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# TOURO LAW REVIEW

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## JUSTICE FOR THE FORGOTTEN AND DESPISED\*

*David C. Leven\*\**

PLS of New York<sup>1</sup> was created by the New York State Bar Association ("NYSBA") in 1976 as a result of the tragic Attica

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\* Justice for the Forgotten and the Despised, remarks delivered on February 9, 1999 at Touro College Jacob D. Fuchsberg Law Center is dedicated to the 58 people out of the 62 staff members, that Prisoners' Legal Services was forced to lay off as the result of the veto of our funding. They are a compassionate, committed and talented group of men and women, most of whom I worked with for 10 to 15 years or longer during my 19 years at Prisoners' Legal Services, and all of whom I deeply miss. I also dedicate this talk to my wonderful wife, Marianne Artusio, and my children, Carolyn and Carson, who continue to bring me much happiness during what has been a professional nightmare. I would also like to thank Elliot Elo and Jessica Schubert for the substantial editorial support provided by them. At the time this speech was given, Prisoners' Legal Services was closed for new business.

\*\* David C. Leven is the Deputy Director of the Lindesmith Center, a drug policy institute based in New York City. He served as the Executive Director of Prisoners' Legal Services of New York between 1979 and 1999, and as Executive Director of the Monroe County Legal Assistance Corporation from 1973 to 1979. For thirty years he has been advocating for prisoners and for a more humane criminal justice system. He serves on the Steering Committee of The New York State Criminal Justice Alliance, the Board of Directors of Partnership for Responsible Drug Information and the Voluntary Committee of Lawyers, the Corrections Committee of the Association of the Bar of the City of New York, and on New York State Bar Association Committee on Legal Aid. For many years, he was Chair of the Board of Directors of the New York State Coalition for Criminal Justice and on the Steering Committee of the New York State Coalition Against the Death Penalty. He is the recipient of numerous awards, including the New York State Bar Association Criminal Justice Section

Prison rebellion which claimed the lives of 39 people and shamed our state and nation.<sup>2</sup> After Attica, the leaders of the bar recognized that inmates had many meritorious legal complaints about prison conditions, but there were no lawyers available to help them. As a result, Prisoners' Legal Services ("PLS") was founded in order to have a small group of lawyers working in offices throughout the state to provide civil legal services to inmates on a wide variety of matters.<sup>3</sup> Since PLS creation, the NYSBA - through its excellent Presidents, including current President Jim Moore, and immediate past President, Josh Prusansky, who is also the chair of the Board of Visitors at Touro Law Center - has been extremely supportive in many ways in the struggle to survive and obtain adequate state funding. Last summer, the New York Bar Foundation gave PLS a generous grant which was timely in helping PLS stay alive, and instrumental in generating other grants and contributions. For this, PLS is deeply indebted to the New York State Bar Association.

While PLS has been able to raise over three quarters of a million dollars since June of 1998, this is not nearly enough to keep a four million dollar program alive.<sup>4</sup> The nightmare began on April 27,

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Award for Outstanding Contribution to the Delivery of Legal Services, and Committee on Public Interest Law, Public Interest Law Award, and the Westchester Civil Liberties Union, Civil Liberties Award. Earlier this year, Mr. Leven was the 1999 Distinguished Public Interest Lawyer in Residence at Touro Law School.

<sup>1</sup> Prisoners' Legal Services of New York (PLS) is a not-for-profit organization which provides civil legal services to indigent inmates in New York State correctional facilities in cases where no other counsel is available.

<sup>2</sup> See e.g., David C. Leven, *25 Years After Attica*, N.Y.L.J., Sept. 19, 1996, at 2. The Attica rebellion remains a painful and vivid memory of the "deplorable conditions that led to the rebellion which prompted an inmate spokesman to say 'if we cannot live as people, then we will at least try to die as men.'" As a result 39 prisoners "did die when the state without justification, retook the prison by force." *Id.*; See also, New York State Special Comm'n on Attica, ATTICA THE OFFICIAL REPORT OF NEW YORK STATE SPECIAL COMMISSION ON ATTICA (1972).

<sup>3</sup> See generally Paul J. Curran and David C. Leven, *Cutbacks in Funding of PLS Have Crippled its Ability to Seek Fairness for Prisoners*, 71 N.Y. St. Bar J 23 (Jan. 1999).

<sup>4</sup> See Gary Spencer, *Prisoners Legal Service Looks Near Extinction*, N.Y. L.J., Sept. 24, 1998, at 1.

1998 when PLS learned of the veto of state funding.<sup>5</sup> Since then, thousands of inmates have been denied the opportunity to obtain justice.

This nation has a far greater lust for revenge and severe punishment than an interest in ensuring justice for all. More people are incarcerated in the United States per capita than in any other nation in the world, except for Russia,<sup>6</sup> and generally for longer periods, while the United States spends hundreds of billions of dollars to build and operate its prisons.<sup>7</sup> The thinking of policymakers and all of those who work in the legal field must be redirected to the critically important, but largely ignored, task of ensuring justice for all.

Last year, New York's Chief Judge Judith Kaye observed, "[a] justice system that allows disparities in justice based on the ability to pay is inconsistent with a fundamental principle of our free democratic society - equal justice for all."<sup>8</sup> However, most disappointingly, Judge Kaye has since reduced the attorney's fees

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<sup>5</sup> See Curran and Leven *supra* note 3 (noting that the entire \$4,775,000 budget was vetoed by Governor Pataki).

<sup>6</sup> See generally Michael J. Sniffen, *Justice Dept. Reports Rate of Growth in Prison Population is the Lowest Since 1979*, BUFFALO NEWS, Aug. 16, 1999, at A3. "There were more than 1.8 million men and women behind bars in the United States, which represented an incarceration rate of 672 inmates per 100,000 U.S. residents, a rate higher than in any other country except Russia." *Id.*

<sup>7</sup> See e.g., David C. Leven, *Curing America's Addiction to Prisons*, 20 FORDHAM URB. L. J. 641 (1993) (noting that in New York alone, twenty-seven prisons were opened between 1983 and 1990). Furthermore, the article states: Over the next thirty years, the total cost to taxpayers will be \$5.4 billion, or \$180,000 per bed, with interest on the \$1.6 billion in bonds that were issued to pay for the construction. In debt service alone, the state pays \$670 per cell, per month. Ten years ago, New York State spent about \$840 million annually for prison operating and construction costs. Now, it costs close to \$3 billion, yearly, for total prison expenditures, a three-fold increase, which amounts to \$8 million a day. It now takes the combined state taxes of 17 New Yorkers to keep just one inmate in prison for a year, and the taxes of 193 New Yorkers to build one cell. *Id.* at 643-44 (footnotes and citations omitted).

