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# Heartbreak Hotel: The Disharmonious Convergence of Welfare, Housing and Homelessness

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# HEARTBREAK HOTEL: THE DISHARMONIOUS CONVERGENCE OF WELFARE, HOUSING AND HOMELESSNESS

SUSAN BENNETT\*

You can check in any time you like, but you can never leave.<sup>1</sup>

To say that Americans value themselves as they value their monuments is probably not to make too sweeping a sociological statement. We celebrate our great public edifices—the Brooklyn Bridge, Fenway Park—for their happy joining of form and function, or their nostalgic associations.<sup>2</sup> Archaeologists studying the 1980's will undoubtedly analyze that era as the one which measured itself in malls. We gasp, we thrill, we buy—we am.

We have other monuments. If our true measure lies in how we treat our most vulnerable, then the real gauges of the 1980's are a hotel and a gymnasium floor. The hotel is the Hotel Martinique, until December, 1988,<sup>3</sup> one of New York City's public shelters of last resort for homeless families. The gym-

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1. Felder, Frey and Henley, *Hotel California*, (Asylum Records, 1976-1977).

2. The impact of each of these monuments has been both captured and enhanced by its troubadours. Hart Crane celebrated the Brooklyn Bridge in "The Bridge." See THE COMPLETE POEMS AND SELECTED LETTERS AND PROSE OF HART CRANE 54 (Weber ed. 1966). Roger Angell and Thomas Boswell, both long-time baseball chroniclers, have rhapsodized over the historical cosinesses of Wrigley Field and Fenway Park, and the purist's functionality of Memorial Stadium in Baltimore. R. ANGELL, FIVE SEASONS — A BASEBALL COMPANION 88 (1977); T. BOSWELL, HOW LIFE IMITATES THE WORLD SERIES 145-146 (5th ed. 1986). In a typically erudite allusion, the late A. Bartlett Giamatti traced the etymology of "paradise" to Farsi for "an enclosed green space," with a clear reference in mind to a ball park. Siebert, *Baseball's Renaissance Man*, N.Y. Times (Magazine), Sept. 4, 1988, at 36.

3. See Barbanel, *As a Hotel is Emptied, the Poor Move On*, N. Y. Times, Dec. 27, 1988, at B1, col. 6, for a description of the move-out of families from the Martinique. According to the article, thirteen families remained of 462 sheltered in the hotel in March of 1988. Officials of the city of New York had publicly committed themselves to emptying the Martinique of its families by the end of December, 1988. Homelessness During Winter 1988-1989: *Prospects for Change: Hearing before the Ad Hoc Task Force on the Homeless and Housing of the House Comm. on the Budget*, 100th

nasium floor is that of the Randall Junior High School, where the government of the District of Columbia provided each of twenty-five with families a living space consisting of an area partitioned off with temporary plywood cubicles on a basketball court.<sup>4</sup> Conditions at the Martinique provoked presidential comment and journalistic outrage; conditions at the Randall Gym formed the subject of litigation. Although the social services departments of both cities did shelter homeless families in other lodgings, these two accommodations—the Martinique and the gym—have become key symbols of our failure to protect our most vulnerable.

There are many Hotel Martiniques. They are called welfare hotels, or temporary shelters, and if they do not exist in every city or town in this country it is because those who are comfortably and conventionally housed express antipathy towards the residents of such shelters.<sup>5</sup> That the housing is

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Cong., 2d Sess. 42 (1988) (statement of William J. Grinker, Commissioner/Administrator, Human Resources Administration).

By April 30, 1989, the Martinique was emptied of its families. HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK, MONTHLY REPORT: NEW YORK CITY EMERGENCY HOUSING PROGRAM FOR FAMILIES (May, 1989) at 4. By May 31, 1989, of the 4,152 families documented by the Human Resources Administration of the City of New York as occupying emergency shelter in the five boroughs, 2162 were living in hotels. Monthly Report at 2, 5. By November, 1989, that number had decreased to 1,780, but the city had significantly increased the number of families moving into one hotel which had been cited repeatedly for the presence of lead paint. Rimer, *Despite Pledge, Homeless Still in Hotel*, N.Y. Times, Nov. 11, 1989, at 29, col. 2.

4. In *Walls v. Barry*, No. 1372-88, (D.C. Super. Ct. dismissed, Feb. 7, 1989), plaintiffs, homeless mothers and their children, sued the District for placing them in commercial hotels, which ejected them at 7:00 or 7:30 a.m. every morning and locked them out of their rooms until 7:00 or 7:30 p.m. each night. Many of the residents—some infant children, some pregnant women—had nowhere to go during the day. Some waited with their families in cars, or in the hallways of the hotels. Many suffered from colds or flu. *Id.* (Declarations of Maude Coleman, Michele Reese, Sheryl White, Mary Hodge in Support of Plaintiffs' Motion for Temporary Restraining Order). After the court granted plaintiffs' motion for a temporary restraining order, District social services officials transferred families from two of the hotels to the Randall School gymnasium, at the time being used as a shelter for homeless men. For a short period, families were sharing space with the men on the floor. Pending implementation of a "phase-out plan," the court allowed defendants to house up to twenty-five families in this fashion. *Walls v. Barry*, Preliminary Injunction Order 7 (April 1, 1988). For a description of the early and middle stages of the *Walls* litigation, and of other litigation related to shelter for homeless families in the District of Columbia, see Sinclair-Smith and Minor, *Down and Out in D.C.: Homeless Families and the Right to Shelter*, 3 WASH. LAWYER 41 (1988).

5. The "NIMBY" ("not in my back yard") reaction to the placement of housing for groups perceived as undesirable is certainly not limited to "the homeless." However, particularly graphic examples exist of community opposition to the opening of shelters for homeless people. One Maryland community recently blocked plans to use vacant General Services Administration surplus property to build a shelter for homeless fami-

"temporary" is a fiction: some families have lived in these shelters, five or six to a single room, for as long as two years.<sup>6</sup> The Martinique ultimately is a metaphor for perversion of purpose. Intended as a luxury hotel for wealthy travelers, it and its replacements now serve as permanent housing for the dispossessed, housing that in itself is a perversion of the idea of "home."

The purpose of this article is not to convey the horror of welfare hotels. Others have done so, far more eloquently than I can hope to. My goal is to attempt to explain yet another perversion: the transformation of federal welfare policy into housing policy, a mismatch of law and function which must share the blame for fostering such monstrosities as the Martinique. In part, this article will describe how two programs under Title IV of the Social Security Act—the Aid to Families with Dependent Children ("AFDC") program and the Emergency Assistance to Families with Children ("EANFC") program—

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lies, pursuant to the provision of the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 5502, 101 Stat. 482, 510-11 (1987) which requires the federal government to make surplus properties available for such purposes. Robinson, *Maryland City Residents Seek to Halt Planned Housing for Homeless*, Baltimore Sun, June 23, 1989, at D1, col. 2. In an example as colorful as it may be atypical, merchants in Burlington, Vermont formed a nonprofit association called "Westward Ho!" to offer one-way plane tickets to homeless men to their original places of residence. Johnson, *Homeless Get Ticket to Leave*, N.Y. Times, Nov. 20, 1988, at 52, col. 1. In its guide to prospective builders of shelter for homeless people, the American Institute of Architects has quoted advice for deflecting community resistance. Recommended strategies include avoiding loaded terms such as "homeless" or "shelter," and substituting phrases such as "residence," "housing," or "congregate facility" in any description of the project. N. GREER, *THE CREATION OF SHELTER* 103 (1988) (quoting ANELLO AND SHUSTER, *COMMUNITY RELATIONS STRATEGIES: A HANDBOOK FOR SPONSORS OF COMMUNITY-BASED PROGRAMS FOR THE HOMELESS*).

When such emotions erupt into litigation, often the catalyst is the unwelcome appearance of homeless children in neighborhood schools. *Riverhead Central School District v. Romano*, 118 A.D.2d 551, 498 N.Y.S.2d 867 (N.Y. App. Div. 1986) (school district sued Suffolk County Commissioner of Social Services for subsidizing long-term placement of homeless families in motel); *Complaint at 7, Vinagra v. Borough of Wrightstown*, No. 87-7545 (N.J. Super. Jan. 5, 1988) (after homeless residents of a motel registered their children in the corresponding school district, the borough ordered the families to vacate the hotel pursuant to a zoning ordinance which limited hotel occupancy to thirty days). In the sad case of *Seide v. Prevost*, 536 F.Supp. 1121 (S.D.N.Y. 1982) the litigation opposed advocates for two outcast groups—homeless men and children residing in state psychiatric institutions—in a struggle for possession of the waste ground of Ward's Island. See also *Coalition of Bedford-Stuyvesant Block Ass'n v. Cuomo*, 651 F.Supp. 1202 (E.D.N.Y. 1987) (plaintiff neighborhood association alleged racial discrimination on the part of the city, for placing disproportionate number of shelters for homeless people in neighborhoods of high minority concentration).

