

RALPH NADER RADIO HOUR EPISODE 101 TRANSCRIPT

Randall Robinson, William Janssen, Russell Mohkiber

ANNOUNCER: From the KPFK studios in Southern California, it's the Ralph Nader Radio Hour.

STEVE SKROVAN: Welcome to the Ralph Nader Radio Hour. My name is Steve Skrovan, along with my cohost, David Feldman. How are you today, David?

DAVID FELDMAN: Very good, thank you.

STEVE SKROVAN: And the man of the hour, Ralph Nader. Hello, Ralph.

RALPH NADER: Hello, David, Steve. This is going to be really a great program.

STEVE SKROVAN: You're absolutely right. As usual, we have a diverse and informative show for you today, and we're able to do that every week because, well, frankly Ralph, you read so damn much. If you didn't read so much, we'd have no show.

RALPH NADER: Our guests are wonderfully accomplished and inexcusably ignored by the mass media.

STEVE SKROVAN: Yes. And in the second half of the show, we're going to talk drugs. Now don't get excited, we're going to talk medicines, to be a little more specific. And potentially deadly medicine shortages that can occur. We're going to be doing that with Professor William M. Janssen of the Charleston School of Law. We will also, as always, find out what's happening in the world of white collar crime with Russell Mohkiber, the Phillip Marlowe of the corporate crime beat. And if we have time after all of that, we'll try to knock out a few more listener questions. But first, we're going to talk to a man who wants to put the world on trial. David, who might that be?

DAVID FELDMAN: That would be Professor Randall Robinson. Professor Robinson is a distinguished author and a political and human rights activist. He's the founder of TransAfrica, the first organization to advocate for the interests of African and Caribbean peoples. Among his many books are the national best sellers, Quitting America: The Departure of a Black Man from his Native Land, The Debt: What America Owes to Blacks, The Reckoning: What Blacks Owe to Each Other, and Defending the Spirit: A Black Life in America. Mr. Robinson is also a Professor of Law at Penn State Law School, and is the creator, co-producer and host of the Public Television human rights series, "World on Trial." He comes to us today from St. Kitts in the West Indies. Welcome to the Ralph Nader Radio Hour, Professor Randall Robinson.

RANDALL ROBINSON: Thank you very much. I'm happy to be here.

RALPH NADER: Wonderful to have you on the show, Randall Robinson. I've known Randall for a number of years. And he's from St. Kitts, which has about 70,000 people and has the same vote for the World Trade Organization as the U.S. One of the few egalitarian references we can point to, Randall.

RANDALL ROBINSON: We have even fewer people than that, Ralph. We've got 35,000 on the island of St. Kitts, and then the sister island of Nevis, we have 10,000. So it's 45,000 max.

RALPH NADER: Oh. I'll have to correct that. St. Kitts, 45,000.

RANDALL ROBINSON: We couldn't fill a large football stadium.

RALPH NADER: But it's probably beautiful weather there. And I want to start by talking about your new public television program, absolutely unique, called "The World on Trial." You have said billions of people living in the United States and countries around the world have legal rights now that their government may not likely have told them that they have. Can you explain that? And then we'll get into what your showcasing in "World on Trial" - in a very unique way - using juries.

RANDALL ROBINSON: When the Allies marched into Germany and into the Nazi death camps, and the newsreels broadcast what they found there, the world was horrified. And this spurred the new United Nations meeting in San Francisco in the spring of 1945 to move toward human rights and to move towards starting with the universal declaration of human rights pioneered by Eleanor Roosevelt and W.E.B. DuBois. And it opened up a whole trove of human rights treaties that now bind nations around the world. There are some 23 major human rights multilateral treaties that bind nations. And for the first time in human history, rights were given to individuals. Before World War II, what a nation did behind its own borders, to its own people, was a nation's own business because of the complete shield of sovereignty. That changed with the war's end. And the idea was to begin to try to protect individuals in countries around the world from the predatory impulses of the state. And so all of these human rights treaties were put in place, and hundreds of nations ratified these treaties. The problem is that the United Nations was not able to put in place an enforcement mechanism vertically from the top down through the instrumentalities of the United Nations. And nobody wanted enforcement of what is called "horizontal enforcement" of one nation against another. And so these human rights that individuals have in the millions in countries across the world have remained largely unenforced.

RALPH NADER: Randall, give some examples of the names of the treaties, and whether the U.S. was one of the last to sign on. Because a treaty, under our Constitution, has the force of federal law.

RANDALL ROBINSON: Well, the first you had - major treaty - was the Genocide Convention of 1948. Then the International Covenant on Civil and Political Rights of 1966, the International Covenant on Economic, Social and Cultural Rights in 1966, then a treaty to combat racism in '66, a treaty to foil discrimination against women in 1979, a convention against torture in 1984, a treaty to protect the rights of children in 1989. Twenty-three major United Nations conventions in all are in place and are the law of the international community.

RALPH NADER: U.S. belongs to all of them?