<sup>8</sup> See Helaine M. Barnett, *An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience - So Far*, 17 YALE L. & POL'Y REV. 467, 477 n.1 (1998). "Chief Judge Kaye announced the appointment of the Legal Services Project on October 7, 1997, at the opening of the New York City Legal Aid Society's new offices in Manhattan." *Id.* (citation omitted).

that the state must pay private lawyers who take capital cases by almost fifty percent.<sup>9</sup> Two years after those fees had been set, following criticism from the governor, the NYSBA Criminal Justice Section adopted a resolution condemning that action.<sup>10</sup> Sadly, disparities in justice are what the poor generally experience, whether or not they have legal representation.

Justice is being denied to prison inmates on an everyday basis, an example of which is the case described below. Three inmates were awarded compensatory and punitive damages based on their claim that they were assaulted by fifteen corrections officers and sergeants at Clinton Prison, euphemistically called a Correctional Facility.<sup>11</sup> The inmates were repeatedly punched, kicked, and struck with batons, often while their hands were cuffed behind their backs.<sup>12</sup> One inmate spent 10 weeks in the facility infirmary

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<sup>9</sup> New York State Assoc. of Crim. Defense Lawyers v. Kaye, N.Y. L.J., Nov. 2, 1999, at 37 (N.Y. Sup. Ct. Albany County 1999). In 1995, the New York State Legislature enacted a death penalty statute and “simultaneously Judiciary Law §35-b which creates the Capital Defender Office.” In part, the new law created a four member screening panel in each of New York’s four Judiciary Departments, which were to “promulgate and periodically update, . . . a schedule of fees for qualified counsel for defendants in capital cases, which . . . shall be subject to the approval of the Court of Appeals.” *Id.* Subsequently on December 16, 1998 the Court of Appeals issued an order approving the revised fee schedules, for legal services rendered after January 1, 1999, in the following amounts:

\$125 per hour for lead counsel’s post-notice work; \$100 per hour for associate counsel’s post-notice work; \$100 per hour for lead counsel’s pre-notice work; \$75 per hour for associate counsel’s pre-notice work; \$40 per hour for reasonably necessary additional legal assistance; and \$25 per hour for reasonably necessary paralegal assistance.

*Id.* See also, N.Y. JUD. LAW §35-b(5)(a) (McKinney Supp. 1999).

<sup>10</sup> In late 1999, the New York State Association of Criminal Defense Lawyers brought an article 78 proceeding seeking a “judgment vacating, nullifying and setting aside the order . . . substantially lower[ing] [the] schedule of fees to be paid to court appointed counsel for defendants in capital cases in New York State.” New York State Assoc. of Crim. Defense Lawyers v Kaye, N.Y. L.J., Nov. 2, 1999, at 37 (N.Y. Sup. Ct. Albany County 1999). On November 2, 1999, the Supreme Court, Albany County, confirmed the Order of the Court of Appeals, finding that the petitioners failed to meet their burden of proving that the Order was “made in violation of lawful procedure, or was affected by an error of law, or was unreasonable or irrational or an abuse of discretion.” *Id.*

<sup>11</sup> *Otero v. Babbie*, 92-CV-1064 (N.D.N.Y 1994) (unreported).

<sup>12</sup> *Id.*

recovering from massive head and leg trauma including a broken foot.<sup>13</sup> The court stated that to subject plaintiffs to this type of treatment “particularly when in restraints was not only excessive but cowardly . . . no trained or even civilized, correction officer could believe that such conduct does not violate clearly established statutory and constitutional rights of which a reasonable person would have known.”<sup>14</sup> Regarding the assault on one plaintiff, Judge Smith noted that the defendants, “after punching [the inmate] as he lay on the floor, [the officers] continued th[e] assault [by] kicking, punching, and striking [him] with batons, all [the] while shouting racial slurs while [the inmate] was handcuffed behind his back.”<sup>15</sup> Judge Smith indicated in his decision that punitive damages were being imposed upon nine defendants, “with the firm conviction gained from 13 years as a judicial officer handling litigation involving prisoners’ claims of civil rights violations that the incidents occurred as described by plaintiffs and that such violations of prisoners’ civil rights are not uncommon.”<sup>16</sup>

Such incidents of prisoner abuse are not uncommon. As the Amnesty International Report “Rights For All,”<sup>17</sup> published in October 1998, noted:

Every day in prisons and jails across the USA the human rights of prisoners are violated. In many facilities violence is endemic. In some cases, guards fail to stop inmates from assaulting each other. In others the guards themselves are the abusers, subjecting their victims to beatings and sexual abuse.<sup>18</sup>

The report documents a myriad of other areas where prison practices and conditions violate laws and international human rights standards, and points out that “the mechanisms available to

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

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

<sup>17</sup> AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: RIGHTS FOR ALL (1998).

<sup>18</sup> *Id.*

provide redress are inadequate.”<sup>19</sup> In one instance, a case alleging guard brutality was referred to a district attorney’s office by PLS, and after a presentation to a Grand Jury, a no-bill was returned.<sup>20</sup> Subsequently, the Appellate Division, Third Department, found in *Marquez v. Mann* that:

When COs [correction officers] entered Diaz’s cell ostensibly to escort him to the SHU [special housing units], they proceeded to administer a totally unprovoked beating of Diaz and continued to assault him on the way to SHU. [Mr. Marquez] . . . observed the beating, which was also recorded on videotape by another CO using a hand-held video camera . . . . When the COS returned to get [Mr. Marquez] . . . [they] beat him with batons, fists and kicks, even after handcuffing and shackling him. They continued to physically abuse him en route to the SHU and after arriving there. This was also videotaped.<sup>21</sup>

Armed with this decision, the videotape and a settlement of \$50,000 for each inmate, PLS asked the DA to convene a grand jury. He refused, and only one of the five officers involved was fired.<sup>22</sup>

Inmates who have been brutalized, sexually abused, and denied adequate or even any medical care are entitled to redress. The problem that they face is that few lawyers are available to represent them. Our Bill of Rights and civil rights laws, which are designed to protect all of our citizens, are worthless to those who are unable to enforce them. It cannot be denied that the words concluding the pledge of allegiance “and justice for all” are betrayed by the reality of our justice system. The promise of that fundamental right remains largely unfulfilled, not just for prisoners, but also for low-income people. A recent study in New York showed that less than twenty percent of the legal needs of the

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<sup>19</sup> *Id.*

<sup>20</sup> *Marquez v. Mann*, 192 A.D.2d 100, 600 N.Y.S.2d 285 (N.Y. App. Div. 1993).

