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# Is America Over-Lawyered

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# ADDRESSES

## IS AMERICA OVER-LAWYERED?\*

SHIRLEY M. HUFSTEDLER\*\*

OUR INALIENABLE LIBERTIES, our productivity, and our creativity are being crushed by avalanches of paper, blizzards of lawsuits and floods of rules and regulations unleashed by government bureaucrats. These unnatural disasters are the creation of lawyers. Rid us of lawyers and no legislature would have a caucus. The courtrooms would be empty, and the halls of all of those pesky governmental agencies would be silent. When we thus delegalize America, our national ills will subside.

The symptoms of our national distresses are evident: inflation, unemployment, declining productivity and huge private and public deficits which indicate an economy in trouble. The quality of public education is deteriorating at all levels. The litigation explosion has clogged the arteries of the justice system. Crime levels are higher than public tolerance will endure. Respect for American institutions is crumbling, and we do not have control over our own lives.

We are "overrun by hordes of lawyers, hungry as locusts." America's law schools are manufacturing more of these "locusts" faster than Med flies breed Med flies. All we need do to get America moving again is eliminate lawyers and lift the government off our backs.

The best way the federal government can serve the nation is to diminish itself. "[T]he Government can do more to remedy the economic ills of the people by a system of rigid economy in public expenditure than can be accomplished through any other action."<sup>2</sup> "[G]reater and greater accumulations of capital [are justified] because . . . therefrom flows the support of all science, art, learning, and the charities which minister to the humanities of life, all carrying their beneficial effects to the people as a whole."<sup>3</sup> The path to prosperity is a balanced federal budget, sharply reduced income taxes,<sup>4</sup> and refunds and credits for businessmen, as "an

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<sup>1</sup> Howard, *A Litigation Society?*, WILSON Q., Summer 1981, at 98-99.

<sup>2</sup> CALVIN COOLIDGE 1872-1933 at 48 (P. Morgan ed. 1970) (quoting reprint of Calvin Coolidge's Second Annual Message to Congress delivered Dec. 3, 1924).

<sup>3</sup> Herring, *Politics, Personalities and the Federal Trade Commission II*, 29 AM. POL. SCI. REV. 21, 22 (1935) (quoting from the Boston Herald of Nov. 28, 1920).

<sup>4</sup> A. MELLON, TAXATION: THE PEOPLE'S BUSINESS 17-21 (1924).

inspiration to trade and commerce.”<sup>5</sup> “The chief business of the American people is business.”<sup>6</sup> The Federal Trade Commission (FTC) is “an instrument of oppression and disturbance and injury instead of a help to business.”<sup>7</sup> Those governmental instruments of oppression must be restricted, and the FTC must no longer be used as “a publicity bureau to spread socialist propaganda.”<sup>8</sup> These observations were made by the President of the United States and members of his administration. The President was Calvin Coolidge.

If we dismantle the federal government and curtail lawyers, can we not return to the halcyon days of domestic tranquility, burgeoning economic growth and the comforting sense of community that pervaded America in the good old days of the Coolidge Administration?

The average American in 1925 had little personal contact with crime, and none with the federal government. The tax burden was negligible. Consumer debt was virtually nonexistent. Unemployment was not a problem, productivity was soaring, and capital formation reached record heights. We respected our churches, our schools and our local government. The divorce rate was low, church attendance was high and we valued our school teachers. Except for a few manufacturing cities, the air was unsullied and the water was pure. We were a country of small towns, large rural areas, wide open spaces and few major cities.

The flip side of the 1925 coin was grim. Disparities in the conditions of rich and poor were immense and growing. Working conditions in factories and plants were squalid to appalling. The average work week was fifty hours, and in many industries, much longer.<sup>9</sup> In the southern textile mills, women and children worked seventy hours per week. The pay scale for a skilled workman was twenty-five cents per hour; skilled women received seventeen cents per hour, and children a pittance.<sup>10</sup> Workers injured or killed on the job had no recompense. Absent family support, old age meant destitution. Organized labor was paralyzed and strikes were routinely broken, often by violence. The average American had no more than an elementary school education. Farmers were suffering acute depression. Consumer debt was non-existent because most Americans could not afford to buy the products they helped to manufacture. Property crime

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<sup>5</sup> *Id.* at 20.

