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Cover Page Footnote

B.A., New York University, Washington Square College of Arts and Sciences, 1974; J.D., New York University School of Law, 1977. From 1988 to 1994, Susan V. Demers served as Deputy Commissioner for Legal Affairs and General Counsel of the New York State Department of Social Services in the Administration of Governor Mario Cuomo. From 1984 to 1988, she served as Associate Commissioner for Legal Affairs and Deputy General Counsel. She is now a legal and policy development consultant, living in the British Virgin Islands. The author would like to thank the staff of the Division of Legal Affairs of the New York State Department of Social Services for their assistance with the research for this Article. This Article was completed in April, 1995, before the end of New York State's legislative session and before the passage of New York State's Budget for 1995-1996. Several of the legislative and budget proposals referred to in the Article did not become law. Some of the statistical information in this Article was provided by the staff of the New York State Department of Social Services, and their titles and offices are cited for identification purposes. They may no longer be serving in those positions at the present time.

THE FAILURES OF LITIGATION AS A TOOL FOR THE DEVELOPMENT OF SOCIAL WELFARE POLICY

Susan V. Demers*

I. Introduction

Since the 1960s, litigation has been used frequently by advocates for a variety of groups seeking to establish fundamental rights, to focus attention on serious social problems, to challenge the policies and practices of government officials and to reform institutions. There have been notable successes. Among the rights established through the use of litigation have been the right to travel freely from state to state,¹ the right to due process before welfare benefits can be reduced or terminated,² the right to privacy³ and the right to reproductive choice.⁴ Litigation has also focused attention on the problems of the mentally ill,⁵ the mentally retarded,⁶ battered women⁷ and the homeless.⁸ In addition, litigation has helped to re-

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1. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

2. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

3. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

4. *Roe v. Wade*, 410 U.S. 113 (1973).

5. *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986).

6. *N.Y. State Ass'n for Retarded Children v. Carey*, 706 F.2d 956 (2d Cir. 1983), *cert. denied*, 464 U.S. 915 (1983).

7. *Bruno v. Codd*, 396 N.Y.S.2d 974 (Sup. Ct. 1977), *rev'd*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd on other grounds*, 393 N.E.2d 976 (N.Y. 1979).

8. *Callahan v. Carey*, Index No. 42582/79 (Sup. Ct., N.Y. County 1979).

form, in significant ways, prisons,⁹ institutions for the mentally retarded¹⁰ and public housing.¹¹ Litigation has been and will continue to be necessary to address issues such as these. Experience has shown, however, that litigation is a poor vehicle for the development of social welfare policy and, in fact, can be detrimental to the very clients whose rights and interests are ostensibly being protected.

Momentum is building around the nation for change and new directions in many areas of social welfare policy. The welfare reform debate is raging and, while it is still unclear what new policies will result, it is clear that experimentation on the state and local levels with new methods of engaging clients and delivering services and benefits will be part of any plan to reform the welfare system.¹² It remains to be seen whether this will be accomplished through the current "waiver" process,¹³ through programmatic variations permitted by federal statute¹⁴ or, as some have proposed, by creating new block grants.¹⁵ However, welfare recipients themselves recognize that the system cannot continue as it presently exists.¹⁶ Families who have had interaction with the child welfare system, advocates for children and other professionals in the field have

9. *Rhem v. Malcolm*, 527 F.2d 1041 (2d Cir. 1975).

10. *Carey*, 706 F.2d at 971.

11. *Duffy v. Longo*, 616 N.Y.S.2d 760 (N.Y. App. Div. 1994).

12. The Clinton Administration's welfare reform proposal contains new requirements for welfare recipients to participate in work or a job search and new sanctions for failure to do so, including the termination of benefits after two years. Work and Responsibility Act, H.R. 4605, 103d Cong., 2d Sess. (1994).

13. Pursuant to § 1115 of the Social Security Act (42 U.S.C. § 1315 (1990)) the Secretary of Health and Human Services may waive various sections of the Social Security Act in order to permit states to test different ways of delivering Aid to Families with Dependant Children (AFDC - 42 U.S.C. §§ 602-645 (1935)) and Medicaid benefits (42 U.S.C. §§ 1396(a)-1397(e) (1935)). Under the provisions of the Food Stamp Act (7 U.S.C. § 2011 (1964)), the Secretary of Agriculture may waive various provisions of the Food Stamp Act to permit states to test different ways of delivering food stamp benefits. In October 1994, the Secretaries of Health and Human Services and Agriculture granted to New York State a series of waivers to permit implementation of a welfare reform initiative known as Jobs FIRST.

14. Work and Responsibility Act, H.R. 4605, 103d Cong., 2d Sess. (1994).

15. Under the block grant approach, welfare would cease to be an entitlement for everyone who meets the program's eligibility requirements, and funding for the program would not increase as demand for assistance grows. The block grant approach is included in the welfare reform plan of the Republican members of the House of Representatives, H.R. 117, 104th Cong., 1st Sess. (1995) and in the Personal Responsibility Act, H.R. 4, 104th Cong., 1st Sess. (1995), of the Republican "Contract With America".

16. David Whitman, et al., *The Myth of Reform*, U.S. NEWS AND WORLD REPORT, Jan. 16, 1995, at 30; Isabel Wilkerson, *An Intimate Look at Welfare: Women Who've Been There*, N.Y. TIMES, Feb. 17, 1995, at A1.

reached a remarkable consensus that services should be family-centered and community-based, and that removing a child from his or her family and community should be a last resort.¹⁷ Last year, the Clinton Administration's proposal to reform the health care system¹⁸ ignited a heated and continuing debate about the need to reduce costs¹⁹ and improve access to health care throughout the nation.²⁰ While no national plan emerged from the debate, states and local governments continue to experiment with ways to improve services to clients²¹ and reduce the proportion of their budgets spent on health care for the poor and uninsured.²²

The reform of each of these systems has one thing in common: the need for state and local governments to experiment, to be innovative or, to use the current, fashionable locution, to be "entrepreneurial", in the delivery of services and benefits. However, litigation is frequently used to halt experimentation and stifle inno-

17. The New York State Department of Social Services and the Office of the Decade of the Child conducted a series of "community visioning" focus groups throughout the State of New York during the spring and summer of 1994. See NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, FAMILIES FOR KIDS ASAP, (1994).

18. Health Security Act, H.R. 3600, 103d Cong., 1st Sess. (1993).

19. National health care costs totaled \$884 billion in 1993. See *Cost of Health Care in the United States is Continuing to Grow*, N.Y. TIMES, Nov. 27, 1994, at 35 (quoting officials of the Clinton Administration). In 1991, national health care costs totaled approximately \$752 billion, or 13.2 % of the Gross National Product. CONGRESSIONAL BUDGET OFFICE, TRENDS IN HEALTH SPENDING: AN UPDATE (June 1993). In New York State, the costs of the Medical Assistance (Medicaid) program for the poor and uninsured grew to \$19 billion in State Fiscal Year (SFY) 1993-94, an increase of approximately 11%. These costs represent 63% of State's total budget. Information provided by Mark Sullivan, former Budget Director, Office of Budget Management, the New York State Department of Social Services, (Mar. 1995).

20. In 1994, almost 40 million U.S. residents lacked health insurance. Information provided by Marjorie Geiger, New York State Health Care Reform Task Force of the New York State Department of Health (Mar. 1995).

21. In 1994, the use of health maintenance organizations by New York State residents grew by almost 16%, to 4.1 million. Elizabeth McFarland, the New York State Department of Health, Bureau of Alternative Delivery Systems. Currently, in New York State, there are approximately 500,000 Medicaid recipients enrolled in managed care programs and the Medicaid program is seeking to increase enrollment in managed care. Information provided by Lawrence MacArthur of the Department of Social Services, Office of Budget Management (Mar. 1995). The legislature has set a goal for 1996 of 1.7 million recipients enrolled in Medicaid managed care. N.Y. SOC. SERV. LAW § 364-j (McKinney 1992).

22. Between October 1, 1993 and September 30, 1994 (Federal Fiscal Year 1993-94), New York State made payments totaling \$930.2 million to general hospitals for care provided to the uninsured and the poor who were not enrolled in the Medicaid program. These costs represent contributions to the "Bad Debt and Charity Pool", and include special payments to financially distressed hospitals. Information provided by John Sweeney, Director of the New York State Department of Social Services, Office of Financial Management (Mar. 1995).

vation. When litigation is used this way, it upsets the balance of power among the three branches of government and permits judges to usurp the role of the legislative and executive branch officials who have the responsibility for making laws and establishing policies. In New York State, various courts have used preliminary injunctions, without rendering decisions on the merits of the underlying substantive legal claims, to micro-manage the social services system, thereby implementing their own or a litigant's vision of public policy, rather than those of the legislature or executive agency officials. A courtroom is the wrong forum for a vigorous and vital debate on policy development. Better policies would result and clients would be better served if clients and their advocates participated in policy development through advisory groups, legislative lobbying and "negotiated rulemaking."²³

Courts have the power, and should exercise that power in appropriate circumstances, to strike down laws, policies and practices that violate the state or federal constitutions or other preemptive laws. However, judges should not fashion wide-ranging relief that substitutes their views of policy, or those of a litigant, for those of the legislature and the executive branch officials to whom the New York State Constitution delegates policy-making authority,²⁴ without finding any violation of law or a constitutional provision that would warrant such extraordinary judicial relief.

Part II of this Article will describe the proper role of the courts when evaluating the actions of government officials and the proper procedures for doing so. Part III will discuss several cases brought against officials of the New York State Department of Social Services and local governments,²⁵ primarily in New York City, in which

23. Negotiated rule-making refers to a process whereby all parties with a stake in a particular subject matter - the regulated industry, the affected clients, the public and the regulatory agency - join together to "negotiate" the content of a regulation to be promulgated by an administrative agency. Negotiated rule-making may be formal [N.Y. Exec. Order No. 156, Exec. Law § 4.156 (June 1992)] or informal (the Department of Social Services used an informal type of negotiated rule-making to develop the regulations governing shelters for families. See N.Y. COMP. CODES R. & REGS. tit. 18, § 900 (1986)).

24. N.Y. CONST. art. III, § 1; art. IV, § 1. *N. Y. State Inspection, Sec. and Law Enforcement Employees v. Cuomo*, 475 N.E.2d 90, 93 (N.Y. 1984); *People ex rel. Broderick v. Morton*, 50 N.E. 791, 793 (N.Y. 1898); *People ex rel. Burby v. Howland*, 49 N.E. 775, 779 (N.Y. 1898); *Methodist Hosp. of Brooklyn v. State Ins. Fund*, 459 N.Y.S.2d 521, 525 (Sup. Ct. 1983), *aff'd*, 479 N.Y.S.2d 11 (N.Y. App. Div. 1984), *aff'd*, 476 N.E.2d 304 (N.Y. 1985), *appeal dismissed*, 474 U.S. 801 (1985).

25. In New York State, the social services system is state-supervised but locally administered. While policies are developed and State and federal funding are provided to local governments by the New York State Department of Social Services,

the courts have abandoned their appropriate role, misused preliminary injunctive relief and, in some cases, reached results that have ultimately been detrimental to the interests of the plaintiff classes. Using those decisions to illustrate its thesis, this Article concludes that litigation is largely counterproductive to the development of a coherent and feasible social welfare policy and interferes with the constitutionally-derived separation of powers.

II. The Proper Role of the Courts

The organization of the government of the State of New York, as set forth in the New York State Constitution, mirrors that of the federal government. It is axiomatic that there are three "co-equal" branches of government and that the New York State Constitution commits very different powers to each branch.²⁶ The power of the judiciary to review acts of the legislature and executive branch officials is well established, as are the standards that must be applied in undertaking such review.²⁷

In challenging the actions of executive branch officials, a plaintiff must prove that he or she has an underlying legal right or entitlement to benefits or services and that the actions (or inactions) of the government officials have infringed upon that right.²⁸ If a court determines that a plaintiff does have a particular legal right or entitlement and that the actions complained of do in some way infringe upon that right or entitlement, then the court reaches the stage of fashioning appropriate remedial relief to redress the harm suffered.²⁹ When reviewing the acts of other branches of government, the judiciary is expected to abide by certain principles that take into account the separation of powers.³⁰ In fashioning remedial relief, courts are expected to exercise restraint and grant relief that is targeted to correcting the harm.³¹ As the court in *Klostermann v.*

benefits are provided and services are delivered by 58 local social services districts throughout the State. See N.Y. SOC. SERV. LAW §§ 17, 20, 34, 61 and 62 (McKinney 1992). Local governments also contribute a share of the funds for benefits and services. See N.Y. SOC. SERV. LAW § 153(a)-(h) (McKinney 1992).

26. N.Y. CONST. art. III, § 1; art. IV, § 1, art. VI, § 1. See *N.Y.S. Employees*, 475 N.E.2d at 93; *Morton*, 50 N.E. at 144; *Howland*, 49 N.E. at 779; *Methodist Hosp.*, 459 N.Y.S.2d at 525.

27. *N.Y.S. Employees*, 475 N.E. at 93; *Morton*, 50 N.E. at 144-45; *Howland*, 49 N.E.2d at 779.

28. See, e.g., *Klostermann v. Cuomo*, 463 N.E.2d 588 (N.Y. 1984); *Jones v. Beame*, 380 N.E.2d 277 (N.Y. 1978).

29. *Klostermann*, 463 N.E.2d at 596.