6. For a discussion of lengths of time during which shelter residents may occupy "temporary" shelter, see *infra* notes 124-5, and accompanying text.

have combined to fund the placement of destitute children in welfare hotels and barracks-style, congregate shelters.

This transformative process rests on a deliberate mischaracterization. The public policy that chooses welfare benefits, rather than housing programs, to resolve homelessness relies on a perception of homelessness as aberrant, and as born of aberrance. As such, the policy treats homelessness as a fluke, and not as a symptom of structural deficiencies in the housing market. Thus, homelessness becomes a temporary problem curable by temporary expedients such as emergency grants. The fiction of homelessness as a "crisis" has justified what has been, up until recently, the continued failure of federal and state governments to divert the vast sums of money poured into nightly hotel placements to more productive uses: into building permanent housing, or into increasing the income available to indigent persons to buy their own accommodations.

This policy failure manifests only the result of a legal value system which safeguards no economic rights, and which structures hierarchies among economic entitlements. Of necessity, legal advocacy for homeless people has mirrored these structures, and another purpose of this paper is to describe this advocacy. For several years, advocates for homeless persons have looked to welfare law, not housing law, to find shelter for poor people. Scattered state constitutions and statutes impose obligations upon states to provide a minimum level of subsistence for their citizens. Through creative use of these provisions in state court litigation, advocates have elicited commitments from city governments to expand significantly their supply of overnight shelter to homeless people.<sup>7</sup> The tangible benefit of this litigation to the plaintiffs has been enormous. But, as advocates for the homeless would be the

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7. There are a number of examples of significant "right to shelter" litigation, litigated under state or local statutes or constitutional provisions, and settled under minutely detailed consent decrees. See *e.g.*, Consent Decree 2-3, *Graham v. Schoemehl and the City of St. Louis*, No. 854-00035, (Div. No. 2 Nov. 15, 1985) (incorporating comprehensive program of services for women and families; obligating the city to provide \$310,000 for shelter services in 1985-6, and to open two hundred units of temporary and one hundred units of permanent housing for homeless people in 1986); Final Judgment by Consent, *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. County Aug. 26, 1981) (setting, among others, some of the following standards for city-operated shelters for homeless men: width of beds; condition of bedding; availability of facilities for storage, laundry and maintenance of personal hygiene; hours of group recreation; unlimited hours of entrance and exit; mail privileges; and pay telephones). *Id.* at 3-5. The decree also set standards for showers, security, storage, cleanliness of bed linens and of the facility generally, and heat for the privately-owned hotels on the Bowery which the city paid to house homeless men. *Id.* at 8-9; *Paris v. Board of Supervisors of the County of Los Angeles*, Case No. 523361, Consent Decree at 4 (L.A. Cty. Sup. Ct. July 16, 1988) (incorporating extensive standards enunciated in the Los Angeles County Department of Public Social Services' *General Relief Handbook* for safety and cleanliness, and for rights of residents).

first to admit, the strategies carry some inherent deficiencies.<sup>8</sup>

First, the obligations imposed through this litigation guarantee survival, not living, and, at best, extend only to shelter, not housing. The difference is significant. These scattered provisions in state statutes and constitutions can at best be interpreted to guarantee residents enough economic security to survive as transients, not enough to sink roots into the community.<sup>9</sup> Second, since most of these commitments are embodied in consent decrees, they form at best a patchwork of successes, and provide no precedent that can be extended to situations in other communities.<sup>10</sup> Yet, minimal as these state constitutional provisions are, they do far exceed any federal sources of assertable right. Despite the most optimistic of interpretations,<sup>11</sup> the United

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8. Robert Hayes, whose advocacy under Article XVII of the New York Constitution compelled the City of New York to spend millions of dollars on sheltering its previously neglected population of homeless men and women, has described litigation as "the equivalent of a bull in a china shop." Hayes, *Litigating on Behalf of Shelter for the Poor*, 22 HARV. C.R.-C.L. L. REV. 79, 87 (1987).

9. See *supra* note 7, on results of several suits settled by consent decree. Of these suits, plaintiffs in *Graham* sued under the charter of the city of St. Louis, which implemented a state-imposed statutory duty to support poor persons. Plaintiffs in *Callahan* sued under the equal protection clauses of the United States' and New York State's Constitutions, Amended Complaint at 22-23, *Callahan v. Carey*, No. 79-72581, (N.Y. Sup. Ct. Oct. 2, 1979); under Article XVII of the New York State Constitution and Section 131, among others, of the New York State Social Services Law, *id.* at 23. Plaintiffs in *Paris* brought their action under Section 526a of the California Code of Civil Procedure (allowing taxpayer suits for the wasteful expenditure of public funds), Amended Complaint at 16, *Paris v. Board of Supervisors*, No. C 523361 (L.A. Cty. Sup. Ct. filed June 27, 1986); under Sections 10000 and 17000 of the CA. WELF. INST. Code (West 1980) and the CA. CONSTIT., *id.* at 20.

10. One author has commented on the questionable precedential effect of the consent decree in *Callahan*, perhaps the most notable litigation to assert a right to shelter as guaranteed by state constitutional rights to subsistence. McKittrick, *The Homeless: Judicial Intervention on Behalf of a Politically Powerless Group*, 16 FORDHAM URB. L. J. 389, 406 (1988). McKittrick has also noted the tortuous history of efforts to enforce rights to shelter under the consent decree in *Callahan*, an exhaustively detailed document invoked repeatedly in subsequent litigation. McKittrick, *id.* at 413. For Robert Hayes' rueful description of the history of enforcement of *Callahan*, see Hayes, *Homelessness and the Legal Profession*, 35 LOY. L. REV. 1, 5-8 (1989).

For a description of the efforts to enforce the settlement agreement in *Russell v. Barry*, No. 87-2072 (D.D.C. Dec. 18, 1987), which required the District of Columbia promptly to provide emergency shelter for homeless families with children, and to promulgate regulations to control the quality of shelter under D.C. CODE ANN. §§ 3-601 - 3-607 (1981) (1988 Supp.), *The Right to Overnight Shelter Act*, see *infra* notes 243-245 and accompanying text.

11. Several commentators have stated that despite a history of Supreme Court opinions disclaiming the presence in the Constitution of any guarantees to economic rights, it is possible to interpret the Constitution as providing substantive due process rights to subsistence, see Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L. J. 1, 23-30 (1987); Michelman, *Welfare Rights in*

States Constitution easily yields no governmental obligation to provide economic security, shelter or housing.<sup>12</sup> Advocates in search of a coherent, nationally replicable strategy to expand access to housing for homeless people are faced with a double bind. Fully aware of the futility of claiming a federal, and thus national, constitutional right to shelter, advocates must look to state law sources of right. Yet, even here, advocates will encounter two threshold dilemmas. First, these sources of law may not always exist.<sup>13</sup> Second, where favorable constitutional provisions are available, since the history of litigation for homeless people has thus far been written in consent decrees, advocates cannot even point to other court decisions as persuasive, and must re-invent the wheel time after time in state courts.

Ironically, it is precisely this constellation of programs paying the bills for the welfare hotels—the public benefits programs contained within the scope of Title IV-A of the Social Security Act—which provides one of the most inviting sources for the assertion of a statutory right to shelter. There are several reasons for this. First, unlike federally subsidized housing, receipt of benefits under either the AFDC or the EANFC program is arguably an entitlement. Eligibility for federally subsidized housing secures an applicant a space on a waiting list measured in months or years;<sup>14</sup> eligibility for AFDC is circumscribed only by the exigencies of need of the dependent child, not by the

a *Constitutional Democracy*, 1979 WASH. U. L. Q. 659 (1979). Professor Michelman expressed the most optimistic view of the assertability of a right to shelter — before the Supreme Court's 1972 decision in *Lindsey v. Normet*. (See *infra* note 12). Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. C.R.-C.L. L. REV. 207 (1970).

12. *Lindsey v. Normet*, 405 U.S. 56, 74, (1972) which, in interpreting Oregon's Forcible Entry and Detainer statute, Or. Rev. Stat. §§ 105.105-105.165 (1984), refuted any claim to a constitutional guarantee to quality of housing or to a property right in rental housing, has been viewed as effectively blocking any claim to any fundamental right to housing or shelter. For examples of such commentary, see Siebert, *Homeless People: Establishing Rights to Shelter*, 4 LAW AND INEQUALITY 393, 397 (1986); Woodward, *Homelessness: A Legal Activist Analysis of Judicial and Street Strategies*, 3 HUMAN RIGHTS ANN. 251, 269 (1986).

