Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power

Debra S. Katz
Bernabei & Katz

Lynne Bernabei
Bernabei & Katz

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Civil Procedure Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol96/iss2/5

This Essay is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
PRACTICING PUBLIC INTEREST LAW IN A PRIVATE PUBLIC INTEREST LAW FIRM: THE IDEAL SETTING TO CHALLENGE THE POWER

DEBRA S. KATZ*
LYNNE BERNabei**

I. INTRODUCTION ........................................ 294
II. HISTORY ................................................. 297
III. BERNabei & KATZ ..................................... 300
   A. Fighting for the Rights of Those Inflicted with AIDS ....................... 303
   B. Helping Students Combat Sexual Harassment ............................... 306
   C. Upholding the Rights of Women Researchers .............................. 308
   D. Defending Whistleblowers ............................................. 312
IV. CONCLUSION ............................................. 316

If there is no struggle, there is no progress. Those who profess to favor freedom and yet deprecate agitation are those who want crops without plowing up the ground. They want rain without thunder and lightening. They want the ocean without the awful roar of its waters. This struggle may be a moral one or it may be a physical one. Or it may be both moral and physical, but it must be a struggle. Power concedes nothing without a demand. It never did and it never will.

—Frederick Douglas
1857

* Debra Katz is a Partner with the law firm of Bernabei & Katz. B.A. Union College, 1980; J.D. University of Wisconsin Law School, 1984. Ms. Katz is a member of the National Lawyers Guild.

** Lynne Bernabei is a Partner with the law firm of Bernabei & Katz. B.A. Radcliffe College, 1972; J.D. Harvard Law School, 1977. Ms. Bernabei is a member of the National Lawyers Guild.
I. INTRODUCTION

Bernabei & Katz is a four-lawyer, private, public interest law firm based in Washington, D.C. The firm specializes in litigating civil rights and civil liberties cases, employment and AIDS discrimination cases, whistleblower cases, and prisoner rights cases. We have been labelled the “scorched earth litigators” of the left by the media¹ and branded “idealogues” by opposing counsel. But first and foremost, we view ourselves as public interest lawyers whose primary obligation—and indeed professional duty—is to provide high quality legal representation to public interest clients. These clients have a vital interest in shaking up the system. To that end, our representation necessarily involves aggressively challenging the existing power structures and institutions to try to force them to operate in a non-discriminatory and equitable manner.

To do so, we, like other public interest lawyers, employ a wide range of strategies and activities, including litigation, counseling, lobbying, research and investigation, the use of the press, mobilizing community demonstrations, and organizing and educating grass root groups. The programmatic use of multi-tiered strategies and various forums by a single law firm on behalf of a public interest client and the broad social cause being represented are distinctive characteristics of a public interest practice.

Various definitions have been offered for the term “public interest law.”² Throughout this article, and indeed in the running of our practice, we use this term to describe providing legal representation to individuals, groups, or interests that historically have been unrepresent-

2. For a discussion of the term “public interest law,” see Benjamin W. Heineman, In Pursuit of the Public Interest, 84 YALE L.J. 182 (1974). See also ABA SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, IMPLEMENTING THE LAWYER’S PUBLIC INTEREST PRACTICE OBLIGATION 1 (1977), which defines public interest law to include: civil rights representation; property law; public rights law; consumer protection law; and the administration of justice. The last category includes activities oriented toward remedying inequities in the legal system.
ed in our legal system, or who are fighting the established power or the established distribution of wealth.3

Private public interest law firms, like ours, are distinguished from non-private public interest law firms such as the NAACP Legal Defense Fund and the American Civil Liberties Union,4 for example, in that they are not dependent upon grants from foundations or governmental assistance and are not membership organizations.5 Nor are they considered "charitable organizations" exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code.6 They operate in the traditional attorney-client mode by accepting fees for legal representation,7 and thereby make their public interest practices self-sustaining.8 Similarly, our firm has survived with minimal foundation

---

3. The ordinary marketplace for legal services fails to provide such services to significant segments of the population and to significant social interests, such as the poor, racial and ethnic minorities, and other disenfranchised groups like women, gays and lesbians, persons with disabilities, environmentalists, consumers, and whistleblowers. See generally, DEBRA CLOVIS & NAN ARON, SURVEY OF PUBLIC INTEREST LAW CENTERS app. B (1980); Robert L. Rabin, Lawyers for Social Change: Perspectives on Public Interest Law, 28 STAN. L. REV. 207, 210-14 (1976).

4. For a history of the early law reform efforts by the NAACP Legal Defense Fund and the ACLU, see Rabin, supra note 3, at 109-24.


6. Section 501(c)(3) provides tax exempt status for:
   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 earning 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.

7. Pursuant to Rev. Proc. 75-13, 1975-1 C.B. 662, Public Interest Law Firms (PILFs) may not charge or accept client-paid fees.

8. See generally Comment, The New Public Interest Lawyers, 79 YALE L.J. 1069, 1116-19 (1970) (summarizing interviews of public interest lawyers who have developed self-
funding: (1) by charging clients at hourly rates substantially less than market rates, depending upon their incomes and other factors affecting their abilities to pay; (2) by receiving the award of statutory attorneys’ fees in cases in which the plaintiff prevails or reaches a successful settlement; and (3) by maintaining our salaries at levels commensurate with those of our non-profit, public interest counter-parts.

We have chosen to operate in this organizational structure because it provides maximum discretion to select cases, guided by our own views of social justice, and ensures that, once having made that selection, we remain true to the interests of that particular cli-

**West Virginia Law Review**, Vol. 96, Iss. 2 [1994], Art. 5

---


10. Unlike the vast majority of private public interest firms, we do not accept “bread and butter” legal work such as wills, divorces, personal injury cases or the like. Nor do we accept any civil defense work. Rather, in addition to handling court cases, we handle a high volume of discrimination cases that settle prior to the commencement of litigation, at the investigation and demand letter stage. Thus, as might be expected, we must devote substantial time and effort to maintaining our practice.