30. *Id.*

31. *Id.*

*Cuomo*³² observed, courts should not issue orders or judgments that intrude upon the policy-making prerogatives and discretionary power of the other branches of government.³³ Thus, a court may not order the legislature to appropriate money, because the New York State Constitution commits that prerogative to the legislature.³⁴ Further, a court may order an executive branch official to carry out a mandated duty, but where that duty involves the exercise of discretion, a court usually should not direct the manner in which that discretion is to be exercised, because that discretion has been committed by the New York State Constitution to the executive branch.³⁵ As the court in *Klostermann* also observed, the other branches of government are better equipped to develop policies and programs, especially those that require choosing among competing goals and allocating sometimes scarce funds.³⁶ If, however, an executive branch official fails to exercise the discretion committed to him or her, or somehow abuses that discretion, a court may issue a more detailed remedial order.³⁷ Before such order can be issued, however, our jurisprudence contemplates that a full development of the facts and law will take place either through a trial or a summary proceeding.³⁸

Each year approximately 500 new lawsuits are filed against the New York State Department of Social Services, its executive offi-

32. 463 N.E.2d 588 (N.Y. 1984).

33. The activity that the courts must be careful to avoid is the fashioning of orders or judgments that go beyond any mandatory directives of existing statutes and regulations and intrude upon the policy-making and discretionary decisions that are reserved to the legislative and executive branches. *Klostermann*, 463 N.E.2d at 596.

34. N.Y. CONST. art. VII, § 7; *Jiggetts v. Grinker*, 553 N.E.2d 570, 572 (N.Y. 1990); *People v. Tremaine*, 168 N.E. 817, 822 (N.Y. 1929).

35. See *Jiggetts*, 553 N.E.2d at 572.

36. The court wrote:

The paramount concern is that the judiciary not undertake tasks that the other branches [of government] are better suited to perform. Acquiring data and applying expert advice to formulate broad programs cannot be economically done by the courts. This restraint is particularly important when the creation of a program entails selecting [from] among competing and equally meritorious approaches so as to allocate scarce resources. Generally, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches of our tripartite system.

Klostermann, 463 N.E.2d at 593 (citation omitted).

37. *Gaynor v. Rockefeller*, 248 N.Y.S.2d 792, 801-02 (N.Y. App. Div. 1964), *aff'd* 204 N.E.2d 627 (N.Y. 1965).

38. N.Y. CIV. PRAC. L. & R. 7801 (McKinney 1994).

cial and local government officials.³⁹ Although many of these cases are suits on behalf of individual clients seeking limited relief,⁴⁰ approximately forty to fifty of the cases filed each year are class actions that have some sort of institutional reform as their goal or are challenges to a variety of social services policies.⁴¹ In over ten years, however, only a handful of these cases have ever gone to trial, despite a multitude of court orders directing specific and often wide-ranging relief.⁴²

These court orders have formed the basis for years of continuing litigation over their meaning and enforcement and, in some cases, for findings of contempt against government officials and administrators.⁴³ The orders either have been issued with the consent of the parties⁴⁴ or are preliminary injunctions.⁴⁵ When a consent de-

39. Information provided by John E. Robitzek, Acting Deputy Commissioner and General Counsel, New York State Department of Social Services, Division of Legal Affairs (Mar. 1995).

40. Pursuant to the New York State Civil Practice Law and Review Article 78, review of the actions of government agencies and officials may be had in a special proceeding. These proceedings have subsumed the common law writs of prohibition and mandamus. These proceedings are often used to review the actions of government officials in individual cases or to determine whether a decision after a fair hearing is supported by "substantial evidence"; N.Y. CIV. PRAC. L. & R. 7801-7804 (McKinney 1994).

41. Information provided by John E. Robitzek, Acting Deputy Commissioner and General Counsel, New York State Department of Social Services, Division of Legal Affairs (Mar. 1995).

42. According to statistics of the New York State Department of Social Services, Division of Legal Affairs, in the past ten years, four cases have gone to full trials on the merits: *Mixon v. Grinker*, 595 N.Y.S.2d 876 (Sup. Ct. 1993); *Jiggetts v. Grinker*, 553 N.E.2d 570 (N.Y. 1990); *Dinkins v. Perales*, Index Number 1457/82 (Sup. Ct., Alb. County 1982); *Anderson v. Perales*, 91 Civ. No. 1294 (N.D.N.Y. 1991).

43. In *McCain v. Koch*, Index No. 41023/83 (Sup. Ct. N.Y. County 1983), various administrators of the New York City Human Resources Administration and the Mayor's Office, in both the Dinkins and Guiliani Administrations, have been held in contempt of court for failing to place homeless families in temporary housing placements "immediately." *E.g.* Order, Freedman, J., Jan. 8, 1991; Order, Freedman, J., Nov. 13, 1992; Order, Freedman, J., Nov. 20, 1992; Order, Freedman, J., Dec. 8, 1992; *McCain v. Dinkins*, 601 N.Y.S.2d 271 (N.Y. App. Div. 1993); *order aff'd as modified*, 639 N.E.2d 1132 (N.Y. 1994); *mot. to amend denied*, 641 N.E.2d 152 (N.Y. 1994); Order, Freedman, J., Mar. 22, 1993; Order Freedman, J., Aug. 3, 1993; Order, Freedman, J., Dec. 8, 1993; Order, Freedman, J., Sept. 23, 1994. See discussion of *McCain*, *infra* part IIIB.

44. See Consent Decree, *Callahan v. Carey*, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 1981); Stipulation of Settlement, *Wilder v. Bernstein*, 78 Civ. 957 (S.D.N.Y. Aug. 27, 1985); Stipulation and Order, *McCain v. Koch*, Index No. 41023/83 (Sup. Ct. N.Y. County June 1, 1990). These cases will be discussed in greater detail, *infra* part III.

45. See *McCain v. Koch*, 484 N.Y.S.2d 985, 988 (Sup. Ct. 1984); *Lamboy v. Gross*, 493 N.Y.S.2d 709 (Sup. Ct. 1985). These cases will be discussed in greater detail *infra* part III.B.

creed is entered into by government officials or when an order is issued by the court with the consent of the parties, it typically contains an explicit statement that there has been no admission by the government defendants that the conduct or policy complained of violates the law.⁴⁶ In addition, it often retains discretion for the appropriate government officials to change policy or practices without further court review or intervention.⁴⁷

A preliminary injunction in New York State is issued upon a finding that irreparable harm will result to the plaintiff unless the conduct complained of or implementation of the policy sought to be enjoined is halted immediately, and that the balance of the equities favors taking action on plaintiff's behalf. For such an injunction to be granted, the plaintiff must demonstrate that there is a strong likelihood of success on the merits of the underlying claim.⁴⁸ A preliminary injunction is intended to maintain the status quo in an action until a full development of the facts and the law can be undertaken, usually through a trial.⁴⁹ In many cases, however, "preliminary" injunctions remain in place for years. Plaintiffs are thus provided with all of the relief sought in the action, without any adjudicated finding on the merits of plaintiffs' claims. The relief granted is often wide-ranging and has a serious impact on the administration of the social services system and on the state and local budgets.⁵⁰

46. *E.g.* Consent Decree, *Callahan* (Index No. 42582/79) ("Now, therefore, without final adjudication of any fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any issue, and upon consent of all parties it is hereby . . .").

47. *E.g.* Consent Decree ¶ 18, *Callahan* (Index No. 42582/79) ("Nothing in this judgment shall prevent, limit or otherwise interfere with the authority of the Commissioner of the New York State Department of Social Services to enforce or carry out her duties under the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.").

48. N.Y. CIV. PRAC. L. & R. 6301 (McKinney 1962); *See Paine & Chriscott v. Blair House Assoc.*, 417 N.Y.S.2d 68, 69 (N.Y. App. Div. 1979); *Tucker v. Toia*, 388 N.Y.S.2d 475, 477 (N.Y. App. Div. 1976), *aff'd*, 371 N.E.2d 449 (N.Y. 1977); *Walker Memorial Baptist Church v. Saunders*, 17 N.Y.S.2d 842, 847 (Sup. Ct.), *aff'd*, 21 N.Y.S.2d 512 (N.Y. App. Div. 1940), *rev'd on other grounds*, 35 N.E.2d 42 (N.Y. 1941).

49. N.Y. CIV. PRAC. L. & R. 6301 (McKinney 1962); *See Int'l Ry. Co. v. Barone*, 284 N.Y.S. 122, 128 (N.Y. App. Div. 1935); *Paine & Chriscott*, 417 N.Y.S.2d at 68; *Walker Memorial Baptist Church*, 35 N.E.2d at 47; *Tucker*, 388 N.Y.S.2d at 477; *Schlosser v. United Presbyterian Home at Syosset, Inc.*, 391 N.Y.S.2d 880, 881 (N.Y. App. Div. 1977).

50. In SFY 1993-94, the costs of implementing the preliminary relief ordered by the trial court in *Jiggetts* and *Perales* totaled \$55 million, with a state share of \$13.8 million, a federal share of \$27.5 million, and a local share (NYC) of \$13.8 million. *Jiggetts* was tried in 1991. No decision has been issued in over 3 years, and the costs of

These trends have resulted in a serious disruption in the separation of powers among the three branches of government in New York State. In a number of cases, the courts have halted the operation of statutes passed by the legislature and signed into law by the governor, budget priorities jointly set by the legislature and the executive branch and enacted into law, and policies implemented by executive branch administrative agencies, as delegated by the legislature.⁵¹ These decisions often have been made without any judicial determination that the laws, priorities or policies are illegal. Judges have usurped the authority of the other branches of government, imposed their own or a litigant's preferred policies and procedures and caused the expenditure of millions of dollars in tax funds of the state and local governments, all in the name of maintaining the "status quo" and protecting clients from irreparable harm. Some of these injunctions have been catalysts for the implementation of policies that, in fact, have been detrimental to the interests of the plaintiff classes.

III. Some Illustrative Cases

Throughout the 1970s and 1980s, advocates for applicants for and recipients of social services brought many class action lawsuits against the New York State Department of Social Services, local social services districts, primarily New York City, and their officials. These actions sought to establish new rights, such as a right to shelter, or to stop the implementation of various social services policies that the advocates believed to be inappropriate. In many of the cases, the courts became entangled in the policy-making and discretionary functions of the legislative and executive branches of government, and used preliminary injunctions to give plaintiffs, in effect, all of the relief sought in the underlying actions, without definitive rulings on the merits of plaintiffs' claims. In some cases this actually resulted in the implementation of policies that were inimical to the interests of the plaintiffs. This Part will discuss several of these cases and the lessons to be learned from them for advocates, courts and government officials.

implementing the preliminary relief continue to mount. At the present time, more than 21,000 families are receiving some form of "Jiggetts" relief. For a full discussion of the case, see *infra* part III.C.

51. For a discussion of some examples, see *infra* part III.

A. *Callahan v. Carey*

The first case in the nation to focus attention on the plight of the homeless was *Callahan v. Carey*.⁵² The case was commenced in October 1979 against the Governor of New York, the Commissioner of Social Services, the Mayor of New York City, the Commissioner of the New York City Human Resources Administration and other state and city government officials.⁵³ The plaintiffs represented a class of homeless men who had sought shelter in facilities administered by the City of New York.⁵⁴ These facilities included hotels, shelters and, in later years, armories used to shelter the homeless.⁵⁵ The plaintiffs asserted claims under the United States Constitution, the New York State Constitution, the Social Services Law, the Mental Hygiene Law, the New York City Charter, the regulations of the New York State Departments of Social Services and of Mental Hygiene and the Administrative Code of the City of New York.⁵⁶ They sought declarative and injunctive relief to enjoin the state and city governments from neglecting to provide emergency shelter for homeless men.⁵⁷

The case was settled in August 1981, when the parties entered into a consent decree in which the city defendants agreed to provide shelter to each homeless man who met the need standard for New York State's Home Relief Program or who, by reason of physical, mental or social dysfunction, needed shelter (hereinafter "Consent Decree").⁵⁸ The city also agreed to abide by certain standards governing space, capacity, cleanliness and resident rights.⁵⁹ *Callahan* has come to be viewed⁶⁰ as establishing an unfettered "right to shelter" for single homeless men and women⁶¹ in New

52. Index No. 42582/79 (Sup. Ct. N.Y. County 1979).

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Complaint, *Callahan* (Index No. 42582/79).

58. Consent Decree ¶ 1, *Callahan* (Index No. 42582/79).

59. Consent Decree ¶¶ 2, 3, and 4, *Callahan* (Index No. 42582/79).

60. See, e.g., Kenneth M. Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 WASH. U. J. URB. & CONTEMP. L. 155, 176-77 nn.116-121 (1987); Ronald Slye, *Community Institution Building: A Response to the Limits of Litigation in Addressing the Problem of Homelessness*, 36 VILL. L. REV. 1035, 1053 n.91 (1991).