<sup>6</sup> A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER, 1919-1933*, 57 (1956) (quoting speech by Calvin Coolidge to the Society of American Newspaper Editors on Jan. 17, 1925).

<sup>7</sup> Herring, *supra* note 3, at 21 (quoting Jan. 6, 1931 address by W. Humphreys, then Chairman of the Federal Trade Commission, to the Institute of Statesmanship).

<sup>8</sup> *Id.*

<sup>9</sup> BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES* 168 (1975).

<sup>10</sup> Some workers earned even less than that. See Blanshard, *How to Live on 46 Cents a Day*, 128 *NATION* 580 (1929).

was rare because the average family owned nothing worth stealing. Crime was not slumbering however, because with prohibition came bootlegging and the development of organized crime. America was ghetto-ized. Black Americans were systematically deprived of their basic civil and personal rights. Although women had finally won the right to vote five years earlier, they were virtually barred from higher employment as well as from many universities and colleges.<sup>11</sup> Their ability to control or manage property was very restricted.<sup>12</sup>

According to the dominant economic theory, increased productivity of workers, the ready availability of capital and very high profits should have resulted in higher wages and lower prices for goods. The theory failed because wealth was concentrated in very few hands.<sup>13</sup> Those captains of industry, purring contentedly in gentlemen's clubs and in the marbled halls of Washington, were oblivious to the ominous rumblings of discontent and the portents of economic disaster rippling through the country. The economic and political structure collapsed in the crash of 1929.

Even a brief retrospective view of 1925 might appear completely irrelevant to 1983. Very few Americans would want to return to the real world of 1925, if it were possible. The Coolidge Administration has regained currency because many of the policies of that administration are being proposed or launched today as solutions to the issues of the 1980's. The prescriptions for economic vitality adopted by the Coolidge Administration were disastrous in 1925, and they have not improved with age. Nevertheless, the call to return to the good old days, to rid us of the shackles of government and the plague of lawyers has great popular appeal. In times of national anxiety, the yearning for some bygone simpler age and for mythological answers to our dilemmas becomes very attractive.

We Americans are attached to nostalgia, but not to history. History teaches us that no golden age ever existed. We are even fonder of myths, by which I mean beliefs in assumptions that are not objectively true, but are treated as if they were. The most enduring myths are those which assure the dominant members of a society that their powers are secure and just, and that tell the subordinate members of the society why it is not only their destiny, but also their duty, to remain where they are. Into this category falls the belief in the divine rights of kings, and, of much greater longevity and importance, beliefs in racial, ethnic and gender

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<sup>11</sup> W. CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970*, 90-111 (1972).

<sup>12</sup> See B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 592-618 (1975).

<sup>13</sup> One-third of the personal wealth in the United States was concentrated in the richest 1% of Americans in 1925. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 471 (101st ed. 1980) [hereinafter cited as *STATISTICAL ABSTRACT*].

superiorities and inferiorities. Ancient, even in Shakespeare's time, is the belief that lawyers are the causes of the ills with which they deal. Still others have a distinctly American flavor: Poor people have no money because they are lazy. Giving poor people money corrupts them. Giving rich people money is not corrupting because the rich do not suffer the character disorders of the poor. The American man is a rugged individualist, fiercely independent, who, when released from artificial fetters, will overcome all obstacles by Yankee ingenuity and true grit. We recognize him immediately: He is Gary Cooper in *High Noon*, Fess Parker in *Davy Crockett*, and John Wayne in dozens of films since *Stagecoach*.

No really good myth exists without some elements of plausibility. Man would never have believed that the world was flat, if it did not so appear to the earthbound. Men would not have believed that women are men's intellectual inferiors if women had consistently excelled in intellectual pursuits. Whites could not have believed that blacks were fit only for menial tasks if the majority of the blacks were employed in high level jobs. In each of these aspects of human affairs, we can observe the destructive power of myths to generate their own kind of reality. If a child is told early enough and often enough that he or she is inferior and if the resources to develop the mind and spirit of that child are withheld, the intellectual yield will be as barren as the mythology predicated, regardless of the treasures with which the child was born.

