



American Enterprise Institute for Public Policy Research  
1150 Seventeenth Street, N.W., Washington, D.C. 20036

(202) 862-5800  
Telex: 671-1239

**REMARKS OF  
DOUGLAS J. BESHAROV  
BEFORE THE  
BOARD OF DIRECTORS  
LEGAL SERVICES CORPORATION  
January 31, 1986**

Thank you for giving me this opportunity to come before you to discuss ways to improve the quality and scope of legal services provided by the Corporation.

Introduction

Before beginning, I should mention that I am presently the director of AEI's Social Invention Project, which seeks to develop new responses to social welfare problems. I am also on the Adjunct Faculties of Georgetown and American University Law Schools.

Before coming to AEI, I was the Director of the U.S. National Center on Child Abuse and Neglect. And, before that, I was the Assistant Corporation Counsel of the City of New York In-Charge-Of Family Court Planning and Programming. As such, I supervised a staff of 37 lawyers who prosecuted juvenile delinquency, child abuse, spouse abuse, and non-support cases.

My most recent book, The Vulnerable Social Worker: Liability For Serving Children and Families, was published by the National Association of Social Workers, a 100,000 member professional association. In the book, I describe how the growing number of lawsuits against child abuse investigators (usually social workers in public agencies) is leading to a form of defensive social work: Fear of being sued for failing to protect a child leads social workers to "take no chances," and to remove children from parental custody when there is no justification for doing so.

#### Context

As I said, I would like to suggest things that you should consider in your on-going efforts to improve the quality and scope of legal services provided by the Corporation. Before discussing the specific ideas that I suggest you consider, let me put my approach in context.

I believe that the fundamental mission of the Corporation should be to "maximize access to justice." We live in a society of laws, and all citizens need appropriate access to the legal machinery of the state. Laws and courts are not private commodities. Rather, they are an indispensable element of a democratic society. As Mr. Durant said to the ABA's Young Lawyer's Division, "no idea [is] more conservative than that disputes

should be settled through the resort to the law with meaningful access to that process available to everyone." <sup>1</sup>

But having said this, I want to emphasize that I do not think that we should simply hire more lawyers to provide free legal services. There have been many attempts to estimate the level of legal services "needed" by the poor. But, if truth be told, there is a certain degree of flim-flamery in such estimates. For so long as legal services are free--as the economists say, a "free good"--there is no limit to the amount of legal services that the poor can consume. If anyone seriously questions this self-evident proposition, let them only consider the present predicament facing Medicaid and Medicare programs.

More importantly, to take such a simplistic and one dimensional approach to maximizing the poor's "access to justice" is both professionally chauvinistic and, ultimately, harmful to the interests of those we seek to help, the poor and disadvantaged.

Within this context, I will discuss three areas for your further consideration:

---

<sup>1</sup> Remarks of W. Clark Durant, III, Chairman of the Board, Legal Services Corporation, Young Lawyers' Division, American Bar Association, Feb. 15, 1985.

1. making legal services programs more responsive to the needs of their clients,
2. using limited funds more efficiently to meet these needs, and, lastly,
3. fundamental reform of the civil justice system.

While these have been important issues throughout the Corporation's history, they are especially important in the era of Gramm-Rudman. As Terry Hartle and I argued in a New York Times Op Ed piece on Head Start (a copy of which is attached), the mere fact that a program has high intentions and entrenched political support should not make it immune from critical examination--and improvement.

#### Responsiveness

To me, "maximizing access to justice" includes program responsiveness, that is, the effective targeting of existing resources to the areas of representation most desired by clients. It is no secret that many activities pursued by LSC grantees do not reflect the priorities of their individual clients. A recent Ripon Society paper notes that: "As even moderate critics of the agency have pointed out, attention to the

efficient and effective provision of individualized service to clients has been obscured." <sup>2</sup>

Some observers have suggested that greater responsiveness can be achieved through more representative local boards and more stringent monitoring by the Corporation. While both would undoubtedly do much to improve the present situation, we have learned that market or quasi-market incentives, rather than administrative regulation, are more efficient--and more effective.