More recent cases from the District of Columbia have accorded extremely limited due process protections to overnight shelter as an entitlement under the Social Security Act, *Caton v. Barry*, 500 F.Supp. 45, 48 (D.D.C. 1980), or as an expectation created by continuous occupation of a government-operated shelter, *Williams v. Barry*, 490 F.Supp. 941, 945 (D.D.C. 1980), *aff'd in part*, 708 F.2d 789 (D.C.Cir. 1983).

13. For an exhaustive list of state statutory and constitutional provisions that impliedly or explicitly provide a right to subsistence; that set eligibility for general (state-funded) relief; or that imply a requirement for the state to protect vulnerable adults through its adult protective services code, see Langdon and Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J. L. & SOC. PROBS. 305, 362-392 (1985).

14. Of twenty-seven cities surveyed in 1988, seventeen had stopped accepting applications for federally subsidized housing programs because the waiting lists were too long. U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOME-

Office of Management and Budget.<sup>15</sup> Thus, if a child and her family meet the financial and other criteria of eligibility for AFDC, they may exercise an absolute claim of statutory right against the state, as conduit for the federal government, for benefits. Although the scheme of "cooperative federalism"<sup>16</sup> that governs both the AFDC and EANFC programs allows participating states significant freedom in setting the dollar amount of monthly payments, and some latitude in the type of benefits they provide, once a state chooses to participate, certain uniform federal standards for implementing the programs apply. Second, although adoption of the AFDC and other relevant programs under the Act is voluntary, all states participate in the cash benefit part of the AFDC program, and thirty jurisdictions participate in the EANFC program.<sup>17</sup>

This article will discuss the strengths and shortcomings of using strategies which rely on these programs under the Social Security Act to assert a right to shelter. The strategy has worked unevenly, in part due to the confusing judicial interpretations of states' obligations under the statutes. The Supreme Court has sent conflicting signals as to whether even the minimal strictures imposed upon the states in the AFDC program apply to EANFC. As a consequence of this confusion, many state plans for EANFC combine the worst of both programs: the extensive personal and financial eligibility requirements for AFDC and the time-consuming procedures for verifying eligibility; the use of AFDC's penurious and rigid payment levels, meant to apply to the long-term program of on-going assistance, as a measurement standard for benefits under the short-term, emergency program; and reliance on the fiction of temporariness to provide to emergency applicants an arbitrary mixture of in-kind and cash benefits, often unrelated to the actual need.

As I have already suggested, it is this same "fiction of temporariness," that is misapplied to homelessness, and that makes litigating for permanent housing solutions under a temporary benefits program so problematic. The absence of any coherent federal legislative or judicial guidance for emergency assistance standards has transformed the application process for any emergency benefit into one as unpredictable as was the emergency itself.

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LESSNESS IN AMERICA'S CITIES: 1988, at 64 (Jan. 1989). Chicago housing officials reported a ten year wait for participation in the city's "Section 8" program. *Id.* at 68.

15. 42 U.S.C. § 601 was amended in 1956 to substitute for a limited appropriation an open-ended authorization to expend "Act of Aug. 1, 1956, for each fiscal year a sum sufficient to carry out the purposes of this part." 70 Stat. 848.

16. The Supreme Court first used this oft-repeated phrase in *King v. Smith*, 392 U.S. 309, 316 (1968) to describe the structure of the federal-state relationship in the provision of AFDC.

17. For a comprehensive listing of variations in all the states' and territories' AFDC plans, see the forty-two reports tabulated and compiled under: *Family Support Administration, Office of Family Assistance, Department of Health and Human Services, Automated State AFDC Plans: Reports Based on State Plan Amendments Effective on or before January 1, 1989 and received by April 1, 1989* (1989) (hereinafter "Automated State AFDC Plans"). Report No. 21 lists the states offering an Emergency Assistance to Needy Families with Children program as of January 1, 1989.



State courts and state legislatures have devised their own chaotic answers to the questions of what sorts of emergency aid states can offer, how they may define "emergency," and whether they may vary their definitions according to the identity of the applicant. This is a situation that is peculiarly perilous for the family seeking the one benefit—housing—for which people need the greatest assurances of predictability and stability.

The ultimate irrationality in the system reserves itself for those who need emergency shelter assistance. "Emergency shelter" is a fiction. For many applicants, the "emergency" which precipitated their homelessness may be neither tornado nor flood, but family crisis or loss of income; the "emergency" state of homelessness may last not for days, but months. It should seem obvious that no construction of the term "emergency assistance" can be compatible with the provision of stable, long-term housing. As I will explain, the federal emergency assistance system has adapted functionally, not formally, to this paradox. The continuing fantasy of treating dire need for housing as an "emergency" has exposed the most vulnerable of all applicants to the full force of all the inequities arising from the states' inconsistent interpretations of the two programs.

One can feel confident that advocates for homeless people would support the basic caveat that should precede this article. Sometimes the well-intentioned efforts to enforce uniform access to emergency shelter under the Social Security Act, or to nudge up the levels of payment in a benefits program may only seem to perpetuate structures which deny dignity. Advocates understand this possibility, and acknowledge it as troubling.<sup>18</sup> No one wants to fight for the "right" of impoverished citizens to live in filthy, temporary housing of any type. No one wants to fight for the "right" to a monthly income set at a percentage of some state legislature's perception of the minimum necessary to sustain life, which may in turn be only some percentage of the federal perception of that minimum. The goal of all advocates for homeless people is to become housing advocates; to assert the right of their clients to live, not on the floor of a church's basement, not in a room at a Holiday Inn, but in a "home," with all its connotations of permanency, autonomy and dignity.

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18. Robert Hayes has decried his own efforts to expand the supply of emergency shelter in an outburst of modesty and frustration:

Why in God's name should you go through five years and, if someone is paying bills, millions of dollars of legal fees to get a relatively modest victory? And what kind of victory? Come to New York; come see city shelters. A shelter for men right now has one thousand human beings sleeping in one room of that shelter. Probably most of you know the scandal of sheltering homeless families in New York City where \$35,000 a year is squandered on a squalid welfare hotel room. If you wanted to find the best way to sabotage some kind of humanitarian response, you come and see the fruits of these various court injunctions.

Hayes, *Homelessness and the Legal Profession*, 35 LOY. L. REV. 1, 8 (1989).

## I. THE SCOPE OF THE PROBLEM — WHO, AND HOW MANY, ARE THE HOMELESS HOTEL FAMILIES?

That local governments are housing destitute families temporarily in hotels is nothing new. As early as the early 1970's, litigation highlighted welfare policies that instead of subsidizing less costly apartments financed expensive hotel placements.<sup>19</sup> It is unclear that any one factor preceding the first appearance in 1988 of Jonathan Kozol's reports of his investigations into the Martinique<sup>20</sup> directed public attention to the intensification of the problem of homeless families— the unavailability of all but the most makeshift, transitory shelter; the escalation of the costs of providing such shelter; the sheer increase in the numbers of families seeking such assistance. Certainly the title of one of the first of several congressional investigations into the housing of families in welfare hotels— "Homeless Families: A Neglected Crisis"— suggested that the scope of the problem had outpaced its notoriety.<sup>21</sup>

It is clear that "the problem"— if by problem, one means increasing numbers of families housed temporarily, exorbitantly, and squalidly— was noted as increasing during the 1980's. In its annual survey of twenty-seven cities, in 1989 the United States Conference of Mayors noted that eighteen reported an increase in the numbers of families seeking emergency shelter. The cities surveyed reported that homeless families constituted between 15 and 80% of the homeless population.<sup>22</sup> Studies seem to concur in singling out homeless families as the most rapidly growing segment of the homeless population during the 1980's, representing on a national average between 33 and 40% of that population.<sup>23</sup> A survey conducted on January 22, 1986 of

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19. In *Washington v. Wyman*, 54 F.R.D. 266 (S.D.N.Y. 1971), the New York City Department of Social Services placed plaintiffs in hotels at \$1350 per month for two rooms, rather than pay \$295 in rent, because the \$295 exceeded the monthly shelter standard for public assistance. *Id.* at 269. For a discussion of more recent applications of this policy, see *infra* notes 197-200, and text. New York City has used its public assistance funds to finance emergency shelter in commercial accommodations such as hotels since 1968. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, REPORT TO CONGRESS: USE OF THE EMERGENCY ASSISTANCE AND AFDC PROGRAMS TO PROVIDE SHELTER TO FAMILIES 18 (1989).