Myths endure not only because they comfort the powerful, by easing any residual pangs of conscience, but also because they provide some balm to the feelings of those who are their victims. Belief in the myths shields them from responsibility for their own lives. For instance, 19th century women did not develop ulcers worrying about whether they should have gone to law school.

The analgesic effect of mythology prevents the believers from addressing the real issues and from seeking means for resolving those problems. An illustration of this phenomenon is the currently fashionable myth that the social and economic programs created by the federal government, beginning with President Roosevelt's New Deal, have been expensive failures. The federal government cannot do very much that is right in any of these areas, and what little has been accomplished could have been done better and cheaper by the private sector. Like any myth worthy of comment, this one has elements of plausibility. Some of those ambitious programs, beginning with the New Deal, did fail, or at the least, their side effects outweighed their benefits.<sup>14</sup> Reliance on the myth justifies massive destruction of social and economic legislation. It also obscures some truly remarkable history—the extraordinary success of an amazing variety of ambitious programs which have become so much a part of the

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<sup>14</sup> See generally 3 A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT: THE POLITICS OF UPHEAVAL* (1960).

American way of life, that most believe that they came to us on the Mayflower.

Here are just a few of those programs: social security, unemployment compensation, medical care for the aged, worker's compensation, aid to families with dependent children, federally insured bank deposits and home mortgages, crop insurance, financial support for every level of education, fair labor standards, rural electrification, interstate highways, aid for medical and scientific research—the list can easily be amended.

Every one of these legislative programs was enacted and funded to address very real problems. Their success can be readily documented. Their collective impact was a significant factor in the immense changes in the American landscape, both literally and figuratively, in the five decades since 1932. Federal programs, their counterparts in the several states and cooperative programs between federal and state government worked tremendous changes for the better. Millions of Americans who had been ill-clothed, ill-housed, ill-fed and ill-educated in 1925 were thereby enabled to enjoy a good education, earn a modest affluence and have the essential protections from the privations of illness, injury, old age and death. In 1940, the median education of adults, 25 years or older, was 8.6 years.<sup>15</sup> By 1980, the median increased to 12.5 years.<sup>16</sup> Significant progress was made on the path toward a more just society for all Americans.

I do not imply that all of this progress was attributable to governmental programs, or that racial, gender and social justice has been accomplished. History does establish, however, that governmental programs were vital elements in all of these improvements and that income transfers accomplished through the federal government more equitably redistributed income than Americans of 1925 would have dreamed possible.<sup>17</sup>

Current dissatisfactions with government and with lawyers are, in major part, a reflection not of our failures but of our successes. For almost the entire span of human history, birth, illness, unemployment, poverty, hunger and pain were believed to be an inherent part of the human condition. Human beings, individually and collectively, could then do little or nothing to ameliorate these distresses. We accepted each as an expression of Divine Will. Yet, in the last fifty years, humankind has intervened in all of these aspects of life. Human beings, acting individually and through private and public institutions, can and have modified all of these aspects of life. In shifting the responsibility for alleviating the ills of life to ourselves and to our government, we have changed our basic conceptions about the human condition, and have thereby turned life's misfortunes into injustices. Prayers for the relief of our distresses are increasingly addressed to the government, including the judiciary, rather

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<sup>15</sup> Kirp, *Education*, NEW REPUBLIC, Mar. 31, 1982, at 31, 33.

<sup>16</sup> *Id.* at 33.

<sup>17</sup> STATISTICAL ABSTRACT, *supra* note 13, at 450-53.

than to the Creator. We are angry if our prayers are not answered.

Millions of Americans' prayers were answered during the three decades following the end of World War II. During this time the United States enjoyed the greatest and most prolonged period of economic surplus in the history of the world. Despite the Korean and Vietnam wars, those surpluses permitted both the private sector and government to satisfy many of the rising expectations and to fuel even greater hopes. Today many Americans who grew up in that era have not experienced the smallest sting of economic deprivation. Others have always been left out, but their hopes quickened during the boom, and their justifiable disappointments are constantly refueled by the riches paraded before them on television.