<sup>21</sup> *Id.* at 101-02.

<sup>22</sup> *Id.*

poor are being met.<sup>23</sup> In this state alone, according to State Bar President Moore in his remarks to the National Press Club in October, some three million people were unable to obtain legal services in 1997.<sup>24</sup> The words “justice for all” are meaningless to most low-income people. The related words enshrined over the United States Supreme Court House, “equal justice under law” are hypocritical to the millions of poor in our country who cannot obtain *any* justice because there are no lawyers to represent them in matters where legal representation is necessary for justice to prevail. This rich nation abysmally fails to comply with the justice standards it has rightfully created.

It has been suggested that libraries are all that inmates need in order to have meaningful access to the courts.<sup>25</sup> Disagreeing with that proposition, in 1995, the then President of the New York State Bar Association said in a letter to Governor Pataki:

Unquestionably, libraries cannot serve as a substitute for trained lawyers to provide meaningful access to the courts. Experience demonstrates that citizens are not able to adequately represent themselves in litigation, particularly that which requires discovery or trial. And inmates who are not literate, who do not speak English well or who are mentally ill surely are entitled to the services of lawyers. The fact is that lawyers are essential to the fair administration of justice.<sup>26</sup>

A consistent view was expressed by United States Supreme Court Justice Potter Stewart in his dissenting opinion in *Bounds v.*

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<sup>23</sup> See New York State Bar Association, *THE NEW YORK LEGAL NEED STUDY 1990* (revised 1993); see also *Building Confidence in Justice*, N.Y. L.J., August 19, 1999 at 2.

<sup>24</sup> New York State Bar Association President Jim Moore, Remarks to the National Press Club (Oct. 14, 1998) (transcript available with the N.Y. State Bar Ass’n and on file with the author).

<sup>25</sup> See Letter from Robert L. King, Director New York Division of the Budget to David Leven (May 20, 1998) (on file with author).

<sup>26</sup> Letter from the New York State Bar Association to the Honorable George E. Pataki, Governor of the State of New York (Nov. 27, 1995) (available with the N.Y. State Bar Ass’n and on file with the author).



*Smith*.<sup>27</sup> The majority held that although prisoners are entitled to meaningful access to the courts, such access could be obtained by merely having law libraries.<sup>28</sup> Justice Stewart said, “[I]n the vast majority of cases, access to a law library will, I am convinced, simply result in the filing of pleadings heavily larded with irrelevant legalisms possessing the veneer but lacking the substance of professional competence.”<sup>29</sup> In *Matter of Smiley*,<sup>30</sup> our highest state court ruled that in a divorce action neither party is entitled to have counsel assigned with or without compensation from the county.<sup>31</sup> Judge Jones dissented, stating:

To my mind it is both artificial and constitutionally impermissible to say that the State may not deny ‘access’ . . . but, entrance having been permitted, the State may then deny effective presence and participation. At the very heart of our recognition of the right to counsel elsewhere has been our articulated conviction that the right to be heard would be ‘of little avail if it did not comprehend the right to be heard by counsel.’<sup>32</sup>

The truth is that the highway of justice usually ends before it reaches poor communities and prisons. Even when it does reach them, there are often disgraceful, impassable roadblocks, created by the federal government, so that justice is still denied. Today, mandatory injustice prevails.

Additionally, it is tragic that the voiceless and powerless are highly disproportionately represented by people of color, which accounts in part for the pernicious discrimination against the poor in the denial of justice.<sup>33</sup> Injustice exists largely because the poor

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<sup>27</sup> 430 U.S. 817 (1977).

<sup>28</sup> *Id.* at 828.

<sup>29</sup> *Id.* at 836 (Stewart, J., dissenting).

<sup>30</sup> *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975).

<sup>31</sup> *Id.* at 437, 330 N.E.2d at 55, 369 N.Y.S.2d at 90.

<sup>32</sup> *Id.* at 443-44, 330 N.E.2d at 59, 369 N.Y.S.2d at 96 (citing *People ex rel. Menechino v. Warden*, 27 N.Y.2d 376, 382 (1971)).

<sup>33</sup> For example, 83% of the New York State prison population consists of minority inmates as documented in New York’s 18th Department of Correctional services periodic population reports.

in society have been either forgotten or dehumanized. Prison inmates (most of whom have not committed the egregious acts sensationalized by the media) have certainly been demonized.

Three years ago, as the draconian Prison Litigation Reform Act<sup>34</sup> was being considered in Congress, four attorney generals, including then Attorney General of New York Vacco, cited three allegedly frivolous cases in a letter to the editor of the New York Times, contending that they were typical of prisoner suits.<sup>35</sup> The papers in those cases were reviewed by then Chief Judge of the United States Court of Appeals for the Second Circuit, Judge Jon O. Newman. Judge Newman remarked that, "it has not been my experience in 24 years as a federal judge that what the attorneys general described was at all 'typical' of prisoner litigation."<sup>36</sup> Judge Newman also found that the cases were not quite accurately characterized, including the often cited case of the inmate who allegedly sued because he got one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.<sup>37</sup> Judge Newman noted that the inmate had ordered two jars of peanut butter, one of which was the wrong kind.<sup>38</sup> The suit was instituted because after the wrong jar was

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<sup>34</sup> See *infra* note 58 and accompanying text.

<sup>35</sup> Dennis C. Vacco, *Frivolous Prisoner Lawsuits Make a Mockery of Legal System*, N.Y. TIMES, Dec. 30, 1995, at 26. The three purported frivolous cases, described as "typical" were as follows:

the inmate who sued because there were no salad bars or brunches on weekends and holidays; the case where a prisoner is suing New York because his prison towels are white instead of his preferred beige; and the case where an inmate sued, claiming cruel and unusual punishment because he received one jar of chunky and one jar of creamy peanut butter after ordering two jars of chunky from the prison canteen.

*Id.*; see also, Hon. Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520 (1996).

<sup>36</sup> Newman, *supra* note 35, at 521.