20. J. Kozol, *A Reporter at Large: The Homeless and Their Children*, THE NEW YORKER MAGAZINE, Jan. 25, 1988, at 65.

21. *Comm. on Government Operations, Homeless Families: A Neglected Crisis*, H.R. REP. No. 982, 99th Cong. 2d Sess. (1986).

22. UNITED STATES CONFERENCE OF MAYORS, *supra* note 14, at 62.

23. U.S. GOVERNMENT ACCOUNTING OFFICE, WELFARE HOTELS: USES, COSTS AND ALTERNATIVES 19 (1989). In 1985, the GAO noted the "changing nature of the population" from one popularly perceived as consisting of itinerant single men, to a more heterogeneous population consisting in growing part of adolescents and families with younger children. U.S. GOVERNMENT ACCOUNTING OFFICE, HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE 5 (1985). See also COMMITTEE ON HEALTH CARE FOR HOMELESS PEOPLE, INSTITUTE OF MEDICINE, HOMELESSNESS, HEALTH AND HUMAN NEEDS 11 (1988); NATIONAL ALLIANCE TO END HOMELESSNESS,

New Jersey's agency caseloads and shelter residents showed that, in all categories— of individuals actually homeless, or of individuals receiving services to prevent homelessness— children constituted the majority of persons getting help.<sup>24</sup>

The perception that many more homeless families were approaching social services departments in search of emergency shelter has seemed most acute in the past five years. In testimony delivered in March, 1988 to a congressional committee, the commissioner of New Jersey's Department of Human Services stated that the state had tripled its expenditures for emergency assistance in the preceding year, to meet a tripling in demand.<sup>25</sup> A sevenfold increase during 1986 in the number of families sheltered, at government expense, in commercial hotels<sup>26</sup> prompted the District of Columbia

HOUSING AND HOMELESSNESS 27-28 (1988) (noting a broad range of estimates from surveys such as those generated by the U.S. Conference of Mayors, but estimating that an average of between 25% and 33% of homeless persons are homeless as families). The Interagency Council on the Homeless, the official executive agency charged under the Stewart B. McKinney Homeless Assistance Act of 1987 with coordinating services on behalf of homeless people among cabinet departments and federal agencies, reports the low estimate of 9% to 10%. The study qualifies this figure by noting that it counts only homeless adult family members; when all homeless family members are counted, the average rises to 23%. INTERAGENCY COUNCIL ON THE HOMELESS, A NATION CONCERNED: A REPORT TO THE PRESIDENT AND THE CONGRESS ON THE RESPONSE TO HOMELESSNESS IN AMERICA, at 5-8 (1989).

24. G. GIOGLIO AND R. JACOBSEN, HOMELESSNESS IN NEW JERSEY: A STUDY OF SHELTERS, AGENCIES AND THE CLIENTS THEY SERVE 24 (1986). However, one should interpret such data cautiously. Figures showing a significant channeling of resources towards one population may indicate nothing more than that this is the only population for which such resources exist. For a comprehensive critique of methodologies for counting homeless people, especially with reference to those which rely on data gathered from service providers, see U.S. GENERAL ACCOUNTING OFFICE, HOMELESS MENTALLY ILL: PROBLEMS AND OPTIONS IN ESTIMATING NUMBERS AND TRENDS 21-22 (1988).

25. New Jersey's expenditures of funds out of the EANFC program, to place families in temporary housing, had risen from nine million to thirty million dollars from 1987 to 1988, with the number of families assisted during that time increasing from five thousand to sixteen thousand. *Use of AFDC Funds for Homeless Families: Joint Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, and the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance*, 100th Cong., 2d Sess. 119 (1988) (statement of Drew Altman, Commissioner, New Jersey Department of Human Services).

26. *H.R. Crawford*, D.C. COUNCIL COMM. ON HUMAN SERVICES' REPORT ON BILL 7-724, "Emergency Shelter Services for Families Reform Amendments Act of 1987," 2 (1987). In January of 1986, the District of Columbia's Department of Human Services had placed thirty-nine families in emergency shelter under "open market contracts" with private commercial hotel and motel owners. By December of 1986, that number had increased to 245.

Council to legislate a fifteen day limit on such placements, and a one hundred and eighty day limit on subsidizing other emergency housing.<sup>27</sup> Although an increase in dollars spent does not automatically signify a commensurate increase in numbers of families served, the county executive of Westchester County testified that expenditures for emergency shelter in his jurisdiction had risen from three quarters of a million dollars in 1983 to a projected 54 million dollars for fiscal 1988.<sup>28</sup> Data from New York City suggest that, for that city alone, the number of families placed in temporary commercial accommodations peaked in 1987, and is decreasing.<sup>29</sup> However, that decrease has resulted from implementation of an articulated policy, prompted by the threat of withdrawal of federal funds, to move homeless families out of the most notorious welfare hotels.<sup>30</sup> There is no suggestion that the demand, or the need, has diminished.<sup>31</sup>

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27. *Id.*, at 5-6. The proposed bill, later codified at D.C. CODE ANN. § 3-206.3 (Supp. 1987), required the Mayor to provide, through building, buying or renovation, enough non-commercial emergency shelter units to make the use of hotels unnecessary. *Id.*, at 5.

28. *Use of AFDC Funds for Homeless Families*, *supra* note 25, at 84 (testimony of Andrew P. O'Rourke, County Executive of Westchester County, New York). O'Rourke noted that Westchester County sheltered four thousand individuals, of whom eighteen hundred were children. *Id.*, at 84.

29. For occupancy in hotels in the five boroughs, New York City noted a decrease from 3512 families in June, 1987 to 2162 families in May of 1989. *Human Resources Administration of the City of New York*, *supra* n. 3, at 5. Occupancy in the city's other private emergency shelter placements—the "Tier I" barracks-style shelters, had decreased from 495 families in December, 1986 to 430 in May, 1989, *id.*, at 6, and for the smaller "Tier II" Family Centers had increased from 500 in June, 1986, when only six were open, to 1560 families housed in thirty-six centers, in May of 1989. *Id.*, at 7. For a discussion of litigation concerning the conditions in Tier I shelters, see *infra* notes 107-109 and accompanying text.

30. In March, 1988, Mayor Edward Koch testified that the city of New York had adopted a five year plan to remove all families from welfare hotels by 1992. He cited the potential loss of \$85 million in federal reimbursements from the EANFC program, under HHS' proposed regulations to limit the time period during which such funds could be used. *Use of AFDC Funds for Homeless Families*, *supra* note 25 at 42-3 (statement of Edward Koch, mayor of the city of New York). The city later accelerated its timetable, and guaranteed that families would be moved out from the hotels in two, rather than five years. *Homelessness During Winter 1988-1989: Prospects for Change*, *supra* n.3, at 41 (1988) (statement of William J. Grinker, Commissioner/Administrator, Human Resources Administration). See *infra* notes 86-92 and accompanying text, for a description of HHS' abortive attempt to change its regulations in order to limit the use of EANFC funds for hotel placements.

31. One can infer from the well-publicized closure of one hotel in the District of Columbia that homeless families have been dispersed, but have not disappeared. After seven years of operation with a record of repeated health code violations, violent crime, and at least one death of an infant by fire, the Capitol City Inn lost its last residents on November 30, 1989. Emergency issue over the summer of two hundred

Playing a numbers game with censuses of "the homeless" has become something of an industry in the last few years.<sup>32</sup> The survey conducted by the Department of Housing and Urban Development ("HUD") in 1984 spawned more controversy and charges of under-counting than it contributed to any real understanding of the numerical dimensions of the problem.<sup>33</sup> The HUD study represents the lowest count, with a national figure of two hundred thousand; the high estimate, from the National Coalition for the Homeless, put the figure at three million.<sup>34</sup> As with counting any segment of the population of homeless people, counting homeless families usually means counting the families who gain entry to shelters.<sup>35</sup>

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federal housing vouchers assisted the process, although no data is available on whether the two hundred families receiving those vouchers were able to find housing in the private market. Other families were moved into public housing; still others were evicted. Housing advocates voiced concern that many of the families were simply being moved to smaller, less visible hotels. C. Spolar, *Capitol Inn Sees the Last of Homeless*, Wash. Post, Dec. 1, 1989, at D1, col. 3; A. Stevens and D. Price, *Boy Killed in Fire at Capitol City Inn*, Washington Post, July 2, 1989, at B1. As of May 8, 1989, a city census of families housed in emergency hotels reported approximately four hundred families housed, comprised of 490 adults and 1050 children. Telephone conversation between Matthew Marquis, research assistant, and Sue Marshall, Mayor's Coordinator for Homelessness for the District of Columbia, July 10, 1989. These figures represent an increase over the 245 families temporarily housed in 1986, as noted in H.R.Crawford, *supra*, note 26, at 2. Litigation recently filed in the District of Columbia alleges that, despite the enactment of the Emergency Shelter Services for Families Reform Amendments Act of 1987, *supra* note 26, the district has persisted in shuttling families between inadequate hotel placements. Complaint, *Fountain v. Barry*, No. 90-CA01503 (D.C. Super. Ct. filed Feb. 12, 1990).