The events and the factors that permitted America's extraordinary period of prosperity could not be extended indefinitely. For example, American energy prices had been artificially depressed far below the world market for decades; at the same time we were using one-third of the world's entire energy supply.<sup>18</sup> The private capital and the government subsidies that permitted millions of Americans to move to the suburbs and the exurbs generated intractable problems for the inner cities. The massive movement of rural people to the cities, and the movement of urban populations to suburbia, compelled the development of increasingly complicated supply systems to serve the needs of the urban population. Those same forces created new kinds of ghettos—neighborhoods and even cities, segregated by race, ethnicity, income and age.

Public and private institutions, formal and informal, that were adequate to resolve our disputes and our disaffections have not been able to keep pace with the convulsive changes of our society during the last fifty years. During that time, we have survived three major wars and multiple revolutions in demographics, science, technology, education, transportation, economics, urban structure, international affairs and personal and social mores. Although life for most Americans is much better today than it was in 1925, it is also far more complicated.

For example, in 1925 a village elder could successfully arbitrate a controversy between neighbors when one built a wall cutting off the light from another's home. Today, when the disappearance of light from a home is caused by a power outage in a public utility grid, or by a quarrel between a customer and a public utility's computer, the village elder is every bit as helpless as his neighbor to work out the problem—unless the elder is also a lawyer and, perhaps, a utility specialist as well.

Although we pine for the simple life and want freedom from government meddling, we also want electric lights, television sets, computers, telephones, indoor plumbing, fresh produce, jet aircraft, high-powered motor cars, quality education through graduate school, employment opportunities, leisure and protection from crime, illness, pain, old age and death. We want protection from our enemies at home and abroad. We

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<sup>18</sup> *Id.*, at 916.

want an unpolluted environment, pure water and clean air, urban parks and wilderness areas. We want due process, redress of our grievances, freedom and justice for all. However, we do not want to pay taxes or endure governmental regulations, red tape, lawsuits or lawyers. Even in the headiest days of our prosperity, our needs and wants could not be met by our resources. Leaving aside the wants stimulated by an excessive and unhealthy devotion to consumer goods, strong and wealthy government is essential to supply our basic needs, both quantitative and qualitative. Equitable distribution of essential goods and services cannot be accomplished by low taxes, a passive government, no legislation and no regulation.

Dismantling the federal government, slashing taxes and undertaking wholesale destruction of the regulatory process are mythical solutions to our very real problems. None of these "remedies" will simplify intrinsically complicated issues and institutions. Destroying social welfare programs cannot make the aged any younger, the poor any richer nor the victims of ethnic, racial and gender discrimination any freer from the disabilities engendered by prejudice. Such actions are counterproductive because they not only hurt the most vulnerable members of society, they also temporarily conceal the real etiology of our problems.

Thus, a blanket indictment charging that the federal government produces too much paper work, snarls us in too many regulations and charges us too much money should be subject to a motion to dismiss. No more useful is the charge that we have too many lawsuits and too many lawyers.

The federal government does produce too much paper work. Excessive paper work is a by-product of every large, complicated institution, public and private. It is also a by-product of the printing press and, more recently, of simple means of producing inordinate copies of almost everything. Local governments, private businesses, universities and colleges and every other large institution grind out more forms, questionnaires, reports and other paper work than does the federal government. That fact does not excuse the governments, but it does put the paper work burden into a more sensible perspective. Similar observations can be made about excessive rules and regulations.

Accepting the premise that excessive paper work and regulations are bad does not raise an inference that the absence of any paper work or any regulations is good. It is simple to obtain a consensus that we litigate too much. But infinitely more difficult—and much more important—are the questions: To whom should tickets of admission to the courts be given and from whom should the tickets be withdrawn? Why?