RANDALL ROBINSON: No. The United States remains the only nation in the West - the only industrial democracy in the world - that does not, has not ratified the Women's Convention. The U.S. has not ratified the Child's Convention. It has not ratified the Convention on Economic, Social and Cultural Rights. It hasn't ratified a number of conventions. The U.S. recognizes the jurisdiction of no international human rights court, including the International Criminal Court. The U.S. does not respect the jurisdiction of that. In part, this has to do with the founding of the U.S. inasmuch as its Constitution and laws were said to be self-given. And so the U.S. doesn't consult other nations, doesn't regard other nations' laws. And I think that has hurt us a bit in the world because the U.S. should be a bigger part of the fabric of what has happened than we are.

RALPH NADER: Randall, let me ask you something. This is extraordinary. It's also a sign of what an empire is all about, above the law. And here you have Hillary Clinton - the Secretary of State for four years with Barack Obama in the White House - didn't she make an issue before the Congress on the inability or unwillingness of the Senate to ratify the treaty to foil discrimination against women and to protect the rights of children? She harkens a lot about her support of women and children. I don't recall her making a real big issue out of this on the U.S. Senate side.

RANDALL ROBINSON: Look, the problem recently has been with the Senate and ratification. The Senate, you have to have two-third vote in the Senate to get something ratified. Bob Dole went on the floor of the Senate and tried to get the Disabilities Convention ratified, because he was severely injured in World War II. He failed. He couldn't get two-thirds from a Republican controlled Senate. And President Obama favors the Women's Convention very strongly. But you can't get the support in the Senate to get ratification.

RALPH NADER: What could possibly be the argument of people in the Senate against the treaty to protect the rights of children? That includes the rights against human trafficking, one of the most odious crimes in the world involving children. You know, to an outsider on this, Randall, it's

inconceivable that the Democrats wouldn't have put the Republicans on the defensive in 2010, 12, 14 elections, and that Hillary Clinton would not have made a trademark stand on this. Can you explain that?

RANDALL ROBINSON: No, I can't explain it, because the excuse is mysterious. One is that the Children's Convention would somehow undermine the authority of parents in their own families. And that's - there's no foundation to that at all. The same thing about the Women's Convention: very little foundation. A city like San Francisco has used the Women's Convention for local law in San Francisco. And the treaty has inspired reform all over the world, but not in the United States.

RALPH NADER: You mentioned the lack of enforcement behind these treaties, even though in most countries that ratified them it has the force of law. Before we get to your great project, "World on Trial," could you tell our listeners how to get more information about these treaties, and how to contact you? We're talking with Professor Randall Robinson, Professor of Law at Penn State, graduate of Harvard Law School, author of many books, from St. Kitts in the Caribbean. Could you tell people how to get more information about these treaties, why the United States doesn't ratify them, and how they can contact you?

RANDALL ROBINSON: Well, I can be written to at rr@rosro.com.

RALPH NADER: Can you repeat that?

RANDALL ROBINSON: rr@rosro.com. My address of course is Penn State Law School, University Park, PA.

RALPH NADER: Very good. Could you now describe this unique communication tool that you have created so imaginatively, called "World on Trial," and how people can watch it?

RANDALL ROBINSON: Well, you can see the first two episodes online. You would go to "World on Trial" and look for the French headscarf trial. The question in that case was whether France had violated the right to religion in the ICCPR, the International Covenant on Civil and Political Rights,

by denying French girls in grade school the right to wear headscarves. France outlawed this - I think in 2004 - with national legislation. And of course we empaneled juries at university law schools all across the world to watch the trial and to render verdicts. And then we asked the public to render verdicts and to vote. But it's a tremendously effective education tool, because we get both sides of the issue. We get the best lawyers in the world to argue the case, the best judges. In the case of the headscarf trial, it was Mrs. Blair, the wife of Tony Blair. And the second trial was a trial to see if the United States had violated the right to life of the International Covenant on Civil, Political Rights, when we used a drone in Yemen that killed a noncombatant. Drone use is heavy in that part of the world. And what does the law say and how protected are noncombatants, innocent civilians? And have their rights been violated? And the same thing goes. Juries all over the world sit and look at that trial and then they vote. The last trial, the headscarf trial, was well covered by public stations. Seventy-three percent of the country with an available audience of more than 200 million shows aired in 88 percent of the top 25 markets, including New York, L.A., Chicago, Philadelphia, Dallas, San Francisco, Boston, Washington, Atlanta. It was well covered in the country. Now all we have to do, Ralph, is to raise the money to conduct more trials. Television is expensive, and that's a difficult thing to do, but we intend to conduct trials in all countries, rich, poor, east, west, left, right, it doesn't make any difference. If there's any suspicion that they may have violated one of the human rights laws - upon ratification these countries pledge to honor - then we intend to put them on trial.

RALPH NADER: How did the verdicts come out in the first two trials?

RANDALL ROBINSON: Well, the verdict in the last trial is still being tabulated. In the first trial, the majority felt that France had violated the law.