32. See U.S. GENERAL ACCOUNTING OFFICE, HOMELESS MENTALLY ILL, *supra* at note 24, ch. 2, "How Sound Are Current Estimates of the Number of Homeless Persons?" at 16-31, for what is primarily an unfavorable assessment of the methodologies used in twenty-seven national and regional censuses of homeless people.

33. HUD Report on Homelessness: Hearings before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 98th Cong. 2d Sess. 7 (1984); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663 (D.C. Cir. 1987).

34. For a comparison table on different estimates, see *Committee on Health Care for Homeless People*, *supra* note 23, at 3. Controversy already surrounds the Bureau of the Census' plans for counting homeless people in the 1990 census. The special count, which will occur on March 20 and 21, 1990, will begin in the evening at shelters and hotels, will continue in the early morning hours to the streets, and will end with a canvas of abandoned buildings. See Berke, *Girding for Bid to Count Homeless*, N. Y. Times, Dec. 16, 1988, at B6, col. 1; *Homelessness in America — The Need for Permanent Housing*, Hearings before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs, 101st Cong., 1st Sess. 748-762 (1989) (testimony of William P. Butz, Assoc. Director for Demographic Programs, Bureau of the Census, U.S. Department of Commerce).

35. One useful statistic, rarely kept, is the number of families or individuals turned away from shelters due to lack of bed space. Certainly statistics which premise the

It is even more difficult to determine how many families are being placed in commercial housing of last resort, and at whose expense. In terms of cold numbers, from FY 1985 to FY 1988, the number of cases in which the federal government provided funding for emergency assistance increased by over a third.<sup>36</sup> These figures, however, do not indicate what these "cases" could have been. Many emergency situations, such as utility shut-off or eviction, can elicit the spending of federal emergency assistance money. Some jurisdictions which do not participate in the EANFC program pay for emergency hotel placements as a "special need," an extraordinary outlay allocated within the structure of the AFDC grant.<sup>37</sup> In addition, local social services departments can tap other federal funding sources to pay for temporary com-

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number of homeless families on the number of families served in temporary shelters miss this unknown proportion of the population. An old study indicated an average of 189 persons in Maryland turned away per night by shelter providers during fiscal 1985, with a mismatch between the type of facilities available and the needs of the persons applying. HEALTH AND WELFARE COUNCIL OF CENTRAL MARYLAND, WHERE DO YOU GO FROM NOWHERE 36 (1986). One recent study of "street people" in the District of Columbia attempted to compensate for the inaccuracies inherent in any survey confined to shelter residents. Data for this study were collected through interviews held during February and March of 1988, with individuals at eighteen indoor and outdoor soup kitchens in the District. K. DOCKETT, STREET HOMELESS PEOPLE IN THE DISTRICT OF COLUMBIA 10, 16 (1989).

36. *Department of Health and Human Services, Office of Family Assistance, "Emergency Assistance: Number of Cases, Fiscal Year 1985"* (revised June 16, 1986) notes the average number of cases as 32,500; the same document for fiscal year 1988 (revised April 10, 1989) notes 45, 872. There are a number of problems with using these tables. They do not differentiate among the many types of federal assistance, which may include special needs payments made out of the AFDC program as well as emergency grants made out of the EANFC program. They also do not indicate whether the numbers represent current active caseload or numbers of cases opened, or whether the numbers mask repeated requests for assistance from the same applicants.

37. For example, Connecticut does not participate in the EANFC program. See Automated State AFDC Plans, *supra* note 17, Report No. 21 (1989). However, from July of 1987 through June of 1988, through its special needs program under AFDC, the state did spend six million dollars on temporary shelter. Department of Health and Human Services, Use of the Emergency Assistance and AFDC Programs to Provide Shelter to Families 15-16 (1989). 42 U.S.C. § 602(a)(23)(1985), as currently implemented by 45 C.F.R. § 233.20(a)(2)(i)(1988), impliedly requires states to specify the standards by which they determine AFDC recipients' need and payments; § 233.20(a)(2)(v)(1988) mandates description of any special needs items. During the late 1960's and early 1970's, virtually all AFDC jurisdictions changed from using highly individualized systems, by which individuals received separate grants according to specific needs, to systems of disbursing uniform consolidated grants. Despite this change, most states retained some provision for small, occasionally in-kind or vendor-paid grants, to cover particularized, extraordinary needs. This transition is described in HANDLER, LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE 23-24 (1983). See also *Rosado v. Wyman*, 397 U.S.

mercial shelter.<sup>38</sup> The Government Accounting Office has acknowledged difficulty in retrieving data concerning the extent to which cities rely on hotel placements as a major source of transitory housing, as well as the extent to which cities draw on any of the federal sources to pay for that housing.<sup>39</sup>

## II. THE SCOPE OF THE PROBLEM — WHAT CAUSES FAMILIES TO BE HOMELESS?

As a recent compendium has suggested, studies of why families seek temporary shelter are primarily anecdotal, limited to small samples, and scattered in terms of the geographic areas they cover.<sup>40</sup> The events preceding the move to shelter of last resort vary tremendously. One study of families in New York City's hotel and congregate shelters posited several major precipitating events. These included involuntary displacement—the sudden loss of housing due to eviction or fire—as well as nominally discretionary choices to move to avoid economic difficulties with rent or to escape physically unsafe conditions.<sup>41</sup> A preliminary report of findings from interviews of residents of family shelters in Boston contradicted the New York findings. None of the 51

397, 416-417 (1970) describing the history of New York state's conversion from an individualized to a flat grant program.

38. These sources include funds allocated to states through the Community Services Block Grant Program, 42 U.S.C. § 1397 *et seq.*; money allocated to local boards through the Emergency Food and Shelter Grant Program under the Federal Emergency Management Agency (FEMA); and the Emergency Shelter Grants Program, administered through HUD. The latter two programs are funded through the Stewart B. McKinney Homeless Assistance Act, P.L. No. 100-77, as re-authorized through the Stewart B. McKinney Homeless Assistance Amendments Act of 1988, P.L. 100-628. See also U.S. GOVERNMENT ACCOUNTING OFFICE, WELFARE HOTELS: USES, COSTS AND ALTERNATIVES, at 36-45 (1989); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, USE OF THE EMERGENCY ASSISTANCE AND AFDC PROGRAMS TO PROVIDE SHELTER TO FAMILIES 16 (1989).

39. U.S. GOVERNMENT ACCOUNTING OFFICE, WELFARE HOTELS: USES, COSTS AND ALTERNATIVES, *supra* note 38, at 17. The picture can be somewhat complicated in the case of a state such as New York, whose jurisdictions may channel their funding for emergency hotel placements through two Title IV-A programs. The GAO report notes that 95% of New York City's emergency hotel placements are paid as special needs grants out of AFDC. *Id.* at 38. However, the Department of Health and Human Services notes that, for the fiscal year ending June 30, 1988, close to a third of the sixty-six million dollars spent by the federal government for emergency shelter assistance for New York state was channeled through the EANFC program; only four million dollars came through AFDC special needs. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, USE OF THE EMERGENCY ASSISTANCE AND AFDC PROGRAMS TO PROVIDE SHELTER TO FAMILIES 16 (1989).

40. Committee on Health Care for Homeless People, *supra* note 23, at 11.

41. J. MOLNAR, HOME IS WHERE THE HEART IS: THE CRISIS OF HOMELESS CHILDREN AND FAMILIES IN NEW YORK CITY; A REPORT TO THE EDNA MCCONNELL CLARK FOUNDATION 20 (1988).

mothers interviewed had arrived in the shelter as a result of a cataclysmic, unpredictable event. Rather they had lost their housing for a complicated combination of reasons, including the breakdown of fragile systems of familial and economic supports.<sup>42</sup> Another study, a one year survey covering eighteen family shelters in the southeastern United States, including interviews with 124 female heads of household, cited personal crisis generated by domestic violence or substance abuse as a factor precipitating homelessness for seventy percent of the interviewees. Other women interviewed in the study had been evicted as a result of the loss of their public benefits, and, consequently, of their rent money.<sup>43</sup>

Some studies of homeless families concentrate on the characteristics of the interviewees: their race or ethnicity; their educational background; their personal and behavioral problems; their psychological profiles, and the psychological profiles of their children. Again, geographical demographic disparities, problems in the execution of surveys, and the myriad number of variables that can account for the residential composition of any family shelter, make generalization unwise.<sup>44</sup> In one report of her study of eighty families housed in shelters in the Los Angeles area, Dr. Kay McChesney implicitly eschewed any quantified demographic analysis of the population, and instead adopted a descriptive mechanism of "typologies," admittedly unstatistical generalizations about the residents' economic and familial backgrounds.<sup>45</sup> Nonetheless, from some of the studies, however impressionistic the data, some patterns seem to emerge.

