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## Strengthening Democracy: The Challenge of Public Interest Law

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## STRENGTHENING DEMOCRACY: THE CHALLENGE OF PUBLIC INTEREST LAW

*Scott Harshbarger*\*+

### I. THE PUBLIC INTEREST LAW SEA CHANGES

I would like to speak to you about a few thoughts that I have had, based on my Common Cause and Corporate Governance experience since 1999, the year I left elected public office, and began the process of “grieving”! When you lose an election, in spite of your hubris, self-interest, ego, you also face the fact you lost! The votes are not going to change, even though, once in a while, you would like to believe there is still three percent sitting in some ballot box in Boston that represents your margin of victory. And every time it’s said, as it was in California last fall, that we just have to accept the fact that they may miss three percent of the votes, and that it doesn’t really matter, I say to myself that that’s a problem! But I lost the election and one phase of my life ended, after thirty years. I am sure all of you have had some experiences like this.

I was faced with the challenge of what to do now, after a life and career seemed to have come to a close: a career that I loved, that gave me the opportunity to work with exceptional professionals who came together in a community committed to a standard of professional excellence, to try to do the right thing, to try to make a difference in the quality of people’s lives, to represent people who without me had

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no one, who helped make me a far better leader, and also gave me a great deal of credit and honored me by their presence. These facts were true whether it was in a Public Defender's office or a District Attorney's office, the civil rights law reform community, the Massachusetts State Ethics Commission, and the Massachusetts Attorney General's office. This is my vision of what a public servant is—a public servant who happens to be a lawyer.

And that was the vision that I had, and I still do. But in these last four years, I have had a chance to think about what differences there are between the formative period of my legal career and today. What has occurred that makes me feel that there has been, in the words of Judge Coffin, a “sea change” in our profession, our culture, in our society?

It's not just that today we have tensions between civil rights and security. We've had those at various times in my life. It's not that we are only now concerned about why people don't participate in our democracy—why the office of citizen is not seen as one of the great obligations we all have in the greatest democracy in the history of civilization. It's not just the alarming increase in evidence that greed, financial incentives and corruption have influenced the private sector and business, not just the public sector. These, too, are not necessarily new. But the change feels quite different to me, and it's not just because I am now a grandfather with four granddaughters; it's not just that I have the perspective gained by moving from a public interest law life in the partisan politics of Massachusetts to the world of Common Cause in Washington, D.C., and have stood on the shoulders of heroes like John Gardner and Archibald Cox and worked with John McCain, and others, to achieve major political reforms. Other things have happened, and some are very tangible.

Three of those things—the election of 2000, the post-9/11 debate about security and the corporate governance scandals—are the ones I would like you to think about with me tonight. And the overriding questions I pose are the following: Where did the passion and the vision go in the public interest law community? Where did our passion and vision go as citizens who believed that we truly could make a difference in our democracy? And where did our passion and vision go as corporate governors committed to honest, open, fair competition and self-regulation? Now, maybe you still feel that this is just an academic debate or discussion. I'd like to challenge you tonight to feel that these are still positive and vital causes, rather than grieving about, or merely having fond memories of, what was.

## II. MY PUBLIC INTEREST LAW CAREER

I grew up professionally in the 1960s. For me, that period was seminal—from the assassination of President Kennedy and assassination of my heroes (Martin Luther King and Robert Kennedy), a Vietnam War that challenged whether our government was truthful, a Civil Rights Movement that, while achieving wonderful ends, also exposed a deep, dark strain of racism that we have not yet begun to remedy in this country—and out of it came a movement that people here have continued in every sector: the public interest law movement.

Remember, John Gardner (a true American citizen hero) founded Common Cause in 1970 because he believed that the only group in Washington that wasn't organized was the people, and it was time for the people's voice and the public's

interests to be heard. The goal wasn't to eliminate money or special interests; it was simply to ensure that in setting public policy in a democracy, the people's voice was also heard. And hundreds of thousands of people sent hundreds of dollars to fund Common Cause. Common Cause led the opposition to the Vietnam War; Common Cause led the crusade against public corruption and for ethics reform and financial disclosure following Watergate; it became the national government watchdog and citizen lobby.

Ralph Nader, at the same time, began the consumer movement. Then, along came the environmental movement and Earth Day; women's rights and *Roe v. Wade*; the expansion of the Civil Rights Movement to include persons with special needs, disabilities, as well as mental health issues; and adult and juvenile corrections reform. In addition, as Judge Coffin has pointed out, within a generation, the world of law changed; administrative law was expanded and redefined, as well as criminal procedure, civil rights and constitutional law.

