm. on Pro Bono & Pub. Serv. & the Ctr. for Pro Bono, *Chart of Law School Pro Bono Programs*, A.B.A., http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html (last updated Sept. 23, 2013) (summarizing law schools' extracurricular pro bono programs); *see also* Standing Comm. on Pro Bono & Pub. Serv. & the Ctr. for Pro Bono, *Law School Pro Bono Programs – Awards and Recognition*, A.B.A., http://apps.americanbar.org/legalservices/probono/lawschools/pb_awards.html (last updated Feb. 14, 2014) (describing law schools' awards for pro bono activity).

32. *See* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 257 (1990). *See generally* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73–81 (1980) (discussing the moral detachment of lawyers).

33. *See* SCHEINGOLD & SARAT, *supra* note 21, at 24–25.

34. *See id.* In an earlier time, Justice Brandeis put this idea in starker terms when he warned that there would be "a revolt of the people against the capitalists, unless the aspirations of the people are given some adequate legal expression." LOUIS D. BRANDEIS, *The Opportunity in the Law*, *in* BUSINESS—A PROFESSION 329, 339 (Hale, Cushman & Flint 1933) (1914).

taking ownership of such activities as a central part of the profession, might create a more likeable, less amoral portrait of lawyers, and generate increased respect for the rule of law.[35]

Another reason for concern about the split between doing good and "conventional"[36] practice is that, if lawyers see public interest lawyering as marginal, such lawyers may lose sight of their moral agency. Once they have set off, by choice or by need, in a conventional legal career, they may believe they have left behind public interest concerns and bear no professional obligation to consider the public interest while fulfilling their daily responsibilities. Robert Gordon describes students who, after abandoning ambitions of public interest careers, make the switch to pursue corporate law and "go all the way."[37] They see themselves as driven solely by interests of clients, and are shy to consider, let alone express, any ethical misgivings about client choices or directions from superiors.[38]

To be sure, thoughtful scholars can disagree about where lines ought to be drawn in the roles of counseling or advocating for a client. David Luban has emphasized the lawyer's obligation to guide clients' activities, insert oneself in decision-making, and steer clients towards conformance with the public interest.[39] William Simon argues that lawyers should maintain discretion to decline to pursue procedural or substantive arguments despite clients' instructions to pursue them and despite the possibility of legal merit.[40] Monroe Freedman and Abbe Smith, on the other hand, make compelling arguments that once a lawyer has signed up to represent a client, it is improper to hold back any tools at her disposal.[41] The lawyer serves the public interest as a zealous advocate, and any dereliction of that duty is the greatest failure.[42] Yet Freedman and Smith still make ethical distinctions between available legal options. They suggest an ethical decision must be made at the moment of entering into a retainer.[43] Rather than accepting that a lawyer should represent

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35. *Id.*

36. This Article uses Sarat and Scheingold's definition of the term "conventional lawyering." *See* SCHEINGOLD & SARAT, *supra* note 21, at 1–22. Conventional lawyering "involves the deployment of a set of technical skills on behalf of ends determined by the client, not the lawyer." *Id.* at 2. In contrast to cause lawyering, conventional lawyering "is neither a domain for moral or political advocacy nor a place to express the lawyer's beliefs about the way society should be organized, disputes resolved, and values expressed." *Id.*

37. Gordon, *supra* note 32, at 291–92.

38. *Id.*

39. *See* DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY 1 (2007); DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 50–103, 174 (1988).

40. William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1113–19 (1988).

41. MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 79–80, 86–87, 121–25 (2d ed. 2002).

42. *Id.* at 8, 13–14, 19–31, 45–49.

43. *Id.* at 59, 8–84; Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111, 112–13 (1995).

anyone who comes to her door, they recognize the choice of whom to represent as an important question.[44]

Regardless of their differences regarding how or when in the representation process it occurs, all of these scholars acknowledge some point at which the individual lawyer's ethics could restrict her advocacy. In contrast, if Gordon is right that some law graduates believe their new professional identity means setting aside their ethical instincts, as lawyers, these persons might become wholly unmoored from any sense of public obligation. That possibility threatens the image and, potentially, the legitimacy of the legal profession.[45]

Historically, working for the public interest has not been an afterthought, left to positions on the margins. On the contrary, serving the public interest has been described as a founding principle of the profession.[46] Talcott Parsons and sociologists following him have highlighted the important social functions served by the legal profession.[47] Roscoe Pound famously stated that a profession is geared towards public service by definition:

> The term [profession] refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. *Pursuit of the learned art in the spirit of a public service is the primary purpose*. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.[48]

From this perspective, the pursuit of public service is the marker that distinguishes a profession from a trade.[49]

Notably, Pound's depiction of the professions indicates not only that service is central, but also that "[g]aining a livelihood is incidental."[50] With regard to the legal profession in particular, this is a his-

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44. *Id.*

45. *See* Postema, *supra* note 32, at 73–81.

46. *See, e.g.*, BRANDEIS, *supra* note 34, at 330.

47. TALCOTT PARSONS, *A Sociologist Looks at the Legal Profession*, *in* ESSAYS IN SOCIOLOGICAL THEORY 370, 381–85 (rev. ed. 1954) (arguing that lawyers provide a critical function in society). For critiques of the functionalist view, see MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS 167–69 (1977) (discussing lawyers' interest in maintaining economic power). For a critique of both Parsons's approach and "anti-Parsonian" approaches, see Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (Gerald L. Geison ed., 1983).

48. ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) (emphasis added).

49. *Id.*; *see* John M. Conley & Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 813 (2005) (summarizing sociological debates on the significance of professions); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 592 (1985) (collecting examples of heightened rhetoric surrounding images of lawyers as professionals and not businesspersons).

50. POUND, *supra* note 48, at 5.

torically accurate representation of an earlier age. When the profession first developed in England, pecuniary gain was neither a goal nor a reality of the practice.[51] Between the seventeenth and nineteenth centuries, barristers were not permitted to charge fees and accepted payments only as honoraria.[52] According to Henry Drinker, barristers "regarded the law in the same way they did a seat in Parliament—as primarily a form of public service in which the gaining of a livelihood was but an incident."[53] Barristers came from wealthy families and did not depend on their legal work to generate income.[54] These men occupied a privileged position that afforded them the luxury to pursue the public interest without regard for financial support.[55]

Today, however, the American Bar Association boasts roughly one and one quarter million members,[56] and it would be a rare member who could perform this role as an unpaid volunteer.[57] While some attorneys possess public service aspirations, most need and expect financial compensation for their work.[58] This is relatively uncontroversial, and the current ideals of the profession do not conflict with the desire to earn a living.[59] On the contrary, a handsome salary is commonly viewed as an

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51. HENRY S. DRINKER, LEGAL ETHICS 210 (1953); *see also* Alexander Schwab, Note, *In Defense of Ambulance Chasing: A Critique of Model Rule of Professional Conduct 7.3*, 29 YALE L. & POL'Y REV. 603, 606 (2011) (explaining that it was considered ungentlemanly for English barristers to be motivated by financial gain).

52. Kelly Buechler, Note, *Solicitation in Class Actions: Should Class Certification Be Denied Because Class Counsel Solicited the Class Representative?*, 19 REV. LITIG. 649, 662 (2000); Katherine A. Laroe, Comment, *Much Ado About Barratry: State Regulation of Attorneys' Targeted Direct-Mail Solicitation*, 25 ST. MARY'S L.J. 1513, 1520 (1994).

53. DRINKER, *supra* note 51, at 210–11; *see* Buechler, *supra* note 52, at 662; Laroe, *supra* note 52, at 1520.

54. DRINKER, *supra* note 51, at 210; *see also* Buechler, *supra* note 52, at 662.

55. DRINKER, *supra* note 51, at 210; *see* Schwab, *supra* note 51, at 606. For discussion of the business-profession dichotomy in the early United States, see Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role*, 8 U. CHI. L. SCH. ROUNDTABLE 381, 386–87 (2001).

56. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf.

57. *See* Ronit Dinovitzer & Bryant G. Garth, *Pro Bono as an Elite Strategy in Early Lawyer Careers*, *in* PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION 115, 115–22 (Robert Granfield & Lynn Mather eds., 2009) (suggesting that elite lawyers at large firms promote the ideals of pro bono, can afford to engage in it, and reap its rewards).

58. *See, e.g.*, Conley & Baker, *supra* note 49, at 793–94 (citing CARROLL SERON, THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL-FIRM ATTORNEYS 129 (1996)) (describing study of small firm lawyers who, while struggling to earn a living, believe they offer a public service "by making representation available and affordable to ordinary people").

59. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5), (6) & cmt. 8 (2012) (permitting lawyer to withdraw if client "fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services," "such as an agreement concerning fees," or representation creates "unreasonable financial burden").

indicator of excellence, and those who reach the heights of the salary charts generally enjoy admiration among their peers.[60]

Yet the expectation for public interest lawyering is that it exists outside the market for services.[61] Public interest lawyering is frequently depicted as the activity of two groups,[62] for which pecuniary gain is either "incidental"[63] to their work or entirely disconnected from it.[64] The first group is classic public interest lawyers who work at non-profit organizations. Although these lawyers earn income from their positions, salaries correspond to neither hours nor case outcomes and are notoriously low.[65] The second group consists of "conventional"[66] attorneys who work at for-profit firms but engage in "pro bono" work as a volunteer activity.[67] These lawyers take relatively small quantities of time from their jobs or personal lives.[68] They donate their hours to non-profit organizations or indigent persons, as if tithing or contributing a charitable donation.[69]

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60. *See, e.g.*, *Columbia University School of Law*, PRINCETON REV., http://www.princetonreview.com/schools/law/LawBasics.aspx?iid=1035777 (last visited Feb. 17, 2014) (ranking law schools according to category of "Best Career Prospects" based on "[k]ey [s]tatistics" including "[a]verage [s]tarting [s]alary"). One set of lawyers who have attracted significant criticism related to the size of their fees is class action counsel. The particulars of class actions are beyond the scope of this Article, but it is possible that the degree of hostility directed towards class action counsel reflects discomfort with their hybrid public–private role. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 109–12 (2006) (describing original view of class action lawyers as furthering public rights, and change towards criticizing the lawyers and their high fees in the 1980s); *see also id.* at 162–63 (highlighting current discomfort with wealth accumulation by plaintiffs' class action lawyers).

61. *See generally Huge Gap Remains Between Public Interest and Law Firm Attorney Salaries, NALP Reports*, NAT'L JURIST (Sept. 15, 2010), http://www.nationaljurist.com/content/huge-gap-remains-between-public-interest-and-law-firm-attorney-salaries-nalp-reports (highlighting discrepancy between public interest and law firm salaries).

62. One category of lawyers left out of the traditional public interest portrait but increasingly recognized is lawyers employed by government entities. *See, e.g.*, CHEN & CUMMINGS, *supra* note 10, at 152–64; Douglas NeJaime, *Cause Lawyers Inside the State*, 81 FORDHAM L. REV. 649, 653 (2012); Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657 (2004).

63. POUND, *supra* note 48, at 4–5.

64. On the history of the split between the "distinct public interest bar" and "elite" lawyers "who served the public only in their limited and separate pro bono efforts," see Pearce, *supra* note 55, at 384, 417–20.

65. *See* Erichson, *supra* note 5, at 2106 (painting image of public interest as financially self-sacrificing); Philip G. Schrag, Why Would Anyone Want to Be a Public Interest Lawyer?, *in* GEORGETOWN LAW FACULTY LECTURES AND APPEARANCES (2009), *available at* http://scholarship.law.georgetown.edu/fac_lectures/1/.

66. *See supra* note 36.

67. *See* Scott L. Cummings & Rebecca L. Sandefur, *Beyond the Numbers: What We Know—and Should Know—About American Pro Bono*, 7 HARV. L. & POL'Y REV. 83, 83 (2013); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 18 (2004).

68. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2012) (setting aspiration of fifty hours of "*pro bono publico* legal services per year"); R. 6.1 cmt. 9 (condoning failure to perform "hours of service" and acknowledging financial donation as substitute).

69. *See* Jacobs, *supra* note 3, at 10 (praising "relief of those who require but cannot afford legal services" as part of "a great tradition of American volunteerism"); Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 802–08 (2002)

In both groups, public interest lawyering is the provision of services devalued in the market. It is legal work provided at a rate lower than the legal professional could otherwise earn. In the first case, the legal professional accepts a salary lower than she could garner in the hiring market.[70] In the latter, the work is not part of the lawyer's primary occupation but something in which she engages on the side. Big firms generally separate attorneys' pro bono lawyering from their tallies of billable hours, and the legal services are often offered without expertise in the relevant field.[71] The client in both situations pays a reduced fee, if any. Although serving the public may have been a founding principle of the profession, public interest lawyering has come to be understood as a deviation from the core activity of the legal market.

II: INSTITUTIONAL DEFINITIONS OF PUBLIC INTEREST LAWYERING

Part I described general perceptions of public interest lawyering, and Part II turns to specific ways in which institutions have operationalized the concept. This Part examines: (a) tax benefits conferred on public interest lawyering, which Congress and the Internal Revenue Service have defined by a charitable purpose and compliance with financial and political restrictions; (b) a public interest exception to the profession's prohibition on solicitation of employment, which the Supreme Court and the American Bar Association have defined by the absence of a pecuniary motive; and (c) fee-shifting statutes, which fund public interest lawyering that serves public policies prioritized by Congress.

(describing culture of philanthropy); *id.* at 816 (describing critiques of volunteerism as approach to provision of legal services).

70. *Fact vs. Fiction: Public Interest Careers*, YALE L. SCH., http://www.law.yale.edu/studentlife/cdobrochureshandouts_factvsfictionpicareers.htm (last visited Feb. 19, 2014) ("Getting a permanent public interest job is more challenging than getting a large firm job."); Nita Mazumder, *Myths and Realities of Pursuing Public Interest Careers*, EQUAL JUST. WORKS (Apr. 17, 2012, 1:59 PM), http://www.equaljusticeworks.org/news/blog/myths-and-realities ("Public interest jobs are often incorrectly perceived as employment options for those unable to land a financially lucrative position."); Debra Cassens Weiss, *Unable to Find Public Interest Jobs, Some Harvard Law Students Settle for BigLaw*, A.B.A. J. (Oct. 29, 2012, 8:32 AM), http://www.abajournal.com/news/article/unable_to_find_public_interest_jobs_some_harvard_law_students_settle_for_bi/ (Assistant Dean for Public Service at Harvard Law reports that in searching for jobs students "work four times as hard to get a quarter of the money in public interest." (internal quotation mark omitted)).

71. *See* Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2395 (2010) (documenting inadequate knowledge and supervision of volunteer attorneys); Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2071–72 (2008) (documenting scarcity of volunteer attorneys with relevant skills and inefficiencies of work by inexperienced counsel); *cf.* Cummings & Rhode, *supra*, at 2429 (documenting that some firms seek to develop expertise in particular areas and channel volunteer efforts in those directions). Note that the inexperience of volunteer attorneys is not a coincidence but more likely the direct result of intentionally avoiding fields where the lawyers perform their "real work" for paying clients. *See infra* notes 324–25 and accompanying text.

A. Tax Benefits

The classic understanding of a "public interest law firm" is a non-profit law firm.[72] From pro bono requirements to loan assistance programs, institutions rely on non-profit status as a key indicator of public interest lawyering.[73] Before analyzing the descriptive and normative value of this nomenclature, below is a brief review of the regulatory benefits and burdens of non-profit organizations and public interest law firms organized as such. As described below, federal law supports the growth of non-profit, public interest law firms but also imposes significant restrictions on their activities.