One study of New York City's family shelters found 95% of the occu-

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42. Bassuk, *The Feminization of Homelessness: Families in Boston Shelters*, 7 AM. J. OF SOC. PSYCHIATRY 19, 21 (1987).

43. P. Dail, *A Psycho-Social Portrait of Homeless Women with Children: Implications for Social Intervention Programs* 6 (unpub. paper presented at the American Psychological Association's Conference on Reaching the Unreachable, Washington, D.C., May, 1988).

44. For example, in one of a series of reports on a study interviewing first residents of Boston shelters for families, then residents of shelters outside the city, and then a control group of housed families, Dr. Ellen Bassuk noted that her inability to gain access to a shelter which housed primarily Hispanic families probably resulted in an undercount of Hispanic homeless families. Bassuk and Rosenberg, *Why Does Family Homelessness Occur? A Case-Control Study*, 78 AM. J. OF PUB. HEALTH 783 (1988). Another team describing the results of a survey of residents of a Salvation Army family shelter in St. Louis noted that the origin of the shelter as a treatment center for entire families could partially account for the high proportion of children under five in the residential population. Hutchison, Searight and Stretch, *Multidimensional Networking: A Response to the Needs of Homeless Families*, 31 SOCIAL WORK 427 (1986).

45. *The Crisis in Homelessness; Effects on Children and Families*, 1987: Hearing before the House Select Comm. on Children, Youth and Families, 100th Cong., 1st Sess. 175, 177 (1987) (written submission of article, *Paths to Family Homelessness*, by K. Young McChesney, Director, USC Homeless Families Project, Social Science Research Institute, University of Southern California at Los Angeles).



pants to be black or Hispanic, with 83% of the residents reporting public assistance to be their source of income.<sup>46</sup> Dr. Ellen Bassuk's reports on her study of family shelters in Massachusetts describe two-thirds of the residents as being black or Hispanic,<sup>47</sup> with 60% having received AFDC for more than two years,<sup>48</sup> and 96% currently receiving public assistance.<sup>49</sup> The predominance of minority families and of AFDC as an income source in these shelters may be a regional characteristic. In her study of family shelters in the southeast, Dr. Paula Dail found two-thirds of the occupants to be white, with only 28% of them receiving AFDC as their primary income.<sup>50</sup> In terms of other demographics, the New York and Massachusetts studies found the majority of the heads of household to be female, with the average or median age of the female household head to be 27. Between 25% and 40% of the household heads had completed high school. Between 50% and 65% of the children housed in the shelters were under the age of five.<sup>51</sup>

Pervasive among the impressions is one of domestic rootlessness as a prelude to homelessness. Bassuk reported a pattern of residential instability in her interviewees: most had moved three or four times during the year preceding their entry into temporary shelter, and 85% had shared living quarters with another family.<sup>52</sup> Half of the women interviewed in Dail's study had lived with relatives or friends before they moved into emergency housing, and 60% had lived in emergency shelter before.<sup>53</sup> Just under half of the interviewees in the New York study had lived somewhere other than in an apartment of their own during an entire two year period before their move into a shelter.<sup>54</sup>

Of these authors, Bassuk has most openly asserted a claim of connection between patterns of personal instability and homelessness. In her attempt to hypothesize causes of family homelessness, based on a comparison

46. J.R. DUMPSON, A SHELTER IS NOT A HOME: REPORT OF THE MANHATTAN BOROUGH PRESIDENT'S TASK FORCE ON HOUSING FOR HOMELESS FAMILIES, at 16 (1987).

47. Bassuk and Rosenberg, *supra* note 44, at 783.

48. Bassuk and Rubin, *Homeless Children: A Neglected Population*, 57 AM. J. OF ORTHOPSYCHIATRY 279, 281 (1987). The findings in this study were taken from interviews of 82 families, with 156 children, housed in family shelters in Massachusetts.

49. Bassuk and Rosenberg, *supra* note 44, at 784.

50. P. Dail, *supra* note 43, at 5-6.

51. J.R. Dumpson, *supra* note 46, at 16; Bassuk and Rubin, *supra* note 48, at 281; Hutchison, Searight and Stretch, *supra* note 44, at 427.

52. Bassuk and Rosenberg, *supra* note 44 at 784.

53. P. Dail, *supra* note 43, at 5-6.

54. J.R. Dumpson, *supra* note 46, at 18. Data from the Urban Family Center, a part of the Henry Street Settlement in New York City, indicates that residents suffered both residential and personal upheavals immediately before their descent into emergency shelter: doubling up, eviction, frequent moves, deaths, unemployment, serious illnesses, and estrangements. Phillips, Kronenfeld and Jeter, *A Model of Services to Homeless Families in Shelters*, in HOUSING THE HOMELESS 322, 323-4 (Erickson and Wilhelm eds. 1986).

of demographically similar homeless and housed families, she found that the most significant differences between the two groups concerned the dependability of close personal or family relationships. Far fewer of the homeless women could name, or lived near, supportive adult relatives or friends; more of the homeless women mentioned physically abusive relationships with spouses or boyfriends as part of their pasts, with their most recent partners experiencing major problems with substance abuse, or unemployment.<sup>55</sup> In one intriguing finding, she rejected the proposition that homeless female heads of families constitute a sub-group of a "culture of poverty." Although most of her homeless interviewees did depend on welfare for their income, far fewer of them had relied on welfare for as long as had their housed counterparts, or had grown up in welfare-dependent households.<sup>56</sup> One conclusion seems to be that, for at least these subjects, the great constant is lack of constancy—no constant relationships, no constant source of income, no constant address. Without predictability or cohesiveness, the "culture of homelessness" is no culture at all.

In other writings, Bassuk goes further, linking homelessness to this condition of emotional and economic rootlessness. She urges the establishment, not only of housing units, but of transitional housing facilities, accompanied by social services, to ease the movement of families who are temporarily housed into the community of those who are permanently housed. The assumption is that, in varying degrees, homeless families are dysfunctional, and unable to re-integrate themselves into housed society without assistance.<sup>57</sup> The assumption is by no means Dr. Bassuk's alone. That the only recent major federal legislation to address homelessness—the Stewart B. McKinney Homeless Assistance Act of 1987 and its 1988 revision—couples its only housing initiative with "supportive services" reflects the view that homeless families need rehabilitation in order to occupy "housing," rather than "shelter."<sup>58</sup>

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55. Bassuk and Rosenberg, *supra* note 44, at 785. Bassuk did note that a greater proportion of the sample of homeless women reported a history of substance abuse or psychiatric problems. *Id.* Other researchers have focused on how personal crisis dominates the lives of homeless women with families. See Axelson and Dail, *The Changing Character of Homelessness in the United States*, 37 FAMILY RELATIONS 463, 465 (1988); Hutchison, Searight and Stretch, *supra* note 44, at 427.

56. Bassuk and Rosenberg, *supra* note 44, at 787. Bassuk noted in the same analysis that her homeless interviewees seemed generally to take less advantage of all entitlements and social services than did the housed interviewees. *Id.*

57. Bassuk, *Redefining Transitional Housing for Homeless Families*, 6 YALE L. & POL'Y REV. 309, 314-6 (1988).

58. The three major shelter or housing initiatives created in the 1987 Stewart B. McKinney Homeless Assistance Act were the Emergency Shelter Grants (ESG), the Supportive Housing, and the Supplemental Assistance to Facilities to Assist the Homeless (SAFAH) programs. See 42 U.S.C. § 11373(a); 42 U.S.C. § 11382(7); and 42 U.S.C. § 11392(a); as amended, respectively, by §§ 421, 441, and 461, of P.L. No. 100-628 (1988).

