Keynote Address[†]

RALPH NADER*

Ladies and gentlemen, this is a remarkable conference for a number of reasons. One is that there hasn't been one like this for many years, and its comprehensiveness reflects both Bob Fellmeth's and Julie D'Angelo Fellmeth's prodigious efforts and the efforts of all the other people who have worked so hard over six months to get this underway. But I think that the Fellmeths are about to imprint history. I think not since Sidney and Beatrice Webb has there been such a duo in terms of initiating so many progressive currents and training so many people here at the University of San Diego School of Law. They have a dean, Dan Rodriguez, who is not afraid to challenge corporate pressures to stifle or otherwise daunt what a law school should be about: engines of knowledge and engines of justice.

The "Future of Public Interest Law" is an invitation to candor. I remember in the late '60s meeting with Charlie Halpern at a restaurant in Washington. Charlie was at Arnold & Porter and he was getting agitated.

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† This Address has been edited to remove the minor cadences of speech that appear awkward in writing and to identify significant sources when first referred to by the speaker.

* LL.B. 1958, Harvard Law School; A.B. *magna cum laude* 1955, Princeton University. Mr. Nader's first major investigation and book, *Unsafe at Any Speed*, and the subsequent attempted retaliation by the auto industry, thrust him into the national spotlight thirty-five years ago. Since then, Mr. Nader has championed the cause of consumers in Washington, D.C., and internationally. He has had a major influence on the enactment of much of the current body of consumer and safety laws of the nation, from auto safety to fair credit reporting to pesticide regulation. Termed the ultimate "citizen," Mr. Nader has had no official title or state power. But through his advocacy and teaching he has stimulated both laws and a generation of activist organizations and lawyers. The list includes public interest research groups and the numerous consumer organizations operating under the umbrella of Public Citizen in Washington, D.C., among others.

He started the Center for Law and Social Policy after we started the Center for Study of Responsive Law. In those days, public interest law had a narrower definition. I remember speaking at the *Indiana Law Review* banquet in 1967; they wanted to hear about public interest law. It was couched largely in terms of representing the unrepresented. That was heavily tilted to representing poor or disadvantaged people; and, at the time, there wasn't a legal services program for the poor. Edgar and Jean Kahn had not yet launched their effort, with the cooperation of the American Bar Association, to enact that legislation. So we had Legal Aid and we had public defenders and we had clinics at various law schools that performed some of those services. The principle of equal justice under the law was not fulfilled. And the situation reflected perfectly what Learned Hand warned about when he said that if you're going to secure a democracy, you cannot ration justice.[1] We were rationing justice.

Later on, the definition of public interest law began to broaden. Alan Morrison came down from the U.S. Attorney's office and established a Public Citizen Litigation Group. It broadened from only representing the poor (very, very important, of course) to include consumer interests, access to justice, and freedom of information. It broadened to representing diffuse interests, future interests, and matters of democratic process. Those cases weren't particularly glamorous. They weren't like the *Gideon*[2] case or other cases about which books could be written or documentaries made.

Over the years, in traveling to law schools, I noticed that more and more students didn't have any idea what public interest law is all about. They knew what corporate law was all about. As their debt burden increased, they became less willing to risk careers in public interest activities, including government attorney opportunities. Now it has come to a degree that can only be described as grotesque. We have law students coming out with over $100,000 in debts, maybe $150,000. They are offered jobs at very high salaries. They justify taking those jobs because they have to pay their debts, even though they don't particularly like what they're doing. Surveys have shown that many lawyers in their early thirties and late twenties don't like their jobs. When you ask law students: "Why are you going to work for the money?" they say: "I'm doing it for the experience, I'm doing it to pay my debts, and I would leave if I had something interesting to do that would make a difference."

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1. SIMPSON'S CONTEMPORARY QUOTATIONS 66 (James B. Simpson compiler, 1988) ("If we are to keep our democracy, there must be one commandment: Thou shall not ration justice.").

