Some Comments on Mr. Nader's Views

Carl Auerbach*

1. It is not clear whether Mr. Nader's attack is directed against the law school of today as well as of yesterday. In any case, I do not think that law schools in the period he describes were or are today engaged in a "process of engineering the law student into corridor thinking and largely non-normative evaluation." Nor is such a process the unintended consequence of the prevailing system of legal education. Certainly, today, it would be very difficult to find many law professors who think that public policy is not the law school's concern.

2. Mr. Nader is not warranted in generally describing "the mixing of the case method of study with the Socratic method of teaching" as "a highly sophisticated form of mind control that trades off breadth of vision and factual inquiry for freedom to roam in an intellectual cage." The "Socratic method" actually covers a great variety of methods used by individual teachers. Many sins of omission and commission are undoubtedly hidden under its cover. But it is also the vehicle for some brilliant teaching. And the materials included in many current "casebooks" are so diverse that Dean Langdell would not recognize his brainchild.

As I see it, the most important function of teaching on the basis of "casebooks" is to give the student the materials he needs to put him on a par with the teacher to the maximum extent possible within the limits set by the student-teacher relationship itself. At its best, then, this teaching method stimulates student participation and discussion and accustoms students to solve problems for themselves.

3. The content of the current law school curriculum is so rich and the freedom to elect courses so extensive in the second and third years that the "curriculum pecking order" to which Mr. Nader refers simply does not exist. For example, the second and third year curricula for the current academic year at the University of Minnesota Law School includes the following courses and seminars in addition to those Mr. Nader would probably regard as "standard": The Child and the State, Criminal Procedure, Land Use Planning, Law and Medicine, Modern Social

* Professor of Law, University of Minnesota.
Legislation, Regulated Industries, Divorce Counseling, Arbitration, Government Housing Programs, Governmental Regulation of Banking, Law and Agricultural Economics (Pesticides), Legal and Ethical Problems of Medical Practice, Legal and Political Conceptions of Equality, Natural Resources Law, Negotiation, Policy Problems in the Law of Divorce, Problems in State and Local Finance, Problems of Consumer Credit, The Law and Education of the Disadvantaged, Legal Problems in Minnesota Public Affairs and Selected Problems in Federal and State Equal Employment Opportunities Statutes. The first-year curriculum includes required courses in the Legal Process and Constitutional Law. Even the "standard" courses in the first year are undergoing significant internal transformation.

Law students, in fact, have difficult problems of choice and law faculties have not succeeded in devising principles to construct a manageable curriculum that will reflect the continually expanding areas of new law. It would be much more fruitful to shift our attention from the law school curriculum to the effect which the present system of bar examinations has on the courses chosen by students.

4. Mr. Nader's most serious point is that law schools in the past failed to "articulate a theory and practice of a just deployment of legal manpower" and that they should do so now. I doubt this is the law school's business. We are dealing here with individual motivation. "Comparatively few imaginations," Mr. Justice Holmes once said, "are educated to aspire beyond money and the immediate forms of power." While it is the law school's function to educate law students to the values of freedom and equality imbedded in our democratic legal order, it is not its function to seek to allocate legal manpower in accordance with the particular view of a majority of its faculty. I shudder to think what the process of faculty selection would be like if this became an avowed aim of the law school.

By their teaching, writing and behavior, individual professors influence individual students. But every teacher has an obligation not to exercise this influence too directly, either by way of support or opposition of choice in order not to diminish the student's right and responsibility.

5. I am not impressed with the demands Mr. Nader tells us young lawyers are making that the big firms give them more free time, at the firm's expense, to engage in pro bono work. Desiring the advantages of association with the big firms, these
lawyers still seem to feel a need to allay their feelings that they are doing something wrong by making all that money and being close to all that power. So they make these demands. But where is the self-sacrifice worthy of respect? I would be more touched if a young man worked five or six days for his firm and spent the sixth or seventh day in pro bono work or even as an orderly in an inner city hospital ward. Nor do I see anything noble about "demands" from law students and young lawyers that others should contribute money for scholarships or pay "reparations" to assist the legally deprived.

