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## **SPECIAL POPULATIONS: MOBILIZATION FOR CHANGE**

*This Article is based on a transcript of a break-out discussion which took place at An Obvious Truth: Creating an Action Blueprint for a Civil Right to Counsel in New York State, held at Touro Law Center, Central Islip, New York, in March 2008. The discussion was moderated by Karen L. Nicolson,<sup>\*</sup> Michael Williams,<sup>\*\*</sup> and Toby Golick.<sup>\*\*\*</sup>*

*This Article assesses the needs of various special populations and the possible strategies and solutions to create change through enacting a civil right to counsel. The Article is intended to capture information and viewpoints of the people who participated in the break-out discussion at the conference. Therefore, the information and viewpoints presented below do not necessarily represent the views of Ms. Nicolson, Mr. Williams, or Professor Golick.*

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## SPECIAL POPULATIONS: MOBILIZATION FOR CHANGE

### INTRODUCTION

The *Gideon* case, which tells the inspiring story of an individual who made it to the Supreme Court of the United States alone and convinced the Court to take his right to counsel case, has important lessons of both courage and our judicial system's ability to accommodate change. *Gideon* shows us that courts can effectuate change if given the appropriate vehicle. By enacting a civil right to counsel, the tale of *Gideon* can be retold for special populations.

The term "special populations" includes many specific groups such as farm workers,<sup>1</sup> prison inmates,<sup>2</sup> those afflicted with HIV/AIDS,<sup>3</sup> and mental illness.<sup>4</sup> However, the special populations

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<sup>1</sup> As of this writing, there were about 2.5 million farm workers, over half of which were unauthorized immigrants, in the United States. But even these statistics provided by the federal government may be inconclusive due to the "invisibility" of this population. Some legislation, for example the Migrant and Seasonal Agricultural Worker Protection Act of 1983, has been enacted to provide this special population with protections and rights. Beth Lyon, *Farm Workers In Illinois: Law Reforms and Opportunities for the Legal Academy to Assist Some of the State's Most Disadvantaged Workers*, 29 S. ILL. U. L.J. 263, 264, 267-68 (2004/2005).

<sup>2</sup> "America's prisons currently house 1.4 million inmates. . . . Virtually all of these inmates are disenfranchised, as are many ex-inmates. . . ." Taren Stinebrickner-Kauffman, *Counting Matters: Prison Inmates, Population Bases, and "One Person, One Vote,"* 11 VA. J. SOC. POL'Y & L. 229, 229 (2004).

<sup>3</sup> The total number of HIV cases reported to the Center for Disease Control and Prevention in 2006 was 37,852. CTR. FOR DISEASE CONTROL, HIV/AIDS SURVEILLANCE REP., Volume 18, Table 3, available at <http://www.cdc.gov/hiv/topics/surveillance/resources/reports/2006report/table3.htm> (last visited Sept. 20, 2008); see also Ellen M. Walker, *The HIV/AIDS Pandemic and Human Rights: A Continuum Approach*, 19 FLA. J. INT'L L. 335, 337, 394 (2007).

Despite evidence showing that protecting human rights helps prevent the transmission of HIV and reduce[s] the impact of HIV/AIDS, fundamental rights continue to be violated . . .

group that is one of the most vulnerable, and has perhaps the greatest need for advocacy, is the poor. The “poor” overlap other special population groups as well, and include people with disabilities, children, seniors, prisoners, and immigrants.<sup>5</sup> These are the specific special population groups addressed in this Article. Further, three unique organizational experiences drawn upon on in this Article are those of Legal Services for the Elderly, Disabled, or Disadvantaged of Western New York, Inc. (“LSED”), The Bet Tzedek Legal Clinic at Cardozo Law School, and the Door’s Legal Services Center.

LSED, located in Buffalo, New York primarily provides free civil legal services to senior citizens aged sixty and over through funding mandated by the Federal Older Americans Act.<sup>6</sup> LSED’s priorities include housing, health care, public benefits, protective services, and grandparents’ rights, but programming changes depending on need. They conduct a legislative needs survey about once every

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The right to equality is currently especially threatened for vulnerable individuals, groups and peoples all along the HIV/AIDS continuum. . . . People primarily and secondarily impacted by HIV/AIDS are owed the equal protection of all rights and equal protection of the law at every stage of an epidemic.

*Id.*

<sup>4</sup> According to the National Institute of Mental Health, one in four adults suffer from a cognizable mental illness, and one in seventeen are seriously mentally ill. NIMH.NIH.gov, Nat’l Inst. of Mental Health, Health and Outreach Statistics, <http://www.nimh.nih.gov/health/statistics/index.shtml> (last visited Sept. 20, 2008); *see also*, Jane Byeff Korn, *Crazy (Mental Illness under the ADA)*, 36 U. MICH. J.L. REFORM 585 (2003) (noting that our legal system makes significant distinctions between the physically and mentally disabled).