Here is one illustration where admission to the courts was critical. In 1980, America had more than 3.5 million school-age children who could not speak any English or who were not proficient in English.<sup>19</sup> The educa-

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<sup>19</sup> See 45 Fed. Reg. 52,052-53 (1980) (codified at 34 C.F.R. part 100) (citing to estimates by National Institute of Education and National Center for Educational Statistics).



tional needs of these youngsters, and children like them, had not been adequately addressed for years in many instances and for decades in others. "Bilingual education" has long been the subject of great controversy. Apart from busing and abortion, no other topic seems to generate more emotional volatility.

It is impossible in brief compass to give more than the sketchiest of outlines of the origins, the crosscurrents and the players in the tangled web of bilingual education. Even the term "bilingual education" is misleading. "Bilingual education" is more multihued than Joseph's coat. Sometimes the term means instruction in both English and a second language, sometimes it means instruction in English for youngsters not proficient in English to help them learn the language and, on still other occasions, it means some combination of these and other approaches.

I have an unusual set of perspectives about this controversy because I was directly involved in it as a federal appellate judge and then a Secretary of Education. My judicial role in bilingual education began in 1973 in a now-famous case entitled *Lau v. Nichols*.<sup>20</sup> The parents of non-English speaking children of Chinese ancestry brought a class action on behalf of their children in the Federal District Court in San Francisco against officials of the San Francisco School District. They were seeking relief against unequal educational opportunities resulting from the School District's failure to establish a program to teach their children effectively. The plaintiffs relied upon both constitutional and statutory grounds, claiming that the failure to provide these youngsters with equal educational opportunity violated the equal protection clause of the fourteenth amendment and the Civil Rights Act of 1964.<sup>21</sup> When the court denied relief, plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit. A three-judge panel, one judge dissenting, denied relief. There was a request for the court to take the case en banc. After intensive debate within the court, the majority refused to take the case en banc.<sup>22</sup> I filed an opinion dissenting from the refusal of the court to take the case en banc in which I expressed my disagreement with the panel on the constitutional issues.<sup>23</sup>

The disappointed plaintiffs filed a petition for a writ of certiorari with the Supreme Court of the United States. When the petition for certiorari was filed, the United States intervened and the Solicitor General asked the Supreme Court to hear the case. The Supreme Court took the case and unanimously overturned the decision of the Ninth Circuit.<sup>24</sup> The Supreme Court never reached the constitutional questions because the

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<sup>20</sup> 483 F.2d 791 (9th Cir. 1973), *rev'd*, 414 U.S. 563 (1974).

<sup>21</sup> 42 U.S.C. § 2000d (1976).

<sup>22</sup> 483 F.2d at 800.

<sup>23</sup> *Id.* at 805 (Hufstedler, J., dissenting).

<sup>24</sup> 414 U.S. 563 (1974).

Court decided that the Civil Rights Act of 1964 provided a remedy through the regulatory powers of the former Department of Health, Education and Welfare.<sup>25</sup> That Department had published guidelines compelling school districts which received federal aid to rectify the language deficiency of students who could speak no English or had little English proficiency.<sup>26</sup>

The Supreme Court observed:

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.<sup>27</sup>

The Court did not attempt to lay down the specific remedy for the language difficulties of the youngsters. The Court did state that:

Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others. Petitioners only ask that the Board of Education be directed to apply its expertise to the problem and rectify the situation.<sup>28</sup>

After the Supreme Court decided the *Lau* case, the Office of Civil Rights, then located in the Department of Health, Education and Welfare, promulgated a series of additional and more detailed guidelines that became known as the "*Lau* Remedies."<sup>29</sup> The *Lau* Remedies are poorly drafted and very difficult to understand. Nevertheless, on the strength of those remedies, the Office of Civil Rights negotiated dozens and dozens of settlements with various school districts to bring them into compliance with those guidelines, on pain of losing federal funds if they failed to do so.

Some school districts balked. That difficulty led to another round of lawsuits, among them, a case in Alaska. The Alaskan court issued a decree compelling the Office of Civil Rights to produce, with all deliberate speed,

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<sup>25</sup> See 42 U.S.C. § 2000d-1 (1976) (giving Department of Health, Education and Welfare the authority to promulgate regulations prohibiting discrimination in federally assisted school systems).