1. Tax-Exempt Non-Profits

Non-profit organizations are corporations formed for a public purpose,[74] which generally enjoy special tax treatment in exchange for accepting certain limits on their activities.[75] The most common non-profit organization[76] is the charitable organization, or charity, defined by Section 501(c)(3) of the Internal Revenue Code.[77] One benefit of recognition as a 501(c)(3) organization is that the organization is exempt from paying federal income taxes.[78] Arguably even more significant, donations to a 501(c)(3) organization are deductible from the income tax calculations of individual and corporate donors, which may encourage donations.[79]

To qualify as a charity under Section 501(c)(3), an organization must meet three core requirements: it must be organized and operated exclusively for a public purpose as defined in the statute; it must comply with limits on handling of corporate assets; and it must comply with limits on political activities.[80] So long as the organization "serves a public

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72. *See, e.g.*, CHEN & CUMMINGS, *supra* note 10, at 127; *see also* George Norris Stavis, Note, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-profit Litigators?*, 31 COLUM. HUM. RTS. L. REV. 209, 227–30 (1999) (describing revenue limits for public interest law firms). *See generally* Houck, *supra* note 12, at 1438–54 (describing history of public interest law firms and non-profit status).

73. *See supra* notes 3–6.

74. 26 U.S.C. § 501(c)(3) (2012); *see also* Treas. Reg. § 1.501(c)(3)-1(d)(1) (as amended in 2008). A non-profit organization is formed by filing bylaws or articles of incorporation with a state agency, pursuant to corporate laws of the relevant state. *See* INTERNAL REVENUE SERV., PUBLICATION 557: TAX-EXEMPT STATUS FOR YOUR ORGANIZATION 5 (2013), *available at* http://www.irs.gov/pub/irs-pdf/p557.pdf. The non-profit corporation can then apply to the federal government and the state for exempt status with respect to tax laws. *See, e.g.*, Treas. Reg. § 1.501(a)-1(a)(2) (as amended in 1982).

75. *See* 26 U.S.C. § 501(a).

76. *Setting Up a Nonprofit Tax-Exempt Corporation*, SPARC, http://www.arl.org/sparc/publications/papers/setting_up_a_nonprofit.shtml (last visited Feb. 19, 2014). Many use the term "non-profit" to mean the 501(c)(3) charitable organization, but there are twenty-nine different kinds of non-profits under the Internal Revenue Code. *See* 26 U.S.C. § 501(c)(1)–(29).

77. 26 U.S.C. § 501(c)(3).

78. *Id.* § 501(a), (c).

79. *Id.* § 170(a)(1), (c)(2).

80. *Id.* § 501(c)(3). The full language of Section 501(c)(3) is as follows:

rather than a private interest,"[81] the particular purpose can be broadly defined. Section 501(c) specifies that the non-profit corporation may be organized and operated "for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals."[82] Although the IRS originally interpreted "charitable" to mean relief of the poor, it has since determined that the term "charitable" is a more general reference to any of the listed public purposes.[83]

The other requirements for charities—the financial and political limitations—are more restrictive than the public purpose requirement. Non-profit organizations may actually earn profits in that they may earn revenue higher than expenses, but the organizations are limited in how they handle those funds. Assets and income may not be distributed to individuals, except as fair compensation for services, and the organization may not be used for personal gain.[84] Additionally, attempting to influence legislation, or supporting or opposing a candidate for public office, may not comprise a substantial part of a charity's activities.[85]

2. Public Interest Law Firms

The Internal Revenue Service (IRS) recognizes the "public interest law firm" (PILF)[86] as a type of charity exempt from income taxes under Section 501(c)(3) of the Internal Revenue Code.[87] The IRS indicates that, although the substance of PILF work need not be "unique" to the non-

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> List of exempt organizations. The following organizations are referred to in subsection (a): . . . Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.; *see also id.* § 501(h) (allowing charitable organizations to spend a limited amount on lobbying, defined in proportion to the each organization's annual expenditures); Treas. Reg. § 1.501(c)(3)-1(a)(1) (as amended in 2008) (organizational and operational tests); *id.* § 1.501(c)(3)-1(c)(2); *id.* § 1.501(c)(3)-1(c)(3).

81. *Id.* § 1.501(c)(1)-1(d)(1)(ii).

82. 26 U.S.C. § 501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(a).

83. Steven D. Simpson, *Tax-Exempt Organizations: Organizational and Operational Requirements*, 869 TAX MGM'T PORTFOLIO at A-109 (2008).

84. 26 U.S.C. § 501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(c)(2).

85. 26 U.S.C. § 501(c)(3); *see* Treas. Reg. § 1.501(c)(3)-1(c)(3).

86. The acronym "PILF" is used only for public interest law firms recognized as such under federal tax law.

87. Rev. Proc. 92-59, 1992-2 C.B. 411.

profit sector, it must concern "issues of significant public interest."[88] The "[c]haritable classification is based not upon the particular positions advocated, but upon the fact that legal representation is made available in important cases where it would not be available from private firms."[89] The rationale for recognizing PILFs as charitable organizations is that, because of their legal work, "courts and administrative agencies are afforded the opportunity to review issues of significant public interest."[90]

In Revenue Procedure 92-59, the IRS sets out guidelines that PILFs must follow in addition to the general requirements of Section 501(c)(3).[91] A major focus of these guidelines is to limit the acceptance of legal fees.[92] Shortly after the IRS first recognized PILFs as charities,[93] it issued guidelines forbidding such firms from accepting fees from clients[94] on the basis that "charging or accepting fees from clients makes the organization indistinguishable from a private law firm."[95] The IRS did permit acceptance of fees if awarded by a court or administrative agency, or if paid by an opposing party, if the PILF derived most of its financial support from grants and contributions.[96] Yet the IRS specified that the possibility of a fee award could not be a substantial motivating factor in the selection of cases.[97] Moreover, PILFs were required to "cease to handle issues with a strong possibility of a fee award if these become economically feasible for private litigants."[98] The IRS revised these guidelines in 1992 to permit PILFs to accept fees directly from clients,[99] but it imposed new requirements "to distinguish a public interest law firm's practice from the private practice of law."[100]

The current Revenue Procedure restricts PILFs' finances in a number of significant ways. First, to maintain its charitable status, a PILF must cover no more than fifty percent of its operating costs with attorneys' fees.[101] The organization is required to rely on donors. Under this definition, a public interest case cannot be economically self-sufficient. Second, fees paid by clients may not exceed the actual costs of litiga-

88. *See* INTERNAL REVENUE SERV., *Litigation by IRC 501(c)(3) Organizations*, *in* 1984 EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM TEXT (1984), *available at* http://www.irs.gov/pub/irs-tege/eotopicd84.pdf, *superseded in part by* Rev. Proc. 92-59.

89. *Id.*

90. Rev. Rul. 75-74, 1975-1 C.B. 152.

91. Rev. Proc. 92-59.

92. *Id.*

93. *See* Rev. Proc. 71-39, 1971-2 C.B. 575.

94. Rev. Proc. 75-13, 1975-1 C.B. 662, *modified and superseded by* Rev. Proc. 92-59.

95. Rev. Proc. 92-59 § 2(03) (interpreting Rev. Rul. 75-75, 1975-1 C.B. 154).

96. Rev. Rul. 75-76, 1975-1 C.B. 154.

97. Rev. Proc. 92-59 § 4(03).

98. *Id.* § 2(04).

99. *Id.* § 2(05)–(06); *see also* COUNCIL FOR PUB. INTEREST LAW, *supra* note 26, at 306–11 (noting fee restrictions adopted in 1970 and suggesting that the IRS should allow public interest firms to accept client fees).

100. Rev. Proc. 92-59 § 2(06).

101. *Id.* § 4(05).

tion.[102] While costs may be charged against a retainer with any remaining balance refunded,[103] a contingency fee agreement would likely be impermissible given that a percentage of a client's award might exceed the actual costs incurred. This is worth noting because contingency fee agreements are one of the market-based mechanisms by which lawyers can earn a living while representing clients unable to pay fees with their own financial assets.[104] Third, to maintain favorable tax status, the lawyers for the PILF may not consider the likelihood or probability of a fee when selecting cases.[105] Presumably, this requirement aims to omit the distraction of a potential for private gain so lawyers focus on their public purpose. Finally, even if a case is of "sufficient broad public interest" to justify representation under the organization's mission,[106] the organization may not accept any case "if the organization believes the litigants have a sufficient commercial or financial interest in the outcome of the litigation to justify retention of a private law firm."[107] Although the IRS does not indicate what level of financial interest would be "sufficient . . . to justify retention of a private law firm," it is clear that the case must be unattractive in the regular market for services.

3. What Public Interest Law Firms Are Not

The IRS distinguishes the PILF from legal aid and civil rights organizations.[108] Legal aid and civil rights organizations gained recognition as charitable organizations based on the definition of "charitable" under regulations issued by the Treasury Department pursuant to Section 501 of the Internal Revenue Code.[109] Treasury Regulations define "charitable" to include:

> [r]elief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by

102. *Id.* § 5(01). Additionally, a public interest law firm may not withdraw from representation due to a client's failure or inability to pay. *Id.* § 5(02).

103. *Id.* § 5(01).

104. In theory, a public interest law firm could draft a retainer agreement to award fees as a percentage of winnings, with an express caveat that the amount could not exceed the costs of litigation, but this would necessarily undercut the utility of a contingency agreement. Contingency fee arrangements are designed to reflect a lawyer's acceptance of a risk of low or no fees. *See* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270–71 (1998). Particularly when one considers an attorney's practice as an interrelated portfolio, the value of any one case must carry the potential to compensate for more than the costs of litigation measured in terms of time and tangible resources expended. Another possible source of funding could be third parties, but third parties can change the dynamics and present their own complications. *See generally* Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268 (2011).

105. Rev. Proc. 92-59 § 4(03).

106. *Id.* § 4(04).

107. *Id.*

108. INTERNAL REVENUE SERV., *supra* note 88.

109. *See* Treas. Reg. §§ 1.0-1–802 (as amended in 2014).

> organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.[110]

Legal aid organizations serving poor clients received recognition as tax-exempt charities in 1969, based on the first clause of this provision.[111] Highlighting that the Treasury Regulation had defined "charitable" to include "relief of the poor and distressed," the IRS determined that providing free legal services to indigent persons otherwise incapable of obtaining such services qualified as a charitable purpose.[112] Organizations providing such services therefore qualified as tax exempt.[113] Ten years later, the IRS recognized a broader exemption and included organizations that charged modest fees.[114] It determined that charging an hourly fee to clients did not negate an organization's charitable purpose where the fee was based on the ability to pay, not the type of services provided.[115] The decision reasoned that, despite charging a modest fee, the organization still provided economic relief to the poor and distressed.[116]

Civil rights organizations, including those with a focus on litigation like the ACLU and the NAACP Legal Defense Fund (LDF),[117] received recognition as charities on the basis that they "defend human and civil rights secured by law,"[118] another charitable purpose recognized by the same Treasury Regulation.[119] The IRS recognizes that human and civil rights include not only constitutional but also statutory rights.[120] Litigation to "defend . . . rights secured by law" also includes that which seeks to broaden the definition of a legally recognized right.[121]

The IRS was slower to recognize PILFs as tax-exempt non-profits than to confer this benefit on legal aid or human and civil rights organizations.[122] This may be due to the definitional challenges PILFs present: their work does not fit the traditional conception of charity.[123] Legal aid

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110. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2008).
111. Rev. Rul. 69-161, 1969-1 C.B. 149.
112. *Id.* (internal quotation marks omitted).
113. *Id.*
114. Rev. Rul. 78-428, 1978-2 C.B. 177.
115. *Id.*
116. *Id.* Note there is a difference between indigency, inability to afford representation despite mid-level income, and lack of economic incentives to pursue legal representation. The IRS did not recognize, or at least did not explore, these distinctions.
117. *See* Nicole T. Chapin, Note, *Regulation of Public Interest Law Firms by the IRS and the Bar: Making It Hard to Serve the Public Good*, 7 GEO. J. LEGAL ETHICS 437, 442 (1993).
118. Rev. Rul. 73-285, 1973-2 C.B. 174; Rev. Rul. 68-438, 1968-2 C.B. 209.
119. Treas. Reg. § 1.501(c)(3)-1(d)(2) (2008).
120. INTERNAL REVENUE SERV., *supra* note 88.
121. Treas. Reg. § 1.501(c)(3)-1(d)(2).
122. *See* Houck, *supra* note 12, at 1446.
123. *Id.* at 1446–47.

organizations represent indigent clients.[124] Although the IRS does not explicitly limit the client population served by civil and human rights organizations, commentators have assumed that such organizations represent minorities.[125] PILFs, in contrast, focus their representation on neither the poor nor minorities;[126] PILFs do not limit their client base to any particular class. A PILF may also represent a client on either side of an issue, whereas civil or human rights organizations serve specifically to defend civil and human rights.[127] When the IRS did recognize PILFs, the key substantive requirement imposed was simply that the cases be of "significant public interest."[128] The definition of PILFs depended primarily on financial restrictions, not the substance of the work.[129]

Although both Congress and the IRS aim to support public interest lawyering pursued by the non-profit sector, the regulation of PILFs reveals the tension between doing so and maintaining viewpoint neutrality.[130] The next section of the Article addresses another area in which legal actors struggle with the appropriate role of government in defining public interesting lawyering: the solicitation doctrine.

B. Exception to Regulation

The regulation of solicitation provides a window into how the Supreme Court and the profession, as represented by the American Bar Association, define public interest lawyering. Although in-person solicitation is no longer the major form by which lawyers attract new clients,[131] it is one of the only areas in which the Supreme Court has offered a detailed examination of how to distinguish public interest lawyering

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124. Rev. Rul. 69-161, 1961-1 C.B. 149.

125. Rev. Rul. 73-285, 1973-2 C.B. 174. *See* Houck, *supra* note 12, at 1446 (suggesting civil rights organizations represented minorities, while PILFs often represented "diffuse majorities" concerned with environmental protection, consumer health, and other issues (quoting Benjamin W. Heineman, Jr., *In Pursuit of the Public Interest*, 84 YALE L.J. 182, 183 (1974) (reviewing SIMON LAZARUS, THE GENTEEL POPULISTS (1974)) (internal quotation marks omitted)).

126. *See* Rev. Proc. 92-59, 1992-2 C.B. 411.

127. *See id.*

128. INTERNAL REVENUE SERV., *supra* note 88. In contrast to both PILFs and civil and human rights organizations, legal aid organizations provide legal services in "routine personal problems" related to family, criminal, and consumer matters. *See id.*

129. Rev. Proc. 92-59.

130. Coming to terms with conservative PILFs is a challenge for progressives. Oliver Houck argued in *With Charity for All*, *supra* note 12, that foundations created and directed by business corporations can be distinguished from PILFs because the rationale for and definition of public interest practice is "access for unrepresented issues to the judicial system," which the corporate interest groups do not serve. Houck, *supra* note 12, at 1449. Houck makes very compelling arguments, but access is not a complete definition of and purpose for public interest lawyering, so this distinction does not answer the question for all contexts. Part of the problem when imagining a substantive conception of public interest lawyering is that the liberal U.S. political system seeks a neutral government. Both to avoid viewpoint discrimination challenges and because of a genuine belief in a particular view of the role of government, legislatures are wary of making values-based distinctions. Yet avoiding values is constricting, if it is even possible. For a critique of the neutrality principle in liberalism, see SANDEL, *supra* note 22, at 3–24.

131. Schwab, *supra* note 51, at 607–10 (describing decrease in solicitation).

from the rest. As will be discussed below, the solicitation doctrine replicates the dichotomy between public interest and profit.