<sup>5</sup> *See* Laura K. Abel, *Toward a Right to Counsel in Civil Cases in New York State: A Report of the New York State Bar Association*, 25 TOURO L. REV. 31 (2009).

<sup>6</sup> *See* Older Americans Act of 1965, Pub. L. No. 89-73, 79 Stat 218 (codified as amended in scattered sections of 42 U.S.C.); *see also* 42 U.S.C. §§ 3001(10), 3021(1), (2)(E) (2000); LSED, WNY Legal Services for the Elderly—Mission, Overview of Services, and Clients Served, <http://www.lsed.org/aboutus/php> (last visited Sept. 20, 2008).

five years, which changes as conditions warrant.<sup>7</sup>

The Bet Tzedek Legal Clinic (Bet Tzedek means “House of Justice” in Hebrew) at Benjamin N. Cardozo School of Law represents two of the 400 or so groups that fall within the definition of special populations. This clinic represents elderly and disabled clients in a variety of civil matters.<sup>8</sup>

The Door’s Legal Services Center is an organization based in Manhattan that provides a wide range of services, including civil legal services, to young people between the ages of twelve and twenty-one.<sup>9</sup> Young people, who have not reached the age of majority, are another special or vulnerable population that would derive a benefit from creating a civil right to counsel.

The broad question raised in this Article is whether certain categories of litigants, such as the above mentioned special populations, should have a broader right to counsel than the general population. This Article also contemplates the narrower issue of whether special populations, due to their unique characteristics and greater vulnerability, should have a right to counsel in specific types of cases where other low income people would not otherwise have a right to counsel. The proposed solutions require consideration of whether there is a sense that the characteristics of these special populations are distinguishable from the characteristics of the more generalized

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<sup>7</sup> See LSED, WNY Legal Services for the Elderly—Clients Served, <http://www.lsed.org/aboutus.php> (last visited Sept. 22, 2008).

<sup>8</sup> Benjamin N. Cardozo School of Law, Bet Tzedek Legal Services Clinic—Overview, <http://www.cardozo.yu.edu/MemberContentDisplay.aspx?ccmd=ContentDisplay&ucmd=UserDisplay&userid=1032> (last visited Sept. 20, 2008).

<sup>9</sup> The Door, About the Door, <http://www.door.org/about/index.html> (last visited Sept. 20, 2008).

low-income population.

The threshold issue is whether very low income should be a necessary qualification when considering a proposed civil right to counsel for special populations. The fiscal realities of public funding and allocation make it challenging, although not impossible, to encompass the widest range of need. Ideally, funding should also reach those members of special population groups who fall within the demographic, who may be somewhat better off financially, yet are unable to afford private counsel.

There are two key questions: (1) how to garner political support for the proposition of a civil right to counsel for special populations; and (2) how to devise a practical blueprint for implementation. This endeavor begins by establishing that there is a right to counsel for a particular group based on need and then determining what can be done practically to respond to that need. It entails identifying state and local agencies, as well as groups that have time and resources to devote to this issue that will commit to working in particular areas, and continue working for the right to counsel for a particular group or groups.

## **I. ANALYTICAL FRAMEWORK**

Analyzing the types of cases specific special populations groups encounter provides a good starting point in identifying the challenges faced by these litigants. A party often does not have a single kind of case, so there is overlap that creates complexity not only in the litigation, but in the funding support available. Another apparent difficulty in these cases is securing government funding.

Government funding is often dependent upon the special population member's status in the suit, particularly whether the litigant is the defendant or the plaintiff. When looking at housing issues, the special population litigant will almost always be the defendant. However, in cases asserting a right, the litigant is more likely to be the plaintiff or petitioner. This difference in status has significant implications for securing government funding because Congress has retrenched funding for litigants who are plaintiffs in many types of civil litigation.<sup>10</sup> Immigrants are another group that fall within this category because they are an underserved community, even in asylum cases. Whether they have overcome the hurdle of legality or remain illegal aliens, immigrants represent a "vulnerable" population.<sup>11</sup> Some of them will be defendants, and others will be in custody or petitioning for relief.<sup>12</sup> Other cases involve immigrant housing, which are similar to other special population cases involving access to housing or access to medical care.

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<sup>10</sup> Alan W. Houseman, *The Future of Civil Legal Aid: A National Perspective*, 10 U. D.C. L. REV. 35, 37-40 (2007).

<sup>11</sup> Robert A. Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 GEO. J. LEGAL ETHICS 3, 3 (2008). "[T]he unmet legal needs of immigrants, a vulnerable population of human beings who come to this country in the hopes of a better life, who enter often without knowing the English language and culture, in economic deprivation, often in fear [is a pressing one]." *Id.* The immigration courts handled almost 369,000 cases in 2005. *Id.* at 7-9.

<sup>12</sup> Demand and diversification of needed legal services for immigrants is rapidly expanding and federally funded legal services have a policy of "triag[ing]" based not on the status of the litigant, but rather on factors such as their legality or whether they are "victim[s]" of "morally sympathetic circumstances, [such as] . . . trafficking and family abuse." Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 1028-30 (2008).