61. The case of *Eldredge v. Koch*, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983) required the application of the *Callahan* Consent Decree to homeless women, using an Equal Protection analysis. While it is clear that homeless women are entitled to and should be provided with the same benefits and services provided to homeless men, it is questionable how frequently government officials will be inclined to enter into con-

York City and New York State. This assertion, however, misinterprets the meaning of *Callahan*. As described above, applicants for shelter must meet the standard of need for the Home Relief program⁶² or need shelter as a result of a serious dysfunction. In addition, the Consent Decree contains language explicitly stating that there had been no final adjudication of any issue of fact or law⁶³—including the issue of whether there is a right to shelter in New York State. In fact, the standards established in the Consent Decree mirrored many elements of the New York State Department of Social Services regulations at the time.⁶⁴ Further, the Consent Decree contained explicit language recognizing the right of the Commissioner of Social Services to change or modify the standards as necessary⁶⁵ and recognizing that the court could not order the legislature to appropriate money to cover the costs associated with complying with the terms of the Decree.⁶⁶ The court, however, retained jurisdiction over modifications and enforcement of the Decree, which contained no expiration date or “sunset” clause.⁶⁷

The Consent Decree was substantially modified in 1982 to revise the standards for space, shower and toilet facilities and conditions at the armories.⁶⁸ In addition, plaintiffs petitioned the court sev-

sent judgments in the future when the terms of the decrees can, without consent, be expanded to classes of persons who were not parties to the initial litigation, nor the intended beneficiaries of the decree. A claim under the Equal Protection clauses of the New York state and U. S. Constitutions seeking to expand the Callahan Consent Decree to include homeless families with children is one of the claims in *McCain*. See Class Action Complaint, Third Claim, *McCain v. Koch*, Index No. 41023/83 (Sup. Ct. N.Y. County, Mar. 31, 1983).

62. The requirements of the Home Relief program, New York State's general assistance program for single individuals, are set forth in the N.Y. SOC. SERV. LAW § 157 (McKinney 1994) and the regulations of the Department of Social Services, N.Y. COMP. CODES R. & REGS. tit. 18, § 370.1 (1982).

63. See text accompanying footnote 46.

64. N.Y. COMP. CODES R. & REGS. tit. 18, Part 900 (1978). The regulations were subsequently repealed and a new Part 491 was added, effective Sept. 1, 1984. Those regulations are currently in effect. See N.Y. COMP. CODES R. & REGS. tit. 18, Part 900 (1986).

65. See text accompanying footnote 47.

66. See Consent Decree ¶ 17, *Callahan* (Index No. 42582/79).

67. The parties' failure to include a “sunset” clause and the subsequent experience of New York City and New York State government officials with years of motions to enforce or modify the decree resulted in the adoption of policies by both the City of New York and the New York State Department of Social Services against entering into such decrees. Subsequent consent decrees contained expiration dates for the decrees, typically five years. Information provided by John E. Robitzek, Acting Deputy Commissioner & General Counsel, New York State Department of Social Services, Division of Legal Affairs, and Jonathan Pines, Deputy Bureau Chief, Litigation Bureau, the Office of the Corporation Counsel (Mar., 1995).

68. Order, Wallach, J., Nov. 4, 1982, *Callahan* (Index No. 42582/79).

eral times each year to seek enforcement of various provisions of the Decree, mostly those regarding space, cleanliness and the ratio of shower and toilet facilities.⁶⁹ The motions for enforcement became so frequent that in 1984 the court felt compelled to issue an order prohibiting the parties from filing motions without the court's prior permission.⁷⁰ Plaintiffs continued to file court approved motions up until 1992.

As a result of *Callahan*, New York City has the most extensive system of shelters for homeless adults in the nation.⁷¹ The city directly operates or funds the operation of thirty-three shelters and eight armories for single adults.⁷² The city and state spend in excess of \$170 million each year to provide this shelter.⁷³ While the fact that each qualified homeless adult in New York City receives what is sometimes derisively referred to as "three hots and a cot" may be seen as a substantial achievement, there has, however, been a significant cost to pay, one that has been paid by the homeless adults housed in the city's shelters as well as by the state and city governments. The conditions in the facilities used to shelter homeless adults remain far from ideal, despite the expenditure of over

69. Since 1981, approximately 20 motions have been brought by plaintiffs seeking enforcement of the decree. *See, e.g.*, Notice of Motion, Apr. 18, 1984; Order to Show Cause, May 21, 1984; Order to Show Cause, May 30, 1984; Order to Show Cause, July 31, 1985; Notice of Motion, Nov. 6, 1985; Order to Show Cause, Nov. 21, 1986; *Callahan* (Index No. 42582/79). The court has issued more than 15 orders directing substantive relief. *See, e.g.*, Order, Wallach, J., Oct. 20, 1981; Order, Wallach, J., July 12, 1984; Order, Wallach, J., Oct. 1, 1985; Order, Wallach, J., Oct. 15, 1985; Order, Sklar, J., July 18, 1986; Order, Sklar, J., Nov. 28, 1986; Order, Sklar, J., Oct. 1, 1987; *Callahan* (Index No. 42582/79).

70. Order, Wallach, J., Oct. 15, 1984, *Callahan* (Index No. 42582/79).

71. Because the action was brought originally in New York City and the Consent Decree was entered into by New York City, the terms of the Consent Decree apply only to New York City. The obligations of other social services districts throughout New York State to shelter the homeless and the standards governing the provision of shelter to the homeless are set forth in an Administrative Directive issued by the Commissioner of Social Services (previously 83 ADM 47 issued on Sept. 29, 1983, now 94 ADM 20, issued on Dec. 29, 1994) and in the regulations of the New York State Department of Social Services, N.Y. COMP. CODES R. & REGS. tit. 18, Part 491 (1984)(shelters for single adults), Part 900 (1986)(shelters for families), Part 1000 (1989) (shelters for pregnant women), § 352.3(e)-(h) (1994)(hotels used to shelter homeless families).

72. Information provided by Robert Dawes, the New York State Department of Social Services, Office of Housing and Adult Services (Mar. 1995).

73. Information provided by Susan Faulkner, the New York State Department of Social Services, Office of Budget Management. The costs of sheltering homeless adults are a combination of public institutional care costs (N.Y. SOC. SERV. LAW § 193 (McKinney 1992)) and Home Relief Costs (N.Y. SOC. SERV. LAW § 157 (McKinney 1992)). These costs are borne equally by the State of New York and New York City. N.Y. SOC. SERV. LAW § 153(a)-(h) (McKinney 1992).

\$1.5 billion since 1979.⁷⁴ As a result of the constant focus on maintaining the standards of the Consent Decree,⁷⁵ millions of dollars were spent to improve conditions in armories⁷⁶ and other shelters that should never have been used to shelter anyone in the first place.⁷⁷ The ability of the city and state to develop homeless policy in a deliberative and rational manner was impeded by the need to respond to frequent motions for enforcement of the Consent Decree. Determining what types of facilities and programs would truly meet the needs of the residents of adult shelters became a lower priority than ensuring that, for example, there were forty toilets working in the Fort Washington Armory.⁷⁸ Eventually, even the court became frustrated with the focus on certain of the less important conditions in the armories,⁷⁹ recognizing that energy, political capital and money that should have been used to develop programs to assist shelter residents to attain self-sufficiency were being dissipated.⁸⁰

74. Information provided by Mark Sullivan, former Budget Director, Office of Budget Management, the New York State Department of Social Services (Mar. 1995).

75. See text accompanying footnote 69.

76. While exact figures for repairs to deteriorated shelters and armories are not available, the New York State Department of Social Services estimates that more than \$40 million has been spent on repairs to these facilities since 1979. Information provided by Mark Sullivan, former Budget Director, Office of Budget Management, the New York State Department of Social Services (Mar. 1995).

77. The first armory shelter was opened by executive order of Governor Hugh Carey. N.Y. Exec. Order Nos. 106 and 107, Exec. Law § 3.106 and § 3.107 (Jan. 5, 1981). Subsequent armories were opened as the demand for shelter increased or as a result of motions by plaintiffs and orders by the court. See, e.g., Order, Wallach, J., Oct. 20, 1981, *Callahan* (Index No. 42582/79) and subsequent N.Y. Exec. Order No. 116, Executive Law § 3.116 (Nov. 25, 1981).

78. At one point, the city even conducted a survey of the use of the toilet facilities in an effort to convince the court that the shower and toilet ratios in the decree should be modified. See Levine and Surcek, *An Observational Study of Toilet and Shower Utilization at Three Men's Shelters*, Feb. 4, 1985.

79. Several motions were filed and court orders issued over matters such as broken lockers and the quality of the laundry service provided in the armories. See, e.g., Order, Wallach, J., July 12, 1984; Order, Wallach, J., Oct. 1, 1985; Order, Sklar, J., July 18, 1986; *Callahan* (Index No. 42582/79).

80. In response to a motion made by plaintiff's counsel in May, 1990, Judge Sklar visited several of the armory shelters and spoke with the residents. The motion sought enforcement of various of the Consent Decree's provisions concerning conditions in the shelters and sought the closing of all armory shelters. After speaking with the residents of the shelters, Judge Sklar admonished plaintiffs' counsel to speak with his clients, suggesting that the residents were more concerned with access to permanent housing, jobs and treatment for substance abuse than with the number of toilets and showers in each armory and whether a partition of sufficient height was erected between the sleeping and dining areas of one of the shelters.

B. *McCain v. Koch*

The plaintiffs in *McCain v. Koch*⁸¹ sought to establish a right to shelter for homeless families with children, relying upon various state and federal statutory and constitutional provisions.⁸² The case was commenced in 1983 against the Mayor of the City of New York, the Commissioner of New York City's Human Resources Administration, the Commissioner of New York City's Department of Housing, Preservation and Development, the Commissioner of the New York State Department of Social Services and various other New York City officials. After almost twelve years, the *McCain* case is still pending, and there has been no trial on the merits of plaintiffs' claims. The case began with a most scrupulous observance by the courts of the appropriate parameters of judicial involvement in social welfare policy issues, but in the intervening years it has deteriorated into one of the most egregious examples of excessive judicial entanglement in the prerogatives of the executive branch of government.

In June 1983, the court issued an interim order requiring that "[w]hen a family is not denied emergency housing, assistance and services," the defendant city and state agencies should "arrange so far as practical" that such housing meet minimum quality standards that the court delineated.⁸³ At the time of the court's order, homeless families were being housed in shelters, hotels and motels throughout the city.⁸⁴ Subsequent to the court's order, the New York State Department of Social Services promulgated regulations governing standards in these hotels and motels used as shelters.⁸⁵ Although many of the standards of the interim order were incorporated into the state's regulations, the regulations were more extensive than the court's order.⁸⁶ The New York State Department of

81. 484 N.Y.S.2d 985 (Sup. Ct. 1984).

82. Plaintiffs asserted claims under Article 17 of the New York State Constitution, the Due Process and Equal Protection Clauses of the New York State and U.S. Constitutions, the Social Security Act provisions governing the AFDC program, 42 U.S.C. §§ 601-645 (1968), the Social Services Law provisions governing the ADC program, N.Y. SOC. SERV. LAW §§ 131-152, 343-360 (McKinney 1992), and various other federal, New York State and New York City statutes and regulations. Class Action Complaint ¶¶ 21-44, *McCain v. Koch*, Index No. 41023/83 (Sup. Ct. N.Y. County, 1983).

83. Interim Order, June 20, 1983, *McCain* (Index No. 41023/83).

84. Class Action Complaint at ¶ 16, *McCain* (Index No. 41023/83).

85. N.Y. COMP. CODES R. & REGS. tit. 18, Parts 352.3(g)-(h) (1983).

86. For example, the court's order required that such housing contain a bed for each family member, with a clean mattress, pillow, sheets and blanket; contain a sufficient number of clean towels; contain sufficient space for the family based on New York City's Administrative Code; have access to a sanitary bathroom with hot water;

Social Services also issued an Administrative Directive⁸⁷ to all social services districts spelling out what assistance should be provided to eligible homeless persons. The following year, the court issued a preliminary injunction incorporating the standards established by the interim order. The court found that plaintiffs had established a strong likelihood of success on the merits of their claims, that irreparable harm would result, and that the balance of the equities weighed in their favor. In its decision, the court noted that neither the New York State Constitution nor the Social Services Law require that emergency shelter be provided. Rather, the court found that once the defendants had undertaken to provide emergency shelter, the shelter provided must meet "reasonable minimum standards" as established by the court.⁸⁸

In August 1984, the court refused to order the city to cease placing families in the large congregate shelters it had opened to accommodate the increasing number of homeless families seeking shelter, declined to set limitations on the use of congregate shelters and refused to order the closing of specific congregate shelters, as sought by the plaintiffs.⁸⁹ The court found that plaintiffs had failed to demonstrate the requisite harm, likelihood of success and balance of the equities to warrant issuance of an injunction.⁹⁰ While recognizing that large congregate shelters were not "conducive to privacy" and were "imperfect," the court refused to order their closing and recommended that the government defendants provide a mechanism for minimizing the length of stay in such facilities. With respect to one particular facility, the court declined to "intervene in a dispute between two levels of government" where the city and state disagreed over the use of the facility.⁹¹

The case then moved into the appellate courts. In May 1986, the Appellate Division unanimously upheld the grant of a preliminary

and be sufficiently heated under applicable New York City law. The regulations required that the hotel or motel have arrangements for garbage removal; maintenance of floors, drapes and furniture; repainting periodically; maintenance of plumbing and heating; vermin control; and that each room be cleaned every other day, have sufficient furniture for daily living, and have a complete change of linens and towels each week. The regulations also required each family to have a private bathroom. N.Y. COMP. & CODES R. & REGS. tit. 18, Parts 352.3(g)-(h) (1983).

87. 83 ADM 47, issued Sept. 29, 1983.

88. The court stated, in part, "[n]either the Constitution nor the Social Services Law . . . provide that emergency shelter shall be given to the needy in explicit terms." *McCain v. Koch*, 484 N.Y.S.2d 985, 987 (Sup. Ct. 1984).