RALPH NADER: The treaty.

RANDALL ROBINSON: The treaty, yes.

RALPH NADER: Yes. You're going to have other issues.

RANDALL ROBINSON: Sometimes it's better to say "law," Ralph, because "treaty" becomes too complex. I mean, most people don't speak treaty. But a treaty is a law, so it's much more consumable.

RALPH NADER: Yes. You have a lot of other issues considered for future trials. Can you give us a quick list of what's coming up on "World on Trial?" And I hope some foundations in this country that want to use their money wisely will take a look at Randall Robinson's innovative global project and support it. At any rate, what are some of the hot button issues?

RANDALL ROBINSON: Well, you have South Korea's detention and expulsion of Falun Gong political asylum seekers; Nigeria's despoilment of the Niger River Delta region and the inequitable distribution of oil wealth by Nigeria; Ireland's discriminatory policy toward non-Catholic children applying for school entry; Paraguay's destruction of the forest; Australia's private prisons; The U.S.'s disproportionate execution of blacks and Hispanics. Those are just some of the programs in the tube. There are more subjects than we can deal with all over the world, and it really doesn't make any difference about the politics of the country.

RALPH NADER: Randall Robinson, the Nigerian show dealing with the inequitable distribution of oil wealth: what international law or treaty does that violate?

RANDALL ROBINSON: Well, the people who live in an area - the Law of Economic, Social and Cultural Rights means that via notions of self-determination - people who live in an area, people who are of a separate language group, have to enjoy the fruits of their soil. Not only did the major oil companies with the central government come in and despoil the area, but there had been maldistribution of income for that as well. So that was the problem in Nigeria.

RALPH NADER: And what is the international law? What's the name of the treaty?

RANDALL ROBINSON: The International Convention on Economic, Social and Cultural Rights.

RALPH NADER: That's interesting for people to know. That's very important.

RANDALL ROBINSON: And many of these treaties, of course, are overlapping. You find some language that joins them, knits them all together. So it could be a number of treaties that would apply to a number of situations.

RALPH NADER: Tell me, Randall Robinson, do you have on your list the Pakistan-India conflict in Kashmir and the Israeli-Palestinian conflict as part of the forthcoming programs under "World on Trial?"

RANDALL ROBINSON: Well, we had on the list the eviction of Israeli Arabs from their homes in East Jerusalem. And with respect to India, we had on our list the inability or the lack of freedom to attend school of Indians living on the rice farms in the very poorest area of India. And so we want to look at those two things.

RALPH NADER: And then, how do people - if they miss a show - how do they get the transcript?

RANDALL ROBINSON: Well, we haven't transcribed the shows yet; but what they can do is simply pull it down from the Internet and watch it. You can watch it at any time. You can see them now. You can pull them down.

RALPH NADER: Listeners may want to go to hlrecord.org in about two weeks, where Randall Robinson has a more detailed article on "World on Trial." That's [hlrecord](http://hlrecord.org), that stands for Harvard Law Record dot org. Can we turn to another article you wrote and has been published in the Harvard Law Record on corporatization of prisons? I want to put this very, very pointedly here. How did we ever constitutionally allow giant commercial prison companies that are listed on the New York Stock Exchange to own prisons that have inmates that were convicted presumably under our criminal laws? And these private prisons can actually punish prisoners? They're making profit. They can throw them into solitary confinement, which often extends their term and allows the prison companies to make more

money. Has there been a Constitutional challenge? And give us the names of these corporate prisons and how many prisons there are in the country, and how many prisoners are under their control.

RANDALL ROBINSON: Well, the major owners are GEO and Corrections Corporation of America. Together, those enjoy - those two corporations with many prisons around the country - enjoy revenues of some \$3.3 billion a year. And the Corrections Corporation of America will avoid \$70 million in tax payments by becoming a real estate investment trust. And the interesting connection here is that Hillary Clinton had gotten significant contributions from both of these companies. And going back to Bill Clinton's administration, the sort of pipeline to these prisons was facilitated by the Clinton Administration's three strikes and you're out. And so when the legislation on the punishment side laid out that crack cocaine was going to require a punishment a hundred times that of powder cocaine, it meant that you had a disproportionate number of blacks from black communities going to jail for nonviolent offenses.

RALPH NADER: Explain "three strikes and you're out," Randall.

RANDALL ROBINSON: Well, if you had three infractions, and Hillary - I think I have something here that Hillary Clinton said... she said - this was in 1994, and she said, "We need more police, we need more and tougher prison sentences for repeat offenders. The three strikes and you're out for violent offenders has to be part of the plan. We need more prisons to keep violent offenders for as long as it takes to keep them off the streets." But the reach of the Clinton Administration and President Bill Clinton went much further than that. They were putting people in prison, disproportionately blacks, for minor offenses. And the real authority in America on this is Michelle Alexander, a law professor at Ohio State Law School, who has written The New Jim Crow, a wonderful book. And what is remarkable here is that she's virtually been excluded from public discussion about this. She is compelling, authoritative, scholarly. And I haven't seen her on CNN, I haven't seen her on Fox, I haven't seen her anywhere, and there should be a demand. She has written a piece saying that Hillary Clinton does not deserve black support for her role in all of this.