## II. AREAS WHERE COMPENSATED COUNSEL IS ALREADY PROVIDED

There are special populations groups who have no access to legal representation at all, yet they have resources available. Then, there are a small category of cases where a statutory right to counsel exists.

### A. The Elderly

Although the elderly do not have a legal right to counsel, the federal government has recognized the protected status of the elderly and their need for legal assistance in the federal Older Americans Act. Moreover, the legislation provides funding for legal services for the elderly without regard to income, and it also mandates senior legal assistance providers may not discriminate based on income.<sup>13</sup> Legal services are one of several mandated services under the Older Americans Act of 1965, although the funding for that act remains stagnant and inadequate to meet the needs of a rapidly aging society.<sup>14</sup> Funding for the elderly is fairly broad and covers various services without regard to the party's status in the litigation. Funding for legal services for the elderly is also available through the New

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<sup>13</sup> 42 U.S.C. § 3002(33), (40) (2006); *see also* Lee Beneze, *Senior Legal Assistance Services: A Well-Kept Secret*, 88 ILL. B.J. 411, 411(2000).

<sup>14</sup> Although the Older Americans Act was passed in 1965 to guide state and local activities for the benefit of the elderly, federal programs which would have provided legal protection, such as the Legal Assistance program, have never been funded. Donna Schuyler & Bryan A. Liang, *Reconceptualizing Elder Abuse: Treating the Disease of Senior Community Exclusion*, 15 ANNALS HEALTH L. 275, 282-84 (2006); *see also* Michael J. Burgess: New York State Office for the Aging—Policies, <http://www.aging.ny.gov/news/2008/FederalFundingAndPolicyPriorities.cfm> (last visited Sept. 20, 2008) (noting that while the growing rate of elder Americans impacts federal programs, Older Americans Act funding “has not kept pace”).

York State Department of Health's Comprehensive Cancer Control Plan. Eligibility requirements are quite liberal and services include estate planning, assistance with access to health care services, insurance issues and denials, housing, and family law issues.<sup>15</sup>

### B. The Incapacitated

Persons alleged to be incapacitated in an Article 81 proceeding brought under the Mental Hygiene Law have a statutory right to counsel in some cases.<sup>16</sup> There are several mechanisms in place that enable incapacitated persons to obtain counsel. Since there is no special fund that pays for these services, payment to counsel comes from the incapacitated person or her estate. However, if the incapacitated person is indigent, she will not be held legally responsible and payment may come from public funds at significantly lower predetermined rates.<sup>17</sup> Frequently, when counsel is appointed for the individual, as opposed to being privately retained, the lawyer will work virtually or entirely on a pro bono basis because the elderly person

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<sup>15</sup> Legal Services of Central New York, Inc. receives funding from the New York State Department of Health for its Cancer Legal Advocacy & Services Project "without regard to age, gender, race, or socioeconomic status." It provides funding for services such as estate planning, gaining access to health care, insurance denials or terminations, and housing and family law issues. Legal Services for Central New York, CLASP Brochure—Cancer Legal Advocacy and Services Project ("CLASP"), <http://www.lscny.org/Clasp/CLASP%20Brochure.pdf>; *see also* New York State Department of Health, New York State Comprehensive Cancer Control Plan: Strategic Directions for New York State 2003-2010, available at [http://www.health.state.ny.us/nysdoh/cancer/cancer\\_control/2003/ccp\\_2003\\_treatment.htm](http://www.health.state.ny.us/nysdoh/cancer/cancer_control/2003/ccp_2003_treatment.htm) (last visited Nov. 19, 2008) (citing as its second goal, "[b]y 2010, encourage best practice delivery systems recognizing the chronic nature of cancer, including ongoing supports and navigation for families, rehabilitation, education, social and legal services").

<sup>16</sup> N.Y. MENTAL HYG. LAW § 81.10 (McKinney 2008).

<sup>17</sup> N.Y. MENTAL HYG. LAW §§ 81.10(f), 81.16(f) (McKinney 2008); *see, e.g., In re Turner*, 730 N.Y.S.2d 188, 191 (Sup. Ct. N.Y. County 2001) (holding that the attorney's fees are payable at \$200 per hour from the incapacitated person's estate, but if funds are not available, at a rate of \$80 per hour for in court time from the City of New York).



has limited or no funds. This situation is problematic on many fronts. Experienced, high quality elder law practitioners are removing their names from the Part 36 fiduciary list<sup>18</sup> because they are frequently appointed to cases without getting adequate compensation positions.