11. Structurally, our law firm looks much like small firms that do commercial litigation. It is organized to manage a large caseload involving a mix of judicial and administrative matters and to handle other routine client matters, including informal negotiations.

12. A distinct element of public interest practice is case selection. Public interest lawyers select clients principally on the basis of whether the representation would advance the ends of social justice. This differs dramatically from traditional legal practices where the market is the principal determinant of case selection. See Rabin, supra note 3, at 208-09 & n.8.

Further, public interest lawyers reject the notion that the lawyer is a neutral professional who puts her skills at the disposal of whatever values or interests come with the client. We believe strongly, as do other public interest lawyers interviewed in a comprehensive survey, in the legitimacy— and indeed necessity— of personal value choices in our work, and that lawyers must accept responsibility for the consequences of their professional actions. See Comment, supra note 8, at 1119-20.
Moreover, we believe that the private public interest law firm structure is best suited to achieve independence from the requirements of funders and Boards of Directors, to permit maximum flexibility in the types of strategies that can be pursued on behalf of our clients, and to ensure long term viability.

Obviously, our litigation practice is not programmatic in nature—that is, we do not map out an agenda for law reform in a specific area and select only those cases which advance that agenda. Nor does it have a singular ideological commitment. Rather, our practice reflects, to a considerable degree, our decision as to which cases best serve the public interest, often defined by the exigencies and needs of our client base and the community in which we practice.

II. HISTORY

Public interest law firms first appeared in the mid-1960s, stirred to action by the civil rights movement, and in direct response to a

13. This is so because we do not have broader institutional interests we must take into account in our representation. Our sole interest is that of the client.

While critics have charged that public interest lawyers run their own political agendas through their representation of clients, we take strong exception to such an appraisal. The lawyer’s only political decision, which is at the outset of a case, is deciding whether to accept representation of a client in a given matter. After that, the lawyer’s role is to educate the client as to every alternative open to him or her and the likely consequences of each alternative. This process is essential to empower the client to act as a partner in the representation and to make the most intelligent and powerful choices about what goals can reasonably be achieved and how best to achieve them.

14. Typically public interest law firms assisted by foundation support maintain program work in discrete areas—reflecting the purposes of the foundation—and cannot, by the terms of their grants, accept clients or cases outside of their program priorities. See Harrison & Jaffe, supra note 5, at 466.

15. As previously noted, PILFs are prohibited from lobbying or engaging in propaganda methods—both of which are important tools in the public interest lawyers’ arsenal. See supra note 6.

16. For example, we have responded to the AIDS crisis by developing a practice specialty in the area of AIDS discrimination, and have worked with the local AIDS Legal Services agency, the Whitman-Walker Clinic, to handle such cases and to train members of the Washington, D.C., bar to do so as well. See infra text accompanying notes 30-57.

17. The relationship between public interest law organizations and social movements is a dynamic and interactive one.
general disillusionment with the slow pace of social change brought about through governmental efforts, and alarm about the dangers of government-industry fraternization.\textsuperscript{18} Throughout the late 1960s and mid-1970s, roused by the pressing needs of social movements, including the anti-war movement,\textsuperscript{19} public interest law firms rapidly increased in numbers, and proved to be an important force in the legal and political landscape.\textsuperscript{20} Funded in large measure by grants from pri-

---

Generally speaking, the diffuse interests of the public can only be articulated coherently by a social movement which emerges to press the issue—civil rights, or environmental quality, or peace, for example. Public interest advocacy organizations often become the lobbyists or litigators for such social movements.


\textsuperscript{18} See Berlin et al., supra note 5, at 678-79 (explaining that among the factors cited by persons who chose to embark on such practices were disillusionment with government service as a result of the failure of political figures to make use of their power to accomplish socially desired ends, and frustration as a result of bureaucratic inertia that defeated efforts to effectively enforce existing statutes); \textit{see also}, Comment, supra note 8 (providing a comprehensive summary of interviews conducted of public interest lawyers nationally and including a discussion of the factors that motivated their career choices).

\textit{See generally} Rabin, supra note 3, at 224-27 (tracing the antecedents of the public interest law movement with an emphasis on the discontent of the public to governmental policy and the public's lack of effective access to institutions); Edgar S. Cahn & Jeam Camper Cahn, \textit{Power to the People or the Profession?—The Public Interest in Public Interest Law}, 79 \textit{Yale L.J.} 1005, 1008-11 (1970) (tracing the sources of the formation of the public interest law movement).

\textsuperscript{19} A number of law collectives or "people's law offices" were established to respond specifically to the needs of "the movement" and to help empower community groups. \textit{See e.g.}, Paul Harris, \textit{The San Francisco Community Law Collective}, 7 \textit{Law & Policy} 19, 19-27 (1985). \textit{See generally} Comment, supra note 8, at 1091-96 (summarizing interviews with public interest lawyers who concentrated their practices upon representing political and cultural activists and dissidents).

\textsuperscript{20} While the absolute number of public interest lawyers, and their proportion to the number of all lawyers remained small, the number of public interest lawyers and organizations increased significantly during this period. \textit{See e.g.}, Clovis & Aron, supra note 3, at 2 (explaining that Council for Public Interest Law's survey in 1979 and 1980 found 117 public interest law centers employing 711 attorneys); \textit{Council for Public Interest Law, Balancing the Scales of Justice} 81-82 (1976) (identifying 92 public interest firms and explaining that the 86 firms that completed the survey employed 589 lawyers); Thurgood Marshall, \textit{Financing Public Interest Law Practice: The Role of the Organized Bar}, 61 \textit{A.B.A. J.} 1487, 1488 (1975) (identifying 250 public interest lawyers among 355,000 members of the legal profession.)

