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Corporate Law Firms and the Perversion of Justice: What Public Interest Lawyers Can Do About It

Ralph Nader*

The following essay is based on a presentation given by Ralph Nader on 26 February 1999.

The curriculum at law schools today is far improved. One may compare the variety of clinical programs, seminars, and the more diverse student body that exist now to when I was in law school in the 1950s. There has been much progress due to student education and experiences during the civil rights movement, the Vietnam war, and other social movements of the 1960s and 1970s. All these events reverberated back to law schools, illuminating the consciousness of law students. They began asking fundamental questions about the maldistribution of justice in our society.

When I was in law school the core curriculum was shaped by the job market, which was divided into two major categories: business law practice and government work. The majority of students took positions in corporate law firms. Some students went to work for the government for a few years, developed their skills, and later sought positions in the private law firms that they often opposed when they were government lawyers. Now, the first-year criminal law course encompasses very little of corporate crime and focuses almost entirely on street crime and larceny. In the 1950s corporate crime was alive and well, and in the boom market of today such crime is surely even more tempting. Yet, the core curriculum has veered away from revolving around just business and government law.

In torts, we studied automobile collision cases by trying to determine who was liable between the drivers. We studied nothing

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about vehicle standards for the public good or standards of care for the highway. Imagine the large numbers of students graduating from law school without any understanding of the fourth leading cause of death at that time and the first leading cause of deaths for college students and graduate students: highway accidents.

Our property law course did not include discussions of commonwealth property, the public lands, trust funds, investments, or the idea of public airways belonging to the people. Neither did we discuss the split of ownership from control, except for a few references to the *Burly & Means* study in the 1930s that concluded that stockholders owned the company but the managers and the executives control it. We studied landlord-tenant law, but we never got to the tenant. Harvard Law graduates were supposed to represent landlords; there was no money in representing tenants.

The most humorous example was in a corporations law course when a student raised his hand and asked why so many cases were tried in Delaware. The professor responded that Delaware had an extremely mature jurisprudence in the area of corporate law. That was the end of the discussion. No one asked why that was the case, or why this small state had so many corporations chartered in it. The answer was that Delaware had a very permissive jurisdiction and that corporations wanted to be chartered there because it was easier to override shareholders and immunize themselves. Delaware used the attractiveness of its permissive jurisdiction as a revenue device. Approximately thirty percent of state revenues came from corporate fees at that time, although it is less now. Delaware controlled the accountability of corporations, yet it was not interested at all in using the corporate charter as a mechanism of accountability. It was just a revenue device and corporations had minimal restrictions on their activities.

We never discussed these ideas because normative issues were considered intellectually soft. In other words, X10B5 or the rule in the *Wiles* case was considered intellectually challenging. We never asked questions about justice or injustice; such was left for pontificators and philosophers because it was too far removed from the rigorous trivia that marked the curriculum of Harvard Law School. Anytime a

student in class asked a fundamental question, both the other students and the professor would look strangely at the person as if asking “What are you, a sociologist?” The way we dismissed public policy at the time was very unfortunate. For example, in constitutional law one day the professor asked why the jury decided the way it did. Fifteen hands shot up and the professor delighted in shooting down every first-year hand with absurd retorts. One student asserted that it was because the jury was all white. The rest of the class wondered why he had uttered such an “extraneous” comment.

Three years later the Supreme Court of the United States began deciding cases about discriminatory jury lists. Harvard Law School was behind the Supreme Court in even discussing the issue. I have always said one could never accuse Harvard Law School of having foresight because it would be impossible to footnote. That was the ambiance there; we held onto our notebooks because they could be pilfered, competition was vicious, and it was a very high-pressure situation.

Law schools today have greatly improved over the past forty years. The question is if they have improved enough. What is the general environment at the law school? When I was in law school, we liberally criticized every judicial decision and every statute. We could even criticize Judge Learned Hand, who was an icon at Harvard. The one thing we could not criticize was the corporate law firm, which was sacrosanct. Many of the professors had worked in corporate firms, and it was not considered a proper subject of intellectual study or commentary. The firms would come to the law school and recruit students. In fact, the wage then was eighty dollars a week, a modest reward for working 70 to 80 hours a week.