When attorneys do get compensated, it may be at a reduced rate. Compensation for practitioners on the Part 36 list is discretionary, although some courts have devised a schedule.<sup>19</sup> By statute, court appointed attorneys in New York criminal cases can only earn seventy-five dollars per hour for their services.<sup>20</sup> In other parts of the court, compensation may vary slightly depending on the circumstances of the case and the attorney's role. Attorney compensation, which is generally considered inadequate in this state, is strictly regulated and capped.<sup>21</sup> Unused funds are circulated back into the mental hygiene legal services budget to help finance and fund some of the other services related to Kendra's Law.<sup>22</sup>

Attorneys in these guardianship situations realize they will not be compensated, and finding any counsel, let alone experienced

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<sup>18</sup> See N.Y. CT. R. §§ 36.1, 36.2(a), (b)(1) (McKinney 2008). The Part 36 fiduciary list is comprised of practitioners who have applied to perform various services for guardians or receivers, or others who are entitled to such legal services by law. The list is maintained by the Chief Administrator of the Courts. § 36.2(b)(1)

<sup>19</sup> See, e.g., *In re Potts' Estate*, 205 N.Y.S. 797 (N.Y. Surr. Ct. 1924) (setting out factors in determining compensation for legal services); N.Y. JUD. LAW §§ 35-a, 35-b (McKinney 2008) (setting out requirements for submitting requests for compensation).

<sup>20</sup> N.Y. COUNTY LAW § 722-b (McKinney 2008).

<sup>21</sup> § 722-b(2). N.Y. CT. R. § 36.3 (McKinney 2008); see also Laura I. Appleman, *The Ethics of Indigent Criminal Representation: Has New York Failed the Promise of Gideon?*, 16 NO. 4 PROF. LAW. 2, 16 (2005) (noting that "scandalously low payment" to court appointed attorneys in New York is a widely recognized problem affecting both the quality and quantity of legal assistance).

<sup>22</sup> See N.Y. Bill Jacket, 2005 A.B. 5909 ch. 137. For an explanation of Kendra's Law, see New York State Office of Mental Health, AOT Summary, [http://www.omh.state.ny.us/omhweb/Kendra\\_web/Ksummary.htm](http://www.omh.state.ny.us/omhweb/Kendra_web/Ksummary.htm) (last visited Sept. 22, 2008).

counsel, is difficult. This fact raises an important issue with the right to counsel in regard to uncompensated mandates. There is a right to counsel, but if somebody does not have money, how do you compel a lawyer to protect that person's interest? In Erie County, for example, most attorneys are unwilling to perform these legal services because of the lack of funding and compensation. Judges often appoint a court evaluator instead of defense counsel, despite the fact the two roles are dissimilar.<sup>23</sup> They are cognizant that there is no way to compensate the attorneys on the Part 36 list, which in and of itself is a deprivation. The statutory right automatically triggered in certain situations is overlooked in lieu of an evaluator, who is supposed to be the "impartial" eyes and ears of the court investigator.<sup>24</sup> This results in compromising the justice that one might obtain by virtue of having an advocate on her side. In addition, the stakes in such proceedings are high—loss of the ability to handle one's own finances, to make medical decisions or to decide where to reside. In fact, the result of a guardian appointment is often involuntary institutionalization in a nursing home. Our society has recognized when one's liberty is at issue, an individual can only be served by counsel on his side. The need is no less great simply because the institution is a nursing home and not a prison.

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<sup>23</sup> See Debra Sacks, *Guardianship: Issues and Legislative Trends*, in PLANNING FOR AGING OR INCAPACITY 1994: LEGAL AND FINANCIAL ISSUES 37, 40, 50, 51(1994) (explaining that although 81.09 mandates a court evaluator and 81.10 provides that there is a right to counsel, in reality states often do not appoint counsel); see also Julie M. Solinski, *Guardianship Proceedings in New York: Proposals for Article 81 to Address Both the Lack of Funding and Resource Problems*, 17 PACE L. REV. 445, 452-58 (outlining the difference between counsel and court evaluator).

<sup>24</sup> See Leona Beane, *Duties and Responsibilities of the Court Evaluator*, in GUARDIANSHIP LAW 1994: ARTICLE-81—TRAINING TO OBTAIN CERTIFICATION 25, 37 (1994).

In some mental health cases, the right to counsel is funded and attorneys are available through Mental Hygiene Legal Services (“MHLS”). MHLS is supported through a separate funding stream because their services include guardianship representation, forced medication, defending committees, and serving as court evaluators for various committees.<sup>25</sup> However, due to the fact that they are an adjunct of the appellate divisions, a conflict of interest may sometimes arise.<sup>26</sup> If the appointment of counsel is necessary and the person currently resides in certain statutorily described facilities, the court may appoint MHLS to act as counsel in an Article 81 proceeding. However, this right does not attach where the alleged incapacitated person resides in the community and the threat of institutionalization is in the future, after a guardian is appointed.

Once a court has determined that a defendant is incapacitated and in need of a guardian, the statute requires that a guardian be appointed, but similarly provides no funding to pay the guardian for his or her services. Since the role of guardian is that of an advocate, courts often turn to attorneys to fulfill this role. However, there are also no funds in Article 18-b (“18-b”) for guardianship where there is no representation because 18-b is for criminal matters.<sup>27</sup> It is not

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<sup>25</sup> Mental Hygiene Legal Service, [http://www.courts.state.ny.us/ad4/mhls/MHLS\\_Default.htm](http://www.courts.state.ny.us/ad4/mhls/MHLS_Default.htm) (last visited Sept. 22, 2008).