89. Order, Greenfield, J., July 31, 1984, *McCain* (Index No. 41023/83).

90. *Id.*

91. *Id.*

injunction barring the denial of emergency shelter to homeless families, finding that the plaintiffs had made the requisite showings to warrant its issuance.⁹² The court examined each of plaintiffs' statutory and constitutional claims for a right to shelter, each time finding a strong likelihood that plaintiffs would succeed in proving their claim.⁹³ However, the court reversed the lower court orders establishing minimum standards. Based upon its interpretation of New York Court of Appeals precedents,⁹⁴ the court held that pursuant to the state Constitution,⁹⁵ the adequacy of welfare benefits, including the adequacy of shelter assistance provided pursuant to a constitutional right to shelter, was a matter for the discretion of the legislature.⁹⁶ The court also held that the issuance of the lower court's preliminary injunction mandating standards for the provision of emergency shelter was unnecessary, because the regulations promulgated by the New York State Department of Social Services obviated the need for the court's intervention.⁹⁷ Finally, the court concurred with the lower court's refusal to order the closing of congregate shelters for homeless families "[i]n accordance with our recognition of the state's discretion as to the quality of emergency shelter."⁹⁸

In the Court of Appeals, both plaintiffs and defendants extensively briefed the issue of whether the cited state and federal statutory and constitutional provisions guaranteed a right to shelter for homeless families.⁹⁹ The court, however, did not rule on this issue. Nevertheless, *McCain* is often cited by advocates, in the media and elsewhere¹⁰⁰ as the case in which the Court of Appeals established a right to shelter for homeless families. This is incorrect. The sole issue before the Court of Appeals was whether the lower court had the power to "fashion equitable relief" and issue a preliminary injunction requiring the city defendants, "when they have under-

92. *McCain v. Koch*, 502 N.Y.S.2d 720 (N.Y. App. Div. 1986).

93. *Id.* at 728-30.

94. *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977); *Bernstein v. Toia*, 373 N.E.2d 238 (N.Y. 1977).

95. According to the New York State Constitution, "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art.17, § 1.

96. *McCain*, 502 N.Y.S.2d at 731.

97. *Id.* at 732.

98. *Id.*

99. Brief for Appellants at 19-33; Brief for Municipal Respondents at 46-71; Reply Brief for Appellants at 18-22; 28-39, *McCain* (Index No. 41023/83).

100. See Chackes, *supra* note 60, at 177 n. 121.

taken to provide emergency housing for homeless families with children, to provide housing which satisfies minimum standards of sanitation, safety and decency."¹⁰¹

The unanimous court held that the lower court did have such power, noting, however, that the injunction "does not direct defendants to provide housing where none is being provided."¹⁰² Later in its opinion, the court reiterated the limited scope of its holding and stated, "Thus to decide the narrow issue here, it is not necessary to resolve questions pertaining to the underlying obligation to furnish 'emergency shelter to eligible families with children'. We do not reach them."¹⁰³ Furthermore, because of the procedural posture of the case, the court did not address that portion of the Appellate Division order that granted a preliminary injunction barring the city from denying emergency shelter to homeless families. Some have interpreted the Appellate Division's decision as a finding that there is a right to shelter for homeless families in New York State. The court also did not address the Appellate Division's finding that plaintiffs were unlikely to prove their constitutional claim regarding the adequacy of the emergency shelter provided, finding that whether or not the plaintiffs had a right to shelter, the lower court had the power to require the state and city defendants to make the shelter that they had undertaken to provide habitable.¹⁰⁴ The court then made clear that the city defendants had to comply with the state's subsequently enacted regulations so long as they were in effect.¹⁰⁵

Finally, the court held that the lower court did not violate the principle that a court should, as a matter of policy, "abstain from venturing into areas if it is ill-equipped to undertake responsibility and other branches of government are far more suited to the task."¹⁰⁶ Rejecting the Appellate Division's finding that the lower court was precluded by precedent from setting minimum stan-

101. *McCain v. Koch*, 511 N.E.2d 62, 62-63 (N.Y. 1987).

102. *Id.* at 63 (emphasis in original).

103. *Id.* at 65 (citation omitted).

104. *Id.* at 65-66.

105. *Id.* ("Because we hold that, whether or not plaintiffs have any right to shelter under State or Federal Constitutional or statutory law, Supreme Court had the power to require defendants, once they undertook to provide housing, to make that shelter minimally habitable, we conclude that *Bernstein* poses no bar to the grant of injunctive relief in this case. Moreover, when defendants undertake to provide emergency housing, they must now comply with the State departmental regulations . . . , and thus, so long as the regulations are in effect, no question can exist concerning the minimum standards for the accommodations to be provided.")

106. *Id.* at 66 (quoting *Jones v. Beame*, 380 N.E.2d 277, 280 (N.Y. 1978)).

dards,¹⁰⁷ the court found that because the New York State Department of Social Services had not acted, and, at the time of the lower court's order, no regulation governing shelter standards had been promulgated, the court could invoke its equitable powers and establish its own minimum standards.¹⁰⁸ Furthermore, the court found that the lower court could keep its standards in place even after the New York State Department of Social Services had acted because there was no conflict with the promulgated regulations, which were more stringent and extensive.¹⁰⁹ The court then concluded that there was no question that the city now had to comply with the regulatory standards and all that remained were questions of compliance and enforcement.¹¹⁰

The Court of Appeals decision was issued in June, 1987. Simultaneously, the litigation continued in the lower courts, where it is still on-going. While the courts were initially, as described above, very careful to apply the appropriate standards for evaluating the actions of the Executive branch officials and wary of intruding upon the discretion committed to such officials, the lower courts began to take a different approach. Numerous motions for injunctive relief were brought by plaintiffs, seeking to prohibit the City of New York from housing homeless families in various types of facilities that were alleged not to meet the appropriate State regulatory standards and various local laws. Still with no trial or ruling on the merits of the plaintiffs' underlying claims, the court began issuing a series of orders¹¹¹ in *McCain* and in two cases consolidated with it, *Lamboy v. Gross*¹¹² and *Slade v. Koch*,¹¹³ that placed more and more types of facilities and hotel rooms out of the City's reach as accommodations for sheltering homeless families. Consequently, the City attempted to develop plans to address the increasing numbers of homeless families seeking shelter and entered into various stipulations¹¹⁴ that set forth the standards to which it would adhere in placing families in hotels, motels and family shelters. These stipu-

107. *Id.* at 66.

108. *Id.*

109. *McCain*, 511 N.E.2d at 67.

110. *Id.*

111. *See, e.g.*, Order, Freedman, J., Feb. 15, 1991; Order Freedman, J., July 18, 1991, *McCain* (Index No. 41023/83). In all approximately 30 orders have been issued in *McCain* to date. Throughout 1990 and 1991, orders were issued almost monthly.

112. Index No. 41108/85 (Sup. Ct., N.Y. County 1985).

113. Index No. 45177/86 (Sup. Ct., N.Y. County 1986).

114. *See, e.g.*, Stipulation and Enforcement Order, Freedman, J., June 1, 1990, *McCain* (Index No. 41023/83).

lations and orders¹¹⁵ committed the city to developing permanent housing and types of preferred temporary housing for homeless families,¹¹⁶ to giving homeless families placement priority in housing managed and developed by various city agencies¹¹⁷ and to meeting time frames for ceasing to use hotels and motels to shelter homeless families.¹¹⁸ Many of these orders would have been appropriate if there had been a ruling that plaintiffs had a right to shelter. In several instances, however, the court essentially substituted its views of the appropriate standards to be applied for those of the executive agency officials whose responsibility it was to develop standards for providing shelter to homeless families once they had "undertaken" to do so. Two particular orders stand out because the lower courts clearly indicated their intentions to substitute their judgment for that of state and city officials administering the programs of assistance to homeless families.¹¹⁹

115. See, e.g., Order, Freedman, J., Nov. 9, 1990; Order, Freedman, J., Nov. 29, 1990; Order, Freedman, J., Jan. 8, 1991, *McCain* (Index No. 41023/83).

116. Numerous temporary shelters for homeless families, known as "Tier II" shelters, were developed after promulgation of regulations by the New York State Department of Social Services setting forth standards for such shelters and a mechanism for funding their development. N.Y. COMP. CODES R. & REGS. tit. 18, Parts 900.10(1)(c), 900.16 (1986).

117. The New York City Housing Authority began giving preferences to homeless families for placement in apartments in buildings owned and managed by the Authority. Affidavit of Ernestine Young, Director of Housing Applications, New York City Housing Authority, submitted to the court, July, 1993. The New York City Department of Housing Preservation and Development began giving homeless families preference for placement in buildings taken over by the city in tax foreclosure proceedings. From 1984 to 1993, the city spent more than \$1 billion developing and renovating permanent housing that was provided to homeless families. Affidavit of William Spiller, Deputy Commissioner, City of New York Department of Housing Preservation and Development, submitted to the court, July, 1993. See Order, Freedman, J., Aug. 3, 1993, *McCain* (Index No. 41023/83).

118. The City Council of New York passed a local law prohibiting the use of hotels and motels to shelter homeless families after April 1993. N.Y. ADMIN. CODE tit. 21A, § 21-308 (1993). The deadline has been extended numerous times; the current deadline is June 1, 1995. N.Y. ADMIN. CODE tit. 21A, § 21-308(3) (1993). The city currently houses 962 families in hotels and motels. Information provided by Peter Brest, former Associate Commissioner of the Office of Housing & Adult Services, New York State Department of Social Services.

119. Another recent example of courts substituting their judgment for that of Executive branch officials is a case concerning homeless individuals, rather than families. Plaintiffs sought to require the City of New York to reduce the number of men residing in an armory to 200, as set forth in the regulations of the New York State Department of Social Services and the *Callahan* Consent Decree. The lower court granted plaintiff's application (Order, Schlesinger, J., Dec. 23, 1992, *Callahan* (Index No. 42582/79)) based upon fire safety concerns, and that order was affirmed by the Appellate Division, First Department. *Doe v. Dinkins*, 600 N.Y.S.2d 939 (N.Y. App. Div. 1993). The Appellate Division recognized the authority of the Commissioner of So-

In a decision issued in August 1985,¹²⁰ and an order entered in October 1985,¹²¹ the court interpreted the New York State Department of Social Services' Administrative Directive on assistance to the homeless¹²² and found that "[i]n no event shall provision of overnight accommodations in the city respondents' welfare offices (including Income Maintenance Centers and Emergency Assistance units) constitute the provision of emergency housing pursuant to the requirements of Administrative Directive 83 ADM-47 or this Order."¹²³ The court found that the ADM required that each eligible homeless family be placed immediately in an appropriate accommodation, regardless of any constraints on the city's ability to do so.¹²⁴ The New York State Department of Social Services had argued that while a "determination" to place a family in an emergency assistance unit even for one night would violate the Department's policy, in certain circumstances it might be necessary for a family to spend the night in an emergency assistance unit.¹²⁵ The state argued that these circumstances included "isolated occasions where the local district's good faith efforts to locate preferable alternative housing are unsuccessful. Reasonable efforts must be made by the local districts to plan for emergency needs and con-

cial Services to waive the capacity limits of the regulations (N.Y. COMP. CODES R. & REGS. tit. 18, § 491.3(g)(1)(i) (1984)), noted that the *Callahan* Consent Decree expressly retained such authority for the Commissioner (*See* text accompanying footnote 47), and found that the Commissioner had declined to exercise such authority because of fire safety violations in the armory. *Dinkins*, 600 N.Y.S.2d at 941-42. The city made the necessary changes to the armory's fire safety systems, and in January, 1994, the New York City Fire Department, the local code enforcement entity, certified that the systems complied with the applicable code requirements. Thereafter, the Commissioner of Social Services approved a waiver, with certain conditions attached. In a subsequent order, the lower court vacated the Commissioner's waiver, based on the judge's opinion that the armory was still unsafe because it lacked what she viewed as an effective sprinkler system, despite the Fire Department's certification that the system met applicable New York City code requirements and despite the Commissioner's decision that the standards for granting a waiver had been met (Order, Schlesinger, J., Mar. 21, 1994, *Callahan* (Index No. 42582/79)). The court's order was again affirmed on appeal. *Doe v. Guiliani*, 614 N.Y.S.2d 133 (N.Y. App. Div. 1994).

120. *Lamboy v. Gross*, 493 N.Y.S.2d 709 (Sup. Ct. 1985), *aff'd*, 513 N.Y.S.2d 393 (N.Y. App. Div. 1987).

121. Order, Freedman, J., Oct. 5, 1985, *Lamboy v. Gross*, Index No. 41108/85(Sup. Ct. N.Y. County 1985).

122. 83 ADM 47, issued Aug. 29, 1983.

123. Order, Freedman, J., Oct. 5, 1985, at 5, *Lamboy* (Index No. 41108/85).

124. The ADM stated, in § IV. A. I. 6: "Emergency housing must be provided immediately if a homeless person is determined eligible . . ." 83 ADM 47, at 2, issued Aug. 29, 1983.