1. Solicitation Is Discouraged

When the legal profession first developed in England, barristers viewed solicitation as unseemly.[132] This was so, at least in part, because barristers came from wealthy families and did not depend on income from their work.[133] They believed seeking business to be distasteful; such activity belonged to tradesman and was unbecoming to professionals engaged in a higher calling of public service.[134]

The ranks of lawyers swelled in the nineteenth century in the United States.[135] Once states expanded eligibility for practice, many chose to pursue the profession.[136] Unlike their predecessors, many of these attorneys were immigrants or persons from lower classes.[137] To manage the newcomers, states drafted codes of ethics.[138] By 1908, the American Bar Association had formed and issued the Canons of Professional Ethics, which included a clear prohibition on solicitation of employment.[139]

Since its beginning, this prohibition has applied primarily to solicitation for pecuniary gain. Despite the absence of an express limitation in the Canons, the Supreme Court interpreted this limitation to have been assumed by the drafters.[140] When the ABA issued the Model Code of Professional Responsibility in 1969, the Code included a broad ban on solicitation "for compensation."[141] The first version of the Model Rules of Professional Conduct included a ban on attorney solicitation "when a significant motive . . . is . . . pecuniary gain."[142] That language remains in the Rule today. The current Model Rule 7.3(a) prohibits lawyers from engaging in "in-person, live telephone or real-time electronic contact solicit[ation of] professional employment from a prospective client [with

132. *See* DRINKER, *supra* note 51, at 210–11; *see also* Max Radin, *Maintenance by Champerty*, 24 CALIF. L. REV. 48, 72 (1935).

133. *See supra* notes 52–56 and accompanying text.

134. Louise L. Hill, *Solicitation by Lawyers: Piercing the First Amendment Veil*, 42 ME. L. REV. 369, 377–78 (1990); Schwab, *supra* note 51, at 606.

135. RICHARD L. ABEL, AMERICAN LAWYERS 40–44 (1989).

136. Louise L. Hill, *A Lawyer's Pecuniary Gain: The Enigma of Impermissible Solicitation*, 5 GEO. J. LEGAL ETHICS 393, 396 (1991).

137. ABEL, *supra* note 135, at 85–90.

138. *See id.* at 112–13, 119, 124–25. For a discussion of the stratification of the legal profession and the use of ethics codes to limit newcomers from capturing business or sullying the professional image, see SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750–1900, at 67–90, 206–39 (1991). *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976).

139. For literature on the class-based elements of anti-solicitation rules, particularly as applied to personal injury lawyers, see Pearce, *supra* note 55, at 396–97. Whereas elite, big firm lawyers connected with clients in country clubs, lower classes of lawyers scrambled and solicited. *See id.*

140. *In re* Primus, 436 U.S. 412, 437 n.31 (1978) (analyzing bar opinions).

141. MODEL CODE OF PROF'L RESPONSIBILITY EC 2-3 (1980).

142. MODEL RULES OF PROF'L CONDUCT R. 7.3 (2012).

whom she has had no prior relationship] when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[143]

2. Public Interest Exception

While acknowledging rationales for a prohibition on solicitation,[144] the Supreme Court in 1963 recognized an exception for public interest lawyering.[145] In *NAACP v. Button*, the Court concluded that interference with the NAACP's solicitation efforts threatened the viability of litigation intended to enforce constitutional rights of racial minorities.[146] The Court ruled that a solicitation prohibition by the State of Virginia unduly restricted the freedoms of speech and association, in violation of the First Amendment.[147] Although the Court's opinion reflected the constitutional claims of the underlying litigation,[148] the Court emphasized the absence of any pecuniary motive on the part of the NAACP LDF lawyers.[149]

To distinguish solicitation for desegregation litigation from the historically disreputable activities of champerty and maintenance,[150] the majority made a point of highlighting the relative poverty of civil rights lawyers.[151] It explained that their work generated less income than that earned for equivalent private professional work.[152] In spite of a dissent by Justice Harlan, pointing out that, pursuant to fee-shifting statutes, the NAACP LDF lawyers do, in fact, earn fees from desegregation litigation,[153] the majority stated broadly that "[l]awsuits attacking racial discrimination, at least in Virginia, are n[ot] very profitable."[154]

The Supreme Court again contrasted public interest lawyering with profit in *In re Primus*[155] and *Ohralik v. Ohio State Bar Ass'n*.[156] Edna

143. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2012).
144. *See* NAACP v. Button, 371 U.S. 415, 439–43 (1963).
145. *Id.* at 428–29, 434–36, 441–44.
146. *Id.* at 434–36.
147. *Id.* at 428–29, 444.
148. *Id.* at 428, 444.
149. *Id.* at 441–43.
150. Intervention in the lawsuit of another has always carried a negative taint, and yet, at various points in history, an exception has been recognized to serve the public interest. In Ancient Greece, only judges, parties, and the personal supporters of parties were to be involved in trials. Radin, *supra* note 132, at 48–49. Starting in the sixth century B.C., intervention on a stranger's behalf was permitted if the injured party could not effectively appear against a more powerful adversary. *Id.* at 49. Assistance for the less powerful party was understood to serve the public interest. *Id.* As this practice developed in Rome, the intervenor was explicitly recognized as the representative of the public, with his client identified as the *populus Romanus*. *Id.* at 49.
151. *Button*, 371 U.S. at 443–44.
152. *Id.* at 420–21.
153. *Id.* at 457 (Harlan, J., dissenting).
154. *Id.* at 443 (majority opinion). Not surprisingly, the majority cited no evidence in the record to support these conclusions. *Id.* This observation is not intended to minimize the impact of boycotts and other penalties exacted on desegregation lawyers, but to demonstrate how the Court's decision, which made no direct reference to such context, inadvertently constructed a portrait of public interest litigation that now threatens its financial viability. *See infra* Part IV.C.
155. 436 U.S. 412 (1978).
156. 436 U.S. 447 (1978).

Primus practiced as a member of a private, for-profit firm and served as a paid consultant to a non-profit organization, the South Carolina Council on Human Relations (SCCHR).[157] Ms. Primus also cooperated on cases with the American Civil Liberties Union (ACLU) on a volunteer basis and served as an officer of the local chapter of the ACLU.[158] The solicitation arose when a community member invited Ms. Primus to speak with a group of low-income women who had been sterilized as a condition of receiving Medicaid assistance.[159] Ms. Primus met with the women and informed them of their constitutional rights.[160] She later contacted one of the attendees, sending her a letter with an offer of free legal representation by the ACLU.[161]

In response, the Secretary of the Board of Commissioners on Grievances and Discipline of the State of South Carolina charged Ms. Primus with solicitation in violation of the state's ethical canons.[162] Specifically, the Secretary claimed Ms. Primus had promoted the services of an organization whose primary purpose was the provision of legal services and given unsolicited advice to join a prospective class action.[163] The state supreme court ordered that she receive a public reprimand.[164] Ms. Primus appealed to the U.S. Supreme Court, which ruled in her favor, finding that that South Carolina had violated her First Amendment rights of expression and association.[165] Making direct comparisons between the NAACP and the ACLU,[166] the Court explained that, for both organizations, litigation was "not a technique of resolving private differences."[167] Citing literature on public interest law and private attorneys-general,[168] the decision emphasized the larger public purpose of the work and

157. *In re* Primus, 436 U.S. at 414–15.
158. *Id.* at 414.
159. *Id.* at 415.
160. *Id.* at 416.
161. *Id.*
162. *Id.* at 417.
163. *Id.* at 420–21.
164. *Id.* at 421.
165. *Id.* at 439. The Court had first introduced the concept of a "right to advocate" in *NAACP v. Alabama ex rel. Patterson*, holding that the First Amendment protected "freedom to engage in association for the advancement of beliefs and ideas." 357 U.S. 449, 460–61 (1958). That opinion highlighted the "close nexus between the freedoms" of association, assembly, and speech, and emphasized that association is often necessary to realize "[e]ffective advocacy." *Id.* at 460. Following *Button*, the Court also extended First Amendment protection to communications in support of workers' compensation claims, which the Court did not recognize as political, but the discussion of which was protected as part of union members' right of association. *See, e.g.*, United Transp. Union v. State Bar of Mich., 401 U.S. 576, 585–86 (1971); United Mineworkers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 225 (1967).
166. *In re* Primus, 436 U.S. at 427.
167. *Id.* at 428 (quoting NAACP v. Button, 371 U.S. 415, 429 (1963)) (internal quotation mark omitted).
168. *Id.* at 414 n.2 (citing, *inter alia*, Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 211–12 (1976); Comment, *Private Attorneys-General: Group Action in the Fight for Civil Liberties*, 58 YALE L.J. 574, 576 (1949)).

demonstrated the Court's developing conception of public interest lawyering.[169]

This portrait of public interest lawyering contrasted with working for a fee. The Court labored over the facts to show that Ms. Primus lacked a pecuniary motive. Rather than simply concluding that, Ms. Primus's solicitation constituted an expression of political ideas because of the substance of the underlying lawsuit, the Court highlighted the distance between Ms. Primus and any pecuniary gain that might result from it.[170] The Court devoted attention to the fee agreement between the ACLU and cooperating attorneys, recognizing that the ACLU could collect fees under the governing fee-shifting statute if the organization prevailed.[171] The Court determined, however, that Ms. Primus's income did not depend on the outcome of the litigation.[172]

The same day the Court ruled that Ms. Primus's solicitation "to advance 'beliefs and ideas'" deserved constitutional protection,[173] it issued a companion decision, *Ohralik v. Ohio State Bar Ass'n*, holding that "ordinary" solicitation did not.[174] Mr. Ohralik, a solo practitioner in Ohio, solicited two clients after an uninsured driver crashed into the car in which the clients were traveling.[175] Mr. Ohralik provided the clients with accurate advice about their legal rights and responsibilities, including their entitlement to recover $12,500 each from an insurance company.[176]

Mr. Ohralik's behavior was, however, unusually aggressive and potentially fraudulent. Mr. Ohralik solicited the clients, two 18-year-old women, when one lay in a hospital bed and the other had returned home from the hospital only a day earlier.[177] Under such circumstances, a reasonable person might have questioned whether these individuals voluntarily elected to engage Mr. Ohralik's services. Perhaps even more troubling, without prior permission or notice, Mr. Ohralik tape-recorded conversations with one of the clients and with the other's parents.[178] Finally, when the clients attempted to discharge him, he insisted that the repre-

169. *Id.* at 437–38.

170. *Id.* at 428–29. As Louise Hill has observed, the *Primus* Court ignored how intertwined the ACLU's and Ms. Primus's interests were. *See* Hill, *supra* note 136, at 404–05. All three members of Ms. Primus's law firm worked with the ACLU; two volunteered and one was a staff attorney. *In re* Primus, 436 U.S. at 418 n.8. Ms. Primus was also engaged as a consultant by the SCCHR, the organization that invited her to speak to the potential plaintiffs. *Id.* at 415.

171. *In re* Primus, 436 U.S. at 429–31.

172. *Id.* at 436 n.30.

173. *Id.* at 438 n.32.

174. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 462 n.20 (1978) (quoting Bates v. State Bar of Ariz., 433 U.S. 350, 380 (1977)).

175. *Id.* at 449–50.

176. *Id.*

177. *Id.* at 450–51.

178. *Id.*

sentation agreements were binding.[179] He ultimately sued one of them for breach of contract.[180]

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio found that, by engaging in solicitation, Mr. Ohralik had violated the Ohio Code of Professional Responsibility.[181] The Ohio Supreme Court held that the First Amendment did not protect Mr. Ohralik, and, in addition to the public reprimand, his license ought to be indefinitely suspended.[182] The U.S. Supreme Court agreed.[183]

The Justices could have distinguished this case from *In re Primus* based on the coercive and fraudulent nature of Mr. Ohralik's conduct,[184] but the majority instead focused on his profit motive.[185] Mr. Ohralik offered representation in exchange for a contingency fee; he would receive one third of any award obtained, but, if he failed to secure any relief, he would earn nothing.[186] Research demonstrates that contingency fee agreements actually provide a method of securing legal services for persons without sufficient means to pay upfront,[187] but this did not enter into the Court's analysis.[188]

The Court interpreted Mr. Ohralik's attempt to gain "remunerative employment" as a proposal for "a business transaction."[189] It characterized his solicitation as commercial speech comparable to advertising[190] but even more dangerous because of its live, in-person format.[191] The Court had previously recognized truthful, nondeceptive advertising as valuable for delivering information to the public and therefore entitled to limited First Amendment protection.[192] The Court recognized no special

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179. *Id.* at 451–52.
180. *Id.* at 452.
181. *Id.* at 453–54.
182. *Id.*
183. *Id.* at 454.
184. *Id.* at 467–68 (describing Mr. Ohralik's conduct as a "striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation").
185. *Id.* at 464 (reasoning that presence of a pecuniary motive is "inherently conducive to overreaching and other forms of misconduct").
186. *Id.* at 450–51.
187. *See supra* note 104 (describing market role of contingency fees).
188. Indeed, the Court apparently took exception to Mr. Ohralik's characterizing the contingency fee arrangement as one in which the client would not have to pay with her own assets. *See Ohralik*, 436 U.S. at 467 ("He emphasized that his fee would come out of the recovery, thereby tempting the young women with what sounded like a cost-free and therefore irresistible offer."); *id.* at 451 n.4 ("In explaining the contingent-fee arrangement, appellant told Wanda Lou that his representation would not 'cost [her] anything' because she would receive two-thirds of the recovery if appellant were successful in representing her but would not 'have to pay [him] anything' otherwise." (alterations in original)).
189. *Id.* at 457.
190. *Id.* at 454.
191. The *Ohralik* majority distinguished *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) (striking down prohibition on attorney advertising), on the grounds that in-person solicitation poses more of a danger of coercion than print advertising. *See Ohralik*, 436 U.S. at 455.
192. *Id.* at 455–56 (discussing lower level of protection for commercial speech as defined after Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)).

test for advertising by attorneys.[193] In the *Ohralik* majority's view, a "lawyer's procurement of remunerative employment is a subject only marginally affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation."[194] The Court drew a bright line between remunerative employment and public interest lawyering.

Once the majority in *Ohralik* found that the lawyer did have a pecuniary stake in the outcome, the Court made no assessment as to the public value of the lawyer's work. Only Justice Marshall, in his concurrence, noted that Mr. Ohralik had in fact provided the two clients with accurate information about their rights.[195] The other Justices saw Mr. Ohralik's pecuniary motive as central,[196] and therefore viewed the substantive value of his work as irrelevant, or else saw the public value of Mr. Ohralik's work as so minimal as not to deserve mention. Given the facts, it is also possible that the Justices viewed Mr. Ohralik's conduct as so troubling that no degree of public value in the work could possibly justify his behavior. If so, the Court still could have distinguished the improper manner of his conduct from whether his motive was pecuniary. Yet the Justices grounded their decision in Mr. Ohralik's apparent goal of pecuniary gain.[197] The Court stated without explanation that Mr. Ohralik not only did not but "could not" have made an argument based on political expression or freedom of association. [198]

Representing accident victims could, however, include both profitable and political components. This argument could be strong in a case where an attorney aggregates multiple parties' claims against large corporate defendants and alters industry practices.[199] Even Mr. Ohralik accurately advised non-wealthy individuals to recover health care costs

193. *Cf.* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536–48 (2001) (striking down funding conditions that prohibited lawyers from challenging welfare laws on grounds of special expressive value of lawyers' communications); *see id.* at 562 (Scalia, J., dissenting) (accusing majority of "improper special solicitude for our own profession"); *see also* Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantánamo*, 44 U.C. DAVIS L. REV. 1487, 1508–12 (2011) (analyzing role of lawyers' speech as portrayed by *Velazquez* majority).

194. *Ohralik*, 436 U.S. at 459.

195. *Id.* at 473 (Marshall, J., concurring).

196. *Id.* at 464 (majority opinion) (reasoning that the presence of a pecuniary motive is "inherently conducive to overreaching and other forms of misconduct" and likely to result in unacceptable harm to the client).

197. *Id.* (explaining that the state necessarily has a strong interest in preventing solicitation where there is a pecuniary motive for the purpose of protecting the public).

198. *Id.* at 458.