RALPH NADER: That was in *The Nation* magazine very recently. Very powerful.

RANDALL ROBINSON: Yes, that's exactly right.

RALPH NADER: Yes. Michelle Alexander.

RANDALL ROBINSON: Michelle Alexander of Ohio State, who's written [The New Jim Crow](#). And she should be everywhere, and she has been nowhere. And one almost has to suspect that this is orchestrated. And I really don't understand how you could have a panel or discussion without her involvement if there's any search for truth at all.

RALPH NADER: She should be in South Carolina. She should be in Nevada. She should be everywhere. It's a wonder to me.

RANDALL ROBINSON: That's right. Absolutely.

RALPH NADER: The book she wrote, [The New Jim Crow](#), was well reviewed - even in the New York Times - and it was a modest best seller. But suddenly, a curtain of censorship has covered her work.

RANDALL ROBINSON: I really think that listeners to your program have to call the networks and demand that we hear her voice, too. This is a shame. And it's this side of the Clintons that I think blacks in South Carolina don't know about.

RALPH NADER: Tell me, Randall Robinson, when did she get the campaign contributions from the two corporate prison corporations? When she was a U.S. senator, or she's getting it now as a presidential candidate, Hillary Clinton?

RANDALL ROBINSON: She's getting it now. She was forced, pressured to return some of the contributions, and she "returned," - and it has to be placed in quotation marks - in the form of contributions of philanthropic contributions for which she got public credit. She did not return the money back to the two major corporations that gave her the money.

RALPH NADER: You say in your article in the Harvard Law Record, now I'm quoting you, quote, "The laws that made the sentences for crack cocaine use literally a hundred times harsher than the sentences for powder cocaine use mock the most basic precepts of equal justice, since the former tends to be used by the urban poor and the latter by suburbanites. And the resultant throwing of more than a million black fathers, mothers, sons and daughters in jail since the 1990's for the types of infractions for which many whites go free has wreaked havoc with families and communities throughout black America." End quote. That's your article in the February 4, 2016 edition of the Harvard Law Record. And the Clintons bear a serious responsibility for this, wouldn't you say?

RANDALL ROBINSON: A serious responsibility. And she is still receiving money recently from one of the bundlers, who is putting the money together for her. Richard Sullivan of the lobbying firm Capitol Counsel is a bundler for the Clinton campaign, bringing in \$44,000 in contributions in a few short months. And he still brings money in that involves money from these private prisons. Now, she was caused to rethink this thing - at least publically - because Sanders introduced legislation to outlaw private prisons to his enormous credit. And now she says she's against private prisons. But she appears to be still taking money.

RALPH NADER: Randall Robinson, before we conclude, this point on the constitutionality of corporate prisons that the Clintons seem to have favored: how could that possibly be Constitutional? Have there been any cases filed?

RANDALL ROBINSON: Oh, it violates every notion of human rights I know anything about. First of all, these prisons are sheer lock boxes. They have guards, who are less well trained, no nothing about penology. The guards make less money. They run them as cheaply as they possibly can. The idea is to catch and house as many people as possible. The more people that get sent to prison and the longer they stay, the more money these businesspeople make. And the Clintons are connected to this.

RALPH NADER: Have there been any lawsuits filed?

RANDALL ROBINSON: I don't know. I can't answer that question, Ralph.

RALPH NADER: We've been talking with Professor Randall Robinson, who is the creator of the public television show, "World on Trial," and has spoken out on many issues affecting the abuse of due process of human beings, and is raising the long overdue public focus on these international treaties which have the force of law in all the countries that have ratified them, and taking note that the United States has not ratified some of them, such as the one affecting discrimination against women and abuse of children. Before we close, Professor Robinson, could you just give our listeners once again the contact number so they can reach you?

RANDALL ROBINSON: I can be reached at rr@rosro.com.

RALPH NADER: And at Penn State Law School, where Professor Robinson teaches law. Thank you very much, Randall Robinson, and good luck on "World on Trial."

RANDALL ROBINSON: Thank your Ralph, thank you so much. Take care.

RALPH NADER: Goodbye now.

STEVE SKROVAN: We've been speaking to distinguished author and human rights activist Randall Robinson, creator, co-producer and host of World on Trial. We will post a link to where you can see this program on the Ralph Nader Radio Hour website. Now we're going to take a short break to find out who our corporate crime reporter, Russell Mohkiber, has in the crosshairs today. You are listening to the Ralph Nader Radio Hour. Back after this.