The vast majority of legal services provided by public interest lawyers were in the area of litigation. \textit{See Joel F. Handler et al., Lawyers and the Pursuit of Legal
private foundations, public interest lawyers made significant contributions to civil liberties, civil rights, environmental, and consumer protection law, securing many landmark victories.\textsuperscript{21}

By the late 1970s and early 1980s, financial support for public interest practices dwindled as the critics of such practices grew more strident and organized in their attack of public interest lawyers and their methods.\textsuperscript{22} Moreover, the social movements that fueled the formation of many such legal practices also suffered attack and political retrenchment. Finally, the executive branch and the courts, packed with conservative appointees of Presidents Ronald Reagan, and later George Bush, meted out blow after blow to civil rights and other public interest litigants and put public interest organizations in tremendously defensive postures.\textsuperscript{23} In this climate, administrative and court victories were difficult or impossible to secure, and when such victories were achieved, many courts refused to provide full relief to the litigants or reasonable attorneys' fees to their lawyers. The unfortunate result of this era was that the public interest law movement ceased in its growth, and a substantial number of established public interest institu-

\textsc{Rights} 79-80 (1978) (explaining that 73.8% of public interest lawyers' activity is litigation; another 9.4% involves the filing of administrative complaints or petitions).


\textsuperscript{22} President Reagan and his political compatriots, like Jesse Helms, repeatedly sought to eliminate federal funding of the Legal Services Corporation and to impose politically-based restrictions on the type of work legal aid lawyers were permitted to pursue. See Stuart Taylor, Jr., *Legal Aid for the Poor Did Work, and That's the Rub*, N.Y. Times, Mar. 15, 1981, § 4, at 3; Conrad MacKerron, *Legal Services Corp. Supporters Fear it May Be "Block Granted" to Death*, 9 Nat'L J. 358, 360 (1981).

See generally, *Council for Public Interest Law*, supra note 20, at 238-42 (describing the steady decline in foundation support of public interest law); Clovis & Aron, supra note 3, at 10, 12, 18; Alan Michael Ferrill & Frances B. Hujar, *The Public Interest Law Firm: Greater Bar Support is Needed*, 30 Baylor L. Rev. 785, 800-03 (1978), for a historical discussion of the American Bar Association's "chilly" reception to the concept of a public interest bar, and its failure to provide funding and other support to such practices.

\textsuperscript{23} Because the social movements that helped secure the victories of the 1960s and 1970s were in disarray, or worse, in conflict with one another, they were not able to organize effectively to fight the conservative backlash of the 1980s.
tions either scaled back or closed their doors as the economics of running such practices was no longer practical.\textsuperscript{24}

While we have been unable to secure empirical data about the current number of public interest lawyers, in 1977, one commentator estimated that public interest lawyers who work for nonprofit, tax-exempt groups constitute only one thousandth of 1 percent of the legal profession.\textsuperscript{25} It is our belief that this percentage, including private public interest lawyers, is less today.\textsuperscript{26}

\textbf{III. BERNABEI \& KATZ}

We started the law firm of Bernabei \& Katz in May of 1987, with the idea of representing whistleblowers, civil rights litigants (women, handicapped persons, African-Americans, and persons with AIDS), and community groups whose cases represented values we believed promoted the public interest. The whistleblowers we represented in 1987 were largely engineers working at nuclear power plants or on the Space Shuttle project. By now, this group has grown to include managers from the National Gallery of Art, the Department of Agriculture, the Federal Aviation Administration, as well as scientists who are harassed or fired for disclosing scientific misconduct. In most of these cases, the whistleblowers are vindicating the values that the American political system espouses. Yet their cases, and the ways in which the government and corporate management treat them, including severe harassment, intimidation, reprisal, termination, and blackballing, demonstrate the corruption of the system and the need for basic overhaul.

In each of the cases, we attempt to empower the litigants and the public interest groups that support them, to advance the particular issue that has led them to litigation.\textsuperscript{27} This may involve pressuring the Nu-
clear Regulatory Commission and Congress to deal with unsafe nuclear power plants, or forcing a local hospital to change its policy to treat persons with AIDS. Regardless of the issue, this period of federal court hostility to public interest claims, clearly requires reaching the constituency that will benefit from winning a case or bringing public attention to the issue, if the public interest community is to make significant gains, or even to hold the ground won through the progressive social movements of the last 30 years. It is only by assisting institutions or corporations—is extremely contentious, drawn out, and costly. It is not uncommon for cases of this type to take five to ten years to complete. Indeed, a number of the major cases we commenced in 1987 are still underway.

Large corporations and the government have vast resources to defend against cases and throw up road block after road block and motion after motion to impede the truth gathering process. Courts, given their substantial cases loads, are ill-equipped to monitor and supervise discovery even in the most egregious cases where documents and other evidence are destroyed. See, e.g., Solomon v. Rockwell International, et al., H-87-307 (S.D. Tex) (magistrate judge recommended default judgment be entered against defendants in January 1992, as a result of defendants' and defendants' counsel's obstruction of discovery and repeated defiance of court orders in this seven year old space shuttle whistleblower case). The district court has yet to act on this recommendation.

Government attorneys have no economic incentive to resolve cases prior to litigation because the taxpayers front the litigation bill, no matter how high. More distressing is that Department of Justice attorneys have an incentive to litigate rather than settle cases because when a case is settled, the settlement will be paid out of the Justice Department budget, whereas any award to the plaintiff made when the government loses the case will be paid from the defendant agency's budget.

