

IV
ADDRESS

By Helaine M. Barnett, Esquire
(Representing the class of new life members of ALI)
President of the Legal Services Corporation

*The Tuesday luncheon session
honoring new life (25-year) members
and new 50-year members
convened in the State Room of
The Mayflower, Washington, D.C.,
on May 19, 2009.
President Roberta Cooper Ramo presided.*

President Ramo: Because I see sitting here many past Presidents of The American Law Institute and some Presidents and past Presidents and future Presidents of the American Bar Association, one of the most interesting challenges that a President of The American Law Institute has is to decide which among a group as august as those who just stood up should speak for each class.

This year for me that was easy, not because each one of you could not stand and tell us about your life and career in an incredibly compelling way, because as I looked at this list I was really awestruck by whomever it was that was the chair of the Membership Committee, I guess in 1983, because it is a most amazing group. But there was one person in particular, whom I know very well, who represented a part of our profession that had never had a chance to address The American Law Institute before.

I should say before I introduce Helaine Barnett, and I want to say a little more about her, that I want to introduce her husband, Victor, who is my close friend, one of the brilliant retailers of our times and a great feminist, Victor Barnett, so we are very pleased to have Victor with us. (*Applause*) And I can say “great retailer” as a person who knows my cowboy boots and my Levi’s, so this is not just any introduction.

I got to know Helaine Barnett because as I joined the Board of Governors of the American Bar Association, the year before I became the President, we were given a great gift. No legal-services lawyer had ever sat on the Board of Governors of the ABA, just as no legal-services lawyer has ever addressed our group.

Helaine Barnett is not simply a legal-services lawyer. Let me tell you a little bit about her.

From the first day she graduated from law school and went to work, she went to work as a legal-services lawyer. Every day of her work, during her entire career, she was out on the streets of New York working for the poor of that city. She rose, as you saw, to be head of the civil division. But her brief, she thought, was much more than just taking care of the cases in front of her and the lawyers that worked for her. I am told reliably that you took your life in your hands if you

went to Thanksgiving dinner at her house, because often it ended with a tour of homeless shelters until whoever had eaten at her wonderful Thanksgiving table had agreed to support the people who had not had such elegant Thanksgiving tables. I am reliably told that one person said, “Helaine, just tell me how much you want, I will write the check now. Don’t make me go to another one.” (*Laughter*)

After 9/11, Helaine Barnett went with a very few volunteers from her office into the area near the World Trade Center, where she had been told not to go because files for poor people were there and their problems had to be resolved.

After Katrina, as the President of the Legal Services Corporation now, which she has been since 2004, she didn’t sit in Washington to try to figure out how to solve all of the problems. Her first concern was to hit the ground in Alabama, Mississippi, and Louisiana, so that she could see with her own eyes both what the lawyers needed and what their clients were going through.

It is not an easy thing in any time to be the President of the Legal Services Corporation, but in this particular time it is an amazing challenge, because there is not enough money and too much need. In addition to going to the Congress on a regular basis, and I would say if anyone has good bipartisan relationships with the United States Congress it would be Helaine Barnett, Helaine decided that we needed to document in some way exactly what the justice gap was in this country, and so under her leadership a report was issued that showed the remarkably poor state of civil justice available in our nation.

I could not be more proud to know a person that I think is one of the most courageous, effective lawyers I have ever met, and as she rises you will see, as I have told her many times, that if the Federal Trade Commission had an opportunity, they would put on the back of her suit “Deceptive Packaging.” (*Laughter*)

Helaine Barnett. (*Applause*)

President Helaine M. Barnett: Thank you, Roberta, for that most gracious and generous introduction, and thank you for the invitation to speak as a representative of the 1984 life members of The American Law Institute. I am honored to be among the leaders of the bar, the judiciary, and academia who are here today to recognize and celebrate their 25 years of membership in The American Law Institute.

Selecting a topic for my remarks to this eminent group was fairly easy for me. As you have heard, I have spent my entire career providing legal services to the poor. Equal access to justice is a fitting topic for an address to the members of The American Law Institute, as you are an organization dedicated to improving the law and the administration of justice. It is also a timely topic, as our nation experiences the worst economic downturn in recent memory.

We all see the headlines each day with the unprecedented disruptions in our banking and financial systems—entire industries in distress are facing bankruptcy, the highest rates of unemployment we have seen in 30 years, record numbers of foreclosures, and increased homelessness of individuals and families. These economic shifts have pushed many millions of Americans into poverty for the first time and put in greater jeopardy those Americans who were already struggling. The lost homes, the lost jobs, the disappearing health care have resulted in many more Americans in need of legal help to meet their basic needs.