199. *See* Anne Bloom, *Taking on Goliath: Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, *in* CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 96 (Austin Sarat & Stuart Scheingold eds., 2001); Erichson, *supra* note 5, at 2093–101 (exploring motives of mass tort lawyers); *id.* at 2094 n.28 (collecting relevant literature on mass tort lawyers).

from a corporate insurer; perhaps this, too, could be considered a form of public interest lawyering.[200]

The Court's jurisprudence reflects a broader ambivalence as to whether litigation for profit can be a method of vindicating public rights, and where public interest lawyering fits in relation to the norms of the profession.[201] As for whether the potential to earn a fee makes lawyers' communications unworthy of protection, members of the Court have acknowledged that earning a living is not mutually exclusive from pursuing public aims, and that the divide between professionalism and remuneration is largely an artifact of an earlier age, disconnected from "the real-life fact that lawyers earn their livelihood at the bar."[202] Yet, in deciding the companion cases of *Primus* and *Ohralik*, the Court leaned heavily on the notion that some but not all solicitation is in the public interest, and that public interest lawyering is incongruous with the presence of any pecuniary motive.

Solicitation doctrine is an area where public interest lawyering has been defined in opposition to that which generates a fee. The next section of the Article will address an area that turns this model on its head.

C. Fee-Shifting Statutes

Congress has repeatedly affirmed a major category of financial support for private litigation in the public interest: fee-shifting statutes. For certain statutes, the private enforcement of which Congress believes serves the public interest, Congress has created judicial authority to allow prevailing plaintiffs to receive full attorneys' fees from defendants. It is notable that Congress chose not only to encourage potential plaintiffs to enforce these statutes, which it might have done by other means,[203] but also specifically to foster representation by skilled attorneys through financial incentives. Fee-shifting statutes therefore offer an interesting window into which statutes and what kinds of lawyering Congress has determined would serve the public interest, and they

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200. *See* Susan D. Carle, *Re-valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 729–32, 736–37 (2001); *see also* Cummings, *supra* note 14, at 10 (defining "private [public interest law] firms to include for-profit legal practices whose core mission is to advance a vision of the public interest that enhances legal and political access for underrepresented groups or pursues a social change agenda that challenges corporate or governmental power").

201. *Compare, e.g.*, *Ohralik*, 436 U.S. at 460 ("Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 674 (1958)) (internal quotation mark omitted)), *with id.* at 458–59 (distinguishing public interest lawyering with political, expressive, or associational value as an exception to the mainstream of lawyers' "remunerative employment").

202. Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977); *see also Ohralik*, 436 U.S. at 460.

203. As examples of alternative approaches, a statute could sanction waiver of filing fees to decrease barriers to litigation or expand categories of available damages to increase plaintiffs' financial incentives.

demonstrate the legislature's recognition of the need to make such lawyering financially viable.

Fee-shifting contrasts with the general rule about availability of counsel in the United States.[204] The traditional rule is that each party pays all costs of participating in any civil lawsuit, including the costs of hiring a legal representative.[205] As a corollary to that principle, if a party cannot pay the costs of participation in a civil matter, with limited exceptions,[206] there is no guarantee that the government or any private party will cover the costs.[207] Generally, if a party lacks the means to pay a lawyer, it might be unable to pursue litigation or it might be forced to do so *pro se*.[208] Fifty years after *Gideon v. Wainwright*,[209] no federal constitutional decision has promised payment for legal representation in civil matters.[210]

Fee-shifting statutes, however, suggest a different approach. Congress has passed extensive fee-shifting legislation that authorizes judges in certain categories of cases to shift the cost of legal representation from prevailing plaintiffs to the defendants against whom they have prevailed.[211] Most of these statutes include the following language: a "court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."[212] While the lan-

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204. For a history of the American rule, see generally John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

205. *See generally* Resnik, *supra* note 29, at 2130–37 (introducing concept of "unaided access" as premise of the U.S. civil justice system).

206. If indigent, a party may request a waiver of court fees.

207. As is well-known, *Gideon v. Wainwright* recognized a constitutional right to counsel in criminal matters, but the same does not apply in civil proceedings. 372 U.S. 335, 339–40, 343 (1963); *see* Turner v. Rogers, 131 S. Ct. 2507, 2520 (2011) (ruling that, even if incarceration is at stake, there is no guaranteed right to appointed counsel in civil cases); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31 (1981) (denying right to appointed counsel in parental termination proceeding).

208. *See* Rhode, *supra* note 49, at 597 (highlighting that allocation of lawyers based on market forces influences individual outcomes).

209. 372 U.S. 335 (1963).

210. *See* Russell Engler, Turner v. Rogers *and the Essential Role of the Courts in Delivering Access to Justice*, 7 HARV. L. & POL'Y REV. 31, 36–37 (2013) (describing civil right to counsel movement); Earl Johnson Jr., *50 Years of Gideon, 47 Years Working Toward a 'Civil Gideon'*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL'Y 35 (2013).

211. *See* Marek v. Chesny, 473 U.S. 1, app. at 44–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions).

212. *See, e.g.*, 42 U.S.C. § 1988(b) (2012). The Civil Rights Attorney's Fee Awards Act of 1976 (CRAFAA) was one of the first of the modern fee-shifting provisions, and many other provisions track this language. *See* Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of* Buckhannon *for the Private Attorney General*, 54 UCLA L. REV. 1087, 1093–94 (2007). Congress passed CRAFAA in direct response to the Supreme Court's ruling in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), which had held that courts lacked the authority to award fees to prevailing plaintiffs in the absence of a specific statutory mandate. Albiston & Nielsen, *supra* at 1093–94. For further analysis of the dialogue between Congress and the Supreme Court regarding fee-shifting provisions, see generally Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291 (1990).

guage may appear neutral as to the identity of the prevailing party,[213] the statutes serve to support work by lawyers striving to enforce these statutes and serve the public values behind them. The Supreme Court specifically recognized this aspect of fee-shifting statutes in a pair of cases, *Newman v. Piggie Park Enterprises, Inc.*[214] and *Christiansburg Garment Co. v. EEOC*,[215] holding that fees are to be awarded to prevailing plaintiffs in virtually all cases,[216] while prevailing defendants may be awarded fees only in highly exceptional ones.[217]

Congress created fee-shifting provisions where it decided that pursuit of litigation, with the assistance of counsel, was in the public interest. Congress did not use statutory authority to restructure the civil justice system and provide fees for all prevailing plaintiffs. This approach could have supported retention of counsel by parties with meritorious claims and arguably increased the deterrent value of all civil laws. Yet Congress adopted the approach of creating fee-shifting provisions only for constitutional and statutory rights whose enforcement has special public value.[218]

In fee-shifting jurisprudence, Congress and the Supreme Court have indicated that some civil litigation has value beyond serving the substantive or procedural rights of the litigants. In those areas, Congress has seen fit to authorize the reimbursement of attorneys pursuing the cases so that attorneys will, in fact, pursue them.[219] These statutory provisions span areas including civil rights, workers' rights, consumers' rights, freedom of information, and environmental protections, among others.[220]

Congress designed fee-shifting provisions as an exception to the traditional American rule for the purpose of encouraging and sustaining legal representation in areas that serve the public.[221] It is important to recognize that the fee-shifting provisions indicate not only that Congress wanted aggrieved persons to pursue certain categories of cases, but also that Congress wanted lawyers to represent the plaintiffs in those cases. The fee-shifting provision does not provide an additional reward to plaintiffs who pursue claims; it rewards only those plaintiffs who secure representation. In theory, Congress could have created a new category of

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213. *See, e.g.*, S. REP. NO. 94-1011, at 3–4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910–11 (1976).

214. 390 U.S. 400 (1968) (per curiam).

215. 434 U.S. 412 (1978).

216. *See Newman*, 390 U.S. at 402.

217. *Christiansburg Garment Co*., 434 U.S. at 421.

218. S. Rep. No. 94-1011, at 4–5, *reprinted in* 1976 U.S.C.C.A.N. at 5912 (explaining the intent behind the Civil Rights Attorney's Fees Awards Act of 1976); *see also* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 108–11 (1991) (Stevens, J., dissenting) (summarizing legislative history).

219. *See, e.g.*, *Newman*, 390 U.S. at 402; Brand, *supra* note 212, at 309–10.

220. *See, e.g.*, Marek v. Chesny, 473 U.S. 1, app. at 43–51 (1985) (Brennan, J., dissenting) (collecting federal statutory fee-shifting provisions).

221. *See infra* notes 286–93 and accompanying text.

compensatory damages awarded to successful plaintiffs, but instead Congress provided an award for the lawyers who take those cases. Congress determined that parties would be unable to assess the merits of their cases or litigate them effectively without representation.[222] Particularly given the absence of a civil *Gideon*, fee-shifting statutes represent a strong statement as to which lawyering activities serve the public interest.

III. COMPARING THREE APPROACHES

The previous section surveyed three very different institutional contexts in which public interest lawyering is operationalized: tax exemptions, exceptions to the solicitation prohibition, and fee-shifting statutes. This section will compare and analyze the definitions constructed in the three contexts.

A. Fee-Shifting Legislation as a Counter-Example

In its solicitation jurisprudence, the Supreme Court has drawn a distinction between litigation aimed at public purposes and litigation motivated by pecuniary gain.[223] The Court has recognized public interest litigation, in contrast to commercial lawyering, as an extension of political expression entitled to the highest level of First Amendment protection. In the companion cases of *In re Primus* and *Ohralik v. Ohio State Bar Ass'n*, the Court protected the solicitation of an attorney volunteering with the ACLU on a potential substantive due process case, while upholding censure of an attorney who engaged in solicitation of personal injury cases for a contingency fee.[224] In addition to the substantive differences distinguishing the underlying litigation, the majority opinion in each case devoted significant attention to the role of the soliciting attorneys' pecuniary gain. Particularly in *Ohralik*, although the concurrence pointed out that Mr. Ohralik had, in fact, provided accurate and potentially useful legal advice, the majority failed to consider seriously the extent to which Mr. Ohralik's lawyering activities served a public purpose.[225] The majority determined that the attorney's motives were pecuniary in nature and resolved the case on that basis.[226] This binary approach has since dominated solicitation doctrine jurisprudence[227] and shaped the

222. S. REP. NO. 94-1011, at 3–4, 6, *reprinted in* 1976 U.S.C.C.A.N. at 5910–11, 5913. Congress wanted to attract counsel who could handle sophisticated cases and recognized that fees needed be set accordingly. *See id.* at 6 (fees should be set at an amount that would "attract competent counsel").

223. *See supra* Part II.B.

224. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 447–48 (1978); *In re* Primus, 436 U.S. 412, 412–13 (1978). For literature on the class-based elements of anti-solicitation rules, particularly as applied to personal injury lawyers, see Pearce, *supra* note 55, at 396–97.

225. *Ohralik*, 436 U.S. at 473–74 (Marshall, J., concurring).

226. *See id.* at 467 (majority opinion).

227. Note that there has been some ambivalence on the Court. In one of its advertising cases, the Court noted that law is no less a profession because lawyers "earn their livelihood at the bar."

public interest exception to the Model Rule, which bars solicitation of employment "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain."[228]

The IRS recognizes a broad category of lawyering as public interest work deserving of tax benefits.[229] Treasury Regulations specify that to qualify, the lawyering work must serve a public rather than private interest.[230] One form of activity that tax law recognizes is legal services for indigent clients, provided at a reduced fee based on the indigent clients' ability to pay, rather than at a market rate based on the type of service. This category qualifies because it is considered a form of charity to the poor, which necessarily serves the public, as opposed to a private interest.[231] The IRS has interpreted public interest lawyering deserving of tax benefits to include organizations that defend human or civil rights, even if their clients are not indigent persons.[232] To qualify for tax exemption, a human or civil rights organization must comply with the asset restrictions of Section 501(c)(3) of the Internal Revenue Code.[233] The IRS will also engage in special scrutiny of whether a human or civil rights organization engaged in litigation serves a public, as opposed to private, interest. If client fees provide a primary form of financial support for the organization, that fact can indicate that the organization services a private rather than public purpose.[234] Finally, another form of activity that the tax law recognizes is that of a "public interest law firm" (PILF) that complies with the particular requirements of Revenue Procedure 92-59.[235] In that case, even if a law firm neither serves indigent clients nor defends human or civil rights, the IRS may recognize the law firm as engaged in a unique category of public interest law if it serves the "public rather than a private interest" and handles "issues of significant public interest."[236] To distinguish these PILF cases from "traditional private law," the IRS has issued guidelines restricting the finances of PILF firms.[237] Although such cases may generate attorneys' fees, to qualify as "public interest law" for tax exemption purposes,[238] the fee for those cases must be severely limited.[239] Most importantly, the fee must be small enough to make the case "not . . . economically feasible for the traditional private law firms," and the fees must add up to less than fifty percent of the

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Bates v. State Bar of Ariz., 433 U.S. 350, 368 (1977). Perhaps there is acceptance of the notion that the profession must earn a living, but public interest work is still held out as special.

228. MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2012).
229. *See supra* Part II.A.
230. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008).
231. Rev. Rul. 69-161, 1969-1 C.B. 149.
232. Treas. Reg. § 1.501(c)(3)-1(d)(2); Rev. Rul. 73-285, 1973-2 C.B. 174.
233. Treas. Reg. § 1.501(c)(3)-1(b)(4).
234. *Id.* § 1.501(c)(3)-1(d)(1)(ii).
235. Rev. Proc. 92-59, 1992-2 C.B. 411.
236. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 § 3(01).
237. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 §§ 3–5.
238. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 § 4.
239. Rev. Proc. 92-59 § 4(03)–(05).

overall costs of operating the lawyer's firm.[240] In all three of these areas recognized for tax benefits—legal aid to the poor, defending human and civil rights, and public interest law more broadly conceived—the IRS tethers its definition of the category of public interest law to the economics of the legal services. In the first category, the economics of the client population are the defining factor. In the remaining two, the work is demarcated by exceptional fee structures and market conditions.

Fee-shifting statutes stand in stark contrast to the approaches to public interest lawyering taken in the contexts of tax benefits and solicitation. Although Congress has not expressly crafted one statute defining all public interest litigation in which fee shifting is to be available, in a series of subject-specific laws, it has carved out a major exception to the traditional American rule regarding the availability of civil counsel, and legislative history makes clear that the purpose of this exception is to encourage litigation in the public interest.[241] The subjects of this public interest litigation have historically focused on civil rights but, for the past half century, they have expanded into other areas including labor, consumer protection, securities, the environment, and public access to government records.[242]

There are two key differences between the concept of public interest lawyering as expressed in fee-shifting statutes, on the one hand, and in solicitation rules and tax exemptions, on the other. First, fee-shifting statutes define public interest lawyering based on the substance of the work. This definition does not depend primarily on the unavailability of representation in the current legal services market. Rather, because the lawyering addresses topics of particular public interest, the statutes seek to facilitate it within, and build on, the existing economic market. This is not to say that the creation of fee-shifting statutes is unrelated to market conditions and market failures. The fee-shifting provisions would not be necessary if all potential plaintiffs with claims had both the means and the incentives to pay market-rate attorneys' fees.[243] Yet what is notable is that the definition of which kind of lawyering work is worth supporting

240. INTERNAL REVENUE SERV., *supra* note 88; Rev. Proc. 92-59 §§ 2(02), 4(04)–(05).

241. *See supra* Part II.C.

242. Although the collection of statutes carrying such provisions may be recognizable as public laws, as a historical matter, the group does not necessarily reflect one unified scheme for public interest lawyering so much as the priorities of legislators at various times in U.S. history.