<sup>37</sup> *Id.* Judge Newman noted that the "salad bar" case involved allegations by 43 prisoners of "major prison deficiencies including overcrowding, forced confinement of prisoners, contagious disease, lack of proper ventilation, lack of sufficient food, and food contaminated by rodents," not a lack of salad bar as was reported. *Id.* In addition, the "beige towel" case was brought after an inmate had the towels sent to him by his family confiscated. Whereby he was subsequently disciplined "with loss of privileges for receipt of the package from his family." *Id.*

<sup>38</sup> *Id.*

returned, he was transferred, never receiving the other jar and was, nevertheless, charged \$2.50 for the item to his account.<sup>39</sup> Judge Newman observed, “[m]aybe \$2.50 doesn’t seem like much money, but out of a prisoner’s commissary account, it is not a trivial loss, and it was for loss of those funds that the prisoner sued.”<sup>40</sup>

The government has made some effort to bring legal services to the poor. Three decades ago, the federal government, as a part of the anti-poverty program, began funding small neighborhood legal services for the poor.<sup>41</sup> In addition, the Legal Services Corporation<sup>42</sup> (“LSC”) was established by Congress twenty-five years ago to act as an oversight agency and conduit of funds for local civil legal services programs for the poor.<sup>43</sup> It was hoped that the ideal of equal justice for all would soon be met. Initially, funding for the program was grossly inadequate and, twenty-five years later, the funding has decreased even more, with many in Congress wanting to destroy the program. Four years ago funding was at four hundred million dollars, but currently, it is three hundred million dollars despite our relatively good financial times.<sup>44</sup> It should be noted that there are a number of law firms in New York City each paying a total of over one hundred million dollars in salaries to more than one hundred partners.<sup>45</sup>

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<sup>39</sup> *Id.* (noting that “the misleading characterization of this case was repeatedly cited during the congressional consideration of proposals to limit prison litigation”).

<sup>40</sup> *Id.* at 522.

<sup>41</sup> See generally, Marc Feldman, *Political Lessons: Legal Services for the Poor*, 83 *Geo. L. J.* 1529 (1995); see also A. Kenneth Pye, *The Role of Legal Services in the Anti-Poverty Program*, 31 *LAW & CONTEMP. PROBS.* 211 (1996).

<sup>42</sup> Legal Services Corporation Act of 1974, 42 U.S.C.A. § 2996 (1994) (creating a private, nonprofit corporation that distributes federal funds to various independent legal programs providing legal services to the poor).

<sup>43</sup> *Id.* at §2996(1).

<sup>44</sup> See Spencer *supra* note 4 (noting that “funding for Legal Services Corporation had been cut by nearly 120 million dollars, from a high of 400 million dollars to 283 million [in 1998]”).

<sup>45</sup> Currently, there are at least 9 New York City Law firms, each with well over 100 partners, where the average yearly partner salaries exceed \$1,000,000. *Partner Compensation*, N.Y.L.J. (visited Nov. 17, 1999) <<http://www.nylj.com/links/amlaw100/99/pcomp.html>>.

Despite the overall success of legal services programs in providing quality legal services, there has not been a significant reduction in the number of legal problems that millions of Americans must face by themselves because they do not have access to poverty lawyers. As short as the highway of justice is, reaching only a small percentage of the poor, there are also unnecessary roadblocks. Congress restricts legal services funded programs in a variety of ways.<sup>46</sup> For example, Congress prohibits use of funds for representing aliens,<sup>47</sup> representing prisoners,<sup>48</sup> engaging in lobbying activities,<sup>49</sup> commencing class actions,<sup>50</sup> and challenging welfare laws in order to obtain greater benefits.<sup>51</sup>

A brief discussion of two of Congress' prohibitions is informative. The prohibition on recipients of LSC funds from "participat[ing] in any litigation on behalf of a person incarcerated in a Federal, State, or local prison" was not adopted because indigent prison inmates have access to lawyers.<sup>52</sup> To the contrary, very few inmates are able to find a lawyer who will take even the most meritorious of cases. Most cases are not fee generating and require expertise that few lawyers have. Some large law firms will take a small number of non-fee generating cases from nearby prisons as they, unlike most small firms, have the resources to front for discovery and expert witnesses. Most prisons are located

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<sup>46</sup> See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. With the passage of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA") Congress imposed a total of nineteen restrictions on the recipients of Legal Services Corporation funds and mandated that "[n]one of the funds appropriated . . . to Legal Services Corporation may be used to provide financial assistance to any person or entity" engaged in any of the nineteen restricted activities. These restrictions are incorporated in the 1997 appropriations bill by reference. See Omnibus Consolidated Rescissions and Appropriations Act of 1997 §502(a), Pub. L. No. 104-208, 110 Stat. 1321.

<sup>47</sup> See *id.* at § 504(a)(11).

<sup>48</sup> See *id.* at § 504(a)(15) (prohibiting participation "in any litigation on behalf of a person incarcerated in a Federal, State, or local prison").

<sup>49</sup> See *id.* at §504(a)(4) (prohibiting attempts "to influence the passage or defeat of any legislation, constitutional amendment, referendum, [or] initiative . . . of the Congress of a State or local legislative body").

<sup>50</sup> See *id.* at §504(a)(7).

<sup>51</sup> See *id.* at §504(a)(16) (prohibiting litigating or lobbying in an effort to reform the federal or state welfare law or systems").

<sup>52</sup> *Id.* at §504(a)(15).

in rural areas where lawyers practice in small firms. In fact, those firms may be in or near towns where the prison may be the largest industry, part of what is increasingly being characterized as the prison industrial complex. Furthermore, there are, sadly, only a few programs like PLS across the country. Thus, prisoners usually suffer mandatory injustice because, regardless of the extent or egregiousness of the civil rights violations, there are no lawyers available to represent them. Although it is true that inmates have been represented collectively in many states, in class actions brought by the National Prison Project of the ACLU and other law firms, the large majority of the thousands of inmates whose civil rights are violated each year will have no place to turn. Our federal government has turned its back on these men and women.

Who are these people in prison? In New York, only thirty percent are in state prison for a violent crime.<sup>53</sup> A large majority of the prisoners have been seriously damaged both before and during their time in prison. At least half of these men and women, most between the ages of eighteen and twenty-four, including about seventy percent of women, were either victimized or neglected and physically, sexually, or psychologically abused during their lives. Having grown up in homes without good support systems, many developed mental health and substance abuse problems, while failing to graduate from high school. Almost all will return to society within a few years. Many will return more embittered than when they were sent to prison, some because our justice system failed them. As a selfish matter, society should be concerned about whether inmates will leave prison more damaged than when they entered.