125. Letter submitted to the court in *Lamboy v. Gross* from Susan V. Demers to Robert Hayes, dated June 19, 1985.

sistent and meaningful attempts by staff at the emergency units must have been made to locate emergency housing for the local district to meet its obligations under the ADM."¹²⁶ The court, however, disregarded the state agency's interpretation of its own policy, and on appeal, the Appellate Division affirmed.¹²⁷

While the Appellate Division recognized that the lower court's order was "substantially broader and more expansive in scope"¹²⁸ than earlier court orders, it justified the order's breadth as "designed to obtain compliance with the definitive standards"¹²⁹ of the state's Administrative Directive. The court then stated essentially that "immediate" means "immediate,"¹³⁰ and found the state's objection to the court's order "puzzling and illogical."¹³¹ Furthermore, despite quoting favorably from the state's explanation of its ADM and policy, the court declined to adopt the state's interpretation because it would "constitute improper judicial legislation."¹³²

The lower court's order and subsequent orders¹³³ relying upon it have formed the basis for findings of contempt against various city officials¹³⁴ that have resulted in the imposition of fines totaling approximately \$4.7 million as of May 1995.¹³⁵ The city has paid these fines to individual families and to plaintiffs' counsel in order to set up a fund to be used for emergency services to homeless families.¹³⁶ Nevertheless, despite the contempt orders and the imposition of these fines, the city has been unable to find shelter for all homeless families who seek it. In recognition that these sanctions have failed, the court recently appointed a mediator/facilitator

126. *Id.*

127. *Lamboy v. Gross*, 513 N.Y.S.2d 393 (N.Y. App. Div. 1987).

128. *Id.* at 395.

129. *Id.*

130. *Id.* at 396-97.

131. *Id.* at 398.

132. *Id.*

133. See text accompanying footnotes 93, 96 and 97.

134. Order, Freedman, J., Jan. 8, 1991; Order, Freedman, J., Nov. 13, 1992; Order, Freedman, J., Nov. 20, 1992; Order, Freedman, J., Dec. 8, 1992; *aff'd sub nom. McCain v. Dinkins*, 601 N.Y.S.2d 271 (N.Y. App. Div. 1993), *aff'd as modified*, 639 N.E.2d 1132 (N.Y. 1994); *mot. to amend denied*, 641 N.E.2d 152 (N.Y. 1994); Order, Freedman, J., Mar. 22, 1993; Order, Freedman, J., Aug. 3, 1993; Order, Freedman, J., Dec. 8, 1993; Order, Freedman, J., Sept. 23, 1994, *Lamboy* (Index No. 41108/85).

135. Information provided by Steven Banks of the Legal Aid Society, Plaintiff's Counsel in *McCain v. Koch*, 511 N.E.2d 62 (N.Y. 1987).

136. *Id.*

who is assisting the parties to reach a solution and achieve compliance.¹³⁷

In January 1991, the court issued an interim order,¹³⁸ and in March 1991, the court issued an order¹³⁹ prohibiting the city from placing families in hotels without cooking facilities. The court did so even though the state's duly promulgated regulation permitted the city to place homeless families in hotels without cooking facilities if none with cooking facilities were available.¹⁴⁰ By combining an analysis of three state regulatory provisions¹⁴¹ and refusing to give deference to the state's own interpretation of one of its regulations because the judge found it to be "not logical," the court concluded that cooking facilities were mandatory.¹⁴² The regulations, and the state agency's own interpretation of them, to which the lower court refused to defer, were the same regulations that the Court of Appeals had earlier found to be the standards with which the city must comply.¹⁴³

In addition to issuing such orders, the lower court's numerous orders and decisions are replete with statements setting forth the judge's view of what standards should apply.¹⁴⁴ The judge has not only criticized the kinds of meals provided by the city to homeless families, but has criticized the kinds of meals homeless families choose to purchase with their own meal allowances.¹⁴⁵ In evaluating the plans for services to homeless families that the city has submitted to the court for review, the judge frequently criticized the plans for failing to meet her own or plaintiffs' ideas of appropriate standards, even going so far as to suggest such things as the number of staff she believes should be working various shifts at the family shelters and the number of city vehicles that should be available to transport homeless families from waiting areas to shelters and hotels.¹⁴⁶

137. Order, Freedman, J., Nov. 23, 1994, *Lamboy* (Index No. 41108/85).

138. Interim Order, Freedman, J., Jan. 8, 1991, *McCain* (Index No. 41023/83).

139. Order, Freedman, J., Mar. 25, 1991, *McCain* (Index No. 41023/83).

140. N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3(e)(2) (1994).

141. N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3(e)(2),(g), (h) (1994).

142. Order, Freedman, J., Mar. 25, 1991, *McCain* (Index No. 41023/83).

143. *McCain v. Koch*, 511 N.E.2d 62, 62-63 (N.Y. 1987).

144. The court's orders are filled with examples of the judge's views regarding the kinds of things that should be provided to the homeless families in city shelters and waiting rooms. See, e.g., Order, Freedman, J., dated Mar. 25, 1991, *McCain* (Index No. 41023/83).

145. See, e.g., Order, Freedman, J., dated Mar. 25, 1991 at 17, *McCain* (Index No. 41023/83).

146. Conferences with Judge Freedman, Oct. 17, Nov. 4, and Nov. 18, 1991. The author was present at these conferences as were the other parties to the action.

This kind of judicial entanglement in the day-to-day administration of the State and the City of New York's system for assisting homeless families is precisely the kind of excessive entanglement in executive agency operations that courts should avoid and that our jurisprudence contemplates they will avoid. What is especially inappropriate about the court's actions in *McCain* and its companion cases is that the court has never held a trial, never issued a ruling that plaintiffs have an unambiguous right to shelter, and has never found that the state and city have failed to provide such shelter to homeless families in keeping with applicable statutory or constitutional mandates. Instead, the court has consistently substituted its own policy preferences and those of plaintiffs' counsel for those of the state and city executive officials responsible for administering the social services system.

C. *Jiggetts v. Grinker*

In March 1987, a group of New York City¹⁴⁷ recipients of Aid to Dependent Children (ADC)¹⁴⁸ challenged the amount of the shelter portion¹⁴⁹ of New York State's welfare grant.¹⁵⁰ Plaintiffs alleged that the shelter grant was so inadequate that thousands of families receiving ADC were becoming homeless,¹⁵¹ that the Commissioner of the New York State Department of Social Services had failed in his state and federal statutory and constitutional obligations to promulgate an adequate shelter schedule¹⁵² that would

147. The plaintiffs in *Jiggetts* are New York City residents and, since the case is not a statewide class action, the relief granted is restricted to them. Similar cases have been filed in other counties throughout New York State. See, e.g., *Sharp v. Perales*, 573 N.Y.S.2d 410 (N.Y. App. Div. 1991).

148. New York State's primary welfare program for aiding families with children is called the Aid to Dependent Children (ADC) program, rather than the Aid to Families with Dependent Children (AFDC) program, N.Y. SOC. SERV. LAW., art. 5, tit. 10 §§ 343-362 (McKinney 1992).

149. The welfare grant in New York consists of two components, the "basic grant," the amount of which is set forth in statute, and the shelter portion, the amount of which is set forth in regulations of the New York State Department of Social Services. N.Y. SOC. SERV. LAW § 131(a) (McKinney 1992); and N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3 (1994).

150. *Jiggetts v. Grinker*, 528 N.Y.S.2d 462 (Sup. Ct. 1988), *rev'd*, 543 N.Y.S.2d 414 (N.Y. App. Div. 1989), *rev'd* 553 N.E.2d 570 (N.Y. 1990).

151. See *Jiggetts*, 528 N.Y.S.2d at 469.

152. *Id.* at 465. The regulations of the New York State Department of Social Services set forth a schedule of maximum grants payable for shelter that vary by family size and locality. These grants are called the "shelter maxima" and provide assistance to each family for shelter that reflects the actual costs of their shelter up to the applicable maximum. N.Y. COMP. CODES R. & REGS. tit. 18, Part 352.3 (1994).

allow children to be brought up at home,¹⁵³ and that the policy that permitted arrears to be paid for applicants for ADC in amounts exceeding those payable for recipients of ADC¹⁵⁴ denied recipients equal protection. In January 1988, the court issued a decision dismissing several of plaintiffs' claims, but granting a preliminary injunction requiring that arrears and shelter payments in excess of the shelter maxima be made on behalf of plaintiffs and all future intervenors in the case.¹⁵⁵ The court found that there was a strong likelihood that plaintiffs would prove that the shelter maxima contained in the regulations were insufficient to enable families to bring up the children in homes, as required by the Social Services Law.¹⁵⁶

The Appellate Division, First Department, reversed the court's order and dismissed the complaint, finding that the Social Services Law did not impose a mandatory duty on the Commissioner of Social Services to establish "adequate" shelter allowances¹⁵⁷ and that the manner in which the Commissioner exercised his discretion was unreviewable by the court.¹⁵⁸ In an April 1990 unanimous decision, however, the Court of Appeals found that the Social Services Law did impose a mandatory duty on the Commissioner to establish adequate allowances to enable children to be brought up in homes and that "[a] schedule establishing assistance levels so low that it forces large numbers of families with dependent children into homelessness does not meet the statutory standard."¹⁵⁹ The

153. Plaintiffs' claims were based primarily on Article 1, § 6; Article 1, § 11; and Article 17, § 1 of the New York State Constitution; the Equal Protection and Due Process clauses of the 14 Amendment to the U.S. Constitution; and § 131, § 131-a, § 344 and § 350 of the Social Services Law. See *Verified Amended Class Action Complaint, Jiggetts v. Grinker*, Index No. 40582/87 (Sup. Ct. N.Y. County, filed Mar. 1987).

154. Pursuant to the regulations of the New York State Department of Social Services, an applicant for ADC can receive arrears payments based on shelter costs that exceed the shelter maxima because prior to receiving ADC the applicant could not have been expected to obtain shelter within the applicable shelter maximum. N.Y. COMP. CODES R. & REGS. tit. 18, Part 352.7(g)(3) (1994).

155. *Jiggetts v. Grinker*, 528 N.Y.S.2d 462 (Sup. Ct. 1988), *rev'd*, 543 N.Y.S.2d 414 (N.Y. App. Div. 1988), *rev'd*, 553 N.E.2d 570 (N.Y. 1990). There are currently more than 21,000 families receiving relief under the preliminary injunction. Interview with Edward Iovinelli, the New York State Department of Social Services, Division of Legal Affairs (Mar., 1995).

156. See *Jiggetts*, 528 N.Y.S.2d at 468. N.Y. SOC. SERV. LAW § 350 (McKinney 1992).

157. *Jiggetts v. Grinker*, 543 N.Y.S.2d 414, 424 (N.Y. App. Div. 1988), *rev'd*, 553 N.E.2d 570 (N.Y. 1990).

158. *Jiggetts*, 543 N.Y.S.2d at 423.

159. *Jiggetts v. Grinker*, 553 N.E.2d 570, 573 (N.Y. 1990).

issue before the court was again one of justiciability--whether the lower court could review the actions of the Commissioner. The court recognized that the separation of powers contemplated by New York State's form of government mandated that policy choices, especially those involving competing priorities and limited funds, are matters for the legislative and executive branches of government.¹⁶⁰ Nevertheless, the court's analysis began, and in essence ended, with the statute's language, finding that the words of Social Services Law § 350(1)(a)--"Allowances shall be adequate"--imported "duty, not discretion."¹⁶¹ The court concluded that when the legislature used those words, it imposed a duty on the Commissioner to establish a schedule reasonably calculated to achieve that goal.¹⁶² The court then made clear that the legislature could choose not to appropriate the funds necessary to finance the schedule, but found that the Commissioner would not discharge his statutory duty unless he promulgated an adequate schedule.¹⁶³

In 1991, on remand after the Court of Appeals decision, the case went to trial. Plaintiffs produced numerous witnesses, including experts on housing availability and the housing markets, and introduced voluminous documentary evidence in an attempt to prove their claims.¹⁶⁴ The defendant Commissioner's witnesses described in detail the processes for promulgating the regulations of the New York State Department of Social Services, developing the executive's budget proposals and adopting the state budget by the legislature.¹⁶⁵ Introducing equally voluminous documentary evidence supported by expert testimony, the Commissioner attempted to prove that the shelter schedule was adequate.¹⁶⁶ He explained that in the process of enacting the state's budget, as jointly developed by the executive and the legislature, the legislature clearly understood that it was appropriating funds sufficient only to finance the

160. *Id.* at 572 ("Broad policy choices, which involve the ordering of priorities and the allocation of finite resources, are matters for the executive and legislative branches of government and the place to question their wisdom lies not in the courts but elsewhere.").

161. *Id.* at 573.

162. *Id.*

163. *Id.* at 575 ("[W]hen the Legislature directed that shelter allowances 'shall be adequate', it imposed a duty on the Commissioner to establish a schedule reasonably calculated for that purpose. Manifestly, the Legislature may or may not appropriate funds necessary to fund these obligations, but the Commissioner does not discharge this statutory duty unless he complies with the mandate contained in Social Services Law § 350 (1)(a).").

164. *See* Aff. In Support of the Plaintiff, *Jiggetts* (Index No. 40582/87).

165. *See* Aff. In Support of the Defendant, *Jiggetts* (Index No. 40582/87).

166. *Id.*

shelter schedule maxima as promulgated in the New York State Department of Social Service regulations.¹⁶⁷ Therefore, the legislature had ratified the shelter schedule.¹⁶⁸

The *Jiggetts* case would appear to be one in which the rules governing the review of legislative and executive actions had been appropriately followed by the courts. However, the court has not yet issued its decision and the preliminary injunction remains in place even though the trial was completed and final briefs were submitted three years ago.¹⁶⁹ Thousands of families have intervened in the case, and more than 21,000 are currently receiving relief.¹⁷⁰ This relief has taken the form of arrears payments of thousands of dollars¹⁷¹ and shelter payments that exceed the regulatory monthly maxima by several hundred dollars. Pursuant to the regulations of the New York State Department of Social Services, a typical family of three in New York City would receive \$276 each month for shelter, if heat is included in the rent.¹⁷² Under the preliminary injunction, that same family could receive up to \$650 per month for shelter.¹⁷³ Landlords in New York City, advertising their vacant rental units in the newspapers, state that they will accept "Jiggetts" payments, and applicants for assistance walk into welfare offices asking to apply for the "Jiggetts" program.