RUSSELL MOHKIBER: From the National Press Building in Washington DC, this is your corporate crime reporter morning minute for Friday, February 19, 2016. I'm Russell Mohkiber. In September, Deputy Attorney General Sally Yates announced that to be eligible for cooperation credit, a corporation must identify all individuals involved or responsible for the misconduct at issue. The Yates memo was praised as a step forward in cracking down on corporate crime. In fact, it may be a step

backward. That's according to two University of California Davis law professors, Elizabeth Joh and Thomas Joo. In some cases, the new cooperation policy's emphasis on individual prosecutions could itself result in leniency. Prosecutors may award extensively generous credit to corporations in order to build cases against individuals. They write that the all or nothing approach to cooperation may backfire, because it not only allows a corporation to choose nothing, but may encourage that choice. For the Corporate Crime Reporter, I'm Russell Mohkiber.

DAVID FELDMAN: Thank you, Russell. Before we get to our next guest, Ralph, we would be remiss if we didn't get your take on the death of Supreme Court Justice Antonin Scalia, and the fight ahead to fill his vacancy on the Court.

RALPH NADER: There's no doubt that Antonin Scalia made people think, even though a lot of liberals and progressives think he was wrong on many judicial issues in his opinions, which mostly were dissents. His most prominent work on the Court he couldn't get a majority on a lot of the cases. But the one where he got a majority, 5-4, selected, unlawfully - in my opinion and in the opinion of a lot of other lawyers - George W. Bush as President in 2000 A.D. out of Florida. That opinion was so blatantly political that it even admitted that it was a unique case, which would have no precedential value in the future. I don't know any Supreme Court decision that's ever said that. And it stopped the Florida Supreme Court order to conduct a full voter recount in the contest between Gore and Bush. And here is Justice Scalia saying again and again on CSPAN and elsewhere that he wanted judicial restraint. He did not want nine unelected lawyers on the Supreme Court to flout the will of the people, meaning to overturn statutes that they normatively didn't like. And yet he was the lead architect of the most extreme display of judicial activism. Somebody once called it a corporate coup d'etat. Someone else called it a judicial coup d'etat that selected George W. Bush as President in a 5-4 decision. Flimsy reasoning. Blatant politics. So blatant that when later Justice Scalia was asked about "Bush versus Gore" on national television, he said in an unlearned manner, "Get over it." Those were his words, quote, "Get over it." End quote. He is a jurist that was a very good writer, and he had biting wit. He made people laugh. He went around the country

speaking, giving often political opinions. But as Justice Richard Posner of the Federal Circuit Court based in Chicago wrote: he was inconsistent in his judicial thinking.

DAVID FELDMAN: I have one quick stupid question. Is it in the Constitution that you have to have an odd number of justices on the Supreme Court?

RALPH NADER: No, it is not.

DAVID FELDMAN: And there's no specific number that we have to have on the Supreme Court? I mean theoretically, Barack Obama doesn't have to name a new Supreme Court justice, right?

RALPH NADER: He's not required to in terms of any enforceable law. And when Franklin Delano Roosevelt wanted to get the Supreme Court to go his way on some critical Depression-era legislation that he wanted upheld in the 1930's, he wanted to add several justices to increase the number of justices on the Supreme Court so a majority would vote to uphold the constitutionality of his enacted legislation. So it could be done by legislation. There's no constitutionally required number of justices.

DAVID FELDMAN: If there were an equal number of justices and they couldn't gain a consensus, it would go back to the appeals courts or back, depending on what the case was, right?

RALPH NADER: It would simply affirm the Circuit Court of Appeal decision.

STEVE SKROVAN: So Ralph, how do you think this is all going to play out?

RALPH NADER: It's clear that I would guess in the next three weeks President Obama will send the most likely to be confirmed replacement for Justice Scalia, and then there's going to be a royal political battle between the Majority Leader Senator McConnell and the Republicans in the Senate and President Obama. I think what's going to decide it is what kind of polls come out in terms of whether the intransigence and delay of the Senate will harm the reelection prospects of some Republican Senators around the country, and therefore turn the Senate over to Democratic Party hands in 2016.

DAVID FELDMAN: Very quickly, if it becomes Bernie Sanders versus Trump, will Scalia be right that the free market of ideas dictates that Citizens United is overturned just by the force of will of the American people?

RALPH NADER: Well, that would be the case in the proposed victory of Bernie Sanders, because he's raised tens of millions of dollars not from corporate sources - he refuses to have a corporate-funded PAC - but from ordinary people. And the average contribution is \$27, a marvelous example that rebuts the Democrats over the years saying, "Yeah, we're for campaign finance reform, but this time, in this election, we are not going to unilaterally disarm." Well, Bernie Sanders has unilaterally disarmed from the corporate plutocracy and is raising tens of millions of dollars to take his campaign all over the country. That alone is a major contribution breakthrough by Bernie Sanders, Senator from Vermont.

DAVID FELDMAN: And if Trump gets the nomination: that would speak to Citizens United also being irrelevant in the general election?

RALPH NADER: In a quite different way, namely that what Donald Trump would have proved is a multi-billionaire can fund his own campaign. That's not the kind of demonstration we're looking for. We're looking for the smaller contributions in great volume voluntarily given by the voters and citizens of this country to a candidate.