In the last forty years law students have lost much of their innocence as they see the result of their forebearers’ work with civil rights on many issues, including housing abuses and police brutality. Clinical programs and summer internships have given students an opportunity to be exposed to these issues. They also learn that *The Wall Street Journal* and *Business Week* are recurrent narrators of corporate crime, fraud, and abuse. Unfortunately, law students tend to be very anxious about their courses, careers, and debt load. This

increases the opportunity costs of one spending time analyzing issues in a broader and deeper manner. Many students view law school as a three year preparation course for the bar. Many students do not want to take jurisprudence or legal history because they are not covered on the bar exam. Most want to take more courses on the commercial code, property, securities, and tax rather than broader, more fundamental issues. Bar exams, however, are very easy to pass because of the large numbers of cram courses that delight in the high percentages of their student customers passing.

I think legal history is a prerequisite of any legal education. If one does not study and learn legal history, one cannot begin to have a comprehensive understanding of the legal system today in our country. Willard Hurst is probably one of the two major legal historians of our century. He was a professor at the University of Wisconsin and a preeminent scholar of legal history.

Roscoe Pound was the Dean of Harvard Law School and obtained his Ph.D. in botany before he began his career in the law. He was a major figure in the area of jurisprudence with a particular emphasis on society. The fact that only a vast minority of you have heard of these figures is a symptom of the decline in importance of legal history in the law school curriculum. This marginalization of a fundamental element of legal education has obscured the actual perception of injustice.

If someone were to ask how much injustice exists in society, how would you respond? The criteria for analyzing a just society is very primitive and unclear. The data one would use is arguably nonexistent. We are then at a point where such a question cannot be answered without a firm understanding of our past. I think that the level of injustice in our society is partly a reflection of expectation levels. Poor or oppressed persons are often downtrodden—having accepted their condition and resigned. If the larger society has a higher expectation level, then we become very uneasy with the state of affairs. Yet, who is better than the legal profession to serve as the catalyst to raise and articulate higher expectation levels?

Is it not upsetting to learn that nine out of ten wrongfully injured people do not file a claim in our country? It is even more disturbing

when this is occurring at a time when corporations are moving for restrictions on tort law and are persuading people through malicious propaganda that we are an overly litigious society in hopes that people will not pursue their otherwise valid claims. However, Joel Rogers and Marco Anton of the University of Wisconsin Law School found that we filed more civil suits per capita in the early nineteenth century than we do today. The economic barriers to justice make it much more difficult to bring a commercial claim against a corporation. Ironically, a burgeoning area of litigation involves patent suits between businesses. The current tort system does not allow for all wrongfully injured plaintiffs to recover, yet business publications are perpetuating a few phony antidotes designed to divert public attention to alleged windfalls by malingering plaintiffs. Further, absentee legislatures influenced by political action committee money are attempting to preempt the common law of torts and abridge the discretion of juries and judges.

Another disturbing fact is that the deterioration of the freedom to contract in our country has now reached a point where it is undermining the fundamental elements of tort rights. I am referring specifically to the epidemic of binding arbitration clauses in the fine print of HMO agreements, bank statements, bank signature cards, employment contracts, insurance contracts, and even medical treatment agreements. People are giving up their rights to go to court and instead enter binding arbitration agreements without adequate information. Even if they would not want to give up this right, they have very few alternatives. Ford and General Motors both have the same fine print, warranties, restrictions, and flood of legal paragraphs that absolve them of responsibility. The same is true with insurance companies. This is a very serious expansion of private legislation. When millions of Americans sign adhesion contracts, these companies are private legislatures. All of the companies have the same law firms writing the same adhesion contracts. They are becoming more bold through the years, and the courts are becoming less prone to find them unconscionable. The effect of the terms of these contracts is as if the contract read: I the consumer have read everything and am going to sign it because it does not make any difference because I do not have

any bargaining power.