I happened to be lucky enough to become a lawyer during that time frame. And I was probably "lucky," because my father, a minister, convinced me that, coming out of Harvard College and having spent a year at Union Theological Seminary, what the ministry had been for him, as a child of the Depression and the first in his family to go to college, in the next twenty-five years of my life, the law was going to be for me—the same kind of defining social and cultural vehicle that religion, theology, Yale, Niebuhr, Bonhoeffer, had been for his generation. And he was right!

The law came to define, and be involved in, almost every social, moral, or economic issue. If we had any problem, as legislators or citizens, we passed a law. We declared the problem to be a crime; then we asked police, prosecutors and the court system to solve the problem! When "criminalizing" things we didn't like failed as a solution, we were frustrated and questioned, "What's wrong with our society? What's happened to our young people? Where has our sense of community gone?" and our whole public life seemed to turn into a focus on litigation and the law. While this reality made it an exciting and challenging time to be a public interest lawyer, it was a major social and political failure because the law, litigation, and the courts, were never meant to define the ethical standards of our times. At best, the law establishes the minimum ethics, the framework, in which our normative civic, religious, educational and professional institutions are supposed to set the positive norms and values of our society. But sadly, for whatever reason, many of those institutions withdrew from the fray and abdicated their responsibility. And so the law was no longer a complimentary or supportive partner. It seemed to be the law or nothing in terms of social consensus.

### III. STRENGTHENING DEMOCRACY

This consequence is relevant here, even in these overly generalized terms, because I think we will look back on this period (1999-2004), if trends continue, and wonder if this was the end of the era of the public interest (and law and advocacy) being a defining value of our community and society, unless our time now becomes the beginning of the "renewal." As espoused by John Gardner, the *renewal* of our values and our commitment to what public service and the public interest means is not a separate, segmented part of our society, but is an integral

part of what it means to be a democracy. And that is my theme tonight: strengthening democracy through a renewal of the concepts of public interest law and citizenship, and their interrelationship.

#### IV. CITIZENSHIP IN A DEMOCRACY

For me, the context is John Gardner's concept of citizenship in a democracy, recognizing that, for many, many people (and not just young people) the concept of citizenship does not exist. For many, it's not that they disagree about being a responsible citizen, it's that there has simply been no discussion about this, let alone few, if any, defining models or heroes talking about and acting on this concept of the obligation of citizens in a democracy. In 2002, the Harvard Vanishing Voter Project found that less than fifty percent of young people have grown up in families where their parents even voted. So something that seemed routine and fundamental in my lifetime is not today, anymore than the concept of peaceful resolution was for the young, urban folks who worked with us in our Safe Neighborhood Initiatives and SCORE Conflict Resolution programs in the early 1990s. We thought they were rebelling by acting out in violence. But, in fact, nobody had ever told them there was another way to resolve a problem other than to run or fight. Learning the lost art of mediation, conflict resolution, became to them a safety and security mechanism. In the adult community they saw violence—within their family, in their streets, neighborhoods, country, on television—as the way that problems were resolved, as opposed to the techniques of peace or other kinds of conflict resolution, including leadership and praise for prevention, partnerships, positive programs, role models, and options of hope.

And so, too, with the fundamental values of being a citizen. Jimmy Carter said that he left the office of President, albeit involuntarily, to assume the most important office in a democracy—the office of citizen. William Jefferson Clinton made the same assertion when he left after his last term. And John Gardner eloquently reminded all of us that, above all, "Democracy is not a spectator sport!" Democracy assumes the consent of the governed; a certain mutuality between our leaders and us. We can't assume they will be honest and accountable if we're not going to be honest and accountable, too, about our role. If you are not going to vote, if you are not going to participate, if you are not going to assume the office of citizen, then where are the checks and balances? This is a government of the people, by the people, and for the people, not the leaders.

The year 2000 saw the closest presidential election of our lifetime, and we don't even know if the one who was elected won, except for one vote: 5-4 in the Supreme Court of the United States. Our "democracy" was tested—a constitutional crisis and power was transferred peacefully. We survived it. Our democracy seemed strong, but was it?

In the high-tech capital of the world, it took thirty-six days after the election to show that we don't even know how to accurately count the votes of the people who do come to vote. We saw the highest turnout in recent times of young black Americans because of the Herculean voter registration and mobilization efforts of the NAACP. Yet many of them couldn't even vote because they hadn't yet been included on the Election Day registration roles in many states.