Similarly, when large defense contractors are the defendants, many of them charge attorneys' fees and costs, and the cost of any settlements, off their government contracts. So there exists no economic incentive to settle cases since the cost is ultimately absorbed by the taxpayers.

Finally, in other cases in which institutions are represented by outside counsel, we believe that defense counsel themselves frequently have an economic motivation to continue litigation even in cases in which any rational assessment of the evidence early on would suggest that the interests of the defendant would best be served by resolving the case. This is particularly so given the high cost of retaining defense counsel.

Often, the centerpiece of the defense litigation strategy is waging a war of attrition against the litigant while simultaneously waging an attack campaign on the litigant and the cause he represents. Such a strategy is designed to bankrupt and discredit the litigant and his cause, to make him an example for others, and to force him to drop his suit or settle it prematurely. In undertaking representation on behalf of such clients, counsel must to be prepared to represent the client over the long haul and to work with the client to marshall forces (e.g., organize grass roots groups, educate the public through the press) to equalize the playing field.
litigants in organizing constituencies that have a vital interest in their legal cases and garnering public attention\textsuperscript{28} to the problems the litigants have exposed that they will be empowered to win their cases or achieve other desired aims.

The cases that we have taken over the last seven years have represented, to some extent, the attorneys’ particular legal and political interests—women’s rights, the abuses of the national security state, first amendment rights, prisoner rights, and establishing non-discriminatory treatment and access to services for persons with AIDS. However, the most important element in each of the cases that we have taken is that the cases have provided the litigant a vehicle to gain some sort of power through the litigation, whether the case has been won, settled, or even lost.\textsuperscript{29}

The goal of many of the public interest lawyers of the 1960s and early 1970s was to change laws, legal doctrine, and regulations in order to achieve protection of the environment, guarantees against government abuse, and establishment of minimal levels of housing, food, and health care for all Americans. However, many of the stunning victories of that decade were lost, with the decline of national, grassroots movements that forced these social issues onto the national agenda. Without a strong political constituency to support the legal decisions, the ever more conservative judiciary and political environment eroded the hard-won legal victories, interpreted the legal decisions in a different way, or simply refused to enforce them. The legal decisions

\begin{itemize}
\item \textsuperscript{28} See McDougall, \textit{supra} note 17, at 44 (explaining that the public policy advocate should be attentive to the means of exerting pressure on media organizations to promote its agenda and to counter the pressure being exerted by opponents).
\item \textsuperscript{29} A lawsuit is a powerful political instrument. Its use is not limited to the pursuit of judicial remedies or doctrinal reform. Even in cases where litigation may prove to be unsuccessful, the lawsuit and information uncovered as a result of the suit, may still result in the desired reforms by stirring the legislature to action, or providing a focal point for the press that will serve to increase public awareness and pressure for such a reform. See generally Comment, \textit{supra} note 8, at 1101-05.
\end{itemize}

and laws that fared the best in the otherwise conservative era of the
1980s were those supported by strong, vocal, and national constituencies, such as the reproductive rights movement. Without that support, as graphically demonstrated by mass demonstrations, and changes in voting patterns to support pro-choice candidates, it is clear that Roe v. Wade would be little more than a case book reference.

What we have attempted to do is take cases where there is a strong basis of support for the plaintiff, and for the basic right that the plaintiff seeks to vindicate. We then attempt to contact and strengthen those grassroots and national groups that desire to support the plaintiff in his or her struggle. In that way, the plaintiff can illuminate for the public the true interests at stake, which involve not only the plaintiff’s individual interest, but the larger social or group interest for which the plaintiff is speaking. Garnering the support of public interest and community groups for a particular case also helps shape the political debate about the case in a manner that supports the plaintiff in what often turns into a war of attrition. We have selected four cases we have handled to illustrate the points discussed above.

A. Fighting for the Rights Of Those Inflicted With AIDS

In 1988, we represented Jane Doe, a young woman with AIDS, who was admitted to Howard University Hospital for suicidal depression associated with HIV infection. The hospital assigned her to an isolation room, rather than to the psychiatric ward, and failed to confiscate prescription medication Ms. Doe had in her possession. Ms. Doe then ingested the medication in a suicide attempt. The hospital responded by placing her in mechanical restraints, binding her to her hospital bed for four days, and then administering chemical restraints and psychotropic drugs for a several week period. At no time did the hospital provide any psychiatric help to her, even though Ms. Doe had entered the hospital because she was suicidal and suffering from major depression.

The case was referred to us by the Whitman-Walker Clinic, which requested that we visit Ms. Doe in the hospital, determine what her treatment course was, and if appropriate, arrange for her transfer to a different medical institution. The Clinic also expressed concern about
the way other HIV positive patients had been treated at the hospital. Initially, the hospital refused to provide Ms. Doe’s medical records for review, and instead summarily released her from the hospital. Ms. Doe was indignant at the way she had been treated—it was immediately clear to her that her civil rights had been violated—and we agreed to investigate her claims and determine whether the violations she suffered were systemic in nature.

At first blush, the case appeared to be a simple one in which the hospital and the treating physicians seriously mismanaged Ms. Doe’s care. After investigating Ms. Doe’s claims, it became clear, however, that the hospital’s treatment of her was consistent with a pattern and practice of discriminating against persons with HIV infection. Specifically, we discovered that the hospital had a policy of denying treatment to persons who had tested positive for the AIDS virus on particular hospital wards, including the psychiatric ward, and that it had refused to adopt universal precautions that would have safely permitted treatment of persons with AIDS throughout the hospital. After the hospital ignored our demand to change its policy, Ms. Doe filed suit.