As an example of how pervasive and ingrained standard contracts have become, assume a buyer goes to a used car dealer and expresses an interest in buying a car. When they present the contract to the buyer, she asks to read it first. The dealer will likely be befuddled because this is very rare. In reading through the contract, she finds a few clauses she does not like and proceeds to cross out a paragraph and double the warranty. After initialing the changes, she returns the agreement to the clerk for him to sign on the dotted line. When someone did this very thing on our recommendation, after having read our action manual for lemon owners, the dealer called the police.

When I was in law school, we had a joke that at Harvard they teach you how to distort the law of contracts and contract the law of torts. Little did I know then that in 1999 this very thing would be occurring. We are losing the two great pillars of American law, torts and contracts, to institutionalized, giant corporations. Corporate law firms are composed of lawyers who have forgotten what it means to be a professional and who are themselves losing their independence. They are not heeding the warnings of Justice Louis Brandis and Henry Stimpson and Ella Herue, who warned about corporate law firms losing their independence to corporate clients by becoming mere adjuncts to the corporation's priorities. When one passes the bar one becomes an officer of the court, yet many do not know that being an officer of the court entails serious responsibilities. An article I read recently concluded that being an officer of the court means very little. At most, it means lawyers should obey the criminal law when they represent their clients. Essentially, it called for us to "either drop the pretense of being officers of the court because it has no content or put content into it and make it mean something."

What is the difference between an attorney and a lawyer? An attorney is supposed to zealously represent the client while a lawyer represents a status that is concerned with the client and serves as the custodian of justice in our society. A lawyer also seeks to advance justice in the courts, regulatory agencies, and the legislature. Most importantly, we should try to do both. We should represent our clients zealously and seek to advance access to justice, improve the

administration of justice, and develop better institutions of justice. It is really quite significant that this distinction is not drawn in law school, and it is also significant that most lawyers hardly ever think about it. If the distinction is critical to our independence as a profession, then it is also critical to the responsibilities of the legal profession. Ours is one of the most powerful and lucrative professions in America and is the catalyst for all other professions.

Members of large law firms are themselves necessarily second to their clients; their very hours and talents are animated by what might be charitably called retainer astigmatism. When the retainer is from the tobacco industry or coal companies who mercilessly exploit the people in Appalachia, members of the firm are bound to assist their client no matter what the client's endeavor. A better way would be for one to integrate one's own conscience with the representation of the client. In other words, while all corporations deserve representation, such representation should not come at the expense of the lawyers own sense of what is just. It is not as if this is a situation where an impecuniously accused defendant might go without legal representation. The corporation will not want for any number of competent lawyers.

It is important to ponder this because there are now lawyers retiring who have made a lot of money, became heads of their local bar associations, and received the honors of traditional practice, yet they feel a sense of emptiness. This sense of emptiness is quite clear. They spent their entire working lives without defending justice. Instead, they spent years defending a large company from a variety of accusations. In fact, there was a senior partner from a large law firm who literally spent a decade fighting the Federal Trade Commission, which claimed Gerital's ad campaign was deceptive. I can imagine this partner's stories to his grandchildren recounting his defense of Gerital's use of the phrase "cures tired blood". This man was an expert on federal administrative law; instead of spending his time improving the regulatory process, he trivialized himself. Many law students fervently deny they will end up this way. Many believe they will become more free with the greater amount of law firm experience. However, one's own opportunity costs go up and soon one is locked into a particular

pattern of living that precludes one from breaking out and pioneering. A lawyer's best ideas for the profession come in the first ten years of practice.

A senior partner at the same law firm represented the Electronic Industries Association in a dispute. A junior associate asked how to handle some newly found incriminating documents. The partner told him to destroy them. The junior associate risks his career track with his firm by challenging his order. By ignoring these ethical quandaries, young lawyers risk becoming callous to their own conscience and sense of justice.

What is important for law students to do now is to relax and spend time reading outside of the proscribed courses in order to develop an intellectual atmosphere that bridges the imposed structuralization and allows one to ask broader questions. One may also become acutely motivated, perceptive, and insightful because it is not just intellectual curiosity—it is the quest for justice.