DAVID FELDMAN: So there might be another way of getting money out of politics without a constitutional amendment to overturn Citizens United. That is what Scalia kind of suggested, right?

RALPH NADER: Well, he did, but you know, a Bernie Sanders doesn't come around very often. And how about all the Senate seats, the House seats, the governor seats, the state legislator seats where you couldn't pull it off so uniformly and in such a widespread manner to circumvent the impact of Citizens United the way Bernie Sanders has. So we shouldn't take Bernie Sanders as the wave of the future.

DAVID FELDMAN: Did you ever meet him (Scalia), Ralph? Did you ever talk to him?

RALPH NADER: I've talked to him on the phone, yeah. I'm going to write a column on this.

DAVID FELDMAN: Were you humbled by him?

RALPH NADER: Not at all, because he came out wrong in so many ways. So a brilliant light that brings on hell is not a brilliant light to be commended.

STEVE SKROVAN: Well, excellent discussion about Antonin Scalia. Now I'm going to switch gears here. And we've talked a lot on this program about access to medicines and the price of medicines from a doctor's point of view, with Dr. Sid Wolfe and Michael Carome of Public Citizen. Today, we're going to go at it from a legal point of view. Professor William M. Janssen has been on the faculty of the Charleston School of Law since 2006 after a lengthy private practice, where he concentrated his practice in pharmaceutical, medical device and mass torts defense and risk containment. In practice, he was involved in several high profile drug and device cases, including the national diet drug fen-phen litigations. He has spoken and written extensively on pharmaceutical and medical device law, and he is here to talk to us about a paper he has written for the Social Science Research Network that argues that pharmaceutical companies have a duty to continue selling their life-saving medicines, despite economic forces that may induce them to take the drugs off the market. Welcome to the Ralph Nader Radio Hour, Professor William Janssen.

WILLIAM JANSSEN: Thank you. It's a pleasure to join you.

RALPH NADER: Thank you very much, Professor Janssen. This affects millions of people, what you're going to hear in the next fifteen, twenty minutes. Please listen carefully, because it does require a little concentration. Let me just put it in two human-interest cases. Case one is where a drug company is selling you a medicine that's critical for your survival, and they're making good profit, and likely they might have benefited from taxpayer funded research and development given to them free by the National Institutes of Health. Then, suddenly there are shortages that appear. And your doctor cannot get the medicines to fulfill your prescription, and your life is endangered. Does the drug company have a duty to

continue selling you these medicines? And if they are negligently not doing so and a shortage occurs, should they be exposed to a tort-based lawsuit for damages? The second case has been coming up more frequently. There are a lot of deadly diseases that are inviting the sale of monopolized or patented drugs. So a person has a serious disease. He has been buying a drug under a monopoly patent to help him survive - or help her survive - and suddenly the price of the drug goes from say \$13 to \$750 per pill. And the person cannot afford it. The insurance cannot cover it. And let's say, hypothetically, the patient dies. Is there a lawsuit that the estate can bring against the drug company? Because there's no other drug that the doctor of the hospital or the patient can resort to, because it's a monopoly patented drug. This is the kind of thoughtful analysis Professor Janssen is engaging in. And so, discuss for our listeners the first issue under your article, "A" quote "Duty" quote "to Continue Selling Medicines." And if there isn't a common law duty, what kind of legislation you're proposing? So make it as clear as possible what's at stake here. And it's only going to get worse. This is a problem that's getting worse. Shortages are increasing in a lot of areas, and monopoly drugs are being hiked to astronomical levels in the U.S., although not in other countries which don't allow this to happen.

WILLIAM JANSSEN: Well, Ralph, it's interesting. The data suggest that we're doing a lot better on shortages and constraining shortages. The RDA was tasked by Congress to give an annual report to the nation on drug shortages that have been identified and those that have been averted. And from 2011 - sort of the high water mark in the data that was reported nationally - the shortages were 251 drugs, and the shortages averted were 191. By 2014, which is the last year that that data has been reported for, the shortage number dropped from 251 during that year to 44. So nationally, that data suggests that the incidents of drug shortages are declining. But to sort of frame the question that you posed, there is a right on behalf of any manufacturer of any product not to enter the market at all. You can choose not to sell a chair, a table, an automobile, what have you. The question this implicates and is very interesting intellectually to me, is do you have a right to exit once you've entered? So think about a very traditional, commonplace product, windshield wipers. If there's a shortage of windshield wipers, and particularly the

windshield wipers that fit on my car, and I go out and drive in the rain and I get into an automobile accident, I'm hard pressed under the laws that currently exist to sue the manufacturer for not having a good supply. It's - it is a shortfall that is significantly impacting me. And were my conduct - my driving - to have injured somebody else or caused other sorts of loss, it wouldn't be the manufacturer's responsibility - because it was in a shortfall position - to compensate me or anyone that I've injured.