We at AEI have done extensive work on the use of vouchers and co-payments as methods to better target limited health care dollars. Building an appropriate system for legal services will be very difficult, but it is worth the effort. I know that you have funded an experimental voucher project. I would urge that you continue this work and extend it to co-payments and other quasi-market mechanisms that: (1) encourage clients to prioritize their legal needs, and (2) encourage grantees to respond to these needs.

---

<sup>2</sup> Frederic R. Kellogg, "Federal Involvement In Legal Services For The Poor: Encouraging Private Sector Fulfillment of a Public Responsibility," p. 4 (Ripon Society Paper, Nov., 1985).

## Efficiency

To me, "maximizing access to justice" also means program efficiency, that is, maximizing the use of existing resources to serve the needs of clients.

Many advocates are still calling for further increases in the Corporation's budget. But, in the present fiscal situation, the reality is that the Corporation's budget is likely to go down, not up. Therefore, more than ever, it is imperative that the Corporation's limited resources be spent in the most efficient way possible to further its basic mission.

Preeminently, there is a need to modernize our thinking about the organization and deployment of grantee resources. Since the start of the legal services program, the practice of law has gone through major change--most dramatically illustrated by the growing use of paralegals and computers. Many grantees have kept up with these changes. But many others operate little differently from the way law offices did twenty years ago. As a result, there are vast disparities in the efficiency of grantees.

I would hope that you would consider encouraging LSC grantees to make greater use of paralegals. After all, about 80% of all LSC supported cases involve relatively uncomplicated family, housing,

income maintenance, and consumer/finance cases <sup>3</sup> in which paralegals could do the bulk of the work. Paralegals should be used not just in the office, but also to represent clients in administrative proceedings (such as welfare hearings) and in uncomplicated court proceedings (such as housing courts). (I will describe how these possibilities might be expanded in a moment.)

Furthermore, much of the work of grantees is repetitious, and easily automated, again resulting in major efficiencies. I know that the Corporation is in the process of providing personal computers for grantees to assist in administration and management. But this is only the beginning of what should be a major push to integrate modern information management and processing techniques into the daily operations of grantees.

Private--for profit--firms are rushing headlong to use both paralegals and computers. Why not legal services? The answer, of course, is that, in the absence of the profit motive, there is no incentive to make the necessary changes.

Competitive bidding for grants might be one approach to encourage your programs to keep an eye on efficiency. I realize that you face statutory constraints in this regard, but I cannot help but believe that the Congress can be convinced of the need

---

<sup>3</sup> Legal Services Corporation, "1985 Field Program Data," p. 39 (undated).

for an incentive scheme if a proper case is made--and if fair procedures are adopted.

### Fundamental Reform

I would also like to suggest that you consider a broader role for the Legal Services Corporation in "maximizing access to justice."

Let's assume for the moment that the Corporation meets only a small percentage of the legal needs of the poor. The Ripon Society, for example, estimates that "the level of service is below equal access by a factor of 3.5." <sup>4</sup> One response to such a statistic is to say that the Corporation's funding must be increased three and a half-fold. However, such an expansion would only aggravate the present anomaly we have created wherein the poor, in many respects, have access to more legal services than does the great majority of the working, middle class.

In any event, whether it was once realistic to think in terms of spending another \$1.5 billion on legal services is immaterial. That is simply not where we are today. Under Gramm-Rudman, the Corporation faces the prospect of a major reduction of funding. But even if this were not the case, one would have to question whether a major expansion of publicly

---

<sup>4</sup> Kellogg, supra, at p. 11.



employed lawyers to "represent" the poor would be an efficient use of resources--or good policy.

Instead, I would ask that you consider a truly radical idea: Use the considerable intellectual and financial resources of the Corporation to assist efforts being made to increase access to justice without hiring more legal service lawyers. For, to me, "maximizing access to justice" also means fundamental reform of the legal system. Legal procedures should be simplified, so that citizens can have their minor grievances and disputes resolved without the cumbersome formalities of a full dress adversary proceeding. And, for those situations in which the aid of an attorney is necessary, a market for low cost legal services should be fostered, so that the poor, and, for that matter, the middle class, can afford to obtain legal representation.

Simplifying legal procedures should be a major goal, so that individuals, on their own, can handle uncomplicated legal matters (or, as we lawyers like to say, to appear "pro se").