While the need for civil legal assistance is increasing, the same economic forces have put a great strain on the resources that support legal services. Interest on Lawyers' Trust Account funds, which have been a very important source of funding for legal services, are dwindling, as interest rates approach zero, and charitable organizations and private donors are unable to contribute as much to legal aid as they have in the past.

State and city budgets for social services are being slashed, and the safety net provided by these services continues to shrink. The result is that one of our country's bedrock ideals, the principle of justice for

all, is under great pressure. All of us here as attorneys have special responsibilities to uphold this core belief in our system of government, so today I would like to speak to you about the concept of justice for all, highlight the history of how the American legal system has strived to meet that ideal, the current challenges to ensuring equal access to justice, and what we need to do as a profession and as a country to make real the promise of justice for all.

The phrase “equal justice under law” is a phrase with which everyone here is familiar. It is inscribed on the West Pediment of the United States Supreme Court building and other courthouses throughout the country. As United States Supreme Court Justice Lewis Powell noted, “Equal justice under law is not merely a caption on the façade of the Supreme Court building. It is perhaps the most inspiring ideal of our society . . . it is fundamental that justice should be the same, in substance and availability, without regard to economic status.”

The legal origins of justice for all go back to the year 1215 in the Magna Carta. The most famous and perhaps most enduring of its clauses concludes: “To no one will we sell, to no one will we refuse or delay, right or justice.”

The clause is echoed in the Preamble to our Constitution, which reaffirms, as its central purpose, to establish justice. One of our Founders, Alexander Hamilton, said “the first duty of society is justice,” and for generations we have concluded our Pledge of Allegiance to our flag, “with liberty and justice for all.”

While our country was founded on inalienable rights to life, liberty, and the pursuit of happiness, securing these rights can require individuals to use legal claims or defenses and interact with our courts, but the procedures of our legal system are complicated. The language of our laws is often opaque and subject to multiple meanings and interpretations.

The complexity of American law was what led to the founding of The American Law Institute in 1923, so that the law and the administration of justice could be improved in a scholarly and practical manner.

Complexity means that the specialized skills of a lawyer are often required to access and effectively navigate our justice system. As the Supreme Court observed in its 1932 decision in *Powell v. Alabama* [287 U.S. 45, 68-69 (1932)], “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”

But for the poor, the right to be heard with the assistance of counsel comes at a cost that is generally beyond reach, and as you know, unlike in criminal cases, there is no explicit right to publicly funded counsel in civil cases under the United States Constitution or any state constitution. Although there has been litigation in several states asserting a constitutional right to counsel in certain limited categories of civil cases, as of yet there is not a right to counsel in civil cases under the federal or state constitutions.

The federal government does fund civil legal services for the poor, to some extent, through the Legal Services Corporation, the organization I have been privileged to lead since January 2004. LSC was created 35 years ago to address the reality that the poor often have no representation in civil cases, where fundamental rights are at stake. The creation of LSC was the culmination of nearly a hundred years of efforts to provide civil legal services to poor Americans.

Turning briefly to the history of legal services in the country, the first organized effort in the United States to help the poor with their civil legal problems was begun in New York City in 1876 with the formation of the German Immigrants’ Society, which addressed the exploitation of German immigrant workers. The Society—funded solely by charitable contributions—was the predecessor to the Legal Aid Society of New York City, the nation’s oldest nonprofit provider of legal services to the poor, and where I spent my entire career prior to coming to the Legal Services Corporation.

Similar legal-aid societies were created, mainly in large cities, and then in the 1960s, President Lyndon Johnson launched a “War on Poverty,” which included the creation in 1964 of a new federal agency, the Office of Economic Opportunity, to operate various programs

designed to serve the poor and disadvantaged populations. The head of the OEO, Sargent Shriver, was persuaded to include legal services as an activity that could be, and then was, funded by the OEO.

The OEO Legal Services Program began operating in 1965 and began distributing grants to legal-service organizations across the country. Not surprisingly, there was political opposition to federally funded legal services from those whose interests were adversely affected by the poor having legal representation.

Proponents of legal services realized that in order for federally funded legal services to survive politically, it would be necessary to form an independent entity. What was recommended was the creation of a private nonprofit corporation that would receive federal funds and would distribute them to private nonprofit legal-services programs. After a few unsuccessful attempts, a bill creating the Legal Services Corporation was signed into law on July 25, 1974, by President Richard Nixon.

The Legal Services Corporation established the corporation's mission to promote equal access to the system of justice and provide high-quality legal assistance to those who would be otherwise unable to afford legal counsel.