2. Gideon v. Wainwright, 372 U.S. 335 (1963).

Of course, that raises the principal challenge to public interest law: how do we provide more opportunities for public interest lawyers? We need young, freshly scrubbed law students, brimming with rapidly declining idealism, indicating that they want to be public interest lawyers. We always try to get them at the first year of law school, because by the time they are in their third year, it is too late. As Harvard's Dean Griswold said in his farewell speech: "We take these students that come to us so idealistic and leave otherwise."

We had to face up to this in my own class at Harvard, class of '58. One day we sat around, six or seven of us in Washington, D.C. and asked: "Do we really want to go through another routine reunion, where they brag about their cases?" I had been to a number of these reunions where I just shook my head in total disbelief at how such bright people could have rendered unto themselves such myopic careers and reveled in them. Ten years out, fifteen years out, twenty years out, it is rather dismal. So we said that we were going to do something different. We started the Appleseed Foundation.[3] Its single goal was to establish centers for law and justice in one state after another and to do it through a full-time staff in Washington, D.C., working with local lawyers around the country to get these centers underway.

The key principle of these centers was neither legal charity nor legal aid; it was systemic advocacy. That is a difficult thing to keep focused on, because the pull in public interest law is always to the immediate cries of pain, the immediate needs of people who have no legal representation whatsoever. But to try to turn this into much more grounded *systemic* advances in the law, whether it was legislative, regulatory, or structural litigation cases, was very difficult. But at least that was the orientation of the Appleseed Foundation. It now has about fourteen state centers for law and justice, and the centers are bringing some important cases and beginning to develop a sort of subculture between them.

We are trying to get other law school classes to do this. What are attorneys who have been out thirty years supposed to look forward to after they've made partner, many times over? Sun City is not exactly the proper horizon for retired lawyers. So we're trying to start this at Yale, and with other classes. It hasn't yet clicked. But just imagine if it does.

3. *See generally* Appleseed Foundation, *Mission: Making a Difference*, *at* http://www. appleseeds.net/mission.html (last visited Feb. 1, 2003).

Imagine if there are fifteen classes in the next five years at the leading law schools that are thirty, thirty-five, forty years out, that do the same thing that our Harvard Law class of '58 is doing. Then there could be an expansion of the range of public interest law through these institutions, which could also provide opportunities for young lawyers coming out of law school to do this kind of work.

Such classes and opportunities will also expand the definition of public interest law. The more people, the more creativity, the more growth. For instance, we would like to see a center established at law schools connected with the Appleseed Foundation. There is now a Center for Electoral Reform at Harvard Law School and American University Law School that is part of the Appleseed effort. So there are branches and there are twigs from the main trunk. We would also like to see an Intellectual Properties Center offered at Stanford. The school was not interested, but it should be. Part of intellectual property involves the conversion of the genetic inheritance of the planet into intellectual property with a patent conferring a twenty-year monopoly—a rather enviable asset for international corporations.

This intellectual property issue illuminates an important point: we have to dramatically increase the magnitude of public interest law while keeping an eye on its quality. The cooperation of law schools is critical to this goal. Unfortunately, many of them are being increasingly commercialized and corporatized with large centers funded by groups like the Olin Foundation at Harvard. Such funding can compromise the very definition of a law school as a service institution (beyond its clinical programs).

Harvard is an example of the coming struggle. It has a $750 million endowment and it can't keep up with its fundraising successes. It had a $150 million target, overshot it, and had to raise it to $200 million. It is a permanent fundraising machine. How many buildings can Harvard build and how many professorships can it endow? So we were going to propose that they fund the expansion of legal institutions outside the law school. That should be one of their functions. Instead, the administration of the law school has impeded the very alumni in our class (who have raised millions of dollars for the law school) from advancing the Appleseed Foundation through petty and bureaucratic obstacles. There is too much serious injustice in this country, where people are dying, people are being denied all kinds of rights, government is being turned against its own people; and these law schools are just wallowing in wildly successful fundraising without expanding their horizons.