<sup>26</sup> See New York County Lawyer’s Assoc., Report on Fiduciary Issues: Recommendations From a Guardianship Perspective 2, 17, 18, [http://www.nycla.org/siteFiles/Publications/Publications91\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications91_0.pdf) (last visited Sept. 23, 2008) (discussing the possible conflict of interest, and conversely, the benefit of having MHLS serving as counsel and guardianship roles); see also Debra Sacks, *Legal Aspects of Protective Services*, in 10TH ANNUAL ELDER LAW INSTITUTE: REPRESENTING THE ELDERLY CLIENT OF MODEST MEANS (1998).

<sup>27</sup> See Sacks, *supra* note 26, at 147-48.

provided in civil cases because they have separate funding streams.<sup>28</sup> However, for protective services in guardianship proceedings, from time-to-time, counsel will petition for guardianship, which does not rise to the level of a right. The statute does provide that other counsel may be assigned through 18-b.<sup>29</sup> This is another example of a right to counsel that is not funded. Representation of the guardian within the guardianship statute does not necessarily have a funding stream attached to it. The question then becomes, “Is there a statutory right to counsel if judges are not appointing counsel because of a lack of funding?”

### C. Children

In the area of children’s rights, there is a right to counsel with respect to young people subject to abuse and neglect proceedings.<sup>30</sup> The right to counsel also exists with respect to juvenile delinquency proceedings.<sup>31</sup>

For the parents of these children, 18-b counsel can be assigned. This assignment process is demonstrated in cases where young people become parents. For example, a young person can be in foster care, and then become the subject of a proceeding as a par-

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<sup>28</sup> Report of the Appellate Division First Department Committee on Representation of the Poor, NEW YORK STATE UNIFIED COURT SYSTEM, *available at* [http://www.courts.state.ny.us/press/old\\_keep/1AD-rep-poor.shtml](http://www.courts.state.ny.us/press/old_keep/1AD-rep-poor.shtml) (last visited Sept. 23, 2008) (describing the different funding sources for 18-b and guardian programs).

<sup>29</sup> See N.Y. COUNTY LAW § 722 (McKinney 2008) (stating that counsel is allowed if the client qualifies under § 81.10 of the mental hygiene law).

<sup>30</sup> Jacqueline Deane, *A Career in the “Kangaroo Court:” Reflections of a Juvenile Defender on the Fortieth Anniversary of In re Gault*, 60 RUTGERS L. REV. 225, 229-30 (2007) (citing *In re Gault*, 387 U.S. 1, 37-38 n.63 (1967) and discussing N.Y. FAM. CT. ACT § 241 (McKinney 2008)).

<sup>31</sup> *Id.*

ent for a child. Legal Aid is representing them in their foster care case and refuses to represent them as a parent. So the young person as parent does not necessarily get counsel. While they are not always assigned, they should be. Although the parents can certainly ask the judges to appoint a lawyer, not all requests will be granted.<sup>32</sup> Parents are thus not in themselves a special population, but children who have children are a special population.

### III. AREAS WHERE THERE IS NO RIGHT TO COUNSEL

#### A. Prisoners

There is almost a negative right to counsel for representing prisoners after prisoner reform took away an attorney's ability to receive full fee reimbursement.<sup>33</sup> Some attorneys cannot even afford to litigate with the fee-capped rates they are currently paid.<sup>34</sup> The funding for Prisoners Legal Services has been so curtailed that even people who are put into solitary confinement do not have a right to a lawyer. According to a participant at the conference, Prisoners Legal Services can only help people who are threatened with eighteen months or longer in solitary confinement.<sup>35</sup> In other words, if an in-

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<sup>32</sup> See N.Y. FAM. CT. ACT §§ 262(a)(iv)-(v) (McKinney 2008); N.Y. COUNTY LAW § 722; Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's Failure To Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151, 1152 (2001) (discussing that although there is a right to counsel, many parents are deprived of that right because of inadequate funding).

<sup>33</sup> See Karen M. Klotz, *The Price Of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision As a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759 (2000) (discussing how the Prison Litigation Reform Act negatively affected prisoners' right to counsel)

<sup>34</sup> *Id.* at 787-92.

<sup>35</sup> See Brochure, Prisoner's Legal Services of New York (on file with *Touro Law Review*).

mate faces a penalty of a year of solitary confinement, that inmate does not have access to a lawyer. It was noted at the conference that prisoners have no right to counsel to contest medical decisions. While MHLS can represent people who are in state mental institutions if they have issues regarding their treatment or care,<sup>36</sup> prisoners have no similar advocate. A striking example is a senior citizen prisoner who refuses medical treatment and has aged out in the prison system.

Prisoners also have many civil legal issues related to their incarceration. For example, there may be a mentally ill prisoner who needs an attorney for a Social Security case. While he was incarcerated, most legal services programs would not represent that individual. What is the possibility of successful reentry into society after incarceration, if the former prisoner has no income stream upon release?