As a society, we over-lawyer conflicts. Business, consumers, reform groups, and elements of the organized bar are all striving to develop alternates to the expensive, time consuming, and clumsy formalities of court proceedings. It would indeed be ironic that, just as the more advantaged were freeing themselves of the

unnecessary costs of litigation, the poor would be increasingly wedded to them.

Therefore, I would propose that the Corporation assist efforts to build alternatives to formal court action in the types of cases most often involving the poor. Various alternate dispute resolution schemes merit your close attention. So, too, does the greater use of administrative agencies to handle certain kinds of disputes. I drafted, for example, the legislation that created the New York Parking Violations Bureau, which served as a model for many other states. There has been a similar growth in the use of administrative agencies to handle housing matters.

Even courts can be made more "user friendly," to borrow a term from the computer world. In the days before legal service attorneys, courts serving poor litigants made special efforts to keep their procedures simple and understandable to unrepresented laypersons. Often, they used clerks, other court staff, or volunteers to help guide unrepresented litigants through the court process. The growth of legal aid programs has led most courts to abandon such admirable efforts. In effect, more expensive legal aid lawyers are now providing these basic services. I am certainly not advocating a return to the past when the poor often found court proceedings confusing and therefore inaccessible. Nevertheless, it does seem reasonable to ask whether, in particular types of proceedings, courts could not

accommodate the needs of those without a lawyer. Once it became apparent that an unrepresented citizen could obtain a fair hearing in such courts, legal service lawyers could--in good conscience--refer potential clients to them.

Some problems require a lawyer's assistance. I know that the Corporation has been active in encouraging greater pro bono representation from members of the private bar. ABA President William Falsgraf recently described how successful this effort has been.

The work of volunteer lawyers around the country to supplement the efforts of federally funded legal services programs represents a concrete expression of that partnership. More than 76,000 attorneys nationwide now provide legal services to the poor through organized pro bono programs. Six years ago, there were fewer than 50 organized private bar-sponsored programs in this country. Today there are more than 400.<sup>5</sup>

Interest On Lawyers Trust Accounts (IOLTA) Programs also show much promise. I understand that Corporation staff estimate that, this year, more than \$40 million will be collected under such programs.

Unfortunately, there is a finite limit to how far such efforts can go in meeting the legal needs of the poor. Much more is needed. Hence, I would also recommend that you explore the

---

<sup>5</sup> Falsgraf, "The President's Page: Access to justice in 1986," 72 ABA Journal, p.8 (Feb. 1986).

greater privatization of legal services for the poor. I say "greater" because the poor, even today, make extensive use of private attorneys. The most obvious examples are in the area of tort law, where the contingent fee gives even the penniless access to the best legal representation.

There is a potential private market for many of the legal services these different groups need. And this potential market is growing as the economics of law practice change. As Terry Hartle and I argued in a Wall Street Journal Op Ed piece on "Mediocre Lawyers" (a copy of which is attached), the rapid increase in the number of lawyers "could be a real boon to society. These new lawyers could make legal services more widely available to the average American. Many would group together, as is already happening, to create legal-service 'clinics' that provide practical help at very modest prices."

To understand the potential for privatizing legal services, one must more carefully examine the meaning of generalized poverty statistics. As we are becoming increasingly aware, falling under the poverty line (itself an arbitrary construct) means many different things. Certainly, an emancipated law student technically impoverished by tuition and housing costs has needs different from a newly divorced mother whose poverty may be a temporary status which will be lifted by adequate alimony and child support and, later, by a job or remarriage. And both are

different from those families, often female headed, caught in grinding and intergenerational poverty.

There are many things that the Corporation could do to encourage a market for these legal services, a market to which even the poor might have access. For example, you might explore the use of contingent fee awards in new areas of the law, such as child support. It is true that there are not vast amounts of money to make in such cases, but the truth is that, as the number of lawyers continues to increase, the relative attractiveness of low paying cases will increase. <sup>6</sup>

#### Implementation Issues

Before closing, I want to emphasize that my suggestions are not tied to greater spending by the Corporation. As has been proven in these last five years, ideas have power. The Corporation's research and demonstration program has already established the feasibility of many of the ideas I have mentioned today. (By the way, I was surprised--and impressed--to learn that these "experiments" also provided legal services to clients as efficiently as traditional approaches, and in some cases more

---

<sup>6</sup> I am not necessarily endorsing the present contingent fee regime. Rather, my point is that we have a system that gives the poor access to justice in one area of law, and we should consider whether it might also work in others areas.

so.) I would encourage you to continue this innovative and promising effort.