If Harvard Law School can have an institute on taxation—which basically services multinational corporations and engages in studies about the tax laws around the world—can it not justify using some of

that endowment income for legal institutions that work for justice? I know all the arguments that they are going to advance. After all, that is their life's work, isn't it, to find rationales to obstruct justice in the service of oligopoly and plutocracy?

It is time for us to get serious about the enormous human and institutional resources represented by law schools. There are over 160 of them, and most of them have no course on corporate crime, fraud, or abuse. The *Wall Street Journal* constantly documents the white collar crime epidemic. Instead, the law school curriculum is occupationally oriented. Anybody who tries to do anything different is always on the defensive, always having to rationalize and justify what they are doing, unless they have leadership on the board of overseers and the dean to protect them. I do not see any corporate-funded center or anything at any of these law schools that is ever on the defensive, that ever has to justify what they are doing. It is always when we are trying to engage in structural redistribution of power and wealth or in procedural advances that we have to be constantly rationalizing the utility of what we are doing. Many of these law schools are right across from the state capitol or at least near the state legislature. They are very geographically positioned to give their students an extraordinary empirical experience. And yet we know that law schools can be very, very abstract.

I remember, when I was in law school, we cut our teeth overwhelmingly on appellate cases. Why? Well, that is what West Publishing Company did for us. They gave us books with appellate cases. In my third year of law school, we had a raging argument as to whether there should be a course on trial practice, and it was not resolved by the time I left. We were generating lawyers who engaged in appellate practice. Appellate practice is important, but it tends to be empirically starved—almost by definition. So legions of law students came out of Harvard without any understanding of an old Roman adage: "the law arises out of the fact."[4] As a result, they were not particularly susceptible to the new needs of the environmental movement and the consumer movement—in my case the motor vehicle safety movement. I remember that in torts class, we had a lot of car accident cases, and it was all in the context of driver-to-driver combat. We never talked about the highway or the vehicle. Luckily, a wheel fell off a Buick years ago,

4. BLACK'S LAW DICTIONARY 1635 (7th ed. 1999) (*ex facto jus oritur*).

giving us *MacPherson v. Buick*.[5] So we actually had a products liability case to analyze.

Let us ask ourselves: "In terms of public interest law, what is the demand for justice now?" It is so massive and so unmet that it is difficult to get a handle on it. So I want to mention some areas where there is little public interest law advocacy—aside from occasional law review articles and some research. And this shortfall of aggressive advocacy is why I like the theme of this conference: "taking the offensive."

I just read an address I made about twenty-two years ago, reproduced in a compilation. It is on the future of public interest law and all the things that should be done. None of them have been done, not one. That is partly because, ever since the Reagan administration, we have been on the defensive, with few exceptions. It has been: "Stop this regulatory reform movement," "Stop this tort reform movement," "Stop this, stop that." The bottom is falling out, and we have to save it. Once we are on the defensive, we never get off unless we make a significant break in either the time or the resources that we commit. That is the greatest mistake we have made in the last thirty-five years of public interest law.

Now, in the litigation context, we can move on the offensive in a number of areas. But in terms of the other two branches of government, in terms of the whole corporate power structure in the private arena, no way. Let me start with some of the groups that would be formed—we are going to form some of them, but not all of them. We are going to try to establish a system where we have a breeder reactor for public interest law groups. It is very difficult to get anyone interested in this, by the way. I have gone through a number of interviews with prospects to run such a breeder reactor, but I cannot find anyone who is interested. They are all interested in substantive issues. They are all interested in being on the front lines and fighting at that interface.

But take the area of contract law. In my judgment, contract law is in a very serious state of decline as it pertains to the mass of the people. Law school students study contracts, and most law school professors spend no more than two or three days on contracts of adhesion. Some law school classes spend a day—all of a day. Now, ninety-nine percent of all contracts we are ever going to sign are contracts of adhesion. We buy auto insurance, we buy an automobile, we sign an installment sales contract, we sign a landlord's lease, we sign a bank deposit card, and so on. They are all written for us and we are asked to sign on the dotted line.