In addition to the fact that they are prohibited from representing prisoners, programs funded by the Legal Services Corporation are also prohibited from bringing class actions.<sup>54</sup> Why? The prohibition appears to be designed by Congress to deprive the poor of an effective tool to challenge collectively apparently unconstitutional practices or policies. As the American Bar Association has stated:

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<sup>53</sup> New York State Department of Correctional Services, February 1999.

<sup>54</sup> See *supra* note 51.

Legal Services programs must make the most of their limited resources. One essential way of doing so is to bring class actions in carefully selected cases. In many cases, a class action suit seeking declaratory and/or injunctive relief is fairer, faster and more efficient than an endless series of suits on behalf of similarly situated individual clients.<sup>55</sup>

Perhaps the class action restriction was imposed because of the impressive record of Legal Services Corporation programs that brought these actions, establishing or protecting important rights of clients in matters pertaining to health care, education, housing, social security benefits and welfare benefits (where, as mentioned earlier, no reform challenges could be made until January of 1999). In one nationwide class action involving social security benefits, *Califano v. Yamasaki*,<sup>56</sup> the United States Supreme Court observed, "the class action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every Social Security beneficiary to be litigated in an economical fashion. . . ."<sup>57</sup>

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<sup>55</sup> See generally David S. Udell, *Seventh Annual Stein Center Symposium on Contemporary Urban Challenges: Implications of the Legal Services Struggle for Other Government Grants for Lawyering for the Poor*, 25 *FORDHAM URB. L.J.* 895, 902. The author describes how Legal Services lawyers must operate under restrictions. Specifically, he discusses "[s]ince Legal Services programs lack the resources with which to file repetitive identical individual cases, the prohibition on class actions imposes enormous constraints on the ability of program lawyers to tackle pervasive and systemic harms on behalf of their poor clients." *Id.*

<sup>56</sup> 442 U.S. 682 (1979).

<sup>57</sup> *Id.* at 701. In *Califano*, the Secretary of the Department of Health, Education and Welfare argued that:

a nationwide class is unwise in that it forecloses reasoned consideration of the same issues by other federal courts and artificially increases the pressure on the docket of this Court by endowing with national importance issues that, if adjudicated in a narrower context, might not require our immediate attention.

*Id.* at 701-702.

Although the Supreme Court agreed that it will often "be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual situations," it declined to "adopt the extreme position that a class may never be certified." *Id.* at 702.

Thus, class actions are universally recognized by lawyers and the judiciary as a uniquely effective and integral part of our legal system, as well as an important option for lawyers seeking to represent their clients properly -- that is, unless they are the indigent clients of legal services programs.

In 1996, the Prison Litigation Reform Act,<sup>58</sup> a disgraceful piece of legislation, was enacted, purportedly intending to reduce frivolous litigation.<sup>59</sup> However, upon objective analysis, the Act appears to be designed to reduce all prisoner litigation, and deny prisoners access to the courts, thus effectively denying justice to inmates.<sup>60</sup> There are many provisions of this Act that are worthy of critical discussion, most of which are currently being challenged in court.

To begin, one provision of the Act prohibits prisoners from filing federal actions after they have had three cases dismissed, unless the filing fee is paid up front, or if the inmate is in imminent danger of serious physical injury.<sup>61</sup> However, this prohibition does not require that the case be dismissed as frivolous.<sup>62</sup> In addition, if

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<sup>58</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66 (1996) (codified in scattered sections of 11 U.S.C., 18 U.S.C., 28 U.S.C. and 42 U.S.C.) (placing restrictions on prisoners' ability to bring civil actions against officials for violations of their constitutional rights by imposing filing fees and requiring a more stringent standard for granting relief).

<sup>59</sup> See also Crawford-El v. Britton, 523 U.S. 574, 596 (1998) (asserting that the Prison Litigation Reform Act will discourage frivolous claims).

<sup>60</sup> See Catherine G. Patsos, Note, *The Constitutionality and Implications of the Prison Litigation Reform Act*, 42 N.Y.L. SCH. L. REV. 205 (1998); see also, Joseph T. Lukens, *The Prison Litigation Reform Act: Three Strikes and You're Out of Court—It May Be Effective, but is it Constitutional*, 70 TEMP. L.REV. 471 (1997).

<sup>61</sup> 28 U.S.C. § 1915(g)(1994). This provision states in pertinent part:

In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

*Id.*

<sup>62</sup> *Id.*

all three cases are dismissed solely for failing to state a claim upon which relief may be granted, the prohibition applies.<sup>63</sup>

This provision was challenged *Abdul-Matiyn v. Coughlin*.<sup>64</sup> The Association of the Bar of the City of New York filed an amicus brief with the court contending that the provision is unconstitutional.<sup>65</sup> The brief argued that the provision prevents litigants who do not abuse the courts from bringing claims. The brief also noted that the provision does not take into account whether the litigant made an honest mistake,<sup>66</sup> such as the common occurrences when a prisoner mistakenly sues the state rather than individual officers, or when a prisoner mistakenly sues individual supervisors not personally involved in the alleged violation, or even when a prisoner fails to exhaust administrative remedies before bringing suit.

Another contention is that the blanket bar imposed by the Act denies prisoners access to the courts. This denial occurs because the blanket bar is neither based on any individualized determination that a litigant is likely to file abusive or frivolous litigation, nor does it provide any safety valve to ensure that meritorious claims can be filed by indigent litigants. As the brief of the Bar Association concludes:

The sweeping effects of the law are not necessary to serve the government's interest in deterring frivolous litigation. Given the poor fit between the law and the interest it serves, [the] plaintiff's interest in vindicating his fundamental right far outweighs the interests of the government in reducing frivolous litigation with such extreme and broad measures.<sup>67</sup>

Next, the Prisoner Litigation Reform Act had a detrimental effect on the Civil Rights Attorney's Fees Award Act of 1976,<sup>68</sup> which

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<sup>63</sup> *Id.*

<sup>64</sup> 180 A.D.2d 930, 580 N.Y.S.2d 537 (3d Dep't 1992).