We then spent much of the next year—expendng literally thousands of hours of legal work—litigating Doe v. Howard University Hospital. We worked in collaboration with the Legal Director of the Whitman Walker Clinic and attorneys at the Lambda Legal Defense Fund in New York, to prove that Howard University Hospital’s refusal to treat persons who were HIV-positive was discriminatory and violated the Rehabilitation Act of 1973 and the District of Columbia Human Rights Act. By the end of the suit, not only had we obtained significant relief for Ms. Doe, but we had succeeded in forcing the hospital to change its policy, to adopt universal precautions, and to agree to treat future HIV-positive patients on a non-discriminatory basis.

30. The defendant withheld, until the tail end of discovery, a written policy that prohibited persons with HIV infection from receiving treatment on the psychiatric ward. See Anne Kornhauser, A Private Room or Stigmatizing Isolation? Suit Against Hospital Raises Questions About Treatment of AIDS Patients, LEGAL TIMES, June 5, 1989, at 1, 10. This policy was critical evidence of the discrimination.
The Doe case is an excellent example of what can be accomplished when public interest lawyers cooperate with grassroots citizen’s groups to empower the aggrieved client. Ms. Doe, who feared ostracism from her family and friends if she went public with her allegations, took the courageous step of filing suit and speaking to the press about the indignities she and other persons with HIV infection suffered. In so doing, she became a symbol of the abusive treatment suffered by many persons with AIDS and of the gaping unfilled need for medical care for persons who are HIV-positive, particularly among the African-American community in Washington, D.C. The case led the AIDS community to reach out to the African-American community that was previously unrepresented and forced a change in the hospital policy.

Lambda Legal Defense Fund helped attract medical experts to testify about the standard of care for AIDS patients and how Howard University Hospital’s treatment of Ms. Doe fell well below that standard of care. Lambda also provided expertise on the scientific literature about AIDS that demonstrated that Ms. Doe could safely be provided care on any ward of the hospital without posing an undue risk to herself or others. Whitman-Walker Clinic helped to solicit assistance from local agencies responsible for ensuring the provision of services to persons with AIDS and worked with the local public health administration to articulate an appropriate, non-discriminatory standard of care for treatment of HIV infection in Washington, D.C. We served as lead counsel and litigated the case.

33. See, e.g., Michael Abramowitz, AIDS Patient Sues Howard U. Hospital: Woman Alleges Discrimination, Substandard Care by Personnel, WASH. POST, Mar. 10, 1989, at B3. On September 29, 1989, after settling her case, Ms. Doe penned a press statement that she requested be sent out. It read: “I can say to all of you out there in the world like myself, stricken with AIDS. We all get tired, just don’t quit. This is not my victory, but one for us all. I hope that I have made a difference by coming forward. God Bless you. Jane Doe.”

34. In State Bd. of Nassau County v. Arline, 480 U.S. 273, 288 (1987), the Supreme Court made clear that courts must give due consideration to the “reasonable medical judgments” of public health officials about the nature, duration and severity or risk of contagion of a given disease. Thus, it was critical to the litigation to secure such an articulation of the standard of care.
Part of our litigation strategy was to empower Ms. Doe, a young woman who had been a former drug abuser, to take the courageous step of demanding health care for herself and others infected with the AIDS virus. The litigation also was aimed at assisting Whitman-Walker to better address the needs of the African-American community, which in 1988 was often excluded from the AIDS debate. Finally, obtaining the support of Lambda Legal Defense Fund led to regular reporting on the progress of the case in Lambda’s newsletter and hopefully provided ideas to other litigants with similar discriminatory health care delivery systems in their communities. Although the case settled prior to trial and left no precedent-setting legal opinions, the litigation empowered the local and national AIDS community.35

B. Helping Students Combat Sexual Harrassment

In 1992, we had basically the same goals of achieving justice and empowering the client when we began representation of the family of a young female student at Montgomery Blair High School who had been assaulted by a male student. The high school’s assistant principal mishandled the investigation of the incident by forcing a face-to-face confrontation between the young woman who had been attacked and her assailant. He also developed and attempted to force a sexual harassment policy on the students that largely blamed female students for the pervasive problem of harassment, and admonished them not to dress provocatively. By the time our representation began, a politically-savvy group of students at the high school had begun protesting the harmful sexual harassment policy and the school’s policy of forcing face-to-face confrontations during investigations into sexual harassment complaints. This group had gathered signatures of about 500 students on a petition calling for the administration to change its sexual harassment policies. In response, the school administration hardened its position and refused to make any modification of its sexual harassment policies or its investigatory practices.

After researching the legal claims of the young woman, we sent a demand letter to the school superintendent setting forth not only her legal claims entitling her to damages, but explaining that the larger underlying problem was that the school was not ensuring a non-discriminatory educational environment as required under federal law.\textsuperscript{36}

We then assisted the students in calling a press conference to expose the pervasiveness of the problem of sexual harassment at the high school and to explain the changes that the students had asked the administration to make, as well as the need for the larger community to recognize the seriousness of the problem of sexual harassment at area schools. Speaking at the press conference were law professors, who applauded the students’ efforts, and affirmed that it was they, rather than the school administration, who were in the forefront of progressive legal thinking about the problem of sexual harassment and how to eliminate it. The story was covered in the local and national press.

The student group, supported by national groups interested in the issue, forced change at the high school.\textsuperscript{37} By publicizing the problem of sexual harassment, the students tapped into a vein of severe distress about sexual harassment that led to extensive student organization and pressure on the high school and school district administration.\textsuperscript{38} Although the high school’s principal continued to resist change, the group of activist students were themselves successful in forcing a non-discriminatory school environment and a dramatic decline in sexual harassment. In addition, the NOW Legal Defense Fund represented the students in filing a complaint with the Department of Education’s Office of Civil Rights, which, within a year, forced the administration to institute all of the changes originally demanded by the students.