243. Although the statutes were passed with the assumption that potential litigants could not afford to pay attorneys' fees, not all fee-shifting statutes were based on evidence of that empirical reality. Moreover, some of the statutes aim to remedy social problems that even wealthy individuals or a collection of such individuals would not have sufficient economic incentive to pursue. Even to assess whether potential clients could afford the litigation in the current market makes little sense, where the case is too expensive for anyone's private interests to make it worthwhile and yet it is highly worthwhile given the larger public interest. *See, e.g.*, Chapin, *supra* note 117, at 442–43 (characterizing PILF cases as those on behalf of a non-indigent majority lacking economic incentive to sue).

is a positive one, based on the substance of the cases, as opposed to a negative one, based on the market's devaluation of the work.[244]

There is a second unique attribute of the fee-shifting statutes as a definition of public interest lawyering. Unlike solicitation jurisprudence, which focuses on pecuniary motives, and tax law, which distinguishes between organizational purposes, fee-shifting provisions do not consider good intentions. Fee-shifting statutes recognize and reward only that activity which, through a court order or settlement, brings results. Under the Model Rule and jurisprudence on which it is based, public interest lawyering without pecuniary intent will be granted an automatic exception to the general prohibition on solicitation.[245] It does not matter whether or not that lawyer accomplishes anything for a client. The same is true for public interest lawyering under federal tax law. A non-profit law firm will enjoy tax benefits so long as it complies with federal tax law requirements, regardless of the actual utility of the services it offers. Yet, to enjoy the benefits of fee-shifting provisions, a lawyer must not only engage in work whose subject matter is defined by statute, but she must prevail.[246] She must not only intend to do good, but also she must actually accomplish something for her clients.[247]

B. Solicitation Rules and Tax-Exempt Non-Profits

The rationale behind the solicitation prohibition might lend itself to a public interest exception defined by pecuniary motive. Bar associations and courts have advanced a number of slightly different rationales for the general rule. These rationales can be divided into three categories.

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244. The financial means of the clients is not totally irrelevant, because if the clients could afford to pay lawyers out of pocket, arguably the fee-shifting statutes would not be necessary. But the reason for the fee-shifting statutes goes beyond obtaining lawyers for individual clients without means to pay; it stems from a sense that the litigation serves a larger public purpose. It serves to enforce laws whose public policies are of particular value and to deter bad actors who would violate those laws in the future. The fee-shifting provisions serve not only to assist the individual with securing access to legal services but, even more, to promote certain kinds of lawyering in the public interest. Unlike in legal services, the class status of the clients is not among the key factors in determining whether the representation should be provided as a form of public service lawyering. On the contrary, the class status of the clients varies widely across fee-shifting statutes, from securities cases to consumer cases to employment discrimination cases, many of which involve persons of means but without sufficient economic incentives to engage a lawyer's services, given the likely damages. But, again, a major purpose of these statutes and the enforcement of them is deterrence, and, for that, the class status of the individual plaintiffs is irrelevant.

245. *See* MODEL RULES OF PROF'L CONDUCT R. 7.3(a) (2012); *see also infra* notes 248–56 and accompanying text.

246. The fee-shifting approach also carries special vulnerabilities and challenges. *See infra* Part IV.

247. It should be noted that some critics believe the lawyer can obtain fees even if the result offers relatively little value for her client. *Compare* Evans v. Jeff D., 475 U.S. 717, 734–35 (1986) (describing relatively high fees despite relatively low monetary damages), *with* Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1117–18 (2012) (describing image of overpaid lawyers as inaccurate). Yet, in theory, successful litigation pursuant to a fee-shifting statute benefits not only the individual client, but also the public at large, *see Evans*, 475 U.S. at 752 (Brennan, J., dissenting), so the estimated value of the legal services should incorporate the broader benefit.

First, solicitation of clients for the lawyer's own employment arguably creates an inherent conflict of interest.[248] When a lawyer communicates with a layperson about the viability of any potential claims or defenses, and the prudence of retaining counsel, the person looks to the lawyer for advice. However, when that lawyer hopes to enter into a retainer with a client, the lawyer cannot provide unbiased advice.

Second, solicitation could result in a retainer when the client does not truly want representation. This is the greatest risk in the case of coercion or fraud by the attorney. Even in the absence of behavior that qualifies as fraud or coercion, courts have issued warnings about the consequences of lawyers, "trained in the art of persuasion," interacting with laypersons.[249]

Third, solicitation could result in a retainer where the client does not need, or would not benefit from, representation. Like the second rationale, this is a concern where the attorney engages in fraud or coercion, or the layperson is fragile or incapable of assessing her own interests. But the concern here is substantive: preventing solicitation where entering into the retainer is not in the person's best interests.[250]

To the extent that solicitation prohibitions aim to avoid conflicted or otherwise bad behavior by attorneys, it could seem that a public interest exception based on pecuniary motives makes sense. One rationale for the pecuniary motive limitation is the idea that a lawyer with a pecuniary motive will necessarily have a conflict of interest when advising a potential client, because of the lawyer's desire to enter into the retainer and earn a fee.[251] If the lawyer bears no financial incentive to convince the

248. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 461 n.19 (1978); *see also* MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 1–3 (2012).

249. *Ohralik*, 436 U.S. at 464–66; *see also* Alexander v. Cahill, 598 F.3d 79, 96–103 (2d Cir. 2010) (upholding moratorium on post-accident targeted solicitation regardless of actual fraud or coercion); MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 2–3 (2012). Regulators and courts generally view in-person solicitation as particularly likely to risk harm to potential clients. Compared with recordings, mailings, and general advertisements, in-person solicitation may allow less time for a layperson to make a decision about entering into a retainer, and she may feel pressured by the presence of an attorney while deciding. *See id.* In *Ohralik*, the Court suggested that in-person solicitation presents special dangers of pressuring potential clients to respond quickly and affirmatively to offers of representation, which might be easier to ignore if presented in printed form. *Ohralik*, 436 U.S. at 457. Additionally, in-person communications may be the most difficult to monitor and to challenge. The content of a written or recorded form of solicitation can more easily be established. Finally, as courts and regulators have loosened restrictions on advertising and non-live forms of solicitation, these alternative avenues of communication may be cited to show a decreased need for in-person solicitation and therefore decreased acceptance of the risks in-person solicitation entails.

250. Another, less emphasized, concern may be that retainers entered into under conditions of in-person solicitation are particularly likely to be gateways to other substantive problems, such as the provision of substandard services. One might believe that in-person solicitation agreements tend to be formed between unscrupulous lawyers and particularly vulnerable populations that lack recourse if the lawyer fails to perform well. If that were the case, regulators might determine that the regulation of the quality of services is too expensive and too intrusive to pursue as thoroughly as would be necessary to stamp out all such incidents of inadequate legal representation, but stopping the formation of such relationships before they occur is a productive approach.

251. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmts. 2, 5 (2012).

target of the solicitation to become a client, the conflict might disappear.[252]

Lawyers motivated by pecuniary gain might also be more likely to engage in the types of abusive practices that solicitation restrictions are designed to prevent. Comment 5 to the Model Rule says exactly this: "There is far less likelihood that a lawyer would engage in abusive practices . . . in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain."[253] The drafters of the comment posit that if an attorney's primary motivation is something other than profit, she will be less likely to behave badly.[254] They suggest that pecuniary gain is the bad motive most likely to cloud a lawyer's judgment.[255] The construction of this rule reflects a progressive idea that, so long as an expert was removed from economic interest, "his commitment to the common good [would be] pure and incorruptible."[256]

Yet, following this logic, the pecuniary motive approach to the public interest exception can be both overinclusive and underinclusive. The exception may be too broad, permitting solicitation in situations where the absence of pecuniary gain does not provide a sufficient guarantee of good behavior. Monetary greed is not the only motivator that can lead to bad behavior or conflicts of interest. Take the case of Ms. Primus: while she might have wanted to help the women she met, she also wanted to participate in crafting litigation to challenge the imposition of sterilization requirements. This might be a motivation separate from pecuniary gain, and it might benefit the public at large, but it could be different from the needs of the potential clients. Scholars have previously written about the conflicts public interest lawyers may face when representing a cause and not just a client.[257] While the lawyer may have multiple goals and the majority of those may be pure in the sense of not being monetarily self-interested, this does not necessarily safeguard the goodness of the solicitation with respect to potential conflicts.

If the goal of the public interest exception is to make room for solicitation that serves the public interest, the pecuniary gain exception is also potentially too narrow.[258] First, an attorney could possess mixed motives, seeking to promote the public interest and to earn a living. Her motives could change over time; for example, an attorney might come to believe strongly in the public value of a case that she previously accepted only

252. *Id.* at cmt. 5.
253. *Id.*
254. *Id.*
255. *See id.*
256. Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445, 1467 (1996); *see* Susan D. Carle, *Race, Class, and Legal Ethics in the Early NAACP (1910–1920)*, 20 LAW & HIST. REV. 97, 144 & n.162 (2002).
257. *See* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 548, 555 (2004).
258. *See* Hill, *supra* note 136, at 393–94.

for monetary reasons. As Carrie Menkel-Meadow has discussed with respect to cause lawyers, parsing or quantifying motives may be impossible.[259] Second, and perhaps more importantly, an actor's conduct may be good or bad regardless of intent.[260] The lawyer might have pecuniary or other "bad" motives and the legal services could still be good.[261] The reverse is also true. In both cases, the motive of the attorney can be unrelated to whether the solicitation serves the public interest.

Aside from the specific rationales behind the solicitation rules, the other factor influencing the solicitation doctrine is the role of the First Amendment. The solicitation cases may have framed public interest in opposition to pecuniary motives due to what the Court perceived as a dichotomy between political and commercial forms of speech. The Court framed *Primus* and *Ohralik* as follows:

> Unlike the situation in *Ohralik*, however, appellant's act of solicitation took the form of a letter to a woman with whom appellant had discussed the possibility of seeking redress for an allegedly unconstitutional sterilization. This was not in-person solicitation for pecuniary gain. Appellant was communicating an offer of free assistance by attorneys associated with the ACLU, not an offer predicated on entitlement to a share of any monetary recovery. And her actions were undertaken to express personal political beliefs and to advance the civil-liberties objectives of the ACLU, rather than to derive financial gain. The question presented in this case is whether, in light of the values protected by the First and Fourteenth Amendments, these differences materially affect the scope of state regulation of the conduct of lawyers.[262]

The status of the commercial speech doctrine at the time of the decisions may partly explain this approach.[263] It was shortly before the de-

259. *See* Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers*, *in* CAUSE LAWYERING, *supra* note 10, at 31, 37–48.

260. A separate question, beyond the scope of this paper, is whether bad acts may be justified if they serve a greater good. In the case of an attorney engaged in solicitation, the solicitation might be conducted poorly, even coercively, for the purpose of serving a greater good. If an individual plaintiff were enlisted by the NAACP LDF under circumstances we might view as pressured, but the organization represented her zealously and it won both a judgment for her and a victory for racial equality, we might have different views as to whether this solicitation should be punished.

261. *See, e.g.*, Maracich v. Spears, 133 S. Ct. 2191, 2212–13 (2013) (Ginsburg, J., dissenting) (noting that lawyers were prohibited from using the Freedom of Information Act to obtain public information to locate additional plaintiffs for ongoing suit, even though statute allows provision of information for litigation or "investigation in anticipation of litigation" (internal quotation marks omitted)); *see also infra* notes 304–08 and accompanying text (describing important public interest served by some lawyering by large, conventional law firms).

262. *In re* Primus, 436 U.S. 412, 422 (1978).

263. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 622–24, 635 (1995) (interpreting attorney advertisements as commercial speech subject to intermediate scrutiny pursuant to *Central Hudson* and holding that restriction on targeted mail advertisements withstood intermediate scrutiny); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–66 (1980) (identifying test for commercial speech); *see also* Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 473–77, 479–80 (1988) (striking down restriction on targeted mailings); Zauderer v. Office of Disciplinary Counsel,

cisions of *Primus* and *Ohralik* that the Court issued *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[264] recognizing limited First Amendment protection for commercial speech.[265] In *Ohralik*, the Court explained that commercial speech merits only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values . . . allowing modes of regulation that might be impermissible in the realm of noncommercial expression."[266] The Court has since broadened the protections for commercial speech, but the notion has persisted that public interest lawyering is disconnected from the commercial market.[267] The drafters of the Model Rules continue to use the absence of a significant pecuniary motive as the key indicator of public interest lawyering excluded from the solicitation prohibition.[268]

Lawyers employed by non-profit organizations are understood to be exempted from solicitation prohibitions, though Supreme Court jurisprudence does not require the exemption to reach so broadly.[269] Comment 5 to the Model Rule explains that the solicitation prohibition "is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations."[270] Courts tend to view solicitation by non-profits as excluded under a blanket rule, without separate analyses of the attorneys' motivations or whether the activity is entitled to constitutional protection.[271] Although the structure of a non-profit means the lawyer will not receive a profit directly from the case, should litigation lead to fees pursuant to a fee-shifting statute, the fees could increase the size of the organization's war

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471 U.S. 626, 647, 649 (1985) (reversing discipline against attorney for truthful and not misleading statements in advertising).

264. 425 U.S. 748 (1976).

265. *Id.* at 770.

266. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

267. The Court specifically applied First Amendment protections to attorney advertising in *Bates v. State Bar of Arizona*, "holding that advertising by attorneys may not be subjected to blanket suppression . . . [but] not . . . that advertising by attorneys may not be regulated in any way." 433 U.S. 350, 383 (1977). It encouraged the bar to "assur[e] that advertising by attorneys flows both freely and cleanly." *Id.* at 384.

268. *See supra* Part II.B. The drafters of the Model Rules are of course free to recognize and exempt a category of public interest lawyering broader than the category of public interest lawyering determined to be constitutionally protected.

269. *Compare* Rivera v. Brickman Grp., Ltd., No. 05-1518, 2006 U.S. Dist. LEXIS 10210, at *5–6 (E.D. Pa. Mar. 10, 2006) (finding that, given non-profit status of law firm, there was no evidence that plaintiffs' counsel was motivated by pecuniary gain, even though attorneys sought fees provided by statute), *with* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1215 n.5 (8th Cir. 1984), *abrogated on other grounds by* Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989) (distinguishing employment case in which class was represented by "a private attorney who is requesting a court-awarded fee" from *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), where class was represented by the NAACP LDF, a "nonprofit organization formed to litigate civil-rights cases").

270. MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 5 (2012).

271. *See, e.g.*, *Rivera*, 2006 U.S. Dist. LEXIS 10210, at *5–6 ("If, like most non-profit organizations, plaintiffs' counsel's employer uses income to fund more projects rather than supplement the salaries of its employees, one can expect plaintiffs' counsel to receive no pecuniary gain whatsoever from their efforts in this litigation.").

chest or even determine its overall financial health. Additionally, since attorneys' careers can crisscross between for-profit firms, government agencies, and non-profit organizations, an individual attorney could have a pecuniary motive in pursuing a case in any one of these settings. If a case might increase the lawyer's legal skill or reputation, it could very well lead, albeit indirectly, to pecuniary gain down the road.[272]

Putting aside motives, it still is not obvious why solicitation for every kind of case handled by a charitable legal-services organization would be constitutionally protected. The Supreme Court's jurisprudence indicated that solicitation for law reform cases involved rights of free expression and association,[273] but the First Amendment might not protect run-of-the-mill legal services cases. Explaining the special democratic role of the litigation on behalf of minorities,[274] the Court emphasized that the NAACP did not take on "ordinary damages actions [or] criminal actions in which the defendant raises no question of possible racial discrimination."[275] In *Primus*, the Court highlighted that "the ACLU has only entered cases in which substantial civil liberties questions are involved."[276] It is not clear that the Court intended for solicitation of all charitable legal organizations to be constitutionally protected.[277]

Why, then, is all non-profit lawyering treated as exempt from solicitation rules? Most likely, bar associations and courts view charitable organizations as providing access to legal services for low-income populations, and they recognize solicitation as a means of improving that access. This access-based definition of public interest lawyering recognizes an exception to the regulation for lawyering that serves otherwise neglected segments of society. The approach of the American Bar Association, in facilitating solicitation by non-profits, offers special regulatory privileges for legal services that compensate for market failures, just as the Court's solicitation jurisprudence reflected special appreciation for legal services that compensate for failures of the political system.

The access-based approach to public interest lawyering stands in contrast to the approach implicit in fee-shifting statutes. Such laws incorporate substantive decisions as to which cases serve the public, and implement those decisions by making use of market mechanisms. Unlike actors that identify public interest lawyering as lawyering in absence of profit or fees, Congress has, in fee-shifting statutes, identified substantive

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272. *See* Menkel-Meadow, *supra* note 259, at 41.

273. *See generally* Sabbeth, *supra* note 193 (analyzing theory of political expression suggested in solicitation cases).