<sup>65</sup> Amicus Brief for Abdul-Matiyn, *Abdul-Matiyn v. Coughlin*, 180 A.D.2d 930, 580 N.Y.S.2d 537 (3d Dep't 1992) (No. 63779).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1994).



authorizes courts to award reasonable attorney's fees to a prevailing party in civil rights actions.<sup>69</sup> These are the types of actions commenced by prisoners who challenge alleged unconstitutional conditions and guard brutality. In 1984, the Supreme Court adopted the marketplace model for determining the hourly rates to be used in calculating reasonable fees.<sup>70</sup> Therefore, since fees were market-value based, private law firms, which could afford to fund necessary litigation expenses, were willing to take time-consuming, complex, and hard-to-win cases on behalf of indigent prisoners. However, since the enactment of the Prison Litigation Reform Act, if an attorney represents a prisoner in a civil rights action, the amount of fees that can be awarded under the Attorney's Fees Award Act has been reduced to one hundred and fifty percent of the abysmally low rates attorneys are paid under the Criminal Justice Act.<sup>71</sup> This results in the reduction of fees by as much as two-thirds.

Under the current fee award system, the maximum hourly rate for a New York City attorney with twenty years of experience, which is up to three hundred dollars per hour, would be one hundred and twelve dollars and fifty cents. Furthermore, one must consider that the hourly rate for successful and unsuccessful cases is probably less than fifty dollars per hour after accounting for the thousands of dollars of expert witness fees in these cases which, win or lose, are not recoverable. This is a losing financial proposition, particularly for large law firms, which have been the most willing and able to take these types of cases.

Attorneys' fees for the private citizen remain at market value, while this is not the situation for prisoners. Why? The attorney fee reduction provision is obviously not related to the goal of reducing frivolous litigation, as fees are only awarded to a prevailing party, one who has proved the unconstitutionality of prison conditions or shown that his civil rights were violated in some other fashion. The only explanation for this disparity is that

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<sup>69</sup> *Id.* Section 1988 provides in pertinent part that: "[i]n any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title. . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

<sup>70</sup> *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

<sup>71</sup> Criminal Justice Act, 18 U.S.C. § 3006(a) (1985).

Congress was so hostile to prisoners and prisoner-generated litigation, that they passed the provision in order to discourage private lawyers and under-funded public interest law firms like Prisoners Legal Services, both of which have historically relied upon these fees to supplement their inadequate budgets, from taking these cases.

Clearly, the justice system lacks integrity and will continue to do so until the day that each of our citizens has access to legal representation for meritorious claims or defenses. That day should have occurred long ago. When that day does arrive, all citizens will have the same access to lawyers, as well as the ability to pursue any meritorious claim in any forum and in any manner, without restriction, whether rich or poor. Certainly, the poor have problems that are equally important, if not more important, than the problems for which representation is provided by law firms to those who can pay for attorneys. For example, a woman with small children about to be evicted, a disabled person about to lose Supplemental Security Income benefits, or a woman seeking to obtain or to enforce an Order of Protection after years of physical and psychological abuse are certainly important and meritorious.

The core principle of equal justice has been and continues to be a hollow one. Justice has been rationed for far too long. Those who are the most vulnerable to injustices but who are powerless to obtain justice have been forgotten or ignored. Furthermore, the current system of justice is antithetical to the values of "justice for all" and "equal justice under law." The failure of federal and state governments to ensure "justice for all" is unacceptable. There is a need to create a paradigm of justice that is inclusive. Those of us working in the legal profession must act as agents for systemic change and help to open the eyes of those who do not understand that the denial of justice to a large segment of society undermines our very democracy.

What can be done? Funding for legal services for the poor is first and foremost a federal governmental responsibility. Congress must dramatically increase appropriations for programs aimed at achieving justice for the poor. Furthermore, a greater effort must be made by private practitioners, organized state bars, law schools, and others to better educate those in Congress of the need for an adequately funded legal services program.

Due to historic unwillingness of the federal government to provide minimally adequate funding, states have been forced to find ways to fund legal services. The Interest on Lawyer Account Fund (IOLA), for example, collects interest earned on short term or a nominal deposit held in lawyers' trust accounts, and then distributes the funds primarily to civil legal services programs.<sup>72</sup> Funding from IOLA peaked at about thirty million dollars six years ago.<sup>73</sup> This amount, however, has been reduced by almost two-thirds,<sup>74</sup> which is approximately eleven million dollars, as the constitutionality of the program is under attack in the courts.<sup>75</sup> In addition, until 1998, when the Governor vetoed the appropriation of almost seven million dollars, there was also general funding for legal services in the New York State Budget.<sup>76</sup> In 1999, the Mayor

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<sup>72</sup> The New York State Interest On Lawyer Account Fund program was created in order to "provide funding for providers of civil legal services in order to ensure effective access to the judicial system for all the citizens of the state . . ." N.Y. STATE FIN. LAW §97-v (McKinney Supp. 1999). *See also*, Gerald A. Gordon, Comment, *IOLA & Professionals in the Shadow of Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 6 J.L. & POL'Y 699, 739 n.5 (1998) (noting that currently IOLA programs exist in 49 states and the District of Columbia, with Indiana being the remaining hold out state).

<sup>73</sup> *See* Helaine M. Barnett, *An Innovative Approach To Permanent State Funding of Civil Legal Services: One State's Experience - So Far*, 17 YALE L. & POL'Y REV. 469, 471 (1998) (stating that the "second major source of funding for civil legal services in New York State, the proceeds of the State [IOLA] program, dropped from \$29 Million in 1992 to approximately \$10 Million in 1998 because of declining bank interest rates and bank fees for lawyer's escrow accounts").

<sup>74</sup> *Id.*

<sup>75</sup> *See* *Phillips v. Washington Legal Found.*, 118 S. Ct. 1925 (1998). In *Phillips*, the Supreme Court held that clients have a valid property right in the interest proceeds earned on the funds in an IOLTA account, which may ultimately result in a finding that IOLTA programs constitute unconstitutional taking of private property under the Fifth Amendment of the United States Constitution. *Id.* *See also*, James D. Anderson, *The Future of IOLTA: Solutions to Fifth Amendment Takings Challenges Against IOLTA Programs*, 99 I. ILL. L. REV. 717 (1999) (examining the "legal issues concerning the IOLTA program and introduc[ing] solutions for its continued existence in light of the *Phillips* opinion").