### **B. Immigrants**

Another area where there is a significant need for counsel is immigration and deportation hearings. This is true for both defense of immigration, which would be immigration court and removal or a deportation proceeding,<sup>37</sup> as well as for an affirmative immigration application, where there is also no right to counsel.<sup>38</sup> There is not nearly enough funding available for these types of proceedings. This

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<sup>36</sup> See Solinski, *supra* note 23, at 487-88.

<sup>37</sup> See Shoba Sivaprasad Wadhia, *Immigration Reform and Policy in the Current Politically Polarized Climate: The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 410-11 (2007) (discussing the shortcomings of the immigration law with regard to the right to counsel).

<sup>38</sup> *Id.* at 410.

inadequacy of funding directly affects particular vulnerable populations, including people working in restaurants, as domestic help, and on farms for slave wages. The case in Nassau County where two female housekeepers were imprisoned in a closet is a good example.<sup>39</sup>

What makes immigrant workers a particularly vulnerable population is having a significant language barrier and lack of community support. In addition, for many immigrants, fear of deportation is so severe that they will not go to the police, even when victims of crimes. Immigrants are continually shipped to the United States and forced to work as slaves.<sup>40</sup> In these types of situations, an issue that arises is what to do with the immigrants, because technically they are not illegal.<sup>41</sup> Although the program participants did not include immigration attorneys, several speakers commented on the special vulnerability of this population and the lack of resources to handle such cases. The consensus was that, due to the potential consequences facing this population (deportation, victimization, imprisonment), this group may have a greater need for counsel than the general low-income community

### C. Grandparents

Another special population within the larger group of the eld-

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<sup>39</sup> United States v. Sabhnani, No. 07-CR-429, 2008 WL 2791869, at \*1 (E.D.N.Y. July 19, 2008); Robert E. Kessler, *LI Housekeepers Held As Slaves*, NEWSDAY, May 16, 2007, at A3.

<sup>40</sup> Dr. Leslie Jermyn, *Slavery Now!*, GLOBALAWARE.ORG, July 29, 2002, [http://www.globalaware.org/Articles\\_eng/slave\\_art\\_eng.htm](http://www.globalaware.org/Articles_eng/slave_art_eng.htm).

<sup>41</sup> World Org. for Human Rights, *Sex Trafficking & Forced Marriage*, [http://www.humanrightsa.org/index.php?option=com\\_content&task=view&id=19&Itemid=40](http://www.humanrightsa.org/index.php?option=com_content&task=view&id=19&Itemid=40) (last visited Sept. 22, 2008) (discussing the fine line between immigrants who the United States grants asylum to and immigrants that are deported).

erly includes grandparents caring for minor children. When discussing barriers to justice, conference participants felt this group was at a particular disadvantage since the parents in custody petitions in New York have a civil right to counsel.<sup>42</sup> Any adversarial proceeding where only one side is represented cannot be fundamentally fair. Moreover, there are some instances, even, where the grandparents have had custody of the children for an extended period of time and develop a relationship that should be protected.<sup>43</sup> In short, the parents have a right, but the grandparents do not.<sup>44</sup>

#### D. Children's Attorneys

Aside from a law guardian appointment, another gap lies with attorneys to represent children. There is no real right at this point because the law guardian can substitute his or her judgment as an attorney for that of the young person.<sup>45</sup> In a recent case, an attorney came into the court and said he was a guardian ad litem and there was a significant issue with regard to the parents. The parents were in dispute, and the attorney asserted that it was his understanding that all guardian ad litem were now instructed by mandates that they will not be referred to as guardian ad litem, but as counsel to the child.<sup>46</sup> This situation came about because some courts were utilizing guard-

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<sup>42</sup> See *Burghdurf v. Rogers*, 682 N.Y.S.2d 702, 703 (App. Div. 3d Dep't 1998).

<sup>43</sup> See *E.S. v. P.D.*, 863 N.E.2d 100, 104 (N.Y. 2007) (finding a New York statute providing a "procedural mechanism for grandparents to acquire standing" in asserting visitation rights with a minor child was constitutional) (quoting *Wilson v. McGlinchey*, 811 N.E.2d 526 (N.Y. 2004)).

<sup>44</sup> *Burghdurf*, 682 N.Y.S.2d at 703.

<sup>45</sup> *In re Amkia P.*, 684 N.Y.S.2d 761, 763 (N.Y. Fam. Ct. 1999).

<sup>46</sup> See Timothy M. Tippins, *The Ambiguous Role of Law Guardians*, 239 N.Y.L.J. 3 (2008).



ian ad litem as mediators between the parents. It was becoming adversarial to the extent that they were being asked questions that took them out of their role as lawyers. Now there has been a shift away from that and the guardian ad litem is instructed that they are not to be utilized in any other capacity than as attorneys for the child.