But for ideas to have power, they must become widely known. Therefore, I would recommend that you begin to disseminate the findings of your research, and that of others, to the widest possible audience. Only in that way will a case be made that there are a breadth of things that we, as a society, can do to "maximize access to justice" for the poor.

\* \* \*

Thank you. This concludes my prepared remarks. I would be happy to answer any questions that you might have.

# Put Politics Aside and Help the 'Head Start' Program

By Douglas J. Besharov  
and Terry W. Hartle

WASHINGTON — Everybody likes Head Start, the Federal Government's preschool program for low-income children. In 1980, President Jimmy Carter praised it as "a program that works." President Reagan included Head Start in the "safety net" and Presided over a 30 percent increase in funding. Now 70 years old, it serves about 450,000 children, at an annual cost of more than \$1 billion. Head Start's popularity is based on the widespread impression that it lifts disadvantaged children out of poverty by improving their school performance and future prospects. But if Head Start is judged by its ability to boost the educational achieve-

ment of disadvantaged children, the evidence is disappointing.

We should put aside political considerations that prevent us from admitting to the program's shortcomings and work to correct them. According to a recent report prepared for the Department of Health and Human Services by C.S.R. Inc., a consulting firm, Head Start can help a child make rapid improvement in intellectual skills, emotional development and general health. But long-term educational and social gains are elusive. The report, which reviewed 210 Head Start research projects, found that this initial impact disappears within two years. According to the report, two years after a child leaves the Head Start program, "there are no educationally meaningful differences" between children who were in Head Start and those that were not.

This conclusion reinforces the findings of a 1969 evaluation — a study by the Westinghouse Corporation — that found few long-term educational gains. The Westinghouse study was

criticized for the method by which it reached its conclusions, and Head Start supporters therefore ignored the critical results. Now some Head Start advocates are trying to find fault with the research techniques of the most recent study. But the persistent finding of a lack of beneficial long-term effects weakens their counterattack.

The impression that Head Start works stems largely from a report in 1980 on a Cornell University study that examined the effects of 11 preschool programs. It found that children enrolled in the programs were less likely to have failed a grade in school or to have been assigned to special education than a similar group of children who were not in the programs.

Lost in the publicity, however, was the fact that only two of the preschool programs studied were Head Start programs. The other nine were funded at significantly higher levels, and, unlike Head Start, they had a highly trained staff. In fact, the Cornell report specifically warned

of impoverished children.

They found that children with the preschool experience fared much better than those without this exposure. Later employment and post-secondary education rates were almost double for those who had been in the program. The high school graduation rate was almost one-third higher, and rest rates were 40 percent lower and teen-age pregnancy rates were almost half. In a test of functional competence, those who went through the program were much more likely to score at or above the national average than others who were not enrolled.

The answer to Head Start's problems is not to cut back. Its short-term and social benefits alone justify its continuation. As the poverty rate for children continues to climb, preschool programs are more important than ever. At present, only one in six eligible low-income children participates in Head Start, a proportion that is falling even as the poverty rate for children is climbing.

But neither should we ignore Head Start's problems. Knowledgeable observers have a clear agenda for reform: closer ties between Head Start providers and elementary schools, more parental participation, more emphasis on educational activities and more attention to preparing children for school.

Unfortunately, political realities have stymied reform. Conservatives are hesitant to propose changes lest they be accused of being anti-poor or seeking to shred the safety net. Indeed, the Reagan Administration has not even figured out how to issue a press release about the health and Human Services report without getting clobbered. Democrats fear that any admission of the program's weakness would alienate constituent groups and encourage budget cuts, especially in the wake of the balanced-budget bill. The result is an uneasy — and unstated — truce.

The real losers from this standoff are disadvantaged children. They deserve better.

## Evidence of achievement is disappointing

against generalizing its findings to the Head Start programs.

The absence of long-term benefits from Head Start does not mean that comprehensive and quality preschool programs for low-income children are not important. They are.