<sup>76</sup> *See generally*, Gary Spencer, *Pataki Budget Would Cut Defense Services*, N.Y. L.J., Jan. 28, 1999 at 1 (noting that in addition to the \$7 million veto of legal assistance to the poor, the Governor's spending plan "fails to restore the \$4.8 million appropriation for Prisoners' Legal Services").

of New York City submitted a budget that reduced the funding for the Legal Aid Society for civil legal services for the poor by one million dollars.<sup>77</sup> In the years to come, the primary focus in New York State should be to secure forty million dollars from the Abandoned Property Fund,<sup>78</sup> which has annual revenues of close to three hundred million dollars.<sup>79</sup> A bill to enable this goal should be co-sponsored by the Chairs of the Senate and Assembly Judiciary Committees. However, legislation to make this possible may not be passed for three to five years, or perhaps ever.<sup>80</sup>

The New York State Bar Association reported recently that estimates of the funding needed for legal services for the poor range from two hundred and fifty million dollars to one billion dollars yearly.<sup>81</sup> The forty million dollars from the Abandoned Property Fund would merely make up for the forty million dollars lost from the LSC and IOLA since 1992. Therefore, the remaining question is where does one turn for the additional funding?

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<sup>77</sup> See Gary Spencer, *Only \$10 Million in Budget Earmarked for Legal Services*, N.Y. L.J., July 21, 1999 at 1. The author aptly notes that in July 1999:

Legislative conference committees began working out how to spend the \$1.1 billion. . . that is available to add to the Governor's proposed budget, which gives legal programs an opportunity to recover at least some of the funds the Governor vetoed from last year's budget or cut from his proposed 1999-2000 spending plan in January.

*Id.*

<sup>78</sup> See Legal Services Project, *Funding Civil Legal Services for the Poor* 11 (1998) (recommending the annual transfer of \$40 million from New York's Abandoned Property Fund to a newly created Access to Justice Fund); see also Helaine M. Barnett *supra* note 73 (describing the Abandoned Property Fund as a potential funding source for legal services).

<sup>79</sup> *Id.* at 473. See also, Michael A. Cooper, *Consider Freedom for the Less Fortunate*, N.Y.L.J., May 3, 1999 at S3.

<sup>80</sup> See e.g., *Building Confidence in Justice*, N.Y. L.J., August 19, 1999 at 2 (noting that the State Assembly passed a version of a bill to provide funding for legal services from the Abandoned Property Fund, but the Senate has yet to do the same). Furthermore, the article remarks that "it is generally considered doubtful that the Senate and Assembly will agree on a bill concerning this issue during this legislative session." *Id.*

<sup>81</sup> See Anthony Perez Cassino, N.Y. L.J., Feb. 25, 1999 at 2. For the past five years New York has appropriated anywhere from \$3 million to \$6 million for legal services for the indigent. However, Governor Pataki vetoed last year's appropriation, along with about \$1 billion worth of other items which had been supported by the New York State Bar Association. *Id.*

One source is the private bar, which has a special obligation to ensure the integrity of our justice system. Private practitioners, to their credit, have increasingly given time and money to legal services for the poor. The private bar, pro bono and legal services programs have forged constructive and productive relationships for the provision of legal services. In fact, there are many wonderful private sector lawyers who are very committed to legal services work and who devote a tremendous amount of time to legal services for the poor.<sup>82</sup> Unfortunately, they are in the distinct minority. Pro bono work needs to be greatly expanded. More importantly, until such time that the government meets its responsibility for providing legal services to the poor, far greater financial contributions are needed from the private bar to legal services programs because it is these programs that have the expertise to provide the significant bulk of legal help to the poor in a cost efficient manner, not the private bar.

Despite the fact that the private bar has made contributions to legal services, these contributions have been insufficient. According to New York State Bar Association President Moore, in his remarks to the National Press Club, “[C]an and should the private bar do more? Of course it should.”<sup>83</sup> In my opinion, this can be done easily. While I hope that the fund-raising experience of PLS with the private bar was an anomaly, the fact is that only a handful of the seventy or so law firms that we contacted, in response to our one time emergency request, decided to help save our program.<sup>84</sup> Our personal appeal was not even responded to in any way by the vast majority of law firms from which we sought help. Meanwhile, as PLS was dying, many firms were increasing the starting salaries of some first year associates, some by twelve percent to \$103,000.00 (which is about three times the starting

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<sup>82</sup> See *Indigent Still Have Unmet Need for Equal Access*, N.Y. L.J., May 3, 1999 at S4. A recent survey has indicated that “nearly half of the attorneys in [New York] State provided pro bono legal services for the poor in 1997, and those attorneys averaged nearly 42 hours of pro bono service each.” *Id.*; see also William J. Dean, *Survey by Volunteers of Legal Service*, N.Y. L.J., July 15, 1998 at 3.

<sup>83</sup> See Moore, *supra* note 24.

<sup>84</sup> See Spencer *supra* note 4 (reporting that although direct appeals were made to more than 60 firms, only five made significant contributions of more than \$5000.00).

salaries of legal services attorneys).<sup>85</sup> Furthermore, some firms were also deciding to give bonuses to their associates, totaling approximately fifty million dollars, which is approximately half of the entire funding for legal services programs statewide.<sup>86</sup>

President Moore mentioned, in his National Press Club remarks, that in one recent year, it was estimated that lawyers gave eight million dollars to support legal services for the poor.<sup>87</sup> This is a lot of money. However, the pertinent question is whether the private bar has struck a reasonable balance between their earnings and their contributions to help ensure “justice for all.” Eight million dollars, while a lot of money, is still only a small fraction of one percent of the yearly earnings of lawyers in this state. Generally, and particularly, lawyers in large law firms must contribute more to the cause of justice.<sup>88</sup>

The fate of justice for the poor and the poverty law programs that serve them is, at least to an extent, in the hands of the members of the private bar, which constitutes a large majority of those in the legal profession in this state. Hence, while we must be grateful to the private bar for the great deal it has done, the private bar must nevertheless recognize that it must do much more to make the core principle, “justice for all,” a reality for a far greater portion of low income citizens. Simply put, lawyers in this state must invest more in the stock of legal services for the poor programs.

In addition, law schools must also be leaders in the march for justice. As Stanford Law School Professor Deborah Rhode, President of the American Association of Law Schools, noted, “Legal educators can do more to foster a commitment to public service among future practitioners. And such a commitment could

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<sup>85</sup> See generally, *Is \$108,000 the New Going Rate*, N.Y. L.J., August 4, 1999 (stating that the going rate for first-year pay at Manhattan’s largest firms seems to have settled a \$108,000). See also, *First-Year Pay at NY’s 25 Largest Firms*, N.Y. L.J., Sept. 7, 1999. This article lists the current first-year salaries at NY’s largest firms in the range of \$101,000 to \$108,000. While noting that salaries for both the Legal Aid Criminal Defense Division and ACLU (New York Division) are currently \$35,000. *Id.*

<sup>86</sup> Leigh Jones, *Survey: Salaries for the Entry-level Associates Keep Climbing*, THE JOURNAL RECORD, Sept. 10, 1998.