To secure Congressional support for the creation of LSC, the Act also included certain restrictions on LSC to prohibit activities likely to cause controversy. Organizations funded by LSC were prohibited from participating in political and organizing activities, litigation concerning nontherapeutic abortions, and proceedings involving desegregation of public schools or military service.

Debate over the LSC flared up during the 1980s, when President Ronald Reagan proposed to eliminate LSC and replace it with grants to states. A bipartisan group of LSC supporters in Congress, led by Senator Warren Rudman of New Hampshire, was able to resist efforts to abolish LSC. Leaders in the American Bar Association and state and local bar associations urged Congress to oppose policies hostile to LSC.

Although LSC was not eliminated, Congress cut its funding by 25 percent in 1982, which led to the closing of many legal-services program offices and the layoff of large numbers of staff. In response to this greatly reduced funding, LSC programs began diversifying their funding streams. The most important new funding source was the creation of Interest on Lawyers' Trust Account programs, which first began in Florida in 1981 and today exist in every state and the District of Columbia. As I mentioned at the outset, because federal interest rates are at historic lows, LSC estimates that IOLTA funds provided to our programs will drop significantly this year.

Turning to the early 1990s, funding by LSC began to increase, and in 1994 LSC received its highest appropriation ever, \$400 million. But soon thereafter LSC became a target for elimination by Congress and funding dropped to \$278 million in 1996. LSC survived with the help of friends and bipartisan support in the Congress. ALI President Roberta Ramo, then President of the ABA, was critical in obtaining the support of New Mexico Senator Pete Domenici, who fashioned a compromise that restored funding and included additional restrictions on how legal-aid programs may use their funding.

Today we operate at a budget of \$390 million. The current budget provides grants to 137 independent legal-aid programs, with over 923 offices throughout the country, which handle more than 900,000 cases a year. LSC is committed to ensuring that the programs it funds provide high-quality legal assistance in conformity with the mandates of Congress.

LSC has asked Congress for \$485 million in fiscal year 2010, and the Obama Administration has proposed funding at \$435 million in 2010. In March, Senator Tom Harkin of Iowa introduced legislation that would authorize a funding level of \$750 million annually for a five-year period. Senator Harkin and the President also proposed to remove some of the restrictions on the use of the funds.

Funding increases are especially crucial at this time because history shows that economic downturns affect the poor disproportionately

and add to the pressures on the nation's public health and safety, child welfare, housing, and job programs.

But despite the many challenges, the history of civil legal services in the United States also includes important accomplishments. The biggest accomplishment was expanding federally funded legal services from a handful of urban programs to a system of programs providing civil legal services in every county in the United States, as well as in the territories.

The litigation brought by legal-aid lawyers also created important new rights. Two prominent examples are the Supreme Court case of *Shapiro v. Thompson* [394 U.S. 618 (1969)], which struck down residency requirements in public assistance, and *Goldberg v. Kelly* [397 U.S. 254 (1970)], which established the right to due process, including notice and an opportunity to be heard, when government benefits are denied, reduced, or terminated.

It is not just the landmark cases that matter. It is the millions of individual cases that attorneys and legal-aid programs handle day after day. These attorneys help to resolve pressing problems in the lives of their clients, as when they assist a family with children from being evicted and falling into homelessness; when they save a battered woman from a violent and abusive relationship; when they help a young mother maintain custody of her child or gain access to necessary health care or food; when they prevent a grandmother from losing her home to foreclosure; and when they overturn an improper denial of disability benefits.

The work of legal-aid attorneys is critical to their clients' economic and personal survival and that of their families. Our clients include the most vulnerable in our society, who have nowhere else to turn. They are the children, elderly, survivors of domestic violence, persons with disabilities, families facing foreclosure and evictions, the uninsured, the unemployed, low-wage workers, homeless families with children, returning veterans and their families, Native Americans on reservations, and migrant farm workers.

Legal-services programs make a meaningful difference in the lives of their clients by helping them maintain the basic necessities of life and obtain stability, security, and self-sufficiency. By helping these clients, legal-service programs contributed to the well-being of communities throughout the states.

What are the current challenges? While LSC encourages its grantees to leverage the federal dollars with other sources of funding, LSC is the largest single source of funding for civil legal aid. Given the millions of low-income individuals and families in need, the adequacy of funding for civil legal aid remains a problem, especially in the midst of a severe economic recession. The economic crisis has resulted in more Americans meeting the definition of poverty and therefore more Americans eligible for LSC-funded assistance.