Consider the Perry Preschool Project in Ypsilanti, Mich. Researchers began tracking students in the 1960's to determine whether a one-year, five-day a week program, reinforced by teacher visits to the home, would make a difference in the lives

# Here Come the Mediocre Lawyers

By DOUGLAS J. BESHAROV  
And TERRY W. HARTLE

"There are a lot of mediocre judges and people and lawyers." So said Sen. Roman Hruska of Nebraska in defending G. Harold Carswell's 1970 nomination to the Supreme Court.

There was little support for a "mediocre" judge on the high court, but what about "mediocre" lawyers in private practice? What if their numbers started to climb rapidly? That seems to be the way we are heading. While a cause for serious concern, this prospect may lead to a genuine legal reform.

In the past 20 years the law—and lawyers—have assumed an expanded role in our society. Lawyers have commanded higher and higher fees: The salaries that top firms pay new lawyers doubled from \$7,500 a year in 1965 (\$22,500 in 1983 dollars) to \$44,000 in 1983. The "practice of law" is now a \$25 billion industry.

High prestige and high incomes attracted many of our brightest young people. Law school enrollments increased 100% between 1963 and 1973, and grew another 25% by 1980. The total number of lawyers doubled, to more than 630,000. In short, the market worked.

But the bloom is fading. The number of students applying to law schools declined 1.6% in 1983. This small decline was followed by a 10.4% drop in 1984. So far this year the number of applicants has fallen an additional 14%. Almost 90% of all law schools were affected, even the most prestigious. In two years applications at Columbia fell more than 18%.

The declines are steepest among the brightest students. Between 1982 and 1984 the number of top scores (46+) on the Law School Admissions Test fell 50%.

What happened? It's not simple demographics. Although the Baby Boom generation has largely passed through school, the number of college graduates is at an all-time high.

## Declining Incentives

First, law schools are caught in the general declining interest in graduate and professional education. Applications to dental schools are down 50% since 1975. Even business schools—home of the highly valued MBA—have seen a slight downturn.

There is also the perception of a "lawyer glut." New lawyers seem to be having a much harder time finding a job; and average starting salaries have reached a plateau, while the cost of attending law school is often more than \$15,000 a year.

Nonfinancial incentives have also diminished. Law no longer enjoys the respect it formerly did. And reforming society, once the primary interest of many law students, is no longer as popular.

In short, the market is again at work. Looking at the costs and likely rewards of law, many are choosing other careers.

All this may seem like good news. Most Americans think that we are an overhithous society, and that we'd all be better off with fewer lawyers. That's not what will happen. At least in the short run, we will continue to produce more lawyers at the rate of about 35,000 a year. They just won't be as smart.

There are still more applicants to law schools than there are slots (1.6 to 1 in 1984). In response to the drop in applicants, schools have simply lowered admissions standards. As a result, the academic quality of law students has begun what appears to be a long-term decline.

In 1983, law schools enrolled 56% of applicants to maintain a nationwide total of 40,000 entering students. In 1984, the figure was 62% and, if present trends continue, in 1986 it will be 71%. Bruce Zimmer, executive director of the Law School Admissions Council, predicts that by 1987 one-third of America's law schools will be practicing open admissions.

Some law schools will establish minimum standards for admission. But any standard reasonably close to recent levels will require all but the most popular to reduce their size. (Some schools have adopted plans to shrink 10% to 30%.)

Many (perhaps most) law schools will take the path of least resistance and reduce their academic standards in order to maintain enrollments. The incentives are clear. In the past decade more than 100 schools built new facilities or substantially renovated existing ones. Hundreds of new and high-salaried law professors were hired. Steady enrollments are needed to justify these expenses.

Law schools might try to keep academic standards high by admitting more marginally qualified students and then failing those who do not perform. But few schools will revert to this practice, common in the 1950s. They will be competing for one another's students. Legal education has become much more expensive. Law

*Every law student dreams of taking a case to the Supreme Court. But we don't need to bar energetic young people from the law merely because they cannot reach this pinnacle.*

students are now older; many are married, and many graduate with large debts. These students will avoid schools with high washout rates. Some schools already operate under a de facto "no fail" policy. Their mandated "curve" limits Fs to the bottom 2% or 3% of the class.