<sup>87</sup> See Moore, *supra* note 24.

<sup>88</sup> See generally, *Pro Bono Hours*, N.Y.L.J. (visited Nov. 17, 1999) <<http://www.nylj.com/links/amlaw100/99/probono.html>>.

do more to help those with the greatest needs and least access to legal assistance.”<sup>89</sup> Law schools must educate their students not only about the positive aspects of the justice system, but also its significant inequities. Learning the law is necessary, but it is equally important to learn about how our justice system works and how it fails those who are most in need. Law schools should require their students to take poverty law and civil rights law courses. Moreover, law schools should require participation in public interest work for under-served populations, as does Touro Law Center, which is one of a small minority of law schools that has such a requirement.<sup>90</sup> Fulfilling a public interest requirement can be made easier by locating a legal services office at the law school, just as Touro Law Center has done by giving the Nassau/Suffolk Law Services Housing Rights Project free office space.<sup>91</sup> In return, the students are intensively supervised but are given flexible work schedules. Furthermore, law schools must encourage its graduates to do pro bono work, to make financial contributions to legal services programs and, at the same time, actively support adequate federal and state financing for legal services. Every graduating law student should not only understand the legal needs of the poor, but also be committed to doing pro bono work.<sup>92</sup>

Law schools should individually and collectively strive to ensure justice for low-income citizens. Law school deans and professors should lobby (with students where appropriate) for legislation to allow forty million dollars of the Abandoned Property Fund to be used for legal services. In the event that efforts are unsuccessful to fund legal services with Abandoned Property Fund money, increases in housing court filing fees and attorneys registration fees

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<sup>89</sup> Deborah Rhode, Address at the *American Association of Law Schools* Presidential Speech (Jan. 9, 1998) (transcript available in the *Stanford Law School Faculty Pages*).

<sup>90</sup> See Kristin Booth Glen, *Pro Bono and Public Interest Opportunities in Legal Education*, N.Y. ST. B. A. J (May/June 1998) (discussing the existing opportunities and requirements for students in law schools in New York to participate in pro bono legal work).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* “For the past twenty years, the organized bar has urged lawyers to expand their pro bono efforts, although attempts to make such service mandatory have been highly controversial and thus far unsuccessful.” *Id.*

should be sought. Additionally, Supreme Court Motion fees should be sought, as recommended in the report of the New York Legal Services Project, established by Chief Judge Kaye.<sup>93</sup>

Just thirty-five years ago, the United States Supreme Court held that a person facing felony charges had a right to have a lawyer represent him if he could not afford one.<sup>94</sup> How long will it be before low-income citizens about to lose their homes or sole source of income will have the same access to representation? As Judge Newman noted in his remarks at a Brooklyn Law School commencement, the poor “have important rights, but unless a lawyer steps forward to assert their rights, there will be no vindication.”<sup>95</sup> Referring to the poor and to prisoners, Judge Newman said, “it frequently happens that those with rights that need assertion are among the less favored members of the community, at best ignored and at worst despised.”<sup>96</sup> For now, PLS and its colleagues, as well as the government, should heed the words of the Reverend Dr. Martin Luther King Jr., who said in a letter from the Birmingham Jail, “injustice anywhere is a threat to justice everywhere.”<sup>97</sup>

What will the loss of funding for PLS mean for state inmates? The New York State Black and Puerto Rican Legislative Caucus stated, in a letter to Speaker Sheldon Silver:

[W]ithout Prisoners’ Legal Services, offenders will be an even greater at risk population than they are now. They will be increasingly at risk of being denied medical care, of being brutalized, of being denied due process in disciplinary cases, of serving longer and illegal sentences . . . . We must not let this happen.”<sup>98</sup>

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<sup>93</sup> Legal Services Project, *Funding Civil Legal Services for the Poor* 11 (1998).

<sup>94</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>95</sup> Judge Newman, Address at Brooklyn Law School Commencement (June 12, 1995).

<sup>96</sup> *Id.*

<sup>97</sup> Letter from Reverend Martin Luther King, Jr., to Fellow Clergymen (Apr. 16, 1963) (on file with the King Estate).

<sup>98</sup> Letter from The New York State Black and Puerto Rican Legislative Caucus, Inc. to Honorable Sheldon Silver, Speaker, New York State Assembly (Feb. 15, 1996) (on file with the author).



We must not let this happen, except during this temporary crisis. I intend to lobby vigorously, as I have for almost two decades, for the right of inmates to have a PLS program which is adequately funded. I hope that others will too, by contacting the governor, budget director, legislative leaders and legislators.

I cannot begin to describe how utterly devastating and painful this experience over the past half year has been. This experience has been extraordinarily disappointing, discouraging, and disillusioning. Still, I am desperately trying, with some success, when my depression and anger are not too great, to follow the “Ten Commandments for the Changer and the Changed” by the Reverend Richard Gilbert, a Unitarian Minister in Rochester.<sup>99</sup> All should consider Gilbert’s first commandment and work to improve our system of justice, until the highway of justice reaches all. “Thou shall not give in to irresponsible despair, for despair only helps people in power. Thou wilt need both perspective and passion – the informed heart. While thou mayest have on occasion pessimism of the intellect thou shalt cultivate optimism of the will and hope of the heart.”<sup>100</sup> Perspective and passion, hope and courage must be had in the efforts to strive to ensure justice for all.

The crisis for PLS will continue until state funding is restored.<sup>101</sup> Only when this occurs, can our staff reunite to ensure that justice will no longer be an illusion for at least a part of the state prison population.

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<sup>99</sup> Reverend Richard Gilbert, Speech on the Ten Commandments for the Changer and the Changed (on file with the author).

<sup>100</sup> *Id.*

<sup>101</sup> Partly as a result of budget cuts by the Pataki administration, David Leven has left PLS since the date of this speech. At the time of his departure, the Legal Services staff of 60 attorneys had dwindled to only four. Mr. Leven has moved on to the Lindesmith Center, a George Soros – funded project that focuses on drug policy. See *Loss for Prisoners*, TIMES UNION ALBANY, Sept. 23, 1999 at A12. However, it should be noted that prior to his departure, a substantial portion of the budget for Prisoner’s Legal Services of New York was restored in the 1999-2000 state budget passed in August 1999.