After a while, these fine print contracts represent, in their totality, private legislation, especially if they are endorsed and supported on judicial review. That was apparent in the U.S. Supreme Court's recent

5. 111 N.E. 1050 (N.Y. 1916).

Circuit City[6] decision on arbitration clauses. These are private legislatures in the form of Aetna, HCA, Columbia, large employers, and Bank of America, among others. People are signing away their rights to use the courts and have a trial by jury. In other words, these private contracts are stripping people of their constitutional access to justice and making them pay for it, that is, literally paying a share of the arbitrator's fee.

We want to start a group on this to build on the work by some scholars and by a center in Boston specializing on the economic relations between consumers and sellers.[7] But notice, if you will, that if we do not have an understanding of the people's rights by the people themselves, we are on very thin ground to sustain a civic institution. Most people just automatically sign on the dotted line without any sense of what they are giving up.

For example, let's say that you go into an auto dealer showroom to buy a car. You pick out the car, and the dealer or salesperson is shuffling the papers, checking out your credit, and getting ready for you to sign on the dotted line. You say: "My mom and dad told me never to sign anything that I didn't read. Can I sit down and read this contract?" And the salesperson is probably thinking: "This has never happened before, in thirty years of work." So you get a chair, you get out your magnifying glass, you read it, and there are things you do not like. So you double the warranty here, you cross out the arbitration clause there, and you initial it all. You go back and you say: "Here, sign on the dotted line." [Laughter] Why is that funny? That is not supposed to be funny. That is supposed to be the mutual freedom of contract negotiation.

But it is funny, because some years ago when we put out a book called *What to Do with Your Bad Car: An Action Manual for Lemon Owners*,[8] we had a proposed "consumer purchasing agreement" for cars, in nice big print. We told people that if they went to buy a car and they put that down for the dealer to sign, to let us know what happened. The first person wrote us back and said that he went and picked out his Pontiac and he went in and they were shuffling the papers, and he whipped this thing out and said: "Here, will you sign this?" And the salesman looked at it, and he couldn't understand it. So the salesman ran back to the

6. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

7. *See generally* National Consumer Law Center, *About Us*, *at* http://www.consumerlaw.org/about/ (last visited Feb. 1, 2003).

8. RALPH NADER ET AL., WHAT TO DO WITH YOUR BAD CAR: AN ACTION MANUAL FOR LEMON OWNERS (1971).

manager, and the manager looked at it and then he called the police. So this may be an important group to start with.

We would also like to start a group working on law schools to broaden the type of curriculum so that all the clinics that are in law schools that deal with poor people's problems (traditional legal charity) can begin paying attention to corporate crimes—some of which can exacerbate that poverty. Very little is done about corporate crime on a clinic or action-oriented basis.

We have a legal system in our country where we have victims without crimes and crimes without victims. That would be a nice seminar: "Victims Without Crimes and Crimes Without Victims." Victims without crimes would include our motor vehicle safety law. It has no criminal penalty for a willful and knowing violation, except for some limited language following the Bridgestone-Ford Explorer events. But ever since 1966, corporations in the auto industry could willfully and knowingly violate the law by selling defective cars, knowing they will injure or kill despite correctable defects. These corporations did not recall them and did not notify the public, but still were not subjected to criminal penalties.

Then there are crimes without any discernible victims. These include government violations that the CIA and the U.S. Army have committed by spying on domestic citizen groups and infiltrating them. There was no remedy since there was no standing to sue in these areas. The whole standing issue is stultifying public interest advocacy, as Alan Morrison and David Vladeck can point out in innumerable cases. I mean, we do not take cases anymore, and we haven't for a long time, because of the antiquated way that the doctrine is applied, particularly in the federal courts.

We need a group that establishes civic institutions, like Congress Watch, all over the country. That will be the firmament of the more focused public interest law groups that take these cases or engage in various forms of legal advocacy outside the court system.