Thus, in the coming years we are likely to see an increasing number of mediocre lawyers released on an unsuspecting citizenry. An oversupply of lawyers will result in more "ambulance chaser" lawsuits and more frivolous suits by attorneys who do not have enough other work to pay the bills. Hardly a soothing thought, but probably offset by the positive effects of having more lawyers in the economy.

Solicitor General Rex Lee argues that we should let the market continue to do its work. A growing oversupply of new lawyers—with declining academic credentials—should drive down the average cost of legal services further (just as past expansions of medical school enrollments led to price competition among doctors).

The most serious weakness of our legal system is not that there are too many lawyers but that they are too expensive—and that they do the wrong things. President Carter exaggerated only slightly when he complained that "90% of our lawyers serve 10% of our people."

Legal services are beyond the reach of most Americans. Only the rich (who can hire a lawyer), or the poor (who might obtain free legal services), or the victims of a major injury (who can engage a lawyer for a contingent fee), have any real chance of obtaining legal assistance. We sorely need more lawyers—to help middle-class citizens cope with the legalisms of wills, consumer complaints, contracts, landlord-tenant battles and other problems.

And that is why the coming glut of mediocre lawyers could be a real boon to society. These new lawyers could make legal services more widely available to the average American. Many would group together, as is already happening, to create legal-service "clinics" that provide practical legal help at very modest prices.

But lawyers are not like widgets. Unlike a poorly manufactured product, incompetent lawyers are not easily driven from the market. They can spend years plying their

craft, and doing untold harm to clients. Thus, the legal profession can't be a completely free market.

To protect consumers, law graduates must prove their competency by passing a state bar examination. In 1983, the average state failure rate was about 25%. If bar examiners do not alter their standards, the declining academic quality of law students will lead to higher failure rates. In 1984, the California failure rate was 58%, up from 51% the year before. These California results are still atypical, but they could be a harbinger of things to come.

Historically, the organized bar has pressured state examiners to set high standards. It will try to maintain current standards to protect consumers. That thus restricting access to the profession will also help prop up falling incomes will not be lost on the lawyers.

Certainly, no one wants to see "incompetent" lawyers set loose on society. The bar's commitment to high professional standards should be applauded. But lawyers realize (and many legal researchers have documented) the bar examination's subjective unreliability. For example, in a well-known California study, Stephen Klein found that bar examiners agreed with one another about whether papers passed or failed only 67% of the time. More telling, when Mr. Klein gave the same papers to the examiners once more, 25% of the time they passed papers they previously had failed or failed papers they had passed.

This does not mean that standards should be radically lowered. A multistage testing procedure should be considered. New doctors are required to take a basic test before entering practice, but many elect further training and take board-certified specialty examinations. Why not lawyers? We can fine-tune standards so they weed out only the obviously incompetent.

## Competent Legal Technicians

We purposely have characterized the coming crop of lawyers as "mediocre" to dramatize their fall in quality. The word has a precise meaning: "of moderate quality." Mediocre lawyers don't belong on the Supreme Court, but they can handle the average legal issue just fine. Barring a collapse of the applicant pool, most future lawyers will still enjoy far better qualifications than their 1950s counterparts.

Law schools should also adjust. The great improvement in the quality of law students in the past 20 years encouraged most schools to upgrade the scholarly content of course work; they now train students to handle the most intricate legal problems. If every American child dreams of being president, every law student dreams of taking a case to the Supreme Court. We don't need to exclude energetic young people from the law merely because they cannot reach this pinnacle of professional performance.

With some modifications in legal education, the changing pool of law students can become competent legal technicians. This role was played by the "second-tier" law schools until the late 1960s.

Thus, the same market pressures that led to fewer law school applicants may also encourage a more widespread—and equitable—distribution of legal services. That is, if we can maintain the flow of new lawyers while assuring minimum standards of professional competence.

Yes, we face a difficult trade-off: more lawyers of declining quality vs. more access to legal services at affordable prices. Deciding where the balance should be is too important to be left to the lawyers.

*Mr. Besharov teaches law at the College of William and Mary and is an adjunct scholar at the American Enterprise Institute. Mr. Hartle is a resident fellow at the AEI.*