\textsuperscript{38} See generally, DiNeeen L. Brown & Fern Shen, "Don't Hug, Don't Touch": Harassment Cases are Making Teachers Wary, WASH. POST June 8, 1993, at A1.
C. Upholding The Rights Of Women Researchers

In a third case, we represent Dr. Margaret Jensvold, a psychiatrist and junior research scientist. Dr. Jensvold was appointed to an extremely prestigious post-doctorate fellowship at the National Institute of Mental Health ("NIMH") to study Premenstrual Syndrome ("PMS"). She has brought a sex discrimination suit against the Secretary of the Department of Health and Human Services39 for NIMH's refusal to provide her the same research and training opportunities as were provided to her male colleagues.40 The Clinical Director of NIMH and other senior scientists pushed her out of NIMH after only two years of her fellowship. In addition, during the first year of her fellowship, her supervisor ordered her into psychotherapy, based on his sex-stereotyped view of her as an "abused woman."41 While refusing to give her the

40. In denying defendant's motion for summary judgment, the court issued an important ruling which establishes that denying supervision, "mentoring" experiences, co-authorships, research support, and other career enhancing opportunities to female employees that are provided to male employees constitutes disparate treatment, in violation of Title VII of the Civil Rights Act of 1964. Jensvold v. Shalala, 829 F. Supp. 131, 135-36, 138 (D. Md. 1993).
41. In defeating defendant's motion for summary judgment, plaintiff offered the expert report of Dr. Kay Deaux, a professor of Social-Personality Psychology at the City University of New York Graduate Center to demonstrate the ways in which Dr. Jensvold's supervisors had engaged in sexual stereotyping by treating her as an "abused woman." Id. at 138. The Supreme Court has recognized that sex stereotyping of this sort is a form of sex discrimination actionable under Title VII. Price Waterhouse v. Hopkins, 490 U.S. 228, 255-58 (1989).

Such sex stereotyping testimony is often critical in proving sex discrimination cases and is particularly important in educating the decision maker as to conduct that takes place so routinely in the workplace that one may be unable to discern it, or which may be extremely subtle and therefore difficult to detect.

For example, in Anderson v. Children's National Medical Center, C.A. No. 93-0233-RCL (D.D.C.), another case we are currently handling, the plaintiff, a preeminent pediatric surgeon, was not selected for the position of Surgeon-in-Chief and Chairman of the Department of Pediatric Surgery at Children's National Medical Center because male members of the search committee deemed her to be too "aggressive" and "not a team player." These same characteristics were either valued in male candidates—by reframing them as positive qualities, such as "leadership qualities"—or ignored in the decisionmaking process. More
names of any women psychotherapists in the Washington metropolitan area, he pushed her to enter therapy with a psychoanalyst who was then working for NIMH as a consultant and reporting to him. After four sessions, Dr. Jensvold learned of the therapist’s conflict, and demanded confidentiality. When the therapist refused Dr. Jensvold’s demand, she terminated his services. The therapist has since become a defense witness in this case and testified that he had diagnosed her with “paranoid personality” traits because she had not trusted him during the psychotherapy and with traits of the “self-defeating personality disorder” because, among other things, she had complained that she had been discriminated against on the job at NIMH.

The problem went far beyond Dr. Jensvold’s individual situation. At the time the case was filed in December of 1990, female researchers at the National Institutes of Health and NIMH were growing increasingly impatient about being subjected to all kinds of discriminatory treatment, including sexual harassment, appropriation of their research ideas and work, and exclusion from important scientific research opportunities. However, the women’s group at NIH had yet to come into its own as an effective political force. Further, the topic of concern to women that had captured the national spotlight was NIH’s failure, despite prodding from the Congressional Women’s Caucus, to include women as subjects of scientific studies.

Using the lawsuit as the vehicle, we connected the discrimination against women researchers at NIH with the failure of NIH to include women as research subjects, and, similarly, with NIH’s failure to focus on women’s health issues. Dr. Jensvold became a primary spokesperson for this issue, and with other activists, successfully appealed to the Women’s Congressional caucus and other interested

---

subtle, however, was stereotyping which is known as attributional bias, whereby negative evaluations of a particular situation are seen as the fault of women whereas the same situations are seen as the result of the objective conditions outside the control of men. Conversely, successes are attributed to the qualifications and skills of men, whereas they are attributed to the good luck or to factors outside of the control of women.

42. About fifty percent of the scientists who study women’s health issues are women researchers. See Tracy L. Johnson & Susan Blumenthal, Women in Academic Medicine: Findings of the Second Annual Scientific Advisory Meeting, 2 J. OF WOMEN’S HEALTH 215, 216 (1993).
groups to raise this issue nationally. Accordingly, since 1990, the Women’s Congressional Caucus and a significant number of professional groups interested in women’s health have emphasized that the underrepresentation of women at the nation’s premier research institution significantly and adversely impacts the nation’s health by derailing the careers of the premier women researchers who are most likely to contribute to the advancement of women’s health studies.43

In this case, NIMH has attempted to defend its discriminatory actions by claiming that Dr. Jensvold had a “self-defeating personality disorder.” In other words, there was no discrimination at NIMH; Dr. Jensvold was to blame for her supervisor’s refusal to retain her beyond the first two years of her fellowship.

Dr. Jensvold fought back, and together with a number of professional groups and women leaders in the American Psychiatric Association, successfully lobbied the Board of Trustees of the American Psychiatric Association to eliminate the diagnosis of “self-defeating personality disorder” from the new psychiatric diagnostic manual, the DSM-IV. Enraged by the government and psychoanalyst’s attempt to use the diagnosis against a victim of discrimination, the psychiatrists succeeded in illustrating, through Dr. Jensvold’s case, the danger of

43. By letter dated December 5, 1990, to then Secretary of Health and Human Services Louis Sullivan, Congresswomen Patricia Schroeder and Olympia Snowe, as co-chairs of the Congressional Caucus for Women’s Issues, stated:

One of the primary factors underlying the deficiencies in women’s health research is the absence of women in key decision-making roles in the health professions.