If the oligarchy controls the yardsticks by which we measure progress and justice, then they also control agendas and that is what is happening. When Alan Greenspan reports to Congress every few weeks on the state of the economy, he uses oligarchic indicators that imply the economy could hardly be better—profits are up, the stock market is up, inflation is down, and unemployment is down. If we were to use the people's yardsticks to report on the state of the economy, we would begin to see that twenty-five percent of children grow up in poverty and that this is the highest in the western world. Eighty percent of the workers in the bottom eighty percent of the job force have seen their wages decrease since 1973 when adjusted for inflation. There are a record number of consumers filing bankruptcies and living beyond their means in order to subsist, totaling record amounts of consumer debt. Homelessness and poverty are affecting large numbers of families and people than ever before; clinics, schools, and public utilities are in extreme disrepair. Yet, what Congress hears is that our economy could not be better.

Lawyers are the architects of justice in our society. When early in the twentieth century the ACLU and the NAACP organized, they became institutions that defended and significantly advanced civil

liberties and civil rights. Civic institutions, environmental groups, and consumer groups formed by lawyers are good examples of lawyers aspiring to a higher calling and a higher level of contribution. We attorneys should be good at building institutions like that, but without the right introduction in law school, it is more difficult. Nonetheless, it is evident that we have been creating these institutions. Lawyers are the weavers; we are the architects.

The mass media is increasingly screening out any subject matter that does not center around violence, sex, addiction, or celebrity status. It is trivializing and sensationalizing its subject matter. The late evening news in Saint Louis, similar to other news programs across the country, contains nine minutes of advertisements, four minutes of sports, four minutes of weather, one minute of contrived spontaneity between the anchors, and then two or three serious news stories with the latest animal story.

Ironically, the greatest wealth in our country is owned by the commonwealth of the people. Private wealth is held only in the hands of few, but public wealth is owned by all of us. There are not intermediate institutions and mechanisms; therefore, because we live in a vibrant and working democracy, we can begin to control what we own. We are the landlords of the public airways and the public lands. The gas, oil, and timber companies are mere tenants, yet so far we have allowed them to control the public lands. The radio and television stations are controlling the public airways. Pension funds are voted in terms of shares by banks and insurance companies and occasionally by big corporate employers. We are allowing the television stations to proliferate more and more commercial channels—home shopping, movie reruns, etc.—while we do not have a one citizen activity channel, worker channel, or student channel. Civic-minded professionals trained in the law are in a prime position to expand our social institutions, renew our priorities of what is important in life, and develop a culture that can combat and countervail the overwhelming spread of commercial corporate culture throughout our society and the world.

Global corporations are increasing at such high rates because there are very few economic models of development available to counteract

them. Communism is no longer even a threat with the collapse of the Soviet Union; such corporations are increasingly their own governments. The North American Free Trade Agreement (NAFTA) has become an autocratic system of governance under the guise of free trade, which undermines our courts and circumvents our regulatory agencies. Under NAFTA trade over all else is the mandate—trade overrides the environment, consumer protections, safety standards, etc.

What is our role in this? Who here is going to lead the fight to save the equatorial forests or the oceans or find a new way to make bureaucracies accountable, both public and private? Our organizational systems are not flexible enough, and they are obsolete given the pace of change. Who is going to lead the way for an equitable tax system? Who is going to lead the fight to deal with the issues of sprawl, health and safety, or the efficiency of land use? Who is going to open the access to the courts for the majority of the people who are currently barred?

The answer to each of these questions is all of us—together. We have organized our law school class at Harvard, the class of 1958, full of successful corporate lawyers, into starting Appleseed Foundation, which hires young lawyers to start centers for law and justice that are systemically oriented. We currently have ten centers. One is just beginning in Kansas, and they are also located in Nebraska, Texas, Hawaii, Massachusetts, Connecticut, New Jersey, the District of Columbia, and Florida. The mission of these centers is to connect with the community and to build bridges with the community in order to address the maldistribution of power and justice.