274. The Court emphasized that litigation expressing the views of minorities and minority interests has special importance in a political system where such views might not find other avenues of expression. *See* NAACP v. Button, 371 U.S. 415, 430–31 (1963).

275. *Id.*

276. *In re* Primus, 436 U.S. 412, 427 (1978) (quoting *In re* Smith, 233 S.E.2d 301, 303 (S.C. 1977), *rev'd*, *Primus*, 436 U.S. 412) (internal quotation marks omitted).

277. *See generally id.*; *Button*, 371 U.S. 415.

categories of public interest lawyering, and implemented measures to make it profitable precisely because of its public value.

C. Tax Benefits and Fee Shifting

Both fee-shifting statutes and tax law involve private actors supporting public interest lawyering, yet they do so in different ways. Fee-shifting statutes encourage public interest litigation and put the cost on the bad actors whose behavior creates the need for it. The legislature defines which litigation is in the public interest and mandates that bad actors pay the costs of the litigation brought against them. Tax benefits, on the other hand, serve as a financial subsidy from the federal government to private actors, who in turn provide a service in the public interest. An important critique of relying on the non-profit sector is the unaccountability of the private provider.[278] The tax benefit model allows unelected, wealthy funders of the non-profits to define the public interest and set the priorities for funding. In contrast, in fee-shifting statutes, the federal government maintains responsibility for setting priorities and defining the public interest.

In fee-shifting statutes, Congress makes a substantive determination that certain lawyering activity is in the public interest, while, in the context of tax benefits, the IRS defines public interest lawyering based primarily on finances and leaves the substantive decisions to the donors. An organization may qualify as a charity for tax purposes based on the finances of the client population, in the case of legal aid organizations serving the indigent, or asset restrictions and fee restrictions in the case of civil and human rights organizations or PILFs. The IRS does maintain some control over what counts as public interest lawyering by defining the public purposes that qualify an organization for 501(c)(3) status, but those purposes have been so broadly interpreted that it is difficult to identify a clear set of priorities. Moreover, the IRS has specified that, in the case of the PILF, it is the fee restrictions that distinguish it.[279] Although the definition of charitable purposes necessarily reflects some value judgments,[280] the federal government has attempted to create the

278. *See* Garry W. Jenkins, *Nongovernmental Organizations and the Forces Against Them: Lessons of the Anti-NGO Movement*, 37 BROOK. J. INT'L L. 459, 510 (2012) ("The notion that nonprofits need to improve their levels of accountability is conventional wisdom among students of civil society and philanthropy."); Penina Kessler Lieber, *1601–2001: An Anniversary of Note*, 62 U. PITT. L. REV. 731, 736 (2001) (describing "unbridled power and potential for abuse" of private foundations); Weissman, *supra* note 69, at 803 ("Philanthropies engage in the social issues of their choosing, without accountability to political processes, yet often perform government functions and influence state power.").

279. *See* Rev. Proc. 92-59, 1992-2 C.B. 411.

280. *See, e.g.*, Cammarano v. United States, 358 U.S. 498, 533 (1959); Slee v. Comm'r, 42 F.2d 184, 185 (2d Cir. 1930); *see also* Resnik, *supra* note 29, at 2128–29 (describing how judges have attempted to rely on market indicators of the value of lawyers' work to avoid making their own assessments of the utility of certain forms of litigation, but arguing that, in issuing opinions on fees, judges do in fact make value judgments, and it is "irresponsible not to talk openly about how judges should spend money in pursuit of social goals achieved through litigation").

appearance of neutrality[281] while recognizing activities worthy of tax benefits.

The key theoretical bases for granting tax benefits to charitable organizations and their donors can be summarized in three categories: (1) charitable donations relieve pressure on the government by offering services that the government would otherwise be obligated to provide or could face political costs for failure to provide, such as shelter for the homeless;[282] (2) charity creates positive externalities beyond redistribution of resources or the provision of services, such as encouraging civic engagement and educating the public on policy matters;[283] and (3) taxing charities may be practically impossible.[284]

In the case of non-profits engaged in public interest lawyering, tax benefits allow the government to support private actors engaged in activities that the government could not engage in directly. For example, through tax benefits, the federal government facilitates the work of the ACLU or the NAACP LDF, and much of that work is to challenge government action. Of course the government could not actually appear in litigation as its own adversary, but through the tax benefits, the government helps to fund its own opposition. The rationale for doing so is, at least in part, the public interest in a vibrant, democratic dialogue.[285]

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281. The political neutrality of the federal government is questionable. Critics on the right would point to recent audits of Tea Party organizations, while critics on the left have described historical persecution of the NAACP and other progressive organizations. *See, e.g.*, CHEN & CUMMINGS, *supra* note 10, at 36.

282. *See* Treas. Reg. § 1.501(c)(3)-1(d)(2) (as amended in 2008) (defining charitable organizations as organizations that "lessen[] . . . the burdens of [g]overnment"); *see also* McGlotten v. Connally, 338 F. Supp. 448, 456 (D.D.C. 1972) ("The rationale for allowing the deduction of charitable contributions has historically been that by doing so, the [g]overnment relieves itself of the burden of meeting public needs which in the absence of charitable activity would fall on the shoulders of the [g]overnment."). One theoretical justification for granting tax benefits to non-profits is that to offer the tax benefits costs less than to provide the services directly. *See* Paul Valentine, *A Lay Word for a Legal Term: How the Popular Definition of Charity Has Muddled the Perception of the Charitable Deduction*, 89 NEB. L. REV. 997, 1009–10 (2011); *see also* Bob Jones Univ. v. United States, 461 U.S. 574, 590 (1983) ("The exemption from taxation of money and property devoted to charitable and other purposes is based on the theory that the [g]overnment is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare." (quoting H.R. REP. NO. 75-1860, at 19 (1938)) (internal quotation marks omitted)).

283. *See* Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 610 (2011); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419, 430 (1998); Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 404–05 (1998) (discussing the view that tax deductions give donors the ability to influence government support).

284. Some of the most common practical objections to taxing non-profits are: taxes could threaten the viability of non-profit organizations, while generating relatively little income for public coffers; identifying taxable income of non-profits creates definitional puzzles; and exemptions for religious non-profits are needed to preserve the separation of church and state. Lloyd Hitoshi Mayer, *The "Independent" Sector: Fee-for-Service Charity and the Limits of Autonomy*, 65 VAND. L. REV. 51, 64–65 (2012); Robert Christopherson & James J. Coffey, *Hedging Property Taxes for Exempt Organizations*, 34 TAX'N EXEMPTS 39, 40–42 (2012). *See generally* Diane L. Fahey, *Taxing Non-profits out of Business*, 62 WASH. & LEE L. REV. 547 (2005).

285. *See* Sabbeth, *supra* note 193, at 1499–502, 1530–31 (discussing importance of dissent).

The rationale for fee-shifting statutes is similar to that of tax benefits for non-profits in that it creates an incentive for private actors to engage in public interest lawyering that exceeds what the government can afford to fund. As the Senate Report concerning the Civil Rights Attorney's Fee Awards Act of 1976 (CAFAA or the Fee Act)[286] indicated, "[a]ll of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain."[287] The legislature designed fee-shifting statutes to support the "private attorney general"[288] who enforces public policy.[289]

One difference between the public interest lawyering supported by fee-shifting statutes and that supported by tax benefits is that the former serves as a deterrent to the behavior of identified bad actors, while the latter provides a universal open invitation to do good. The Senate Report for CAFAA highlighted not only representation of victims of civil rights violations, but also prosecution of the violators: "If private citizens are to be able to assert their civil rights, and *if those who violate the Nation[]'s fundamental laws are not to proceed with impunity*, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court."[290] The fee-shifting statutes function not only as carrots but also as sticks; they encourage public interest lawyering, but also mandate that bad actors will be required to cover the costs of it when necessary to bring them into compliance with the law. Tax law portrays public interest lawyering as a politically neutral activity, to be funded by private parties inclined by generosity. Fee-shifting statutes, in contrast, elevate public interest lawyering to an essential activity, whose funding, though covered by private actors, is mandatory.[291]

A second difference between the incentives in fee-shifting statutes and tax benefits is worth noting. Fee-shifting is tied to prevailing in individual cases, while tax subsidies are based on an organization's overall

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286. 42 U.S.C. § 1988(b) (2012). The Civil Rights Attorney's Fee Awards Act of 1976 was one of the first of the modern statutory provisions, and most other provisions use it as a model.

287. S. REP. NO. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (1976).

288. *Id.* at 3 (internal quotation marks omitted); *see* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2133–37 (2004) (describing the growth of the concept of the private attorney general).

289. S. REP. NO. 94-1011, at 3, *reprinted in* 1976 U.S.C.C.A.N. Notably, the Senate Report described civil rights victims, the potential plaintiffs, as private attorney generals, but their lawyers are the better private analogue to the attorney general, and, as is discussed in Part II.C of this Article, it is clear that it is the lawyers at whom the legislation was aimed.

290. *Id.* at 2 (emphasis added).

291. Of course, to the extent the tax benefits support litigation, there is a less explicit adversary. For example, if there were no subsidy for the ACLU, that would weaken, if not destroy, the ACLU, and violators of the constitutional rights defended by the ACLU might be able to more freely engage in unconstitutional behavior in the absence of any lawyers to challenge their acts. The same is true for legal aid organizations that, for example, represent poor tenants and make it harder for private or public landlords to violate housing laws.

activities. Tax law recognizes charitable organizations engaged in non-litigation activities and imposes special restrictions on charities engaged in litigation. Fee shifting, in contrast, is available only for litigation and, as discussed above, only that in which one prevails.[292]

Both of these contexts reflect fundamental conceptions of what public interest lawyering is and should be. Tax law depicts public interest lawyering as an individual choice, a voluntary act of charity and good will. Fee-shifting statutes, on the other hand, embrace a vision of public interest lawyering grounded in democratically defined values and a social mandate to enforce them.[293]

IV. COMPLICATING THE DIVISION BETWEEN PUBLIC INTEREST LAWYERING AND PROFIT

The ambiguity about where financial gain fits in the definition of public interest lawyering may reflect a broader ambivalence about the identity of the legal profession. We may be confused or conflicted about how earning an income fits with the view of ourselves as enlightened professionals serving the public. If all lawyering helps to ensure that social problems are resolved within the rule of law and all lawyering protects the interests of some members of the public, then perhaps all lawyering is in the public interest. Yet we tend to believe that there is a subset of lawyering activity for which the term public interest lawyering is reserved. The term is typically used as shorthand for volunteer activities outside of a lawyer's regular practice or the activities of a small subset of lawyers who have selflessly committed themselves, at least temporarily, to a life different from the mainstream of practice; in many cases, they have taken vows of relative poverty and sacrificed the usual rewards of the profession. Yet this approach is both descriptively incomplete and potentially dangerous.

When legal actors are in the position to make choices about regulation, funding, or less tangible forms of support, they ought not to mistake undercompensation for the only indicia of public interest lawyering. Rather, they must engage in constructing a substantive definition fitting the specific institutional context and the legal actors' priorities. There are two reasons why this is important. First, there are lawyering activities that serve important public functions, regardless of whether they generate income. Second, to the extent that there are public values worth protect-

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292. *See supra* Part III.A.

293. Fee-shifting statutes do not require government expenditures (unless a government entity is liable as a defendant), but tax benefits cost the federal government millions of dollars per year. *See* S. REP. NO. 94-1011, at 3–4, *reprinted in* 1976 U.S.C.C.A.N. (highlighting the advantage of fee-shifting, rather than the creation of more government "bureaucracy" for enforcement, in terms of both revenue and political philosophy). Tax laws reflect value judgments, but they also maintain the appearance of substantive neutrality. Perhaps it would be difficult to make a substantive judgment, like that in the fee-shifting statutes, in combination with a significant allocation of resources, like that in the tax laws, without generating significant controversy.

ing, it is critical that protection efforts are strong and financially independent. Otherwise, lawyering against economically or politically powerful actors may be too easily thwarted.

A. Public Interest Lawyering in For-Profit Settings

Empirical research complicates the dichotomized portrait of public interest lawyering and profit-generating practice.[294] Since the days of *Button* and *Primus*, attorneys motivated by political commitments have increasingly crafted careers not only as staff attorneys at impact-litigation funds and legal aid offices, but also as partners, associates, and solo practitioners at private, profit-generating firms. Though all of these lawyers share an abiding commitment to the pursuit of law as a public profession, the form they choose varies widely, as do their explanations of their choices. Some lawyers are candid about seeking higher salaries, admitting that the romance of public interest lawyering proved insufficient to sustain them while sending children to college, yet others choose alternative, for-profit structures as integral to their public interest goals.[295] Those choices reflect diversifying definitions of public interest practice.[296]

To some degree, the development of for-profit, fee-based structures represents an increasingly pluralist approach to the delivery of services.[297] One might charge low-income clients a fee on the view that paying even a small sum encourages clients to be more active in their cases and take ownership of the process by which they participate in the legal system. For low-income clients, paying a small fee can increase their agency and improve their relationships with their lawyers. By paying, clients may be in a better position to make demands of their lawyers, shifting the paradigm away from the traditional power dynamics between public interest lawyers and their indebted non-paying clients. In this way, the presence of the fee, rather than the absence of the fee, contributes to the public interest nature of the lawyering.[298]

Another area of developing for-profit practice has been firms serving particular demographic groups. As the Supreme Court noted in *Button*, the NAACP LDF at that time did not handle "ordinary" litigation, only cases where the substance of the claims or defenses related to racial

294. *See* Ann Southworth, *What Is Public Interest Law? Empirical Perspectives on an Old Question* (Univ. of Cal., Irvine Sch. of Law, Legal Studies Research Paper Series No. 2013-106, 2013), *available at* http://ssrn.com/abstract=2256719.

295. *See* Trubek, *supra* note 12, at 429–32; Trubek & Kransberger, *supra* note 10, at 202–03.

296. *See* Cummings, *supra* note 14, at 9–11; Scott L. Cummings, *What Good Are Lawyers?*, *in* THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 1, 4–10 (Scott L. Cummings ed., 2011).

297. Until 1992, non-profit, tax-exempt legal services organizations were not permitted to accept fees from clients. Rev. Proc. 92-59, 1992-2 C.B. 411 § 2(05)–(06); *see also* COUNCIL FOR PUB. INTEREST LAW, *supra* note 26, at 306–11 (describing IRS restrictions on client-based fees for public interest law centers and the Council's recommendation to relax the restrictions).

298. *See* Trubek & Kransberger, *supra* note 10, at 209.

justice. Some lawyers, however, view the provision of legal services to particular client populations as a vital form of public interest lawyering, regardless of the substance of the individual cases.[299] If a lawyer wants to dedicate herself to racial justice, the NAACP LDF may offer the best opportunities, and, similarly, if she wants to work for women's rights, then Legal Momentum (formerly NOW LDF) is an excellent forum. Yet, if one believes in increasing the relative power of certain segments of the population, a small, for-profit organization may provide the means to do it. As with the acceptance of a fee, the for-profit firm may provide an important avenue for democratic, public interest lawyering.[300]

Beyond using profit structures to more freely pursue empowerment for a client population, the pursuit of economic power can itself be understood as a function of public interest lawyering.

B. Economic Strength and Independence

Certain categories of public interest lawyering require economic strength and independence. In particular, fact-intensive civil litigation requires significant resources, and challenging powerful corporate interests requires independence from those interests. Non-profit organizations and volunteer services of conventional lawyers both contribute valuable legal services that increase access for clients unable to afford representation, but each carries its own limitations due to its economically devalued and dependent position in the legal market.[301]

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299. Trubek, *supra* note 12, at 418; *see* Trubek & Kransberger, *supra* note 10, at 207–08.

300. *See* Trubek & Kransberger, *supra* note 10, at 208–09.