<sup>26</sup> 35 Fed. Reg. 11,595 (1970).

<sup>27</sup> 414 U.S. at 566.

<sup>28</sup> *Id.* at 565.

<sup>29</sup> Task Force Findings Specifying Remedies Available for Eliminating Past Educational Practices Ruled Unlawful under *Lau v. Nichols* (1975) (unpublished, but widely distributed to school officials and the general public). For a description of the "*Lau* Remedies," see 45 Fed. Reg. 52,052, 77,898-901 (1980) (codified at 34 C.F.R. part 100).

a set of bilingual education regulations by following statutorily-mandated rulemaking procedures.<sup>30</sup>

When I traded in my judicial robe for my cabinet hat, the controversy was heating up. Lobbying groups on every side of the opinion spectrum were becoming very vocal in their advocacy before all levels of government, state and local, and in every medium of public expression from soap boxes in the park to nationwide television. Amidst the uproar, it was still necessary to meet the long overdue requirement of the judiciary to produce regulations.

Following the statutory procedure for rulemaking, on August 5, 1980, the Department of Education published a draft in the Federal Register of the proposed regulations for public comment.<sup>31</sup> Public hearings in six states were set to permit wide public commentary on the proposed rules. Hundreds of pages of testimony were taken. In addition, the Department received thousands of letters, both responsible and irresponsible, commenting upon and criticizing the proposed regulations.

The purpose and the policy of the regulations are simple to state, but they were very complicated to draft. The policy was to require school districts to teach non-English proficient youngsters English as quickly as possible, and, while the children were learning English, to give them instruction in required courses in a language they could understand.<sup>32</sup> Debate raged among educators about the best methodology for teaching non-English proficient youngsters.<sup>33</sup> Moreover, we did not have an adequate reservoir of teachers who could speak any language other than English, and in some language groups, it is almost impossible to find any teacher who can communicate with the children. The determination of the entrance and exit criteria for non-English proficient children proved very troublesome. To mention only one of the problems: Non-English speaking children enter our public schools for the first time at every grade level from kindergarten through grade twelve. Entrance criteria to a bilingual program obviously needed to be very different for a kindergarten than for an eleventh grader. Accordingly, the proposed regulations provided a number of different alternatives available to school districts in trying to reach these children.

As soon as the draft regulations were published, the response was explosive.<sup>34</sup> Associations representing minority groups were furious because they perceived the proposed regulations as too weak. Many senators, congressmen, governors, chief state school officers, school board

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<sup>30</sup> Northwest Arctic School Dist. v. Califano, No. A77-216 Civ. (D. Alaska Sept. 29, 1978) (consent decree).

<sup>31</sup> 45 Fed. Reg. 52,052 (1980).

<sup>32</sup> *Id.*

<sup>33</sup> See 45 Fed. Reg. 77,898, 77,899-900 (1980).

<sup>34</sup> See, e.g., Middleton, *Officials Talk Down Bilingual Education Rules*, 66 A.B.A. J. 1504 (1980).

representatives, teachers, parents and others complained bitterly that the Department was improperly intervening in matters that should be left solely to state and local control. Few of these critics knew that the Department was complying both with the commands of federal statutes and the interpretation of those statutes by the United States Supreme Court and lower courts. Many of the same critics at the state level in substance complained: "Don't send us regulations, send us money." It seemed that almost everybody had an opinion, although few held opinions based upon knowledge of either the facts or the law.

When the administration changed, the new Secretary of Education withdrew the proposed regulations.<sup>35</sup> A second draft has not been proposed. Federal funding that had been available to help school districts run bilingual education programs was then cut in half, and the present administration is seeking deeper cuts.

What is the effect of these actions? The statutes are still on the books. The *Law Remedies* are still in place. The commands of the courts are unheeded. We still have the same children, and many more, whose linguistic needs are not being met. The withdrawal of the regulations did not help one child to learn English. The slashing of federal funds to help school districts with these youngsters leaves those same districts more impoverished than they were before.