To be eligible, a person can earn no more than 125 percent of the federal definition of poverty, which is by no means generous. For a family of four this year, that means an income of no more than \$27,563. Before the recession began, almost 51 million Americans were eligible for LSC-funded services. This figure includes 17.6 million children living in poverty, or about 24 percent of the nation's children. Looking ahead, based on previous economic downturns we can expect the eligible population for LSC-funded services to increase by the end of 2009 to at least 62 million.

The need for LSC-funded legal service greatly exceeds the supply. As Roberta Ramo referred to, in 2005 LSC conducted an extensive study of the gap between the need for legal assistance and available resources and issued a report entitled, "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans." The report defined the problem facing the nation: shape the dialogue for LSC and the Congress, and help bring about the higher levels of funding.

The LSC "Unable to Serve" study, the first comprehensive national statistical study ever undertaken, demonstrated that there is a significant shortage of civil legal assistance available to low-income Americans. It established that for every client who receives service

from an LSC-funded office, one applicant is turned away, indicating that 50 percent of potential clients requesting assistance from an LSC grantee, or close to one million people, were turned away for lack of resources.

Considering that LSC grantees were instructed to count only the potential clients who actually came to an LSC office, the need is even greater than the study indicates. Further, state civil-legal-needs studies from at least 10 states indicate that the percentage of individuals who are unable to obtain assistance is closer to 80 percent.

Obviously, current economic conditions are widening the justice gap. As more Americans lose their jobs and fall into poverty and as millions face the effect of the subprime mortgage crisis, programs are besieged with increased requests for assistance. In foreclosures alone, the numbers are vast. Since the crisis began, almost five million foreclosures have occurred, and many millions more are predicted in the next few years, with estimates of foreclosures as high as one in eight homes.

Many low-income Americans have been the victims of predatory lenders. Others are renters who are being evicted because their landlords are in foreclosure, and still others are now facing foreclosure because of the loss of employment.

Foreclosures are an area where legal assistance is especially important because of the complex state and federal laws involved. Legal-aid programs throughout the country are working with lenders and other public-interest groups to find ways to prevent home foreclosures by negotiating solutions to permit families to remain in their homes or by asserting legal protections in court.

Additional issues relating to the recession include unemployment-insurance claims, late payments on medical bills and on credit cards, and delinquent child-support payments.

Another unfortunate effect of financial strain is an increase in domestic violence. The most effective way to reduce domestic violence through a public service is to provide the victims access to legal aid.

Natural disasters also increase the need for legal services. We saw that most dramatically in 2005, after Hurricanes Katrina and Rita, and again in 2008, after Hurricanes Ike, Gustav, and Dolly. Once the immediate dangers from hurricanes, tornadoes, floods, wildfires, and the like are over, victims of natural disasters need help with resolution of landlord-tenant disputes, temporary-housing issues, consumer fraud related to insurance, home-repair and contractor disputes, health problems from environmental issues, and increased family-law issues from disaster-related stress. These civil legal problems linger long after a disaster, and providing civil legal assistance is a critical part of disaster-recovery efforts.

Now for the call for action. The current challenges facing our country mean that the ideal of justice for all is more important than ever and requires action from all of us. The most significant group that can help, of course, is the bar. The bar has played a critical role in LSC's creation and survival and has been the strongest supporter for increased funding.

It also plays an important role in providing pro bono legal representation to the poor. Nearly a hundred thousand attorneys provide pro bono services with LSC-funded programs, but with one million lawyers in this country, there is capacity to do more. Many attorneys are not engaged in organized, documented pro bono. That means we have the potential to bring in thousands of lawyers to help expand access to justice.

In one aspect, the economic downturn provides an opportunity. As you know, the headlines in the legal world in the last few months have been dominated by stories of layoffs at major law firms, with many firms deferring a part of or entire incoming classes of associates for a year. We are encouraging legal-aid programs to reach out to the deferred associates and hopefully involve them in the delivery of legal services. This would add to the capacity of programs to serve more clients and provide these new attorneys with important professional development and a likely lifelong dedication to doing pro bono work.

The courts are another important partner, especially with the enormous growth in the number of pro se litigants. Because we are not able to provide legal services to all the eligible clients who need it, more and more poor Americans represent themselves. Although some individuals actually choose to go to court without counsel, most pro se litigants have no choice.

This is another area where the economic downturn has had a big impact. As *The New York Times* recently reported, courthouses across the country are seeing double-digit increases in the percentage of civil cases where individuals are representing themselves. We need to work with the courts and to find ways to support pro se litigants, encourage court-required and supervised mediation where appropriate, and provide the information and assistance unrepresented litigants need to effectively have to navigate the court system without a lawyer at their side.