301. The fee-shifting model of public interest lawyering also carries special vulnerabilities and challenges, and the Supreme Court has not offered consistent support. First, the Supreme Court ruled in *Buckhannon* that serving as a catalyst for change in a defendant's behavior is not sufficient to prevail and be entitled to fees; rather, an attorney must obtain a judgment against the defendant. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 600, 610 (2001). This means that an attorney can consult with a client regarding violation of an important public policy, reach out to the bad actor to request that it cease its unlawful conduct, draft and file a complaint, litigate a case through discovery and up through trial, and then, if a defendant "chooses" to change its conduct, the attorney representing the plaintiff will receive no fees. This seems odd given the public interest in ensuring compliance with public policy and the lawyer's role in forcing the defendant to comply. It makes taking on these public interest cases much riskier for attorneys representing clients not paying out of pocket. Catherine Albiston and Laura Beth Nielsen have demonstrated that the financial impact of the *Buckhannon* decision has in fact curtailed public interest lawyers' activity. *See* Albiston & Nielsen, *supra* note 212, at 1120–21.

Another challenge of the fee-shifting model of public interest lawyering is that civil litigation increasingly ends in settlement and defendants can condition settlements on the sacrifice of payment for plaintiffs' lawyers. If such an offer otherwise satisfies a plaintiff's interests, it can be difficult to refuse. Yet in the aggregate, these sacrificial offers threaten to defund this category of public interest lawyering. *See* Evans v. Jeff D., 475 U.S. 717, 734–36, 742–43 (1986) (permitting sacrifice offers); *id.* at 754–55 (Brennan, J., dissenting) (arguing that the majority decision would have damaging aggregate effects for enforcement of civil rights laws). For further discussion of Court-condoned obstacles to the recovery of fees for public interest lawyering, see *infra* Part IV.C. *See also* Cummings, *supra* note 14 at 89 (describing terms of one firm's retainer, which prohibits acceptance of sacrifice offers and provides for contingency fees in the absence of fees from statutory awards).

The accumulation of economic power is particularly important preparation for successful litigation against wealthy corporate defendants. Civil litigation is often an expensive proposition, and for any public interest lawyer to serve as a serious gladiator, she must bring the resources to fight as aggressively and persistently as her adversaries. Cases involving multiple parties and complex factual disputes can create insurmountable challenges for a firm without ample financial resources.[302] Even where fee-shifting provisions offer the possibility of fees after prevailing, the firm needs to have sufficient resources to survive until the time of any such payout. In the meantime, salaries and other overhead costs must be covered, and the firm must be financially prepared to absorb the full cost of the suit if, for any reason, the client does not prevail. This is all the more daunting given the Supreme Court's limited interpretation of what it means to prevail.[303]

To the extent that public interest lawyering includes litigation to change industry standards,[304] economic power is a prerequisite.[305] Qualitative empirical research shows examples of lawyers who have migrated from legal aid offices to large firms precisely because they believe they can lodge more powerful attacks on corporate wrongdoers when armed

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A number of these obstacles could potentially be addressed through legislation, but deeper, structural challenges remain. Because fee-shifting statutes encourage lawyers to litigate cases they are likely to win, the fee-shifting model does not necessarily support the pursuit of risky cases or clients. Yet risk may be involved in impact litigation seeking to change the law. Risk may also be required to represent marginalized clients whose voices are less likely than more privileged members of society to receive respect and empathy. If there is hope of public interest lawyering for social change, it must, at least sometimes, take on risks. One way lawyers can pursue risky cases under the fee-shifting model (or a contingency fee model), is if they support the risky work by balancing it with less risky matters. *See* Cummings, *supra* note 14, at 61 (describing how one firm develops portfolio of cases so it can pursue some riskier cases). Nonetheless, were fee-shifting statutes the only form of support for public interest lawyering, certain categories of wrongs might go unaddressed. Notably, this Article does not argue that fee-shifting is categorically superior to other forms of public interest lawyering but simply that it ought to be recognized and supported as one important form.

302. *See* COUNCIL FOR PUB. INTEREST LAW, *supra* note 26, at 143.

303. *See Buckhannon*, 532 U.S. at 603–05 (ruling that, even if litigation is the catalyst for change in defendant's behavior, plaintiff does not "prevail" for purposes of fee-shifting statute unless plaintiff obtains judgment against defendant (internal quotation mark omitted)); *see also* Indep. Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 761 (1989) (holding that, in Title VII class action where intervenor unsuccessfully challenged settlement, plaintiffs could not recover fees without showing intervenor's claim to be "frivolous, unreasonable, or without foundation"); Albiston & Nielsen, *supra* note 212, at 1130 (documenting empirically that the *Buckhannon* decision has limited lawyers' case selection). For more evidence that these fee decisions do have an impact, see Brand, *supra* note 212, at 361–62.

304. *See, e.g.*, Bloom, *supra* note 199, at 96.

305. To the extent that litigation remains a viable avenue for social change, today's most successful approach may be to exact economic costs from private entities, rather than to seek ongoing injunctions against government actors. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (questioning the extent to which the judiciary can affect social change). *But see* Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Failure of Institutional Reform Litigation After* Horne v. Flores, 46 U.C. DAVIS L. REV. 1435, 1444–48 (2013) (describing ongoing importance of institutional reform litigation against government actors).

with larger war chests.[306] Some might question whether attorneys earning handsome salaries at large firms deserve recognition as public interest lawyers. But access to justice should mean more than individual representation,[307] and, to the extent that structural change remains a recognized goal of public interest lawyering,[308] the enforcement and deterrent values served by economically powerful actors should not be overlooked. Such actors may be uniquely positioned to challenge corporate and government entities with significant power of their own.

Like economic strength, economic independence also improves public interest lawyering.[309] Financial dependence can limit the nature and scope of activity. To receive tax benefits as a non-profit, an organization must agree not to lobby or organize more than a limited amount.[310] Private donors, whether foundations offering grants, or members paying dues, can impose their priorities on the use of funds.[311] Both government actors and financial benefactors have been known to censor controversial public interest lawyering.[312] In contrast, a lawyer who earns her income directly from public interest lawyering is beholden to no one but her clients. This not only increases the clients' power in the representation relationship but also decreases the power of outside influences.[313] For public

306. *See* Erichson, *supra* note 5, at 2101 n.63.

307. *See* Gary Blasi, *How Much Access? How Much Justice?*, 73 FORDHAM L. REV. 865, 875 (2004).

308. *See* ROSENBERG, *supra* note 305, at 32–33 (suggesting courts may be able to produce social change when paired with market incentives and deterrents).

309. *See also* MODEL RULES OF PROF'L CONDUCT pmbl. 11 (2012) ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. *An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice*." (emphasis added)).

310. *See supra* notes 81, 85–86 and accompanying text.

311. For a discussion of the challenges of alternative funding sources, see CHEN & CUMMINGS, *supra* note 10, at 128–42, 174, 184–86, and SCHEINGOLD, *supra* note 1, at 194–99.

312. In one important example of how public interest lawyers' activities have been restricted by funders, the Legal Services Corporation (LSC) in 1996 imposed a variety of restrictions on all lawyers in offices receiving LSC funding. Luban, *supra* note 4, at 220–24. These restrictions ranged from censoring the substance of the cases (no constitutional challenges to welfare regulations) to limiting the client population to be served (no representation of undocumented immigrants except in limited domestic violence matters) to cutting off access to other sources of support (no collection of fees under fee-shifting statutes). *Id.* at 221, 224.

313. *See* Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 294–97 (1993) (describing the authors' for-profit firm, independent of funders or a Board of Directors, as the best structure to represent clients with "a vital interest in shaking up the system" and provide "representation [that] necessarily involves aggressively challenging the existing power structures and institutions"). It should be recognized that even if, in an attempt to maintain independence from government actors and foundations, a legal services provider relies on fees, government choices still influence the success of that effort. At the most basic level, legislatures and courts determine which legal claims and defenses are cognizable and which damages are available. One example is fee-shifting provisions, which depend on the legislature to recognize the enforcement of particular laws as in the public interest and the judiciary to cooperate in awarding fees. Even the contingency fee, which may be one of the more independent sources of funding, is subject to legislative support or reduction. Capping awards, for example, can make those cases financially infeasible. *See, e.g.*,

interest lawyering to be free to challenge the power of governments and corporations, both economic strength and economic independence may be crucial.[314]

Neither non-profit organizations nor conventional firms engaged in pro bono activity can perform all public interest lawyering functions. The structure of non-profits creates limits and presents special challenges for capacity building.[315] Funding uncertainty and dependency can make it hard to build new programs, take risks with existing programs, and establish and maintain relationships with individuals and other organizations.[316] Securing and maintaining funding also is time-consuming and requires expertise.[317] This can strain the resources of staff time and salary budgets.[318] Further, attracting and retaining well-qualified employees can be difficult for non-profit organizations requiring long hours but paying low salaries.[319] Due to the contingent nature of funding, the security of positions may be difficult to guarantee; the lack of job security discourages potential applicants and creates stress and anxiety for current workers.[320] These difficulties can lead to a high rate of employee turnover, creating a workforce with a lack of expertise and further increasing administrative costs.[321] Additional costs tie up resources that an organization could otherwise devote to expanding its public interest lawyering. Certainly, many non-profit organizations do attract and retain highly intelligent, skilled, and dedicated staffs, and many do operate with impressive budgets. Nonetheless, it is important to acknowledge that, even for elite non-profits, obtaining and maintaining donations can be a challenge.[322]

For PILFs, these structural challenges make industry-changing litigation difficult. Donating for discovery costs does not appeal to funders

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Bloom, *supra* note 199, at 108 (describing reform legislation proposed in response to litigation that was too successful).

314. *See* Gilles & Friedman, *supra* note 60, at 163 (suggesting that plaintiffs' class action lawyers "use their wealth to finance further class action litigation against U.S. companies" and "comprise the most effective lobbying counterweight to corporate interests in [American] politics").

315. *See* VENTURE PHILANTHROPY PARTNERS, EFFECTIVE CAPACITY BUILDING IN NONPROFIT ORGANIZATIONS 33–36 (2001), *available at* http://www.vppartners.org/sites/default/files/reports/full_rpt.pdf (describing model of defining and evaluating "nonprofit capacity").

316. *See* Rhode, *supra* note 71, at 2056.

317. *Id.*

318. Nell Edgington, *Overcoming the Catch-22 of Nonprofit Capacity*, SOCIAL VELOCITY (Aug. 29, 2011), http://www.socialvelocity.net/2011/08/overcoming-the-catch-22-of-nonprofit-capacity/.

319. *Cf.* VENTURE PHILANTHROPY PARTNERS, *supra* note 315, at 49–53 (explaining how some organizations overcome recruiting challenges).

320. *Cf. id.* (explaining how some non-profits have attracted professionals by providing benefits packages and generous compensation).

321. *Cf. id.* (demonstrating that some organizations have overcome human resource challenges through innovative programs).

322. *See* Rhode, *supra* note 71, at 2056 (describing fundraising challenges for even the most elite, wealthy organizations).

choosing among worthy causes. Simply amassing enough funds for these cases may be an insurmountable obstacle. The unreliability of funding can make it difficult to commit to a large piece of litigation, particularly one that is risky or controversial. To responsibly accept a large case, an organization must be in a suitable position, financially and in terms of available labor. In the early stages of case selection, the number of hours and years a case might demand will be uncertain, and this, in addition to the risk of losing, must be weighed. The capacity to absorb the costs of the case, in the event of a failure to prevail, is essential to public interest lawyering of this kind.

Beyond the structural challenges inherent in operating a non-profit, PILFs face additional regulatory restrictions. Although Congress created fee-shifting statutes to make certain categories of public interest lawyering profitable, the IRS limits the ability of PILFs to use fees from such cases for that purpose. To maintain the tax benefits of non-profit status, a PILF must cover no more than fifty percent of its operating costs with attorneys' fees, and it must receive at least half of its financial support from outside, non-client sources.[323] This means both its economic strength and its economic independence are necessarily curtailed.

Pro bono volunteer work by large, conventional law firms cannot fill the gaps of the non-profit sector. First, while the non-profit setting suffers from one kind of employee problem, pro bono suffers from another. Volunteer lawyers often lack relevant expertise.[324] Firms lack sufficient incentives to provide robust training because the clients, if they even know enough to identify its absence, cannot threaten to take their business elsewhere. The firms often see pro bono as a vehicle for acquiring skills; firms generally do not allow inexperienced lawyers to "practice on" paying clients.[325] In the interest of avoiding conflicts, attorneys typically volunteer in fields disconnected from the main of their work.[326] The disconnect between the fields of the attorney's paid and volunteer work can further stunt the development of expertise in the fields pursued pro bono.

Excellent representation requires knowledge and commitment, both of which are more likely to flourish when the legal services are central to an attorney's practice, rather than provided on a voluntary basis. As U.S. District Judge Myron Thompson explained in the context of awarding

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323. Rev. Proc. 92-59, 1992-2 C.B. 411 § 4(05).

324. *See* Cummings & Rhode, *supra* note 71, at 2395 (documenting inadequate knowledge and supervision of volunteer attorneys); Rhode, *supra* note 71, at 2071–72 (documenting scarcity of volunteer attorneys with relevant skills and inefficiencies of work by inexperienced counsel); *cf.* Cummings & Rhode, *supra* note 71, at 2429 (documenting that some firms seek to develop expertise in particular areas and channel volunteer efforts in those directions).

325. Cummings & Rhode, *supra* note 71, at 2426–28.

326. *Id.* at 2393.

fees to lawyers who successfully represented victims of employment discrimination:

> Both local and national pools of plaintiffs' lawyers, with an in depth knowledge about the theory and practice of employment discrimination law, are essential if the plaintiffs' perspective is to be fully and adequately represented both *in court*, in cases presenting new and complex legal issues, and *out of court*, before national and state legislative committees and before national and local bar committees where policy decisions affecting the direction of employment discrimination law are made. Fees in employment discrimination cases should therefore be awarded so a lawyer can litigate such cases for a living rather than as occasional charity work.[327]

Beyond the question of expertise, volunteers sometimes demonstrate less zeal than when they are doing their "real jobs."[328] Perhaps because they believe they are doing a good deed by engaging in charity, they approach the exploration of various strategic options and other components of zealous advocacy as voluntary. As a result, the quality of the legal services may suffer, as may the achievement of the broader aims of public interest lawyering.[329]

Additionally, although big-firm lawyers working pro bono may have more economic strength for litigation than their counterparts at nonprofit organizations, economic independence for conventional lawyers is illusory. Conventional for-profit firms function to amass profit; they seek to secure and maintain paying clients, preferably as many as possible, paying fees as high as possible. Not surprisingly, paying clients take priority over those receiving free representation. In the selection and pursuit of pro bono work, big-firm lawyers first examine their dockets of paying clients and then seek out pro bono activity that raises no potential conflict, as opposed to taking on these responsibilities in the opposite order. Lawyers have withdrawn in the middle of pro bono representation due to conflict with a paying client.[330] In this way, the economic devaluation of pro bono results in the devaluation of the work in terms of the ethical expectations of the profession.

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327. Stokes v. City of Montgomery, Ala., 706 F. Supp. 811, 817 (M.D. Ala. 1988), *aff'd mem.*, 891 F.2d 905 (11th Cir. 1989).

328. *See* Weissman, *supra* note 69, at 816 (describing critiques of volunteerism as an approach to the provision of legal services).

329. For example, if a defendant knows plaintiff's counsel is acting pro bono and therefore will litigate the case less aggressively, this could influence strategic choices in the litigation of the case or in settlement. Ultimately, it might well mean that the enforcement and deterrence goals of the litigation are compromised.

330. Cummings, *supra* note 67, at 116–20, 147 (describing how firms decline to accept, and sometimes withdraw from, cases that could create either actual conflicts with paying clients or even positional conflicts with those clients' business interests); *see also* Cummings & Sandefur, *supra* note 67, at 102.