While the election was close, both parties and both candidates raced to cam-

paign only on issues honed by focus groups that would not offend voters! We had no debate on many issues that most Americans cared deeply about but were politically divided about in terms of solutions: the failed drug war, racism in the justice system, the death penalty, universal health care. We spent more money, hard and soft, than any election of our lifetime—on television, on negative advertising.

The result, in the greatest democracy in the world, less than fifty percent of the people who were registered to vote even took the time to vote. One hundred million people in this country sat on the sidelines, even though the President's leadership sets the tone for decisions on issues that affect us all: choice for women; corporate integrity; Al Qaeda; Afghanistan; Iraq; the Patriot Act; affirmative action. In the face of a potential constitutional crisis this democracy stood firm when most other democracies might have failed completely. The weakness? Where have all the people gone? Why didn't they see or want, or choose to participate and get their vote counted?

#### V. CIVIL RIGHTS AND SECURITY

The second topic relevant to our strength as a democracy is how we handle civil rights and civil liberties in the face of a national security threat. Here, too, we would expect the lawyers to come into play, to try to figure out this balance. It is our Constitution we are interpreting. Bill Moyers has said that he always believed we would, as a country, rally as a people and nation in the face of an external threat. What he feared, however, was the kind of erosion from within that we have discussed: the fear that erosion by apathy and cynicism was the greatest threat to the strength of our democracy. Maybe the cynicism was caused by money and scandals in politics; maybe it was apathy because the candidates were not inspirational; maybe people are tired of partisan politics; maybe it is because both parties are addicted to money; maybe it is because my party, the Democratic party, is on life support and doesn't know what it stands for anymore; maybe it is because the Republican Party is no longer the party of Lincoln or McCain. Whatever the reason, we didn't energize our peers or our future leaders to participate.

More importantly, after 9/11, when it came time to determine how to balance our need for security and protection and our unique heritage of civil liberties and civil rights, we learned that we, as a nation, had forgotten how to participate in a debate. We had forgotten that dissent does not mean disloyalty. We had lost or forgotten the habits of citizenship. We had forgotten that, in a democracy, while we don't have the right to have our way, we do have the right and the responsibility to be heard. We have the opportunity, right *and* obligation to express our views. It's a tension that Judge Coffin has written about, and most of you have lived, taught, and thought about, and realize that this tension always exists in a constitutional democracy. We ask our police officers in this country to do something no other country in the world asks of them: protect us, make our homes, our neighborhoods, our streets safe, and at the same time, preserve our civil rights and civil liberties. We don't always strike the right balance, but we always insist on public review and accountability to deal with this dilemma.

We also know that we must be tough on crime, and I yield to no one in my record and belief in that, because one of the most important civil rights issues of our times is whether you're entitled to the same level of safety and security, re-

ardless of where you live, in urban or suburban America. Do you have a lesser right to be safe, to walk home, because you're Black or Latino or poor? And, surely you're also entitled to the same level of security, plus accountability, without sacrificing your rights and having a declaration of martial law. We demonstrated we can do that in the Boston Safe Neighborhood Initiative urban crime reduction model, by being tough but smart. We did it the old-fashioned way—by recognizing that the best and cheapest form of public protection is prevention and building that security through investments in community trust, programs and partnerships!

Surely, if we can succeed in being tough but smart, in this heretofore seemingly intractable arena of urban street violence, why can't we do it in the face of external threats?

We are about to have a presidential campaign and election in which citizens and candidates seem determined to prove we cannot debate and disagree without being disagreeable. Yet even Bob Dole, on his eightieth birthday, dedicating his library in Kansas, said he hoped, above all, that we somehow figure out how to have disagreements in this country without turning them into holy wars. He said, "I want to have us show, as legislators, we know how to get things done and achieve results." Now that is also a challenge to us as lawyers because this security/rights tension is a classic legal crisis and lawyers are defining the framework and the rules for this contest and debate.

The Attorney General of the United States and the ACLU lawyers are already engaged. Where are the rest of us? Where is the organized bar? Where are the citizens? Why don't people understand that this issue is very important to debate and discuss? Again, you don't have the right to win, and, in a crisis, I want to rally behind my President, but I want to make sure that he or she is having the benefits of open debate and discussion. We've lost that habit. It's a habit of citizenship, but it's also one of the things that every lawyer in this room was trained to deal with from the day we walked into law school: how to sort and balance interests, values and principles when they are in competition or conflict. And not the ones from 1968 when we went to law school, but the principles that apply today as the law evolves. Do we really want to have a Guantánamo Bay holding facility in the United States of America? Do you really believe that makes us safer? Do we really believe that dramatically expanding the Patriot Act is what will make us, as a nation, free from or more safe against terrorism?