... Women scientists and physicians nationwide have now succeeded at the junior levels of research and administration, but there is a sudden loss of these bright and educated women when the time comes for promotion and tenure. There is a much lower percentage of women who are tenured as associate and full professors on our nation’s medical school faculties than men. There are only a few women department chairs and only one woman dean of a school of medicine (out of 126). We do not believe it is because women are less qualified but rather that barriers, both seen and unseen, are put in their way. We believe that women scientists will help correct the lack of research studies into areas of women’s health, and also have a great deal to add to policy decisions about the future of science, technology and medicine.

Letter on file with the authors.
diagnoses like "self-defeating personality disorder" which have no scientific basis.  

Other women who had been subjected to sexual discrimination, sexual harassment, and, in some cases, sexual assaults, began to organize to publicize these problems, establish task forces to document these problems, and to force the new NIH Director, Dr. Harold Varmus, to address and remedy them. While not yet successful in effecting major changes at NIH, Dr. Varmus was forced to concede in his confirmation hearings, during the fall of 1993, that ensuring gender and racial equity among NIH’s scientists is a goal he will implement. Moreover, the tenure system at NIH is under review and will undoubtedly be revamped. Meanwhile, NIH administrators have been forced to acknowledge that the EEO system does not satisfactorily handle these complaints, and that it is time to consider an overall resolution to the problem of sex harassment.

Most importantly, the women’s groups active in the fight against sexism at NIH are beginning to form coalitions with the African-American groups mobilized in 1993 to fight racism and sexism, graphically exposed in a sex ring scandal in which largely minority women were forced to have sex with NIH officials. For the first time, the National Organization for Women and the NAACP are fighting discrimination at NIH as partners.

The case went to trial in late February 1994. The jury found that the defendants denied Dr. Jensvold mentoring and retaliated against her in a manner that hurt her professional reputation.  

This case is

44. Alisa Solomon, Snake Pit, MIRABELLA, Apr. 1993, at 140.

The extent of the plaintiff’s standing within the NIH community was revealed by attempts by the United States Attorney’s Office of Maryland to have the court bar her from the NIH campus, including open forums to discuss problems of sex discrimination within NIH. When it became clear that the Department would be embarrassed by the exposure of its vindictive actions at a public hearing, it withdrew its request a few weeks before the scheduled hearing.

Similarly, the government unsuccessfully attempted to suppress Dr. Jensvold’s research results and publication of important research findings on PMS. As a tactic to fight her lawsuit, the government also threatened to stop the analysis and publication of data on PMS from a study that it itself had funded.
thought to be the first to find that a lack of mentoring was actionable in a sexual discrimination suit.

D. Defending Whistleblowers

We have also represented clients who have been seriously abused by the federal government and who have desired to fight the harm done to them—even though the political and legal forces on the other side were likely to be overwhelming. We have taken on these types of cases because they help to shape the political debate and force the legal system to become accountable for its role in defending against an abusive government.46

In 1988, we began representation of Robert J. Maxwell, formerly a senior manager in the First National Bank of Maryland, who was threatened by the Bank and the Central Intelligence Agency (CIA) after he refused to handle what he believed to be illegal CIA transactions. After transferring millions of dollars for Associated Traders' Corporation (ATC) through Panamanian and Swiss Bank accounts and signing letters of credit for the purchase of millions of dollars of arms, Mr. Maxwell began to worry that the transactions were illegal. He therefore asked the Bank to give him written authorization for the activities that it had directed him to carry out on behalf of the CIA proprietary. The Bank refused to do so, despite repeated requests from Mr. Maxwell, and instead tried to coerce him to speak to the CIA to gain reassurances. In response, Mr. Maxwell insisted that his name, the only one on the ATC account, be removed from the account and that he no longer be directed to carry out what he saw as the “laundering” of millions of dollars of funds for arms transactions. After all, he reasoned, he worked for the Bank and not the CIA. Bank officials then resorted to harassing Mr. Maxwell, threatening his safety and that of his family. Finally, officials forced him out of the Bank, which in turn, caused him to suffer an emotional breakdown.

46. See generally Rabin, supra note 3, at 252-54 (explaining that some cases force individual self-examination, mobilize organizational activity, and trigger political reaction, thus contributing to the process of law reform over the long term).
In August 1987, Mr. Maxwell filed suit against the Bank for wrongful or abusive discharge, intentional infliction of emotional distress, and misappropriation of name. Shortly after filing suit, the Bank’s attorney telephoned Mr. Maxwell’s attorney at the time and stated that he had been visited by officials of the CIA, the FBI, and the Department of Justice, all of whom wanted to convey a threat to Mr. Maxwell. The threat was that if Maxwell did not “go easy” in the suit, he would be criminally prosecuted and his attorney would be disbarred. We took up the representation of Mr. Maxwell and added constitutional and civil rights act claims based on the threats conveyed by the Bank’s attorney to Mr. Maxwell’s attorney.47

After the court accepted Mr. Maxwell’s amended complaint adding his claim that the Bank, together with the CIA and other government officials, were trying to silence him in violation of 42 U.S.C. § 1985(1) and the First Amendment to the United States Constitution, we pressed a motion to compel the Bank to answer questions and provide documents related to the ATC account. The Bank previously had objected to providing information about the ATC account on the basis of “national security.”48 Holding that only the United States government could assert national security as a basis for resisting discovery, the court overruled the Bank’s objections, and ordered it to turn over the information Mr. Maxwell sought.