Moreover, conventional firms engaged in pro bono work are so beholden to their paying clients, and the paying clients they hope to attract, that they will not engage in litigation that threatens the positions or business interests of these client populations. Most large firms will refuse entire categories of pro bono cases, including employment discrimination, labor rights, consumer interests, and environmental claims.[331] "[W]hen [conventional] firms do bring pro bono civil rights cases, they tend to bring them against state and local governments—who have their own in-house attorneys—rather than against private corporations for whose business [the firms] might compete."[332] Ultimately, most large, conventional firms will not engage in pro bono litigation that threatens the business interests of large corporate defendants, let alone entire industries.[333]

C. Public Interest Practice for Profit

Congress recognized the limits of relying on charity for public interest lawyering.[334] Congress believed that public interest lawyering would have to be profitable for lawyers to pursue it with the frequency and force required for effective enforcement and deterrence.[335] The legislature passed numerous fee-shifting statutes for this reason.[336] However, the ongoing perception of public interest lawyering as free services by non-profits and pro bono donations threatens the success of the legislature's vision.

In a variety of decisions from the Supreme Court and lower courts, judges have demonstrated ambivalence about awarding fees under fee-shifting statutes. They have rationalized their decisions by suggesting that public interest lawyers can be expected to act in spite of, and sometimes in opposition to, their own economic incentives.[337] This overly generous, perhaps patronizing, view of public interest lawyers contrasts with the assumptions the judges bring to the interpretation of other ac-

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331. Cummings & Rhode, *supra* note 71, at 2393 (amassing evidence that firms avoid employment, consumer, and environmental claims likely to involve suits against major corporations).

332. Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1463 (2007).

333. Weissman, *supra* note 69, at 816–17 ("Pro bono services, like foundation funded projects, do not typically include representation in matters that challenge structural inequities, nor do they seek solutions to fundamental injustices.").

334. *See* Evans v. Jeff D., 475 U.S. 717, 747–48 (1986) (Brennan, J., dissenting) (citing legislative history describing strain on legal aid organizations and unavailability of counsel); *see also* Miller v. Amusement Enters., Inc., 426 F.2d 534, 539 (5th Cir. 1970) ("Congress did not intend that vindication of statutorily guaranteed rights would depend on . . . the availability of legal assistance from charity—individual, collective or organized. An enactment aimed at legislatively enhancing human rights and the dignity of man through equality of treatment would hardly be served by compelling victims to seek out charitable help.").

335. *Evans*, 475 U.S. at 748–52 (Brennan, J., dissenting).

336. *See supra* note 213.

337. *See supra* Part II.B.2.

tors.[338] The results pose a real danger for the viability of important categories of public interest lawyering. Attorneys cannot litigate industry-changing litigation without first accumulating significant economic resources. Small, for-profit firms are the main individual enforcers of civil rights laws,[339] and they too cannot afford to pursue public interest lawyering for free.

Jeffrey Brand's review of the Supreme Court's fee-shifting decisions from 1976 to 1990 demonstrates the Justices' "assumption that public interest litigation is not part and parcel of ordinary practice, but is more in the nature of charity or volunteer work."[340] Professor Brand highlights a string of cases in which the Court has limited the effectiveness of fee-shifting statutes. A few examples from his analysis should suffice to make the point.

In *Marek v. Chesny*,[341] a Section 1983[342] case brought by a father whose son had been shot and killed by police officers, the Court held that Rule 68 offers of judgment could cut off entitlement to fees governed by fee-shifting statutes.[343] The decision opened up the possibility of a strong pecuniary interest on behalf of the lawyer—to settle and get paid rather than risk years more work for no reward—that could directly oppose her client's interest going forward. The *Marek* majority acknowledged that its holding could "serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer," but surmised that "[m]erely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts, or significantly deter them from bringing suit."[344] In other contexts, the Court has sought to remove conventional lawyers from situations where pecuniary interests could test their ethical commitments; for example, the Court has approved the general use of solicitation prohibitions.[345] Nonetheless, in the case of public interest lawyering, the Court expects a lawyer to rise above such challenges and continue the work even if denied financial

338. *See supra* notes 186–99 and accompanying text (describing the Court's approach to solicitation rules in *Ohralik*).

339. *See* Bagenstos, *supra* note 332, at 1460–61 (citing Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 768 (1988), and Christine Jolls, *The Role and Functioning of Public-Interest Legal Organizations in the Enforcement of the Employment Laws*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 141, 162–64 (Richard B. Freeman et al. eds., 2005)).

340. Brand, *supra* note 212, at 373; *see also* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 530 (1986) (describing judicial hostility in case limiting veterans' rights lawyers to fees of ten dollars).

341. 473 U.S. 1 (1985).

342. 42 U.S.C. § 1983 (2012).

343. *Marek*, 473 U.S. at 11–12.

344. Brand, *supra* note 212, at 357 n.397 (alteration in original) (quoting *Marek*, 473 U.S. at 10) (internal quotation marks omitted).

345. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 464 (1978) (reasoning that presence of a pecuniary motive is "inherently conducive to overreaching and other forms of misconduct").

support. The *Marek* majority failed to come to terms with the ethical conflict its decision permitted and the serious ramifications for civil rights enforcement.

In *Evans v. Jeff D.*,[346] the Supreme Court ruled that after years of protracted settlement discussions in a class action concerning inadequate education and healthcare for disabled children, defense counsel could condition a consent decree on plaintiffs' counsel waiving all costs and attorneys' fees.[347] The majority claimed to be "cognizant of the possibility that decisions by individual clients to bargain away fee awards may, in the aggregate and in the long run, diminish lawyers' expectations of statutory fees in civil rights cases," but the majority determined that the likelihood of such a result was remote.[348]

Again, the Court's analysis suggested public interest lawyers have no pecuniary needs. The *Jeff D.* plaintiffs had sought an injunction to repair educational and health care systems but requested no monetary damages, other than payment of the fees and costs accumulated during the litigation.[349] Three years into the case and one week before trial, the defendants offered injunctive relief in exchange for a waiver of fees and costs.[350] Given the offer of virtually everything the plaintiffs wanted, their attorney felt ethically bound to advise his clients to accept, even if that meant his office had to absorb the accumulated costs of the litigation.[351] The parties agreed to a settlement that made the waiver of fees and costs conditional on the court's approval.[352] The plaintiffs' counsel then filed a motion asking the court to order the defendant to pay costs and fees.[353] He argued that requiring his office to absorb these expenses when the plaintiffs had essentially prevailed—after years of litigation fueled by thousands of hours of public interest lawyering of the kind encouraged by Congress—undermined the spirit of the fee shifting provisions.[354] The lower court and Supreme Court rejected this argument.[355]

The majority ruled that plaintiffs' counsel faced no ethical "dilemma" because he had "no *ethical* obligation" to recover statutory fees.[356] This approach suggests that ensuring payment for public interest lawyers has no broader purpose, or at least that removing payment would have no impact on that broader purpose. And yet the fee-shifting provisions were

346. 475 U.S. 717 (1986).
347. *Id.* at 721–28.
348. *Id.* at 741 & n.34. *But see id.* at 754–55 (Brennan, J. dissenting) (pointing to such evidence).
349. *Id.* at 721 (majority opinion).
350. *Id.* at 722.
351. *Id.*
352. *Id.*
353. *Id.* at 723.
354. *See id.*
355. *Id.* at 723–24, 728.
356. *Id.* at 728 (internal quotation marks omitted).

adopted precisely because this is not a realistic approach to human behavior. In fact, contrary to the *Jeff D.* majority's assertion that there was no evidentiary basis for the concerns that the decision could have an "aggregate" effect, the legislative history of the Fees Act does include such evidence.[357]

Nonetheless, in *Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air*,[358] a case that limited the calculation of awards under the fee-shifting provision of the Clean Air Act,[359] the plurality again assumed that profit has minimal impact on public interest lawyering.[360] In this case, the plaintiffs' counsel, after prevailing, argued that calculation of their fee should reflect the level of risk the attorneys absorbed by accepting a case with slim chances of success (and winning it).[361] The Court, in a fractured opinion, restricted the availability of such a risk enhancement.[362] Confronted with the point that such a decision would dim prospects for future representation in similarly meritorious but risky cases, the plurality explained, "[W]ithout the promise of risk enhancement some lawyers will decline to take cases; but we doubt that the bar in general will so often be unable to respond that the goal of the fee-shifting statutes will not be achieved."[363] In referring to "the bar in general," the Justices seem to suggest that even if fees are not available, the profession can expect someone to step in and take these cases. Perhaps the Justices expect non-profit organizations to rely on donors for support, or perhaps they imagine that for-profit organizations will pursue these cases pro bono. Yet, the costs and risks of such lengthy and complex environmental cases make them infeasible without financial support.

Professor Brand identified "a deeply held view that public interest lawyers should be expected to act on a higher moral plane and should not be subject to the same economic pressures as other practicing civil litigators."[364] Building on that observation, Sam Bagenstos has also suggested that more recent decisions reflect "a fundamentally prissy, goo-goo" view of civil rights lawyers as pious devotees who should not be moti-

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357. *See id.* at 741 n.34; *see also* Albiston & Nielsen, *supra* note 212 (documenting empirically that the *Buckhannon* decision has limited lawyers' case selection). For more evidence on the fact that these fee decisions do have an impact, see Brand, *supra* note 212, at 361–62.

358. 483 U.S. 711 (1987).

359. 42 U.S.C. § 7604(d) (2012).

360. *Delaware Valley*, 483 U.S. at 727.

361. *See id.* at 714; *id.* at 740–42 (Blackmun, J., dissenting).

362. *Id.* at 734 (O'Connor, J., concurring).

363. *See* Brand, *supra* note 212, at 355 n.387 (quoting *Delaware Valley*, 483 U.S. at 727 (plurality opinion)) (internal quotation mark omitted).

364. *Id.* at 373. *See also* Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 193–94 (2d Cir. 2007) (reasoning that public interest cases should garner lower fees than regular lodestar because lawyers have other incentives to do the cases). *But see* Perdue v. Kenny A., 559 U.S. 542, 546 (2010) (holding that fee-shifting statutes may be used to increase attorneys' fees in extraordinary situations).

vated by financial interests.[365] The issue goes beyond civil rights lawyers to public interest lawyering more generally, and to a deeper difficulty with reconciling public interest lawyering and profit. To be clear, in the case of civil rights,[366] the problem is likely compounded by some judges' distaste for this particular type of work and perhaps their doubts as to whether the litigation does serve the public interest. Yet it should not be overlooked that the view of public interest lawyering as pious, a view often perpetuated by non-profit and conventional lawyers alike, helps to buttress the judges' decisions.

The common confusion about the definition of public interest lawyering has significant real-world consequences. If we keep in mind that fee-shifting statutes are designed for more than the individual litigants and are aimed at the broader public interest, it is harder to paint the lawyers as greedy for seeking financial compensation,[367] and harder to shrug off the aggregate public impact of refusing to provide this support. The view of public interest lawyering as a charitable endeavor may be clouding the judges' thinking. Moreover, the widespread acceptance of that view obscures the reality that fee-limiting decisions are, intentionally or not, defunding public interest lawyering and "taking out the adversary"[368] of corporate and government power.

CONCLUSION

With few exceptions,[369] the legal profession understands public interest lawyering as charity work donated by non-profits or volunteers, operating outside the market for legal services. Defining public interest work in terms of the absence of pecuniary gain neglects the substantive value of the work. This understanding not only is incomplete, but also damages the pursuit of public interest law and, ultimately, the profession. It threatens the viability of important public interest lawyering work because it fosters an environment in which public interest lawyers seeking

365. Samuel R. Bagenstos, *Thurgood Marshall, Meet Adam Smith: How Fee-Shifting Statutes Provide a Market-Based System for Promoting Access to Justice (Though Some Judges Don't Get It)* 4–5 (Univ. of Michigan Law School, Public Law and Legal Theory Working Paper Series No. 150, 2009), *available at* http://ssrn.com/abstract=1407275; Bagenstos, *supra* note 332, at 1464–66; *see* Brand, *supra* note 212, at 373–75.

366. *See* Samuel R. Berger, *Court Awarded Attorneys' Fees: What Is "Reasonable"?*, 126 U. PA. L. REV. 281, 310 (1977) (pointing out that antitrust lawyers received statutory fees averaging $181 per hour, while those engaged in comparable civil rights litigation were compensated at the rate of $40 per hour).

367. *See* Reda, *supra* note 247, at 1116–17 (collecting literature).

368. *See* Luban, *supra* note 4, at 213 (internal quotation marks omitted).

369. One increasingly dynamic area is law schools' loan repayment assistance programs. *See* sources cited *supra* note 9. Roughly one quarter of the top 50 law schools in the United States currently recognize for-profit work as public interest, depending on the substance of the firms' dockets. Kathryn A. Sabbeth, Loan Repayment Eligibility Requirements and Their Implications (unpublished report) (on file with author). Eligibility requirements of most law schools' loan repayment programs can be found on the schools' websites.

market-rate fees encounter skepticism.[370] If they cannot collect fees, they will remain beholden to powerful economic and political actors who can limit, and historically have limited, their work.[371]

The dichotomized view of public interest lawyering and making a profit also threatens the profession as a whole. Despite the many lawyers who need work and the large quantity of work worth doing, there is dwindling funding to connect the two.[372] Defining public interest lawyering as an activity divorced from independent economic support makes it unavailable to most as a career. Developing a more nuanced and flexible approach could broaden the professional outlook.

There are various opportunities, from pro bono awards to financial subsidies, where the legal profession can and should explore the question of which lawyering to promote in the public interest. The answers should be context-specific and will necessarily reflect and promote the values of the institutions involved.[373] While the definitional project will be challenging,[374] and people will disagree,[375] if we recognize doing good as a duty of the legal profession, it is necessary to struggle with what that means.

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370. *See* Bagenstos, *supra* note 365, at 4–5; Bagenstos, *supra* note 332, at 1464–66; Brand, *supra* note 212, at 373–75.

371. *See* Luban, *supra* note 4, at 241–44. It must be recognized that public interest lawyering in profit-generating settings carries its own challenges. Certain categories of cases or clients may receive lower priority or be neglected completely. *See supra* note 301 (describing risk-aversion of lawyers seeking fees); *supra* note 331 and accompanying text (describing how for-profit firms reject employment and environmental cases perceived to create conflicts of interest with industry clients); Cummings, *supra* note 14, at 90 (describing how the search for profit causes a firm to prioritize cases seeking monetary damages over cases seeking injunctive relief, because of the difference in availability of contingency fees); Cummings, *supra* note 14, at 91 (suggesting that "privatizing [public interest lawyering] may produce better litigation [but] not better social outcomes"). To be clear, this Article does not argue that fee-based, for-profit models of public interest lawyering are superior to all others; rather, it suggests that such models offer particular strengths for particular contexts, and ought to be recognized and supported as one important form of public interest lawyering among others.

372. *See generally* STEVEN J. HARPER, THE LAWYER BUBBLE: A PROFESSION IN CRISIS, 3 (2013); BRIAN Z. TAMANAHA, FAILING LAW SCHOOLS (2012).

373. *See* CHEN & CUMMINGS, *supra* note 10, at 7 (arguing that the term "public interest law . . . asserts a vision (or multiple visions) of the good society, and frames the definitional question in historically grounded and institutionally specific terms") (internal punctuation omitted).

374. *See, e.g.*, Luban, *supra* note 4, at 210 n.1; Esquivel, *supra* note 15, at 328. Drawing on comparative law literature may help us to approach this challenge in new and creative ways. *See, e.g.*, Po Jen Yap & Holning Lau, *Public Interest Litigation in Asia: An Overview*, *in* PUBLIC INTEREST LITIGATION IN ASIA 1, 2 (Po Jen Yap & Holning Lau eds., 2011) (explaining that standing doctrine in Hong Kong and India depend on defining public interest lawyering).

375. *See* Houck, *supra* note 12, at 1420–21 (arguing that non-profit organizations supporting corporate interests should not be recognized as PILFs because they do not increase access for underrepresented groups or interests); Southworth, *supra* note 16, at 1250–52 (explaining that progressive legislation does not represent a universally recognized public interest but instead reflects distributional priorities with which conservative members of the public disagree).