## VI. STRATEGIES AND SOLUTIONS

### A. Underlying Issues and Themes

Several conference participants noted that, comparing civil litigation and criminal defense as clarified by *Gideon* is like comparing apples and oranges.<sup>47</sup> Although clearly in some cases, the litigant in civil cases is in a defensive posture (i.e., defending against an eviction, a mortgage foreclosure or the imposition of a guardian), in some cases the litigant is affirmatively seeking something (disability benefits, bankruptcy protection etc). Whether the right is affirmative or defensive might impact the public perception of the right to counsel. Will there be a plenitude of cases that will inundate the courts? Do people have an inherent right to sue? And in doing so, do they have the inherent right to an attorney if they cannot afford one? The conference participants were cognizant of the public perception of attorneys and that our society is seen as increasingly litigious. The potential for opening up the floodgates argues for limiting the right to either special populations or particular types of defensive cases.

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<sup>47</sup> See *Gideon*, 372 U.S. at 344 (holding the Fourteenth Amendment provides that all criminal defendants have the right to counsel and if a defendant is indigent he can have counsel appointed for him).

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Another possible area of focus is enhancing the narrow issues where there is currently a right to counsel, but there is inadequate or no funding. The legal services community could make a commitment to litigate for counsel in those instances. For example, within the Article 81 statute, there is a right to counsel in a specific situation (if the individual objects or if the individual is institutionalized), but no funding to pay the attorneys who takes these cases.<sup>48</sup> The program participants felt that the legal services community should provide guidance on enforcing these unfunded mandates.

There are two potential strategies for special populations. One focuses on the moral arguments surrounding the deserving poor. This encompasses a significant portion of the populace. The other strategy is a collective self-interest, like the disability funding model. This is the theory that if we get funding and pay for this particular service, it will enable us to reduce spending in the future. However, these strategies can overlap. For example, with disability funding, there is a “financial return,” but the disabled are also presumably a deserving community as well.

### **B. Funding**

As noted above in the context of Mental Hygiene Guardian proceedings, a right to counsel without adequate funding is not a right at all. One example to consider is the New Jersey model, where legal services get some funding through their filing fees. According to one

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<sup>48</sup> See N.Y. MENTAL HYG. LAW § 81.10 which states, in pertinent part, “[t]he court shall appoint counsel in any of the following circumstances unless the court is satisfied that the alleged incapacitated person is represented by counsel of his or her own choosing . . . .”

conference participant, New Jersey passed a law that a certain percentage of the filing fees will go to fund legal services for the poor.<sup>49</sup> Kathryn Grant Madigan, president of the New York State Bar Association, has mentioned that these types of administrative fees could be funded through IOLA accounts and dropping the funding stream the state was matching.<sup>50</sup>

Direct funding is, of course, the most effective strategy, but it is important to be wary of pitting one group against another. For example, 18-b lawyers do not get paid as much as they should for criminal work, as opposed to civil legal services funding. The money for all people's representation comes from the same pools.<sup>51</sup> In order to avoid this, the civil right to counsel movement should not only articulate a funding mechanism but be clear that money should not be taken from the criminal defense budget to fund civil legal services.

Therefore, it is important to focus our arguments in support of funding, not just on legal services funding, but on the civil right to counsel specifically. There has been a huge effort over the last twenty years to identify every possible source of funding for pro bono and legal services programs. However, the funding alone,

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<sup>49</sup> N.J. STAT. ANN. §22A:2-51 (West 2008).

<sup>50</sup> Press Release, New York State Government, New State Regulations To Increase Funding For Civil Legal Assistance To Eligible Poor New Yorkers (May 31, 2007), available at [http://www.state.ny.us/governor/press/0531071\\_print.html](http://www.state.ny.us/governor/press/0531071_print.html).

Access to justice for all, not just those who can afford it, has been and will continue to be a key Association priority. We hope that the steps that the IOLA Fund is taking to raise its income through new banking regulations will result in a significant increase in civil legal services for poor New Yorkers and we applaud Governor Spitzer for making civil legal services a priority in the current State budget.

*Id.*

<sup>51</sup> N.Y. CT. R. § 36.2.

without a mandatory right to counsel is not adequate. A good model is the federal Older Americans Act, which funds a variety of different programs, such as Meals on Wheels, home care, protective services and legal assistance.<sup>52</sup>

Since a program like legal services is actually a relatively small part that funds the Office on Aging, it is also helpful to examine how this group was identified as needing legal assistance, as a special subset of the population. A similar strategy led to the right to counsel legislation in New York City for senior citizens in housing court.<sup>53</sup> The program participants felt that the elderly, particularly in defensive cases, present the best avenue for success for guaranteeing a civil right to counsel. While most special populations present a moral reason for supporting the right to counsel, the elderly are a universal group. In this era of limited funding for legal services, it is important to focus funding efforts on those groups with the most wide based support.

For example, in Central New York, there are six different funding streams from the Protection Advocacy System.<sup>54</sup> These funding streams are a testament to the groups who do the best lobbying—developmental disabilities, parents with kids in special educa-

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<sup>52</sup> See Meals on Wheels Ass'n of Am., About MOWAA, <http://www.mowaa.org/displayContent.asp?MemberNo=5E&CurrentNo=5E5B5F&type=I> (last visited Sept. 23, 2008) (describing the goals and the mission of the organizations).