I think what will make us "free and safe" is people believing firmly that the law will be applied equally, that it will be fair whether you are black, Arab-American or white. We can't kid ourselves into believing that rights restrictions will just apply to "Arab-Americans who are Political Terrorists," and not to us as citizens, especially if you are a minority or unpopular or vulnerable. Every minority group in this country understands what it means when we talk about "cracking down" on people's civil rights in the name of security. And the rest of us, at least as lawyers, need to understand and challenge these realities as we did and have before.

Some of us send our checks to the ACLU or Legal Defense funds, to People for the American Way or Judicial Watch or Cato, and we tell them to "go get 'em." But mostly we stay on the sidelines and we don't participate in the fray ourselves. In fact, how many of us are actually actively supporting or opposing a candidate for President because of our beliefs or feeling about security and civil rights in this

day and age? How many of us are asking those questions of every candidate, including the President of the United States, and the party of Abraham Lincoln and John McCain?

## VI. CORPORATE GOVERNANCE AND LAWYERS

The third current and fundamental topic relevant to our strength as a democracy, and the challenge to us as lawyers and citizens, is the governance crisis in our leadership structures—most recently emerging in the corporate scandals. I'd just like to touch upon this issue, which, these days, is often a longer part of my remarks because of my current legal practice career. I think this topic is where the rubber meets the road and the first two topics intersect. In the first, the election, democracy is all about us as citizens. Each of us is a citizen. Some of us are lawyers. The second topic, security and rights, involves us directly. Lawyers have a special status in a democracy. Lawyers have a special status because we asked for some unique privileges and claimed a special role as the interpreters of the Constitution. It is a constitutional democracy we are expounding here, and lawyers have a special status and role in doing that, in helping people understand what that means to them as citizens.

Our roles and responsibilities as professionals come into play in the more mundane world of the regular practice of civil and/or criminal law. You may just chalk off this corporate governance crisis to good old greed and scandal in corporate America. In public life, with ethics reforms and financial disclosure laws, we've been grappling with these challenges for the last thirty years. We periodically go through these crises in our nonprofit communities, with high-salaried executives or boards diverting money from charitable purposes, and other crimes, frauds and excesses that invite scrutiny and reforms and cause reputation damages and costs.

Today, we face what I think is a very serious problem in corporate America. And I make this statement as somebody who believes that the economy, the markets, our economic system, is the key to the quality of life for everyone in this nation. It's only due to our economic opportunity that we are able to say, with any degree of credibility, that every person in this country can make it, can have access to the American dream. But when you can't trust the numbers; when, as my friend, a vice president of one of the major financial institutions, said to me, "Why was there not one independent director anywhere in America over the last two years who would stand up and say this is wrong?" When it's legal or you have the right to do it, no one really asks if it is the right thing to do? And, more importantly, when we lost \$7.5 trillion in shareholder value within the space of a two- or three-year period and see very little political reaction, few demands for major change, and no significant "victim/average investor" mobilization? What is at play here?

Some of this passivity is because we don't understand the market. Some is because it is too complicated. We didn't go to business school. We're not accountants. We're not auditors. But some of it is also very basic. We had a massive collapse in self-regulation, and a massive ethical breakdown in the business sector in our country. The fact is that money greased the independence of lawyers, accountants, auditors, CFOs, CEOs and boards of directors. And the people who have paid the price are average Americans across the entire socioeconomic spec-



trum. "Main Street," far more than Wall Street, paid the price: in retirement accounts, pensions, jobs lost; companies merged, moved, bankrupt. This is a massive political problem, but it's not a partisan problem. It's not a Republican or Democratic problem, it's a massive social problem.

We're now beginning to see a range of changes and "reforms" as a result of these scandals and the new external constituent, enforcement, media and governance realities. However, the "reforms" are not a result of concerted, active pressure and mobilization by the legal profession. We have not identified "corporate governance" or "responsibility" as a major public interest law focus. They are also not a result of public interest activism by the average citizen or investor, in part because average citizens do not understand what they could possibly do.