One can speculate that the judge has been hoping that by delaying a decision in the case, she is providing the executive the chance to propose, and the legislature the chance to enact, a shelter grant increase. Each year since litigation began, the legislature has considered and rejected enacting a statute to place the shelter schedule

167. *Id.*

168. *Id.*

169. The trial was completed in July 1991, and post-trial briefs were submitted to the court in January 1992.

170. In SFY 1993-94, the costs of implementing the preliminary relief ordered by the trial court totaled \$55 million, with a state share of \$13.8 million, a federal share of \$27.5 million, and a local share (NYC) of \$13.8 million. Information provided by Elizabeth Lassi of the Department of Social Services, Office of Budget Management.

171. *See, e.g., Jiggetts v. Perales*, 609 N.Y.S.2d 222 (N.Y. App. Div. 1994). One family received a payment of over \$12,000 for back rent owed to their landlord.

172. N.Y. COMP. CODES R. & REGS. tit. 18, Part 352.3(a) (1994).

173. Under the preliminary injunction, payments to intervening plaintiffs are approved on a case by case basis, and the New York State Department of Social Services has established guidelines, agreed to by plaintiffs and the court, that place outside limits on the amount of arrears and shelter costs that will be approved for payment. The maximum arrears payment under these guidelines has been \$7,000 and the maximum rent for a typical family has been \$650. *But see Jiggetts v. Perales*, 609 N.Y.S.2d 222 (Sup. Ct. 1994) (approving arrears payment of \$12,000).

into section 131 of the Social Services Law.¹⁷⁴ At the time of the commencement of the action, then-Governor Cuomo had proposed a shelter grant increase, to be effective in January 1988, in his State Fiscal Year ("SFY") 1987-88 Executive Budget.¹⁷⁵ In addition, in the budget that was enacted that year, the legislature appropriated the funds necessary to finance the increase.¹⁷⁶ However, each year since then the legislature has considered, and rejected, additional increases in funding for the shelter component of the welfare grant. In his Executive Budget for SFY 1995-96, Governor George Pataki proposed decreasing the non-shelter portion of the average ADC grant by 15% and, after three months, the non-shelter portion of the average Home Relief grant for "employable" recipients by 25%, and placing the shelter schedule in a statute.¹⁷⁷ In light of the refusal of the legislature to enact even modest funding increases for the shelter portion of the welfare grant, it seems inconceivable that it would appropriate the funds necessary to finance shelter costs and arrears payments at the levels necessary to comply with the court's orders.

For years the existence of the court-imposed preliminary relief has permitted each participant in the litigation and governmental authorities to shirk their responsibilities. The plaintiffs and intervenors have not had to seek more suitable or lower-cost housing or develop alternative strategies for meeting their shelter costs. As a

174. The author attended many budget negotiations and bases this statement upon her personal recollections of those proceedings. If the shelter schedule were placed into statute by the Legislature, the *Jiggets* case would be moot. The Court of Appeals' decision only addressed the obligation of the Commissioner to promulgate an adequate shelter schedule in regulation. If the Legislature enacted a statute embodying the schedule, whether adequate or not, it would be clearly beyond the courts' power to review; Article 17, § 1 of the N.Y. Constitution states that the aid, care and support of the needy shall be determined by the Legislature and the cases have held that the adequacy of these benefits set by the Legislature is outside the courts' jurisdiction. Thus, the Department of Social Services argued that by appropriating only enough money to fund the schedule at its present levels, the Legislature had, in fact, ratified the regulatory schedule. The courts cannot order the Legislature to appropriate money and Article 17 clearly makes the determination of the adequacy of benefits a legislative prerogative.

175. Governor Mario M. Cuomo, Governor's Message to the Legislature (Jan. 7, 1987), in *New York State Legislative Annual* (1987), at 42 (proposing a 22% increase in shelter allowance ceilings for public assistance recipients).

176. Memorandum from John C. Cochrane, Ranking Minority Member, New York State Assembly Ways and Means Committee, to Republican Members of the Assembly 80 (April 20, 1987) (on file with the *Fordham Urban Law Journal*) (noting legislative approval of an "average statewide increase of 22% in public assistance shelter allowance ceilings" as part of the 1987-88 aid to localities budget).

177. See *supra*, note 174 and accompanying text; see also Executive Budget for SFY 1995-96; proposed amendment to Budget Bill, S. 1826/A. 3126 (Mar. 6, 1995).

result of the court's orders, many clients who mismanage their grants, fail to pay their rents and accrue large arrears are rewarded by receiving duplicate payments. In addition, they are being permitted to remain in housing that they cannot really afford. Other clients who manage to make ends meet receive no additional assistance. The court's orders, by permitting clients to remain housed, have decreased pressure on the executive branch to propose a significant increase in the shelter portion of the welfare grant, a rental subsidy program to assist welfare recipients and other low-income people, or the building of more low income housing—proposals that would be unpopular with taxpayers who are clamoring for lower taxes and appear to be retreating from their traditional desire to assist the needy. The court's orders have also resulted in the expenditure of millions of dollars that, with appropriate planning and deliberation by the executive branch, might have been allocated more rationally among the caseload of welfare recipients. The legislature's prerogatives of deciding whether to appropriate funds and how to allocate appropriated funds has been usurped, because the funds necessary to finance the court-imposed shelter amounts are automatically available since ADC is an entitlement program. The legislature has also been able to avoid making the same politically sensitive choices as the executive.

The implications for the more than 21,000 families receiving "Jiggetts" relief are staggering: most of these families have been living for years in apartments and houses throughout New York City that they could not afford absent the court-imposed relief. It would be cruel irony indeed if, when their "temporary" relief ends, their shelter payments are reduced to the levels authorized by statute or regulation, making them unable to meet their shelter costs, leading to eviction from their homes, thus exacerbating the already significant problems of homelessness among families.

D. *Community Service Society v. Cuomo; Greater New York Hospital Association v. Perales*

In May 1989, the New York State Department of Social Services proposed regulations¹⁷⁸ to establish a new system of controlling utilization of services under the Medical Assistance program.¹⁷⁹

178. Notice of Proposed Rulemaking, SCS-22-89-00010-P, filed May 16, 1989.

179. New York State's Medical Assistance Program, commonly referred to as the Medicaid program, is a comprehensive program that provides medically necessary care, services and supplies to the needy in New York State. The program is one of the most comprehensive health care programs for the needy in the nation. New York

The Medicaid Utilization Threshold System ("MUTS") was intended to curb overutilization and inappropriate utilization of care and services by recipients and to combat fraud by providers.¹⁸⁰ The New York State Department of Social Services also estimated that implementation of MUTS would save New York State approximately \$31 million in SFY 1989-90.¹⁸¹ The proposed regulations established a system requiring prior authorization for medical care, services and supplies provided to recipients in excess of the level of such services required by the majority of Medicaid recipients. Different thresholds were proposed for different kinds of services,¹⁸² with the thresholds being set at the service utilization levels of between 92 percent and 99 percent of the eligible recipients.¹⁸³ Procedures were proposed to deal with the needs of some recipients for additional services, including permitting applications for increases in thresholds and permitting additional services to be provided for recipients with urgent or emergency needs for services.¹⁸⁴

In August 1989, prior to the adoption of the proposed regulatory amendments and while they were still subject to public comment, a lawsuit challenging the regulations was filed on behalf of a group of recipients, taxpayers and not-for profit organizations against the Governor of New York State and the Commissioner of Social Services.¹⁸⁵ In September 1989, a second lawsuit was filed against the Commissioner, challenging the regulations on behalf of a group of

State has elected to cover under its program most of the optional services authorized under the federal program, as well as providing a complete range of services to the "categorically needy" (persons eligible for federally funded Medicaid by virtue of their receipt of other categories of assistance such as ADC), the "medically needy" (persons who would be eligible for federally funded Medicaid but for the fact that they possess too much income or too many resources) and all recipients under the Home Relief program (New York State's general assistance program). N.Y. SOC. SERV. LAW, §§ 363-369 (McKinney 1992).

180. Notice of Proposed Rulemaking, Regulatory Impact Statement, § 3; Notice of Adoption, Number SCS-22-89-0010-A, Revised Regulatory Impact Statement, § 3.

181. Notice of Proposed Rulemaking, Regulatory Impact Statement, § 4. This estimate of savings was revised to \$24.5 million state share in SFY 1989-90 in the Notice of Adoption, Number SCS-22-89-0010-A, Revised Regulatory Impact Statement, § 4.

182. For example, 14 visits to physicians or clinics, the filling of 60 prescriptions for drugs, 18 laboratory service procedures. Notice of Proposed Rulemaking, Regulatory Impact Statement, Section 3; Proposed Part 503 of N.Y. COMP. CODES R. & REGS. tit. 18 (1989).

183. Affidavit of Mary Brankman dated Nov. 14, 1989, *Community Serv. Soc'y v. Cuomo*, Index No. 18221/89 (Sup. Ct. N.Y. County 1989).

184. Notice of Proposed Rulemaking, Proposed Part 503 of N.Y. COMP. CODES R. & REGS. tit. 18 (1989).

185. See Complaint, *Community Serv. Soc'y* (Index No. 18221/89).

doctors and not-for-profit operators of hospitals and clinics.¹⁸⁶ The lawsuits contended that the MUTS set arbitrary limits on services that would result in recipients rationing their care and failing to seek medically necessary treatment. They further contended that the New York State Department of Social Services lacked the statutory authority to propose such regulations and that the proposed regulations violated the Social Services Law and the New York State Constitution's provisions requiring the state to care for the needy and provide due process of law.¹⁸⁷ Finally, the lawsuits asserted that the proposal violated sections of the State Administrative Procedure Act (SAPA),¹⁸⁸ and that, with regard to the Medicaid providers, the regulatory impact statement underestimated the costs associated with the implementation of the program.¹⁸⁹

Subsequent to the filing of the complaints, the New York State Department of Social Services adopted the regulations, after making several modifications to the program in response to the comments received during the public comment period.¹⁹⁰ These modifications included excluding certain services from MUTS,¹⁹¹ permitting recipients to apply for exemptions from and increases in thresholds,¹⁹² decreasing the maximum time permitted for the New York State Department of Social Services to take action on an application for an exemption or increase, after which the application would be deemed approved,¹⁹³ and providing for additional services to be provided while an application for exemption or increase was pending.¹⁹⁴ Modifications were also made to the procedures for requesting "fair hearings" to challenge actions taken by the New York State Department of Social Services in connection with MUTS.¹⁹⁵

186. *Greater New York Hosp. Ass'n v. Perales*, Index Number 21148/89 (Sup. Ct. N.Y. County 1989).

187. *Id.*

188. N.Y. A.P.A. §§ 101-501 (McKinney 1984).

189. Complaint at 25-36, *Community Serv. Soc'y* (Index No. 18221/89); Complaint at 10-19, *Greater New York Hosp. Ass'n* (Index No. 21148/89).

190. Notice of Adoption, No. SCS-22-89-0010-A, filed Aug. 24, 1989.

191. For example, mental health services and pediatric services, including pediatric dental services, in addition to the previously proposed exclusion of services under the Child/Teen Health program. N.Y. COMP. CODES R. & REGS. tit. 18, Part 503.4 (1989).

192. The proposed regulations only permitted providers to apply for exemptions from and increases in thresholds on behalf of recipients. N.Y. COMP. CODES R. & REGS. tit. 18 §§ 503.7, 503.8 (1989).

193. N.Y. COMP. CODES R. & REGS. tit. 18, Part 503.11 (1989).

194. N.Y. COMP. CODES R. & REGS. tit. 18, Part 503.10 (1989).

195. N.Y. COMP. CODES R. & REGS. tit. 18, Part 503.12 (1989).

In November 1989, the court issued preliminary injunctions in each of the cases, enjoining the New York State Department of Social Services from implementing MUTS, notwithstanding the modifications that had been made to the program to address the criticisms of plaintiffs and other public comments on the proposed regulations.¹⁹⁶ The court found that there was a strong likelihood that plaintiffs would succeed in proving their statutory claims that there was no statutory authority for MUTS,¹⁹⁷ that the plaintiffs had demonstrated irreparable harm,¹⁹⁸ and that the balancing of the equities favored maintaining the status quo.¹⁹⁹ In granting the injunction, the court evaluated the New York State Department of Social Services' estimates of savings, but rather than giving deference to its expertise in developing such estimates for the Medicaid program, gave great weight to plaintiffs' experts, who challenged the estimates.²⁰⁰ The court also made its own estimation as to the value of the savings.²⁰¹ The court also refused to defer to the agency's analysis of alternatives²⁰² to MUTS and again engaged in its own review of alternatives.²⁰³

On appeal, the Appellate Division, First Department, upheld the preliminary injunctions, finding that the lower court had not abused its discretion.²⁰⁴ The court found no specific statutory authority permitting implementation of MUTS, and that sufficient questions had been raised as to whether the Social Services Law provisions governing the Medicaid program would support its im-

196. Order, Fingerhood, J., Nov. 9, 1989, *Community Serv. Soc'y* (Index No. 18221/89); Order, Fingerhood, J., Nov. 15, 1989, *New York Hosp. Ass'n* (Index No. 21148/89).