The judiciary is also a leader in one of the most important developments in legal services in the last decade, the formation of state access-to-justice commissions. Access-to-justice commissions bring together the judiciary, the bar, legal-aid providers, law schools, business and civic organizations, and other stakeholders to assess the civil legal needs of low-income individuals and develop a statewide strategic plan to address those needs. They are often created by the supreme courts of the states, often in conjunction with the state bar.

There are now 25 states with active access-to-justice commissions, with plans to create commissions in additional states. As the involvement of judges is critical to all access-to-justice commissions, the continued leadership of the judiciary in this effort is of utmost importance.

Another significant development in the last decade has been the expanded and creative use of technology. Technology increases access to legal information for those unable to obtain legal assistance, enhances program efficiency, and improves services to a greater number of clients. Since 2000, LSC has encouraged innovations through a Technology Initiative Grant program funded by Congress. It supports

developments such as statewide legal-services websites that provide information, automated forms, assistance to low-income workers, and filing applications for the Earned Income Tax Credit. Technology has made possible centralized intake and advice systems and enhanced services to clients in remote areas through video conferencing.

The nation's law schools also play an essential role in providing legal assistance to the poor. Law-school clinical programs are the sources of thousands of hours of legal assistance to our poor clients. Other law schools provide pro bono services as part of mandatory requirements at some law schools. Fellowships, internships, and externships with legal-services organizations also give students opportunities to contribute. These programs are an important means of helping to address the justice gap. The programs also expose law students to the fulfilling experience that comes with representing the disadvantaged.

Law schools have an important mission to instill and nurture an ethic of public service among their students so that, no matter what type of career their students ultimately pursue, they carry the public ethic throughout their professional lives. By training lawyers who embrace the responsibility to serve people without means and to ensure equal access to justice, the law schools play an important part in moving us closer to the ideal of justice for all.

There may also be a role for The American Law Institute. The various Restatements, including the Restatement Third of the Law Governing Lawyers, do not address the professional responsibility of lawyers to promote pro bono services. Given the critical role of lawyers in addressing the justice gap, the Restatements appear incomplete without taking on this issue. As the ALI charter gives it a mission to ensure the law's "better adaptation to social needs," the ALI may wish to consider the inclusion of a statement on the central role of the legal profession in serving individuals without means and upholding equal access to justice for the poor.

In closing, that ideal of justice for all, for one of our Founders, was of the highest importance. In his first inaugural address, Thomas

Jefferson listed what he called the “essential principles of our government.” The very first was equal and exact justice for all.

When I reflect on what motivated me to be a legal-aid lawyer decades ago and remain in this endeavor as long as I have, it is that ideal and my belief that providing civil legal aid to the poor is central to fundamental fairness, due process, and the equal protection of the law. This ideal recognizes the importance and value of giving a voice to those not able to represent themselves and whose pressing concerns are not always foremost in the minds of the policymakers and the public.

In order to foster respect for the law, we must ensure that no segment of society is excluded from access to justice and that the ability to resolve civil legal problems is not based on financial status, for how we respond to the needs of the most vulnerable among us at their time of greatest needs is one of the ways by which we will be judged to be a civilized society.

As Judge Learned Hand aptly noted, “If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice.”

If we are serious about our commitment to equal justice for all, we need the help of everyone in this room: The judges, the lawyers, the law-school deans and professors, the business leaders, and those involved in local and state government. We need more voices championing the need for and the value of equal access to justice. We need your voices for all those who are not, cannot be at the table where policy and administrative decisions are made, so that access to justice and the provision of civil legal assistance to the poor are part of every discussion involving the justice system. This is an opportunity to show that equal justice for all is a shared value, even more important in these times of economic crisis.

We must insist on an ongoing and robust federally funded legal-service program and work together to develop effective pro se initiatives, expand the efficient use of technology, support enhanced pro bono assistance, secure financial assistance from state and local

governments and private funders, and create and strengthen successful partnerships and strategic collaborations, such as medical-legal partnerships that improve health outcomes of low-income children, in order to meet the civil legal needs of low-income families and make justice available not just to those who can afford to pay for it.

All of us here today have the privilege of living in this great democracy and serving in a profession that enables us to preserve and improve that democracy. We must embrace the responsibility that comes with those privileges to ensure that justice is not just for some but truly for all. Thank you. (*Applause*)

President Ramo: It is my great honor, having heard you, Helaine, to present on behalf of The American Law Institute your commemorative plaque—each of you will receive these—welcoming you to the life class. Thank you very much, Helaine, and thank you for everything you do. (*Applause*)

Ladies and gentlemen, have a leisurely 10 minutes, do whatever you want, and then please appear at 2:00 o'clock sharp. We have other business to take care of. I'm using my watch. You have 10 minutes to get there.