In an op-ed in the *New York Times*, Professor Ben Barber argued that this is not a failure of capitalism, because greed and fraud have always been part of capitalism; it is a failure of democracy. Former SEC chair Richard Breendon has noted that it's the problems of a few capitalists, not capitalism, but the market does need adult supervision! When we faced a similar crisis and no "adult supervision" in the 1980s in the streets of urban America, we cracked down; passed mandatory sentences for street crimes; sent young adult offenders to jail; demanded greater moral and personal responsibility and accountability and waxed eloquently about the need for moral reform. There were few voices (including stunningly few legal ones) raised on behalf of the class of potential violators, countering these forces and trends. We're only just beginning to apply that same kind of equal law, justice, and morality to white collar America, and yes, already there is a multitude of voices (including many legal ones) urging moderation, caution, and defenses!

Sadly, it is crystal clear that the laws, justice and the rhetoric of morality still do not apply equally to everyone in this democracy, and the general silence of the legal community about this reality is stunning! Yet what also leaps out at me is that in nearly every single transaction at WorldCom, Enron, Global Crossing, Adelphia, Tyco, Qwest, and any of the other leading examples of serious corporate problems involving crime, fraud, schemes, and malfeasance, in all those cases, there was a lawyer who, at some level, saw, heard, reviewed, analyzed, and billed for legal services rendered. What did we see? What did we do? What should we do now?

Here is the challenge: Was our only primary responsibility to preserve confidentiality and secrets, to be sure that our clients could get zealous advocacy within the law? Was that first priority what allowed, if not required, us to participate, advise, and counsel our clients in those enterprises? Is it okay if we simply didn't know what our clients were doing? Were we like the New York Stock Exchange Board—either we knew the facts and felt they were perfectly okay, or at least didn't cross any legal boundary, or, on the other side, which is probably worse, did we not know or want to know what was occurring, and yet we took our fees? While we reaped the benefits of our legal representation, the public lost hugely because we either chose to be passive or were immobilized and muted by the prevailing wisdom or "law" of our professional role.

If that is so, and that's also what our predecessors faced, how did they and we achieve the great victories and reforms of the 1960s and 1970s and launch the public interest movement? In the words of John Gardner or the actions of Archibald Cox, what then gives us the right or permission to stay on the sidelines; at least

now, knowing what the reality now is?

## VII. CONCLUSION: THE CHALLENGE TO LAWYERS

In conclusion, for me, these three examples demonstrate two points. First, we have lost the ability as a citizenry to figure out how to express our views and be heard in key corridors of power. Maybe as we test some of the shareholder democracy reforms in corporate America, we will figure how to make our voices heard, but, generally it's going to require a renewal—a new day and a new beginning.

Second, there is lots of work to be done in terms of defining what it means to be a lawyer in the best holistic sense—not just when you have the good fortune to be acting as a lawyer in a defined public interest role. It is easy to be a dedicated public lawyer if you're a D.A. or a public defender, a Legal Aid attorney, or a judge. That's the role. The professional, moral and ethical challenge comes when you are in the middle, dealing with conflicting obligations; when you are representing your client but you also must think about what, if any, broader obligations also exist, and if you don't do it or we as a profession decide you should not, then our profession must do it. And that is our challenge.

The two points are also connected this way: In a constitutional democracy, we need to have an active, aggressive professional bar and lawyers interpreting our obligations, so that the citizens can actively and positively fulfill their role in the office of citizen. They are not separate. They are all part of a community. It's the interstices that we deal with—the public and private sector and those conflicting obligations.

Fraud is not risk! It is not an *ethical* dilemma if your clients are committing a crime or you are committing a crime. That's just illegal. An ethical dilemma arises when, within legal boundaries, principles, or values conflict. And each of you have spent your careers trying to find that balance, and probably done it very well. What I fear is, we, as a society, have forgotten how to strike those balances, and in a democracy, in an era where the law should speak to the values of a democracy—inclusion, fairness, integrity, honesty, accountability—the law has got to respond in a way that is positive.

It's a great challenge, but we can succeed. John Gardner believed that the challenge to leaders in a democracy is to see that the golden opportunities are masked as insurmountable obstacles, and to convince the people that they have a key role to play in seizing that opportunity. People can trump money. Mobilize the people in a democracy and you win. We've seen examples of this mobilization and its success, but it never happens when we are passive. We never do it by complaining; by whining. We don't get it done simply by standing on the sidelines and being pure and virtuous, and not being in the fray. The challenge to each of us—to me, to you—is not to look back at what our legacy was, but to do as Judge Coffin has challenged us: With the legacy you have, what will you do with it now? How do you stand on the shoulders of former leaders and create role models and mentors for the next generation of leaders and activists?—How do you prepare them as citizens to reclaim our democracy, and as lawyers, prepare them to renew the pride and value of being a lawyer in the public interest, in public service, whatever your professional role and vocation may be?