197. Order, Fingerhood, J., Nov. 9, 1989 at 13-17, *Community Serv. Soc'y* (Index No. 18221/89); Order, Fingerhood, J., Nov. 15, 1989 at 2-4, *New York Hosp. Ass'n* (Index No. 21148/89).

198. Order, Fingerhood, J., Nov. 9, 1989 at 17-19, *Community Serv. Soc'y* (Index No. 18221/89); Order, Fingerhood, J., Nov. 15, 1989 at 2-4, *New York Hosp. Ass'n* (Index No. 21148/89).

199. Order, Fingerhood, J., Nov. 9, 1989 at 19-20, *Community Serv. Soc'y* (Index No. 18221/89); Order, Fingerhood, J., Nov. 15, 1989 at 2-4, *New York Hosp. Ass'n* (Index No. 21148/89).

200. Order Fingerhood, J., Nov. 9, 1989 at 11, *Community Serv. Soc'y* (Index No. 18221/89).

201. *Id.* at 11-12.

202. *Id.* at 12.

203. *Id.* at 9-13.

204. *Community Serv. Soc'y v. Cuomo*, 561 N.Y.S.2d 461, 465 (N.Y. App. Div. 1990).

plementation.²⁰⁵ The court concluded that the lower court's order properly maintained the status quo.²⁰⁶

The MUTS had been carefully developed by the New York State Department of Social Services, using the vast amounts of information about Medicaid utilization contained in its information systems.²⁰⁷ The proposed thresholds were set at extremely high percentiles (92% - 99%) to avoid adversely affecting usual and legitimate patterns of recipient service usage.²⁰⁸ In addition to seeking cost savings, the New York State Department of Social Services was seeking to intercede where it detected patterns of overuse or misuse of services, in order to ensure that recipients were receiving the highest quality medical care, as required by the Social Services Law.²⁰⁹ Protections for recipients were included in the program to ensure that legitimate needs for additional services were met. Procedural protections were a part of the program, including a series of notices, appeals, fair hearings and judicial review.²¹⁰ The regulations were promulgated pursuant to SAPA,²¹¹ and as required, modifications were made in response to legitimate concerns raised during the public comment period.²¹² Despite all these safeguards, the courts still enjoined implementation of the program, however, uncritically accepting plaintiffs allegations of harm²¹³ and ignoring the inherent authority of the Commissioner of Social Services, pursuant to the Social Services Law, to administer the Medicaid program, promulgate regulations necessary for its proper administration, and determine what constitutes medically necessary care, services and supplies.²¹⁴

As a result of the preliminary injunctions, implementation of MUTS was halted and New York lost savings of approximately \$45

205. *Id.*

206. *Id.*

207. The Medicaid Management Information System (MMIS) and its Surveillance and Utilization Review Subsystem (SURS) provide the New York State Department of Social Services with detailed and voluminous data on all aspects of utilization of services in the Medicaid program. N.Y. SOC. SERV. LAW § 367-b (McKinney 1992).

208. *Id.*

209. N.Y. SOC. SERV. LAW § 363 (McKinney 1992).

210. Submissions of New York State Department of Social Services including affidavit of Mary Brankman, dated Nov. 14, 1989, *Community Serv. Soc'y* (Index No. 18221/89).

211. *See supra*, note 188.

212. Submissions of New York State Department of Social Services, including affidavit of Mary Brankman, dated Nov. 14, 1989, *Community Serv. Soc'y* (Index No. 18221/89).

213. Complaint at 22-25, *Community Serv. Soc'y* (Index No. 18221/89).

214. N.Y. SOC. SERV. LAW, §§ 17, 20, 34, 363, 365 (McKinney 1992).

million.²¹⁵ Subsequently, the Legislature enacted statutes that expressly authorized the implementation of MUTS, at first for adults who were eligible for Medicaid by virtue of their eligibility for Home Relief²¹⁶ and later for all Medicaid recipients.²¹⁷ The New York State Department of Social Services promulgated regulations governing the program²¹⁸ pursuant to specific statutory authority²¹⁹ and the program is in operation today.²²⁰ Gross savings attributable to the program total \$60 million annually, with a State share of approximately \$30 million, as originally projected by the New York State Department of Social Services. None of the horrors anticipated by plaintiffs came to pass. There are approximately 2.7 million Medicaid recipients each year, and since the beginning of the program between 96 and 99 percent of all requested exemptions and increases in thresholds were granted. Those that have been denied were rejected because the applications contained incomplete or incorrect information. No application has been denied for lack of medical necessity. There are approximately twelve requests for fair hearings concerning utilization thresholds each year, and there has been no related litigation.²²¹

The savings from the program's implementation were delayed for more than a year.²²² In that time, the executive was forced to propose and the legislature was forced to enact a series of more drastic limitations on services and eligibility restrictions. These limitations and restrictions have included a reduction in the Medicaid benefit package available to Home Relief recipients,²²³ the requirement that certain Medicaid recipients contribute financially to

215. Implementation of MUTS was delayed for approximately one and one half years for Home Relief Medicaid recipients and almost two years for other Medicaid recipients. With annual savings of \$30 million attributable to MUTS, a one and one half year delay resulted in lost savings of approximately \$45 million. Information provided by James Donnelly, the New York State Department of Social Services, Division of Health and Long Term Care (Mar., 1995).

216. N.Y. Soc. Serv. Law § 365-g (McKinney 1992), added by Chapter 938 of the Laws of 1990, effective January 1, 1991.

217. N.Y. Soc. Serv. Law § 365-g (McKinney 1992), as amended by Chapter 165 of the Laws of 1991, effective June 12, 1991.

218. N.Y. COMP. CODES R. & REGS. tit. 18, Part 503 (1989)

219. Act of June 12, 1991, ch. 165, 1991 N.Y. Laws 210.

220. N.Y. COMP. CODES R. & REGS. tit. 18, Part 511 (1993).

221. Information provided by Mark Sullivan, former Budget Director of the New York State Department of Social Services, Office of Budget Management, and Russell Hanks, Deputy General Counsel for Administrative Hearings, the New York State Department of Social Services, Division of Legal Affairs (Mar. 1995).

222. See text accompanying footnote 215.

223. N.Y. SOC. SERV. LAW, § 365-a(8) (McKinney 1992), as added by § 62 of Chapter 41 of the Laws of 1992.

the costs of their care by payment of a "co-payment" amount,²²⁴ the requirement that a fiscal assessment tool be used to evaluate the costs of recipients' home health care and personal care services,²²⁵ and the requirement of the use of a home care assessment instrument to evaluate recipients' need for home care and personal care services.²²⁶ It is more than mere speculation to suggest that if MUTS had been implemented when first proposed and the projected savings of \$30 million annually realized, some of the other service limitations and eligibility restrictions which have had a direct impact on the plaintiffs in these cases would not have been necessary. The new limitations on services and eligibility restrictions have each been challenged in litigation²²⁷ and, in most of the cases, preliminary injunctions have again enjoined implementation of the policies developed and enacted by the legislature and the executive. Additional fiscal savings have been lost, leading to additional proposed reductions in services and benefits.²²⁸ This cycle of litigation and budget cutting will presumably continue as the legislature and the executive struggle to contain health care costs and advocates resist their efforts.

E. *Wilder v. Bernstein*

In 1973, the American Civil Liberties Union, representing a class of black Protestant foster children²²⁹ challenged the foster care

224. N.Y. SOC. SERV. LAW § 367-a(6) (McKinney 1992), as added by § 91 of Chapter 41 of the Laws of 1992.

225. N.Y. SOC. SERV. LAW, § 367-j, k (McKinney 1992), as added by §§ 22 and 23 of Chapter 165 of the Laws of 1991.

226. N.Y. SOC. SERV. LAW, § 367-o (McKinney 1992), as added by § 78 of Chapter 41 of the Laws of 1992.

227. *Burland v. Dowling*, Index No. 407324/93 (Sup. Ct., N.Y. County 1992) and *Catanzano v. Dowling*, Civ. Action No. 89-1127L (U.S.D.C., W.D.N.Y. 1989) (challenges to fiscal assessment tools); *Dowd v. Bane*, Index No. 17335/92 (Sup. Ct., N.Y. County 1992), *Home Care Council of New York City v. Bane*, Index No. 17508/92 (Sup. Ct., N.Y. County 1992), *Home Care Ass'n of New York v. Bane*, Index No. 7151/92 (Sup. Ct., Alb. County 1992) (challenges to home care assessment tool); *McCall v. Bane*, Index No. 17344/92 (Sup. Ct., N.Y. County 1992) (challenge to reduction in Home Relief Medicaid benefit package); *Sweeney v. Bane*, Civ. Action Number 92-2528 (S.D.N.Y. 1992), *aff'd*, 996 F.2d 1384 (2d Cir. 1993) (challenge to co-payments; denial of preliminary injunction).

228. In his Executive budget proposal for SFY 1995-96, Governor George Pataki has proposed additional cuts in private duty nursing services, audiology, dental care and physical therapy for adults. He has also proposed additional restrictions on eligibility for home health care and personal care services.

229. The defendants were various New York State and New York City child welfare officials, including the Commissioners of Social Services and officials of various Catholic and Jewish child care agencies.

placement²³⁰ policies of New York State and New York City, alleging that the foster care system's traditional reliance on religiously affiliated agencies to provide foster care services and the practice of "religious matching"²³¹ of foster children and agencies was unconstitutional.²³² The plaintiffs alleged racial and religious discrimination, and violations of the constitutional ban on the establishment of religion.²³³ A three-judge Federal court examined New York's constitutional and statutory scheme under the standards developed by the U.S. Supreme Court for evaluating claimed violations of the First Amendment's religion clauses.²³⁴ The court determined that while the scheme, especially the use and funding of religiously affiliated foster care agencies, appeared to violate the literal wording of the Establishment Clause, the rights of foster children to the free exercise of their religious preferences saved New York State's policies from facially violating the U.S. Constitution.²³⁵ The court found that New York State's policies represented a reasonable accommodation between the Establishment and Free Exercise Clauses of the First Amendment.²³⁶

Subsequently, a second action was filed²³⁷ and the trial court granted class certification.²³⁸ The complaint was amended several

230. In New York State, a child can enter foster care "voluntarily" pursuant to N.Y. SOC. SERV. LAW § 384-a (McKinney 1992) or "involuntarily" pursuant to Art. 10 of the N.Y. FAM. CT. ACT §§ 1011-1074 (McKinney 1983).

231. The New York State Constitution requires that, when practicable, a foster child must be placed in a facility governed by or in the custody of a person of the same religion as the child. N.Y. CONST. art. VI, § 32. The Social Services Law also provided that a child should, when practicable, be placed with an agency under the control of persons of the same religion and that placements must, consistent with the child's best interests, give effect to the religious preference of the child's parent. N.Y. SOC. SERV. LAW § 373 (McKinney 1992).

232. *Wilder v. Sugarman*, 385 F. Supp. 1013, 1017 (S.D.N.Y. 1974) [hereinafter *Wilder I*].

233. Plaintiffs alleged violations of the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution and the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution. *Id.* at 1018.

234. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

235. *Wilder I*, 385 F. Supp. at 1024.

236. *Id.* at 1029.

237. *Parker v. Bernstein*, 78 Civ. 957 (RJW) (S.D.N.Y. 1978).

238. *Wilder I* was dismissed by the court with the understanding that the court in *Parker v. Bernstein* would treat *Wilder I* as *stare decisis*. The case was renamed *Wilder v. Bernstein* [hereinafter *Wilder II*]. The court's class certification order also dismissed several of plaintiffs' facial challenges to other New York State and City statutes not considered in *Wilder I* but that the court considered to be inherently part of the statutory scheme challenged in *Wilder I*. *Wilder II*, 499 F. Supp. 980 (S.D.N.Y. 1980).

times,²³⁹ and as the parties prepared for trial, the plaintiffs' main claims continued to be that the foster care system operated in a racially discriminatory manner toward black children, who were placed in agencies that provided poorer quality care;²⁴⁰ that the foster care system discriminated on the basis of religion, because Catholic and Jewish foster care agencies were permitted to give preference to children of their own religions;²⁴¹ that the foster care system violated the Establishment Clause because it provided government financing to pervasively religious entities and excessively entangled government with religion;²⁴² and that the foster care system impermissibly burdened the free exercise of religion by Protestant children.²⁴³

Prior to trial, the plaintiffs and the City of New York negotiated a proposed settlement and presented it to the court. The court held hearings before approving the settlement, in order to give affected parties, including the child care agencies, the opportunity to object to the proposed settlement.²⁴⁴ Modifications were made to the proposal to address various concerns raised, and the Stipulation of Settlement²⁴⁵ was signed and presented to the court for final approval in December 1985.

Without any admission of wrongdoing,²⁴⁶ the Stipulation²⁴⁷ established an elaborate classification system, by which an independent consultant would rate the quality of all foster care agencies and rank them accordingly.²⁴⁸ The assignment of children to the care of foster care agencies²⁴⁹ would be on a "first come, first served" basis, and the expression of a religious preference would not give a child greater access to the best available program than other children for whom the program was appropriate.²⁵⁰ There would be

239. A fourth amended complaint was filed in April 1983. *Wilder II*, 645 F. Supp. 1292, 1301 (S.D.N.Y. 1986), *aff'd* 848 F.2d 1338 (2d Cir. 1988).

240. Fourth Amended Complaint ¶¶ 49-74, *Wilder II*, No. 78 Civ. 957 (RJW) (S.D.N.Y. filed Apr. 27, 1983). The Complaint also alleged violations of Title VII of the Civil Rights Act, 42 U.S.C. § 2000(d).