<sup>53</sup> For a look at the bill, see Nat'l Legal Aid & Defendat Ass'n, Right to Counsel for Low-Income Seniors Facing Eviction & Foreclosure, <http://www.nlada.org/DMS/Documents/1197407975.79/NYC%20CRTC%20bill.pdf> (last visited Sept. 23, 2008). See also Manny Fernandez, *Free Legal Aid Sought for Elderly Tenants*, N.Y. TIMES, Nov. 16, 2007, at B3; Edwin F. Martin, *Access to Justice in New York City*, 47 NO. 3 JUDGES J. 14 (2008).

<sup>54</sup> See NYS Comm'n on Quality of Care, <http://www.cqc.state.ny.us/> (last visited Sept. 21, 2008).

tion—while the mentally ill, who are substantially fewer, are a less powerful voice when advocating for funding. This is because the general population does not say, “we are one of them,” or “we are going to be one of them.” The same is also true for immigrants and prisoners, two other potential populations that were identified at the conference.

### C. Legal Arguments

Focusing on funding is only one strategy, however, and that focus might be too limited. If we concentrate on the “right” and that due process requires a right to counsel, funding will follow, as it did with representation in criminal cases. When you look at the places where there is a right to counsel, you see either no funding, as in the guardianship area, or funding so low that representation is inadequate. This due process argument is invoked in proceedings such as those falling under Article 11.<sup>55</sup>

Our mission is to find a case, the right case, like *Gideon* where we can make the legal argument, as well as mobilize public support for a fundamental right to counsel in a civil case. You can then employ various funding mechanisms and other methods, such as continuing legal education (“CLE”) credit for lawyers who do pro bono litigation on behalf of individuals. The State Bar is effectively increasing the pool through the number of members of the bar who are willing to take on civil cases where there is a glaring deficiency.

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<sup>55</sup> See N.Y. C.P.L.R. 1102. See also N.Y. CONST. art. I, § 6 (“No person shall be deprived of life, liberty or property without due process of law.”); Andrew Scherer, *Why People Who Face Losing Their Homes in Legal Proceedings Must Have a Right to Counsel*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 699, 716-19, 721-23 (2006).

#### D. Political Mobilization

Another strategy is educating the general population. *Gideon* did not rely on legal theory as much as it did the environment and the change in public opinion. The program participants noted with irony that most of the public believes that poor people have a right to a lawyer in all cases. This is due, in part, to a lack of understanding about the difference between criminal and civil matters. Many participants thought that a big public demonstration is needed. For example, at South Brooklyn Legal Services in the early 1970s, there was an uncontested divorce day.<sup>56</sup> Even though people were told they could and would be seen at any time during the day, there would be lines four blocks long, and the Daily News and The Post captured many photographs of people waiting in line for many hours to get in for their divorce proceeding. This method has proven effective. In the pre-*Goldberg* days, New York City's efforts to swamp the welfare system with requests for hearings ultimately contributed to the process that led to *Goldberg v. Kelly*.<sup>57</sup> The legal services community cannot do this alone and must reach out to other groups for support: women's groups, children's advocates, advocates for the aging and disabled. All these special populations need to work on an education campaign together.

A coalition made up of non-attorney advocates will also avoid

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<sup>56</sup> This is based on the experience of one of the break-out session participants while working at South Brooklyn Legal Services in the early 1970s.

<sup>57</sup> See 397 U.S. 254, 270-71 (1970) (holding that a welfare recipient "must be allowed to retain an attorney if he so desires." Such assistance from an attorney would not "prolong" or "encumber" a hearing. Further, "prior involvement in some aspects of a [welfare] case will not necessarily bar a welfare official from acting as a decision maker").

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the appearance of self-interest, and many of these networks exist already. They just have not focused on civil right to counsel as an issue that cuts across all disciplines. Not-for-profit organizations have a great network. For example, in community legal projects, there are attorneys taking on pro bono cases who can get the word out to the public. This network of not-for-profits representing the people we want to represent here: the immigrants, the children, the families, the people with disabilities, and people with matrimonial problems. The New York State Bar Association must, and very easily can, plug into these networks. In the end, we are talking about basic underlying rights—not the right to a lawyer, but the right to decent treatment, the right to a place to live, and enough money to live on.

## VII. CONCLUSION

While many advocates are committed to fighting for a general right to counsel in civil litigation, that goal will likely be difficult to attain. In the meantime, efforts to obtain a right to counsel for certain defined special populations may be more successful. Such efforts, when successful, can establish a recognition that particular groups, due to their situations, resources, or the nature of their needs, merit a commitment by society to insure that they are aided by counsel. In addition, securing the right to counsel for designated groups may be an essential step towards establishing a civil right to counsel for all those who cannot otherwise afford a lawyer.