I am also concerned that this kind of dabbling with pro bono work may take attention away from the responsibility of the government at all levels of the federal structure to see to it that all our people have adequate access to competent legal services. Let us seriously consider some "judicare" system.

6. This brings me to Mr. Nader's plea for more "basic" pro bono work, which is premised on his conception of the lawyer as champion of the "public interest." Mr. Nader ignores the difficulties of his conception and the long history of thought given to it. This may be attributable to the fact that he was writing for a magazine read by the general public and not by the profession. But oversimplification is not justified even when communicating with the general public on professional matters.

In an excellent little book discussing these problems some years ago, Mr. Charles Horsky wrote:

We [Washington lawyers] have an obligation to do more than tell clients how they can lawfully do what they want to do. I do not refer only to the clients who want to urge positions so outrageous that no lawyer could advocate them and still maintain his self-respect. We should go beyond that. The public position of the bar suffers, and properly so, when it becomes apparent that there are Washington lawyers who are quite willing to ignore entirely the larger interests of the country and the basic standards of decency in the process of stringing together sets of legal loopholes to achieve some inordinate advantage. Because this is an area in which canons of ethics and Grievance Committees cannot operate is the more reason why all lawyers should be alert to the implicit, as well as the explicit, responsibilities which distinguish law as a profession, not merely a highly technical trade.¹

Most lawyers would generally agree with Mr. Horsky. But suppose it is not a question of ignoring "the basic standards of decency?"

"[B]y what warrant may lawyers judge their clients' goals

illegitimate although legal, and impose their own views about the path of virtue upon their clients?" What specialized knowledge does the lawyer possess that entitles him to insist that his views of the "public interest" shall prevail? What self-respecting client would tolerate such arrogance? Of course the bar has a collective responsibility to assure that all individual and group interests or claims in the society are articulated. But it is natural for every group to claim that what is good for it is good for the country. It is the task of government to vindicate the "public interest."

In short, I think Wilmer, Cutler and Pickering did nothing wrong in negotiating a consent decree for their clients, the automobile manufacturers. If a consent decree in this case is against the public interest, the Justice Department should not agree to it and the federal district court should not approve it. But the auto makers are entitled to have Wilmer, Cutler and Pickering present their case for a consent decree. The picketing of their offices, which Mr. Nader was reported in the press to have encouraged, was disgraceful.

Big law firms can give only a narrow interpretation to pro bono work—representing indigents and servicing the needs of poor people on a case-by-case basis. If pro bono work is defined in more "basic" terms, as Mr. Nader suggests, undesirable conflicts of interest will result.

7. Mr. Nader has performed many public services, not least of which is his effort to realize the idea of the "public interest" law firm. But here, too, there is a lurking misconception which may jeopardize Mr. Nader's public service aims. No lawyer in such a firm should be certain that he is representing the "public interest." He can do no more than represent a very significant but nonetheless partial interest. This is a good deal and should be appreciated by all. But issues of public policy generally turn on which part of the public should be protected or the extent to which, in a particular situation, it is more important to satisfy the claims of people as consumers rather than as producers or to sacrifice the claims of present generations in favor of future generations. The people in a town that is in economic distress, for example, may find that their interest in "clear water" comes into conflict with their interest in jobs for their breadwinners.

The “public interest” will have to be determined by the law-making agencies themselves after also giving due considerations to the claims of individuals and groups in the society whom Mr. Nader—more power to him—may oppose.

This makes it difficult to comprehend why Mr. Nader sees government as a hostile force to be combated by the “public interest” lawyer. Why should not young lawyers seeking to champion the public interest enter government service? Local and state governments, even more than the federal government, need to be revitalized, and this will not happen without the help of lawyers. Until it happens, the efforts of Mr. Nader and his fellow “public interest” lawyers will come to naught. True, many local and state governments pay miserably and federal pay does not compare with what can be earned in the big firms. But then government service should have the extra attraction of holding out the opportunity for self-sacrifice. I hope Mr. Nader will not discourage young men and women from seizing this opportunity.