We need an energy group. Here in California we still have not learned the lesson. As long as there are no gas lines, we do not pay attention to energy. We have been talking about energy policy year in and year out and putting out reports; nobody was interested. It has not been a subject in presidential campaigns since 1980. And now, in 2001, we have this crisis. We need a group that has a sustainable advocacy mission in this area because it is not simply about price or what they are going to do about strip mines. The whole global environment is at stake.

We also need a group dealing with corporate chartering and corporate governments. The modern giant corporation operates globally without legal restraints, just as the British East India Company and the Hudson

Bay Company of the eighteenth century did. These corporations are planning our future—our financial future, our genetic future, our environmental future, and our government's future. It is called strategic planning. They are planning it every day, and we are not planning anything in terms of the civic culture to provide the proper check on this growing corporate culture.

We have to ask ourselves: "How do we build more civic institutions?" Where would our civil liberties be without the ACLU? Where would the civil rights laws be without the NAACP? The people who started these institutions almost 100 years ago did not say to themselves that they were too busy with their daily cases to start an institution. They started an institution. And now these institutions reflect what Jean Monnet, an architect of the European Common Market, once said, when he wrote that without people, nothing is possible, but without institutions, nothing is lasting.

And so we have to ask ourselves whether there is a huge dearth of civic institutions, given the expansion of corporate power, the redefinition and enlargement of rights, and the new kinds of technologies, from computers to genetic engineering. We have a huge gap there. Nobody is addressing how we can systematically start one after another. Part of that is because we are all too busy. We are too busy with incredible brush fires and challenges, with being on the defensive, and trying to make the budgets—extremely busy. So either some of the veteran public interest law people are going to have to redefine how they are going to spend their time trying to engineer these new institutions, or we are going to have to hope that the next generation is going to take up the cudgel.

So how do we get the young generation involved? They came from the same backgrounds that we did, except for the expansion and diversity that has beneficially occurred. Therefore, we should anticipate an even better background of experience and urgency among them. But we have not paid enough attention to them. In our case, we have fewer interns in the summer than we had twenty or twenty-five years ago. One summer we had hundreds of college and law school interns. They take a lot of time. Joan Claybrook was talking about it. She and Bob Fellmeth ran the Congress Project, which at one time had over 1000 people around the country and in Washington, D.C. It was the hottest summer in Washington, and it was designed to do what no one has ever done before or since—write profiles on every member of Congress running

for re-election. They were about thirty pages each and they were compiled into a number of books about congressional committees and a best seller called *Who Runs Congress?*[9] This was all done in the summer and part of the fall. But we are not paying enough attention or making that kind of investment today.

The other day I was talking with some students who really did not know about the Vietnam War, other than what they saw in movies. I mean, this is a generation where, if you mention Paul Bunyan, they think you are talking about a podiatrist. And it is a serious disjunction in history. They are into information; and yet, they do not have the time, opportunity, or mentorship to move their interest into knowledge, and then into judgment, and then into something called "the dreaded word-wisdom." Information bytes—the ubiquitous information bytes—they are getting overloaded as well. So we have to spend much more time to prepare them for leadership in the coming century. I hope that these kinds of opportunities and new institutions will serve to do that.

Let me talk briefly about a category of institutions that are supportive of all these civic and public interest law groups. It is difficult to get people to run them. We need a group that deals with recruitment. If we cannot recruit people, nothing follows. The Health Research Group has done such great things, all because Sidney Wolfe and I bumped into each other one day at a seminar with a number of doctors and others, and the same with Joan and the same with Alan. We need people who are willing to perfect what they are doing, stay with it, and refuse to be demoralized or discouraged. So we need a group that just deals with recruitment, because we all know how time consuming that can be.

We also need a group that deals with distribution and marketing of all the materials that we have—all the good magazines, newspapers, and newsletters. We need to get books written on these activities. There is a book being written on the Public Citizen's Litigation Group, and a few others are in the works as well. We need this because the new generation does not have a clue about what is going on here. It is not like they can look at it on the evening news, right? What *is* the evening news any more? It does not have substance. There are few civic celebrities being created. People working hard in every city of the country don't get on the evening news, so they don't become civic celebrities. They don't draw audiences and they don't draw press.