The question here is: are drugs, pharmaceuticals, medicines, a different horse entirely? Does that or ought that to command a different answer? In my research, what I've discovered is that over the years, there have been ten different candidates for trying to argue that the law ought to impose that duty, that a manufacturer - once it begins the process of making a pharmaceutical - has an obligation to remain in that market. Ten different theories I've examined for whether or not it exists. And Ralph, my conclusion is the law simply - no matter how reinvented, how creative, how boundary pressing a lawyer tries to move the needle in that debate - the existing panoply of laws out there don't do that job. And the question, you know, you think about traditionally products liability asks this question. If you're - the product manufacturer - is held to account, the plaintiff is suing the product manufacturer, distilled to its essence, that claim is this: "you injured me by selling me a product that was defective, and the defect in your product harmed me." In this environment, what the plaintiff is saying is, "you injured me by not selling me a good product that could have helped me." Or maybe a little more precisely, "you injured me by negligently failing to protect your ability to sell me a good product that could have helped me." And my findings are that the existing body of law out there does not impose that duty on manufacturers. And given the way the law has developed in those ten areas that I examined, it shouldn't. That law is stable body of law, and it points in the other direction.

RALPH NADER: Let me interrupt you here. It's good that the shortages are declining, but remember, 80 percent of the ingredients in medicines sold in the United States come from India and China, and you have to be very careful of those country's bollixing things up for either political or managerial reasons and creating shortages. But I meant to say more specifically that the monopoly patent

one, which we will discuss, seems to be increasing, because so far, they've gotten away with increases in drugs without adding any innovation. They just buy a company that's selling a drug - say for ten bucks a pill - and they take it to hundreds of dollars a pill. But let me ask you this. You remember the Good Samaritan laws, Professor Janssen? These are laws

WILLIAM JANSSEN: I do.

RALPH NADER: Yes. These are laws that basically say, 'if somebody's injured and is on the side of the road and a doctor is driving by, and voluntarily gets out of the car to help the injured person, that if that doctor helps in an incompetent and negligent way, he or she should not be held liable under the Good Samaritan laws.'" But that took a statute to override a common law duty that if you do volunteer to help somebody and you do it in a dangerously incompetent way, you could be held liable. How do you distinguish the common law prior to the Good Samaritan laws in that case from what you've just said about the drug companies?

WILLIAM JANSSEN: Ralph, it's a wonderful example. And the distinction is here: The common law to which you refer has always held a volunteer liable in those situations, but only if the volunteer made the person worse. It had to have made the person who is the object of the rescue worse off. And what the case law is doing in the area that we are speaking of today, they are examining the person as someone suffering from a disease who presents in that position before he or she is ever encountered by the medicine supplier. So the question then would ask, there would be liability under a negligence theory, if the provider makes the person worse off than they would have been had they never gotten the medicine in the first place. In other words, had the medicine not even been invented, are they worse off? And if you assess the question from that calculus, it leads to the answer that liability is missing.

RALPH NADER: Interesting, because in the Good Samaritan situation, it's a volunteer. The person rushing to the rescue is not there to make a profit. In your cases, these companies are there to make

a profit. But what about another theory, which is dependence? They sell the drug to an ailing patient year after year, and suddenly there is a negligent shortage and the drug is not available. And the health of the patient deteriorates and there's no other drug that could replace the drug that is the subject of the shortage. What about induced dependency based on a profit motive?

WILLIAM JANSSEN: Another great example. I think, Ralph, the response that the law, the existing law now is what we're speaking of. The existing law's response to that question is the dependency very well may have been induced, but it didn't change the patient's perspective had the drug not been available in the first place. So in other words, there may have been a dependency because the manufacturer supplied something that was of value but that wouldn't compel under the existing law the manufacturer to remain in the business of producing it.

RALPH NADER: So this is why you are proposing legislation, because normatively you think there should be a duty. Explain the legislation you would like to have enacted by Congress or a state legislature.

WILLIAM JANSSEN: Sure. Well, so the frustration that I found in researching this article, Ralph, was this: I don't like the answer - the answer that says the law provides no remedy. Now, I'm focused less on providing a compensatory remedy than in injunctive one or a prospective one. So it would be a secondary focus of mine to say the injured person - or excuse me - the patient who is treating on the drug or pharmaceutical ought to be compensated for a period of time that the shortage persisted and caused them a challenge or - in terribly serious cases - death. And more - my focus is more on what do we do to remediate the shortage in the first instance? So thinking less about compensation and more from a perspective focal point, how do we stop it from happening in the first place? Or how do we incentivize better behavior in the first place? So my suggestion is: motivate it by achieving a number of different goals. It seems to me that our first goal, our highest goal, is better medicine, better delivery of medical care to patients who desperately need it, and particularly when you're dealing with the type of shortages that the law has encountered here, you're dealing with very high end, very sophisticated

recombinant DNA manufactured pharmaceuticals. I mean, these are the outer marker, the boundaries of science and medicine at the moment. You're dealing with really sophisticated things. So the fact that we're making such remarkable progress in so many of these boundary-pressing medicines to treat calamitous diseases, we ought to be doing what we can to incentivize better and uninterrupted supply paths. Secondly, it seems to me our goal has to be - in whatever choice is made - to not disincentivize innovation. The United States has long been the absolute cauldron for the development of dramatic medical inventions and developments of great new in the treatment of very serious, very confounding illnesses. And what we want to do is never disincentivize with whatever solution we design, a path that causes that development to cease or to migrate away from diseases impacting small population. With the last few pieces, we also want to respect the investment that's being made. And finally, we want to avoid imposing liability on someone where it doesn't belong.