241. *Id.*

242. *Id.* at ¶ 223.

243. *Id.* at ¶¶ 68-69, 225.

244. Hearings were held during the August 1984 and March 1985.

245. Proposed Stipulation of Settlement dated Aug. 27, 1985, *Wilder II* (No. 78 Civ. 957 (RJW)) [hereinafter *Wilder II* Stipulation].

246. *Id.* at ¶ 2.

247. The Stipulation is extremely detailed, covering every aspect of New York City's foster care placement system, and comprising 84 paragraphs.

248. *Wilder II* Stipulation, *supra* note 245, at ¶¶ 6-17.

249. *Id.* at ¶¶ 18 - 55.

250. *Id.* at ¶¶ 19 - 20.

recognition that for compelling therapeutic reasons exceptions to the "first come, first served" policy would be permitted,²⁵¹ and certain special agencies would be designated to care for children whose religious tenets required that their upbringing be guided by adherents of their own religions.²⁵² Parents would be permitted to make their preferences known,²⁵³ and, if an "in-religion" placement were not immediately available, parents would be given the option of having their children wait for the "best in-religion program," placed in the "next best in-religion program," or placed in the "best available out-of-religion program."²⁵⁴

Several Catholic and Jewish child care agencies continued to object to the Stipulation. The court, in an extensive opinion,²⁵⁵ analyzed each of the objections, evaluated the Stipulation against the applicable constitutional principles, and approved it, finding that it was legal, fairly resolved plaintiffs' claims without prejudicing the interests of other participants in the foster care system, and furthered the legal objectives of the underlying lawsuit.²⁵⁶ Endorsing the "thoroughness, craftsmanship, scholarship and sensitivity to the issues presented" of the lower court opinion, the U.S. Court of Appeals for the Second Circuit affirmed.²⁵⁷

The classification system contemplated by the Stipulation has still not been fully implemented, and, because its implementation is the trigger for activating the "sunset" clause,²⁵⁸ the case is still pending, twenty two years after its initiation. In that time, there have been significant changes in the child welfare system. After years of decreasing numbers of children entering foster care, an increased focus on the prevention of child abuse and maltreatment, the AIDS epidemic and the widespread use of "crack" cocaine in the 1980s caused the number of children entering foster care to skyrocket.²⁵⁹ As a result of changes in child welfare policy and

251. *Id.* at ¶¶ 21, 32 - 43.

252. *Id.* at ¶ 61.

253. *Id.* at ¶¶ 56 - 60.

254. *Id.* at ¶ 23.

255. *Wilder II*, 645 F. Supp. 1292. The opinion issued by the court was 118 pages long. The court entered final judgment after plaintiffs met certain court-imposed conditions. Order, Ward, J., Feb. 19, 1987, *Wilder II* (No. 78 Civ. 957).

256. *Wilder II*, 645 F. Supp. at 1354.

257. *Wilder v. Bernstein*, 848 F.2d 1338, 1341 (2d Cir. 1988).

258. The Stipulation was to terminate three years after full implementation or five years after entry of the Stipulation, with various options for extension. *Wilder II* Stipulation, *supra* note 245, at ¶¶ 79-81.

259. Between 1978 and 1985, the number of children in out-of-home care in New York State declined by 29%. In 1986, there were approximately 28,000 children in foster care. By 1988, there were almost 46,000 children in foster care and by 1992,

practice—an increased emphasis on keeping troubled families together²⁶⁰ and, where foster care is necessary, a focus on the placement of children with their own relatives, rather than with strangers²⁶¹—the foster care system has changed radically. New York State has initiated a variety of projects to explore alternatives to traditional foster care. The Home ReBuilders initiative encourages foster care agencies to move children out of foster care and into permanent homes more quickly by changing the way agencies receive funding.²⁶² The use of “resource families”—relatives or

there were almost 63,000 children in foster care in New York State. Almost 75% of these children were from New York City. NEW YORK STATE KIDS COUNT 1994 DATA BOOK 44 (Apr. 1994). There are currently more than 60,000 children in foster care in New York State. N.Y.S. DEP'T OF SOCIAL SERV., IMPROVING SERVICES TO FAMILIES AND CHILDREN (1994); Information provided by James Purcell, Assoc. Comm. of the Office of Children and Family Services, the New York State Department of Social Services, Division of Services and Community Development (July, 1994).

260. Among the initiatives focusing on family preservation is a new federal funding stream. Omnibus Budget Reconciliation Act of 1993, P.L. 103-66 tit. 13, §§ 13711-16, 107 Stat. 312, 649-58.

261. In *Miller v. Youakim*, 440 U.S. 125 (1979), the Supreme Court held that the same level of funding must be provided to children placed in foster care with relatives as those placed with strangers. In 1986, a group of foster children in care with relatives in New York City sued officials of New York City and the New York State Department of Social Services to obtain the same care and services provided to children in placement with non-relatives. *Eugene F. v. Gross*, Index No. 1125/86 (Sup. Ct. N.Y. County 1986). In November 1985, the New York State Department of Social Services promulgated regulations governing the use of relatives as foster parents. N.Y. COMP. CODES R. & REGS. tit. 18 Parts 443 and 444 (1985). In October, 1986, the New York State Department of Social Services issued an Administrative Directive, 86 ADM-33, that advised all social services officials in New York State of new procedures for the use of relatives as foster care placements (“kinship” foster care). In 1990, the legislature indicated its preference for placement of children with relatives. N.Y. SOC. SERV. LAW § 384-a (1) (McKinney 1992). See also FAM. CT. ACT § 1017 (1983). In 1992, another issuance of the New York State Department of Social Services, 92 LCM-27, provided social services officials with additional information on the use of relatives as resources for children. At least one court has found that children have a constitutional right to be placed with relatives. *Lipscomb v. Simmons*, 884 F.2d 1242 (9th Cir. 1989). There are currently more than 20,000 children across New York State in placements with relatives. N.Y.S. DEP'T OF SOCIAL SERV., IMPROVING SERVICES TO FAMILIES AND CHILDREN (1994); Information also provided by James Purcell, Assoc. Comm. of the Office of Children and Family Services, the New York State Department of Social Services, Division of Services and Community Development (July, 1994).

262. Traditionally, foster care agencies received a daily “per diem” rate for each child in their care. Agencies received more money for caring for children who remained in care for longer periods of time. Home ReBuilders uses capitated rates, whereby agencies receive a fixed amount for each child in their care, regardless of how long the child remains in care. It is hoped that this rate structure, similar to the way medical “managed care” providers are reimbursed will encourage agencies to move children to permanency more quickly. For a fuller discussion of Home Re-

families from children's own communities—to provide a wide range of assistance to troubled families is being explored. These families will be expected to provide respite to parents and mentoring to children and, when out-of-home placement is necessary for a period of time, will care for the children in their own communities, maintaining close ties with the children's own families. It is hoped that some of these resource families will become adoptive families, if children cannot be reunited with their own families.²⁶³

These new initiatives make clear that if the concept of “first come, first served” ever really had any validity as a way of determining foster care placements for children, it no longer does so. Yet, despite all of these changes to the foster care system, in 1993, the plaintiffs in *Wilder* moved to hold the New York City defendants in contempt²⁶⁴ for failing, among other things, to apply the Stipulation's provisions to kinship foster care placements.²⁶⁵ Interpreting the Stipulation, the Judge determined that it did apply to kinship placements,²⁶⁶ and, in a recent decision, that ruling was, in effect, affirmed, although the appeal was dismissed and the case was remanded to give the city defendants the opportunity to seek modification of the Stipulation to exclude kinship placements.²⁶⁷ In light of the changes to the child welfare system described above, in light of the legislature's expressed preference for placement of children with relatives, and in light of the inherent illogic of using a “first come, first served” placement system to deal with children going to the homes of family members, the court should exclude kinship foster care placements from the ambit of the Stipulation.

IV. Conclusion

The cases described above illustrate that although some very significant benefits have accrued to the clients served by the social services system through the use of litigation, it is far from an ideal

Builders, see N.Y.S. DEP'T. OF SOCIAL SERV., IMPROVING SERVICES TO FAMILIES AND CHILDREN (1994); and FAMILIES FOR KIDS ASAP (1994).

263. *Id.*

264. *Wilder v. Bernstein*, 153 F.R.D. 524, 527 (S.D.N.Y. 1994), *appeal dismissed*, 49 F.3d 69 (2d Cir. 1993).

265. *Id.* The lawyers for the plaintiffs in *Eugene F.* were granted permission to intervene in *Wilder* for the limited purpose of arguing that kinship foster children are not and, because it is not in their best interests, should not be subject to the terms of the Stipulation. Order, Ward, J., Jan. 28, 1994, *Wilder II* (No. 78 Civ. 957 (RJW)). In response to the contempt motion, the New York City defendants contended that the Stipulation was never intended to apply to kinship foster care.

266. *Wilder v. Bernstein*, 153 F.R.D. at 528.

267. 49 F.3d 69 (2d Cir. 1995) (*appeal dismissed*).

way to make public policy. The intrusion of the courts into the policy-making arena reserved for the legislature and the executive branch prevents those entities from developing policies in a reasoned, deliberative manner, and, even when they have done so, substitutes courts' and advocates' views of policy for those of the persons and entities, chosen by the voters, to whom the New York State Constitution commits the responsibility for policy development.

The energies and talents of executive officials are diverted from the planning and development of appropriate policies, and are devoted to responding to complaints, motions and court orders. Funds that could be used to implement sound policies are used to respond to court-imposed mandates and, on occasion, fines. The courts are, in effect, requiring the appropriation of funds by the legislature, because sufficient funding must be budgeted to respond to court imposed solutions.²⁶⁸ Court mandates are responsive only to the immediate crises that precipitated the litigation, and do not take into account the competing, and equally compelling, broader issues and needs that must also be addressed. While the views of advocates and judges may be interesting and insightful, litigation should not be used to impose them upon or substitute them for the policies of the legislature and executive.

Courts should be mindful of their appropriate role and not exceed it. Our jurisprudence correctly delineates that role, and the reasons for the judiciary to avoid intruding on the prerogatives of the other branches of government are equally valid today as when those principles were developed. Courts are not equipped to make choices between competing policies and demands for funding. With taxpayers demanding tax cuts and the Congress and the legislature responding to those demands, the pool of money to be divided among various needs is finite and decreasing. Hard choices must be made and courts lack the expertise and political judgment to make them. The courts should focus on deciding the merits of underlying claims, and issuing final and truly equitable relief, rather than permitting preliminary injunctions, with plaintiffs' claims taken at face value, effectively to decide the course of public policy.

268. Each year, in its budget submission to the legislature, the executive requests an appropriation for "Jiggetts" relief. See, e.g., Executive Budget, SFY 1993-94. The City of New York is required to include in its budget request to the New York City Council sufficient funds to pay the fines ordered by the court in *McCain*.

Most importantly, litigation can sometimes have unintended results that actually harm the interests of the people it seeks to protect. The homeless men and women who are represented in *Callahan* would have been better served by the careful and rational development of housing with services programs that meet their needs. The millions of dollars spent on improving conditions in armories are only in recent years being redirected to developing, in consultation with advocates for the homeless and service providers, more appropriate types of housing.²⁶⁹ The families receiving “*Jiggetts*” relief have been encouraged to rely upon a safety net that will probably be pulled from beneath them in the near future. Home Relief recipients would be better off today if the kind of Medicaid services to which they are entitled had not been reduced as a result of the delay in implementation of MUTS. The ability to have 200, perhaps medically contraindicated, drug prescriptions filled each year is a poor substitute for the eye care that some of them no longer receive and the shorter hospital stays for which they are eligible. The children entering foster care because their parents abuse drugs or are dying from AIDS would be better served if they are permitted to live with relatives and family friends in their own communities. Being assigned to the supervision of foster care agencies on a “first come, first served” basis, relying upon a twenty year-old vision of what the foster care system looks like, is the height of absurdity.

Advocates must work to develop access to policy-makers, including members of the legislature and executive agency officials, so that their views can be heard in a calm, non-adversarial, and non-confrontational manner. Bringing problems to the attention of agency officials before litigation is necessary, and will often result in policy changes that provide as much or more relief to clients than court orders ever can.²⁷⁰ Threats of litigation cause doors to

269. The Times Square Hotel, once a notorious example of the worst the system had to offer, is now a model of housing with available social services, serving formerly homeless persons, persons with mental illnesses, persons with HIV infection and AIDS and low income persons from the surrounding community. The project was developed collaboratively by advocates for the homeless, social services providers, and various officials of New York City and New York State government agencies, with a mixture of federal, state, city and private funding.

270. For more than 10 years, the Division of Legal Affairs of the New York State Department of Social Services has had a Legal Services Advisory Committee. The Committee, comprising legal services lawyers from around New York State, brings various ideas for policy development and problems to the attention of the General Counsel and legal staff of the agency. As a result of the free exchange of ideas that the Committee encourages, regulations have been amended and, where necessary,

be closed; offers to work collaboratively on policy development can open ears and minds. When litigation is necessary, advocates must choose their cases wisely and plan strategically to avoid consequences that actually harm clients. This is especially important as political developments threaten to curtail radically the social services system. Litigation should be used to protect and establish fundamental rights, but change and policy experimentation that does not threaten those rights should be permitted to take place unimpeded.

developed; policies of local social services agencies that violated state policy have been halted; new policies and programs have been implemented in ways that are more sensitive to clients needs; and litigation has been avoided.