Shortly thereafter, the United States government filed a Suggestion of Interest in the case and asserted that a protective order should be granted by the court mandating that no information tending to demonstrate a relationship between the CIA and ATC or the Bank need be produced by any party. Even more radically, the government asked that Mr. Maxwell be barred from using information already in his possession that would tend to demonstrate a relationship between the CIA and ATC or the Bank.49 The basis for requesting this extraordinary

47. Mr. Maxwell sought new counsel because his first attorney had become a material witness to the threat.
48. Mr. Maxwell, during the period he was a manager at the Bank, was one of the few Bank officials with access to all records that the Bank maintained on the ATC account.
49. At this point, Public Citizen Litigation Group, which has a particular expertise in this area, joined the case as amicus curae. It joined the case as co-counsel at the circuit court stage.
“gag order” was the state secrets privilege. More startling was the federal government’s concession that it would not seek to bar Mr. Maxwell from speaking to the press or to disseminate the information outside the courtroom. In fact, the story of the ATC transactions and the retaliation taken by the Bank against Mr. Maxwell had appeared nationwide in syndicated Jack Anderson columns and other national publications. The Bank and CIA’s threats against Mr. Maxwell had also received widespread press attention in such publications as The Washington Post and Philadelphia Inquirer. The government had never moved to restrain Mr. Maxwell or any publication or broadcasting company from telling these stories. The government’s sole purpose was to prevent the use of the information in Mr. Maxwell’s case, which would help him gain redress for the emotional and financial damages caused him by the Bank and the CIA.

The court referred this extraordinary motion by the government to a Magistrate. In contrast to the procedures used in previous state secrets cases and in violation of the Rules of Civil Procedure, the Magistrate, ex parte, solicited an in camera affidavit from the government. Then, based in large part on that in camera affidavit, the magistrate recommended that the district court bar Mr. Maxwell from discovering or using any information to prove his case that would tend to show that the CIA was connected with either ATC or the Bank. The Magistrate disregarded Mr. Maxwell’s arguments that the government could not shield “solely illegal actions,” such as the threats made to Mr. Maxwell to silence him, behind the state secrets privilege. She also indicated that she saw no First Amendment problems with the government barring Mr. Maxwell’s testimony in court on the illegal threats of the CIA and the Bank, even while it had conceded it would not, and could not, restrain Mr. Maxwell in speaking publicly about these matters.


The district court accepted the Magistrate's recommendation without comment. Upon the defendants' motions, the district court then dismissed Mr. Maxwell's case, holding that applying the protective order in this case would prevent Mr. Maxwell from proving his case. In addition, even if Mr. Maxwell could prove his case without using the banned information, the Bank would not be able to defend itself.\footnote{52}

The Fourth Circuit, in an unpublished opinion, affirmed the district court decision, primarily on the basis of its review of the in camera affidavits submitted by the CIA.\footnote{53} The Supreme Court denied certiorari on January 23, 1994.\footnote{54}

The case, which has been discussed in legal publications and the national press, forced the federal judiciary to be explicit that it was taking the position that the CIA could threaten with impunity a private citizen like Mr. Maxwell, who was involuntarily conscripted into working for the CIA and in carrying out illegal covert activities. The logical extension of the legal principle established by the federal courts is that any United States citizen who somehow becomes entangled with CIA activities, even unwittingly, can be threatened and possibly physically harmed and killed.\footnote{55} The courts were forced to state publicly that they were protecting the right of the CIA to carry out illegal actions against United States citizens, without demonstrating that there was any secret or confidential national security information at stake.

Although Mr. Maxwell lost at every stage of the legal process, he was successful in forcing the CIA to publicly assert its interest in court. He thereby made both the executive and judicial branches of the government accountable for their role in permitting the CIA's abusive actions against private citizens that are taken in the name of "national security".\footnote{56} Without Mr. Maxwell's aggressive litigation of this case,  

\footnote{52. Id.} \footnote{53. Maxwell v. First Nat'l Bank of Maryland, No. 92-2393, 998 F.2d 1009, 1993 WL 264547 (4th Cir. July 14, 1993).} \footnote{54. Maxwell v. First Nat'l Bank of Maryland, 114 S. Ct. 920 (1994).} \footnote{55. This precedent would apply to lawyers representing individuals such as Mr. Maxwell or journalists reporting Mr. Maxwell's story.} \footnote{56. Both Republican and Democratic administrations have defended the position that}
the CIA and the courts would never have reached the issue of CIA abuse set forth in the case. In addition, they would have done secretly the same thing that they have now had to justify publicly. In this manner, at least some segment of the public and the legal profession can examine the actions of the national security apparatus of the government, and presumably, those people who are shocked by it can begin to organize support for change. By exposing the terrible effect of singleminded pursuit of the national security state, Mr. Maxwell has helped to build the beginnings of a base for change.

IV. CONCLUSION

Ending a 1991 address to law students at Hofstra University, in Hempstead, New York, Ralph Nader stated:

I hope that I have succeeded in conveying some of the opportunities and horizons open to you [in the public interest law field.] Those who come after you will have an easier time than you did if you are the pioneers. But nothing can happen in this area without your developing a heady sense of injustice about situations that you are not going to tolerate in this society or in this world . . . . As Professor Cahn at NYU once said, "You'll never have an adequate sense of justice unless you have an adequate sense of injustice as a frame of reference." And to do that, you have got to light a fire inside yourself, so that your heart works in tandem with your mind, and you begin to question the assumptions of a society that raises its children corporate.57

We, too, hope that you will choose to devote your hearts, minds, and professional training to work on behalf of public interest clients in challenging the power establishments. Our experience tells us that being part of that one thousandth of one percent of lawyers working for social justice is more than just extremely gratifying—it's essential.

the government can commit the abuses committed against Mr. Maxwell with no legal liability.

57. Nader, supra note 9, at 562.