So my solution is this, my recommendation is this: First, that the FDA be empowered to install a timetable for a resolution of a shortfall. So they identify a shortfall, and they erect a timetable that says we need to resolve this by this day. Secondly, the incumbent manufacturer has a choice. It can endeavor to resolve that shortfall, or alternatively, it can pass, but it has the right to pass. Third, the FDA then, if the incumbent decides to remediate the shortfall, the incumbent has to do so within a time period set by the FDA, either itself or through a sub-license, and if the incumbent refuses to do it, can't do it, can't meet the timeframe, Ralph, I would empower the FDA to alternatively source the product - that they could nominate another source for the production of that medicine. That new provider would be incentivized with a period of exclusivity to do it. And then during that period of exclusivity they would be the sole manufacturer of that product. When the incumbent is ready to return to the market, if they ever do, they become companions with the alternative source. And I think that incentive, that power invested in the FDA to find an alternative source, provides a level of motivation and incentive that doesn't now exist to remediate shortfalls.

RALPH NADER: We've been talking with Professor William Janssen, Professor of Law at Charleston School of Law, and if you want to know more about his proposal and his analysis, go to his article in the American Journal of Law and Medicine. It came out in 2014 at the Boston University School of Law. Let's conclude in the final minutes, Professor Janssen, with my second. Let's say you have a relative who has a serious illness. There's only one drug that can keep that relative alive. That drug is under a 15-year monopoly patent by a drug company. The price of the pill every day is, say, ten dollars. The drug company then sells itself to another company and without any additional improvement or research, the acquiring company raises the price to your relative from ten dollars to a thousand dollars a day pill. You can't afford it. The insurance won't cover it. You're facing death. Is there a duty here under the law of torts incumbent on the drug company?

WILLIAM JANSSEN: Ralph, I think the answer is no.

RALPH NADER: And there's no other drug that can deal with it in the world.

WILLIAM JANSSEN: There is no current constraint of which I'm aware that says that a drug manufacturer has to be pricing a product like that in any particular way. Obviously, as we saw in the instance that you're probably inferring (the Martin Shkreli case), the pressures of the market and the pressures of publicity drove that price hike down dramatically. It may also be that the federal government has a role to play there in an informal way, communicating with that drug manufacturer with respect to product supply. But at the end of the day, the price-setting role by the manufacturer remains the province of the manufacturer. And there is no - of which I'm aware - there is no rule in the law of tort that would affix liability there.

RALPH NADER: Well, there's no rule of reason here, according to what you say. Unfortunately, I don't have any more time to disagree with you, Professor Janssen. But I hope if you're up in the New England area you'll visit the first and only law museum in the world, the American Museum of Tort Law in Winsted, Connecticut. Again, how would our listeners get in touch with you, before we conclude?

WILLIAM JANSSEN: Ralph, I thank you very much for having me. My email address is wjanssen@charlestonlaw.edu.

RALPH NADER: Thank you very much, Professor Janssen.

WILLIAM JANSSEN: It's been my pleasure, Ralph. Thank you.

RALPH NADER: You're welcome.

STEVE SKROVAN: We've been speaking with Professor of Law William Janssen. His paper is entitled, "The Duty to Continue Selling Medicines." We'll post a link on our Ralph Nader Radio website to that. And that's our show. I'm sorry we didn't get to listener questions today. We'll try to do that next week. I want to thank our guests, author and activist Randall Robinson, host of "World on Trial," and Professor of Law William Janssen, author of "The Duty to Continue Selling Medicines." We'll post links to all of the relevant material on the Ralph Nader Radio Hour website. And a transcript of this episode will be posted there too. For Ralph's weekly blog, go to Nader.org. For more from Russell Mohkiber, go to CorporateCrimeReporter.com. Remember to visit the country's only law museum, the American Museum of Tort Law in Winsted, Connecticut. Go to TortMuseum.org. The producers of the Ralph Nader Radio Hour are Jimmy Lee Wirt and Matthew Marran. Our Executive Producer is Alan Minsky. Our theme music, "Stand Up, Rise Up" was written and performed by Kemp Harris. On behalf of David Feldman, I'm Steve Skrovan. Join us next week on the Ralph Nader Radio Hour. Talk to you then, Ralph.

RALPH NADER: Thank you very much Steve and David. Thank our listeners. Remember, contact public television in your area about Randall Robinson's brilliant new program, "World on Trial."