America has a very real problem that is not being effectively addressed by state and local governments: the education of non-English speaking children. The presence of millions of non-English speaking youngsters is the result of multiple national and international developments: The admission into the United States of thousands of Indo-Chinese refugees; severe unemployment in Mexico and Latin America, coupled with tremendous demands for unskilled and low-skilled cheap labor in the United States; the increase in migratory workers within the country; decades of invidious discrimination against minority populations, even though these minorities have resided in the United States for over 200 years; the lack of political strength by the same populations and the concentration of non-English speaking parents and their children in the more impoverished school districts. The great majority of these factors are beyond both the control and the resources of local school districts, and in many instances, beyond the reach of individual states. In short, both the causes and the potential remedies for the difficulties of non-English speaking youngsters are issues of national concern and responsibility.

The requisite majority of Congress, a majority of whose members are lawyers,<sup>36</sup> correctly perceived the issues and sought to provide remedies by enacting the Civil Rights Act of 1964. Congress did not attempt to prescribe the exact particulars in finding a remedy, however, but left

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<sup>35</sup> 46 Fed. Reg. 10,516 (1981).

<sup>36</sup> STATISTICAL ABSTRACT, *supra* note 13, at 511 (270 of 535 members of the 96th Congress were lawyers).

that chore to the executive branch, specifically the Department of Health, Education and Welfare.<sup>37</sup> Lawyers were key people in drafting the *Law Remedies*. When local school districts refused to obey the law, lawyers went to the courts. The judges of the United States Supreme Court, also lawyers, construed the intent of Congress and of the Office of Civil Rights in favor of the children.

The political forces that defeated efforts to aid the children in the first place have coalesced in refusals to obey the law. Children do not vote and the parents of non-English speaking children are almost as politically helpless as their youngsters. These children and their parents are disproportionately represented in our most impoverished school districts. They do not have an effective voice in either their school districts or in their state legislatures.

The immediate reaction to the withdrawal of the proposed regulations was a sigh of relief and loud applause because the government had been removed from the backs of the people.<sup>38</sup> In addition, the refusal of the executive branch to enforce the law meant some financial relief to hard pressed school districts who were not immediately required to find money to pay for the instruction of non-English speaking children. The burden of the proposed regulations was removed from the dominant members of the political structure and placed on the weakest members: the children. In the short term, the richer members of society were relieved from paying that bill. In a few years, however, all must bear the failures of responsibility. The non-English speaking youngsters will be deprived of the social and economic mobility that adequate education would bring to them and to our whole society.

The next entry in this history will replicate the events in other civil rights struggles. As the doors to the executive and legislative branches of government close, the aggrieved will turn to lawyers to open the doors to the judiciary. If lawyers, and ultimately judges, do not effectively respond, where will the aggrieved go? They will either lapse into despair, or turn to the streets.

Mythical solutions to very real problems only make bad problems worse. If we are to seek constructive solutions to the complicated dilemmas of non-English proficient youngsters, we must rely on the talents of persons who know how to marshal the evidence, become effective advocates, negotiate settlements of the disputes and think of creative ideas for addressing the real needs. Far more than any other group, lawyers have the training to fulfill these tasks.

Are we over-lawyered? The answer that a lawyer must give is the kind of response that always exasperates laypersons—yes and no. We do have far more lawyers than we can absorb in the existing professional

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<sup>37</sup> See Equal Educational Opportunities Act of 1974 § 205, 20 U.S.C. § 1703(f) (1976); Title VI of Civil Rights Act of 1964 § 602, 42 U.S.C. § 2000d-1 (1976).

<sup>38</sup> *E.g.*, N.Y. Times, Feb. 3, 1981, § 1, at 1, col. 1.

structures, at costs that can be paid by persons who need those services. The unmet need for legal services is very large and growing. Program after program designed to fund legal aid for the poor has been cut or extinguished. Even in a profession that is as crowded as our own, there is always room for the very best, the dedicated and the least selfish. The house of the law is a house of many mansions, with rooms enough to accommodate each person who has the determination, the imagination and the skill to find the key.