There was a man named Julius Hobson in Washington, D.C. He was a government statistician back in the 1950s and 1960s, and his main civic hobby was trying to do something about the schools in D.C. He became a civic celebrity. He would be on the evening news. He was able to

9. MARK GREEN ET AL., WHO RUNS CONGRESS? (4th ed. 1984).

attract audiences. And we don't have that anymore, so people don't watch it. When Bob Fellmeth was recruiting the first "Nader Raiders," as the Washington Post's Bill Greider once described them, I called him up at Harvard Law School. I said: "Bob, you know, we need about thirty or forty students." He said: "Thirty or forty? I've got resumes for hundreds. I can't keep up with it." Why? Because they saw us on national network news: ABC, CBS, and the others. That is just not happening anymore.

So we have to make a very, very studied effort to get this underway in terms of finding the next generation of leaders and also in terms of reaching them though materials that describe what is going on. If there were a book written on the Health Research Group, we would wonder how so much could have been done by so few.

According to Professor Edgar Kahn, one of the cofounders (with Jean Kahn) of the Legal Services Corporation, there are about 500 public interest lawyers in the country who, full time, take their conscience to work and do the work. I know some of you may be saying: "How about these right-wing public interest law firms?" That is for another day. Spare me from making that distinction—their corporate adjuncts and so forth.

But 500 lawyers—let's say that is accurate and it could well be accurate. Over the years, they have achieved enormous impact, breakthroughs in litigation, legislation, and stopping bad things. And, we can ask, this has such a fantastic social utility for the advancement of justice in America, why aren't there more? Why don't the institutions that call themselves foundations begin thinking hard about how to expand these institutions instead of helping to start one or two and then cutting them off after four or five years. We have never had more money in foundations. Even with the stock market decline, there is enormous foundation expansion—huge endowments. Never has so much money produced so little in terms of social justice. It is a testimony to the "ability of comfort to undermine agitation," to use one of Jim Hightower's favorite phrases.

There is also the fundraising aspect: because we have a collage of public interest groups, it would be nice to have a fundraising institution that just gets funds for them. There are all kinds of new and old ways that can be developed if it isn't just an adjunct to an existing group. It is a difficult thing to juggle with all the other things with which we have to deal.

We will never have a quantitative conclusion in any given year about the demand for justice as compared to the supply of justice. That is for the economists. They have their numbers down in very deceptive ways, called supply and demand curves. But it is clear that the growing demand for justice that is not met is a major affront to the legal profession. Not simply a challenge, but an affront.

We are officers of the court, we are quasi-public people, and there is no definition attached to what that means. What is the obligation of an officer of the court? A professor wrote an article in the *Vanderbilt Law Review* twelve years ago on that.[10] And he searched and he searched, and he huffed and he puffed, and he finally came in with a conclusion that the term "officer of the court" means an obligation to not violate criminal laws associated with legal work. This concept needs to be fleshed out. We represent public interest injustice that we are uniquely qualified to advance, by prevention as well as by remedy. And we are not on a dynamic track in that direction.

It was Lloyd Cutler himself, of Wilmer, Cutler, and Pickering, who acknowledged in one public forum that corporate law firms devote ninety-five percent of their time to fewer than one percent of the people. I assume he includes corporations as persons. And I would say that is a conservative estimate. Lawyers today represent one of humanity's greatest wasting resources in terms of whom they have decided to serve; overwhelmingly they are serving the corporation and commercial systems in our economy. Not exactly what the noble pantheons at our law schools anticipated.

I hope that all of us will devote more discussion to this, and I know in the coming hours in this conference you are going to be talking about a number of structural issues, including those issues confronting the courts, legislatures, campaign finance, and regulatory action. But I hope that we can take from this conference a sense of renewed idealism and divergence in the way we spend our time. We have to spend our time on present day expenditures of our human energy, but we have to also invest our time in the future. Thank you.

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10. Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989).