To describe the characteristics of families in shelter— characteristics arguably molded or induced by the very physical hardships inherent in the shelter placements—risks blurring the line between characteristics and causes. These studies concur in concluding that instability of place precedes entry into shelter. They seem, superficially, to present different reasons for the instability. However, all concur in the presence of one factor in the conglomeration of the many that may precipitate homelessness: the complete absence of any affordable alternatives in the private housing market when precarious housing situations fall apart. I do not intend this paper to be a disquisition on the causes and characteristics of the shortage in low-rent housing. Nonetheless, a brief summary of the explanation for why housing is difficult to retain, or, once lost, to regain, will demonstrate the inappropriateness and ineffectiveness of treating homelessness as a momentary problem, remediable through temporary expedients.

"Affordability" is a complicated concept, combining considerations of supply and income; what is "affordable" depends in large part on the expectation of what percentage of income should be spent on housing. For all renters, that percentage has increased substantially in the last few years, from 20% in 1970 to 29% of median income in 1983.<sup>59</sup> For low income renters, the percentage is much higher: of the 5.4 million renters who paid more than 60% of their income for utilities and rent, 95% of those individuals had annual incomes under \$15,000.<sup>60</sup>

Several factors obviously contribute to any analysis of why low income families must divert increasingly large portions of their incomes to housing costs. One factor is a decrease over the last ten years in the number of rental units affordable to persons living on low, fixed incomes— whether that affordability results from low market rents, or the lowering of high market rents through federal subsidy or direct federal supply of housing units. One well-publicized reason for the loss of low rent units is the sharply decreased federal financial commitment to rental subsidies. The figures are stark: from 1980 and 1981, the last years of the Carter Administration's budgets, to 1982, funding levels for subsidized housing assistance fell from 26.6 and 24.9 billion dollars to 13.2 billion, with the number of additional assisted households decreasing over that time period by 70%. In 1983 and 1984, President Reagan actually attempted to rescind housing appropriations previously voted by Congress.<sup>61</sup> The administration's FY 1990 housing budget request increased the 1989 level of funding for housing subsidies from 7.4 to 7.5 billion dollars, but eliminated all funding for construction of public housing, removed funding from the Section 8 existing housing subsidy,<sup>62</sup> and

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59. C. DOLBEARE, *LOW INCOME HOUSING NEEDS* 1 (1987).

60. *Id.* at 2.

61. *Homelessness in America — The Need for Permanent Housing*, *supra* note 34, at 485.

62. "Section 8" refers to § 8 of the United States Housing Act of 1937, as amended by the Housing and Community Development Act of 1974, 42 U.S.C. § 5301

doubled the funding allocated for housing vouchers. The FY 1990 request reduced rural housing assistance by 77.5%, and cut or eliminated assistance under most programs under the McKinney Homeless Assistance Act.<sup>63</sup>

Shrinking federal involvement explains the decrease in the numbers of new households assisted every year. Other factors also contribute to the overall disappearance of affordable units from the rental market. One such factor is the demolition of rental units, or the conversion of rental units into ownership units.<sup>64</sup> Another is the acceleration under the Reagan administration of the shift in housing policy from constructing housing units to subsidizing the rents on existing units.<sup>65</sup> A third source for the loss of units results from the expiration of the twenty-year rent restrictions placed on low income housing units constructed under Section 221(d)(3) of the Housing Act of 1961, and Section 236 of the Housing Act of 1968.<sup>66</sup> One commentator has estimated that 331,705 of these units are subject to the expiration of the use restriction by 1995, with another 727,878 built under the more recent Section 8 construction programs due to expire by 2025. This total of over a million federally subsidized rental units represents about a quarter of the total federally subsidized rental housing stock.<sup>67</sup>

The phased departure of the federal government from the process of

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(1987), 24 C.F.R. § 882 (1988), under which an eligible renter receives a "certificate" for housing in the private market, with the federal government paying the difference between the landlord's rent, subject to pre-set regional limits, and thirty percent of the tenant's adjusted income. For a description of the initiation of this program, see Mitchell, *Historical Overview of Direct Federal Housing Assistance*, in FEDERAL HOUSING POLICY AND PROGRAMS, PAST AND PRESENT 201 (J.P. Mitchell ed. 1985).

63. *Homelessness in America — The Need for Permanent Housing*, *supra* note 34, at 490-491.

64. Between 1973 and 1983, 4.5 million units, approximately half of which were rented to low-income households, were lost from the rental housing market. NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE, at 6, *reprinted in* Hearings before the Subcomm. on Housing and Urban Affairs of the Senate Comm. on Banking, Housing and Urban Affairs, 100th Cong., 2d Sess. 134, 142 (1988).

65. J.P. Mitchell, *supra* note 62, at 203.

66. See *id.* at 198-199 for a description of these programs. Under the § 221(d)(3) program, the government provided what were in effect direct, below market interest rate (BMIR) loans to private developers. Under § 236, the government subsidized to developers the difference between the market mortgage rate and one percent. Under both programs, an initial condition of assistance was that developers maintain below market rents for twenty years, after which point they could pre-pay their remaining mortgage debt and extinguish their obligation.

67. 1,352,000 units consist of public housing, which is owned by local governmental housing authorities and not subject to any changing use restrictions. P.L. CLAY, AT RISK OF LOSS: THE ENDANGERED FUTURE OF LOW-INCOME RENTAL HOUSING RESOURCES 7-11 (2d. printing 1987). For a summary of how changing federal policy, market forces, and expiration of use restrictions have contributed to the decline in availability of low-rent housing, see McDougall, *Affordable Housing for the 1990's*, 20 U. MICH. L. REV. 727, 755-762 (1987).

increasing the quantity of low-rent housing units correlates to one statistic: that barely 20% of the poorest of poor families enjoys the benefit of any federal housing subsidy. Of the 3.7 million families assisted by AFDC, 63% live in private sector housing; 9.9% live in public housing, and 9.8% live in federally subsidized rental units.<sup>68</sup> From 1974 to 1987, the number of rental households with income below \$5,000 which received no housing assistance increased from 2.2 million to 3.2 million.<sup>69</sup>

These figures are crucial. What they mean is that only 20% of families receiving AFDC can depend on paying no more than 30% of their income on rent, the maximum set under the federal subsidy programs for lower income families. For the rest, market forces dictate that they will spend crippling portions of their incomes on rent. This is exactly what has happened. According to the National Housing Task Force, by 1983, six million, or almost half, of low income households (defined as receiving incomes of \$10,000 a year or less), paid more than half of their incomes for rent, compared with 3.7 million such households in 1975.<sup>70</sup> For single parent families, the group eligible for assistance under AFDC and EANFC, the rent burden has always been disproportionately onerous, and has increased, from 34.9% of income in 1974 to 58.4% in 1987.<sup>71</sup>

Federal subsidies do more than provide rents that are affordable; they assure rents that are predictable. Housing subsidy programs insulate impoverished families living on fixed incomes from fluctuations in rents in the private market—increases of some 300% in the median rent between 1970 and 1983.<sup>72</sup> Accompanying this rapid increase in rents is a significant decrease in the ability of welfare-dependent families to pay for them. When payment levels were evaluated in adjusted dollars, only two AFDC jurisdictions showed increases in their payment levels between 1970 and 1989; the median state decreased its AFDC payments over that period by 37%.<sup>73</sup> The elasticity of rents, and the inelasticity (in reality, the negative elasticity) of welfare income, suggest that access to a rent-subsidized apartment or house may be the only guarantee of stable, affordable housing costs for a welfare-dependent family. Another, related issue, which complicates the housing pic-

68. FAMILY SUPPORT ADMINISTRATION, OFFICE OF FAMILY ASSISTANCE: CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS, FY 1987, 35 (1987).

69. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING, 1988, at 18 (1988).

70. NATIONAL HOUSING TASK FORCE, A DECENT PLACE TO LIVE, *supra* note 64, at 6.

71. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *supra* note 69, at 14.

72. The national median rent increased from \$108 in 1970 to \$315 in 1983; during that same period, the number of units renting for less than \$80 per month decreased from 5.5 million to 650,000. Wright and Lam, *Homelessness and the Low Income Housing Supply*, 17 Soc. POL. 48, 49 (1987).

73. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 546-547 (Comm. Print 1989).

ture even for families fortunate enough to receive precious federal housing subsidies, is scarcity of any rental housing, or scarcity of housing at a rent which HUD will subsidize.<sup>74</sup>

A comparison of AFDC grants in some states with what HUD assesses as "fair market rents" ("FMR") in portions of those states is illuminating. In Massachusetts, the maximum, statewide AFDC grant for a family of three is \$539; in the District of Columbia it is \$393; in Alabama, it is \$118.<sup>75</sup> HUD's current FMR for a two bedroom apartment in Massachusetts range from a low of \$488 in the western part of the state to a high of \$810 in Boston; the FMR for a two bedroom is \$695 in the District; and it ranges from \$237 to \$410 in Alabama.<sup>76</sup> The HUD FMR is a crude gauge of housing costs. But one certainty in the economics of housing and welfare is that rents charged by the private sector will continue to rise, while incomes provided by the public sector will not. The litigation which I will describe briefly at the end of this paper addresses this issue. It is a strategy that recognizes the gulf between housing costs and income resources; recognizes that that gulf can only be bridged by the provision of more housing or more income; and chooses to attack the problem by asserting that state government has an obligation to provide more income. But, even when successful, such litigation is premised primarily on state law, and provides no national solution. For that, a renewed commitment to housing subsidies and to increased supply remains the only meaningful answer.

As Chester Hartman has reminded us, housing is in fact a commodity like no other: it is indivisible, immovable, and it gobbles money. Whether

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74. In its study of HUD's two major housing subsidy programs, the housing voucher program [42 U.S.C. § 1437f(o)] (1989 supp.) and the Section 8 certificate program [42 U.S.C. § 1437f(c)](1989 supp.), the General Accounting Office compared the rental housing markets in the Houston and New York metropolitan areas. In Houston, the GAO investigators found plentiful rental housing at rates well below the FMRs set by HUD. U.S. GENERAL ACCOUNTING OFFICE, RENTAL HOUSING: HOUSING VOUCHERS COST MORE THAN CERTIFICATES 33 (1989). Conversely, in the New York area, investigators found that while New York City units rented within the FMR, units overall were scarce; in the metropolitan counties, actual rents exceeded FMRs. *Id.* at 38. During fiscal 1986 and 1987, only 32% of the Section 8 certificate holding tenants and 34% of the voucher-holding tenants in New York City were able to find housing they could use. The rates of success in finding acceptable apartments were higher in the surrounding counties. *Id.* at 40.

75. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST CONG., 1ST SESS., BACKGROUND MATERIALS AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 541 (1989).

76. For the Massachusetts figures, see 54 Fed. Reg. 39888, 39890 (1989); for the District of Columbia, 54 Fed. Reg. 39874 (1989); for Alabama, 54 Fed. Reg. 39868 (1989). HUD fair market rents are set at the 45th percentile of market rents. HUD publishes these standards as a basis for determining the payments it will make to landlords under the Section 8 housing programs and the housing voucher program. 54 Fed. Reg. 39866 (1989).

one rents or buys, one must amass savings that far exceed monthly income in order to tender a security deposit or downpayment. Whether it goes toward a rent or a mortgage payment, the monthly check mailed for the privilege of remaining in occupancy again claims a major portion of income. Moreover, that payment cannot be apportioned, budgeted into other needs, or delayed.<sup>77</sup>

These basic characteristics of housing make providing for it through income supplements, such as emergency assistance or special needs grants, extremely problematic for two reasons. First, it is clear that the sudden loss of housing is always a risk for a low income family. This is an inflexible good, which poor people cannot afford to buy, and, increasingly, cannot afford to rent. When 60% of income must go into housing costs, any upset in the fragile balance of family finances, such as the incurrence of unexpected medical costs, may infringe upon that 60% and make paying the next month's rent impossible. The result is indeed an "emergency," but only if one conceives of emergency as a potentially infinitely recurring condition. Second, to re-locate a homeless family using an emergency grant requires a high level of expenditure—typically, the double payment of first month's rent plus security deposit. This one-time infusion of money may constitute a reasonable use for an emergency assistance grant, but it is useful only if the state's emergency assistance allocations allow the full amount of the expense to be met. As we will see in a later discussion of variations in state emergency assistance grants, states are perfectly free to limit emergency assistance and special needs grants to levels wholly inadequate for this purpose.

### **III. EMERGENCY AS NORMALCY— HOW EMERGENCY ASSISTANCE CAME TO PAY THE RENT, OR, "AND I WONDER WHY SOMEBODY DOESN'T BUILD THEM A HOUSE FOR \$37,000?"<sup>78</sup>**

How much does it cost? "Millions" leaves us blase, but numbers in an individual case still retain the power to shock. In 1987, New York City spent an average of \$125.86 per day to maintain a family of four in barracks-style shelter, and an average of \$91.95 per day for sheltering in a hotel.<sup>79</sup> The bill in Westchester County, New York for a single room in the Fox Ridge Motor

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77. C. Hartman, *The Housing Part of the Homelessness Problem*, in *THE MENTAL HEALTH NEEDS OF HOMELESS PERSONS* 73 (E. Bassuk ed. 1986).

78. *Use of Emergency Assistance Funds for Acquisition of Temporary and Permanent Housing for Homeless Families: Hearing before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 5 (1986) (statement of Charles E. Schumer, representative from the state of New York, quoting transcript of statements by President Ronald Reagan at a press conference held Nov. 19, 1986).

79. U.S. GOVERNMENT ACCOUNTING OFFICE, *WELFARE HOTELS: USES COSTS AND ALTERNATIVES*, *supra* note 23, at 32 (citing the New York City Mayor's Advisory Task on the Homeless).

Inn, which may shelter any number of family members, is \$3,750 per month.<sup>80</sup> When the District of Columbia finally removed its homeless families from the Capitol City Inn, it did so only after seven years of subsidizing the owner to the tune of ten million dollars.<sup>81</sup> Sometimes the jurisdictions cannot even keep track of the amounts. The District has lost significant sums in federal reimbursement for its emergency shelter expenditures, because it could not document where the money went.<sup>82</sup>

The mechanism by which private hotel, motel, and dormitory operators have gorged themselves has been fairly simple. States have manipulated the Title IV-A programs to provide almost unlimited payments to commercial hotels and congregate shelters, payments for which the federal government provides almost unlimited reimbursement. As described below,<sup>83</sup> the EANFC program limits the funding of assistance to thirty days within a twelve month period. The regulations implementing the law are a good deal more expansive: they allow for allocation of funds to cover obligations or needs *incurred* during any thirty day period.<sup>84</sup> It is under this provision that some cities have committed themselves to long-term contracts with private providers of hotel and barracks-style shelter. Funding of hotel rooms under an AFDC special needs grant carries no specific time limitation, but is limited in other ways: the grant by definition is restricted to applicants already receiving or applying for AFDC, and theoretically can be deducted from future regular grant payments.<sup>85</sup> In practice, states have also used the AFDC special needs mechanism to pay for long-term "temporary" shelter.

The impetus for cities such as New York to move families from hotels to more apartment-like accommodations came as much from an agency threat to close this loophole as from any humanitarian motive. On December 14, 1987, the Family Support Administration published proposed regulations to

80. Henry, *Homeless Families in "Welfare Motels" Want Them Closed*, 10 YOUTH L. NEWS 12 (July-Aug. 1989).

81. *Requiem for a Hellhole*, Wash. Post, Dec. 2, 1989, at A18, col. 1.

82. U.S. GOVERNMENT ACCOUNTING OFFICE, WELFARE HOTELS: USES, COSTS AND ALTERNATIVES, *supra* note 38, at 34.

83. See *infra* notes 126-142 and accompanying text for description of the EANFC program, its reimbursement formula, and the reimbursement formula for Title IV-A special needs grants. The time-limiting language of 42 U.S.C. § 606(e) provides less than a model of clarity, and has generated litigation; see *infra* note 174 and accompanying text.

84. 45 C.F.R. § 233.120(b) reads in part:

(b) Federal financial participation. . . .

(3) Federal matching is available only for emergency assistance which the State authorizes during one period of 30 consecutive days in any 12 consecutive months, *including payments which are to meet needs which arose before such 30-day period or are for such needs as rent which extend beyond the 30-day period.* . . . (italics added).

85. For a discussion of problems with special needs grants as emergency assistance payments, see *infra* note 168 and accompanying text.



restrict use of EANFC funds to one thirty day period within a twelve month period, to prohibit states from paying more for hotels than for other kinds of housing under special needs grants, and to require states to set maxima for assistance in both programs.<sup>86</sup> The agency's rationale was simple: emergency assistance expenditures had risen 65% in the preceding four years,<sup>87</sup> and by categorizing hotel assistance as a different special need from a shelter allowance, some jurisdictions had been billing the federal government for reimbursement at rates varying between \$270 and \$1470 a month.<sup>88</sup>

The proposed regulation lasted, at best, a week. Politicians and social services agencies panicked, and issued grim prognostications about cuts in funds. New York officials predicted that the state would lose \$85 million in shelter supplements over the following year if the proposed regulations were approved.<sup>89</sup> On December 21, in Section 9118 of the Omnibus Budget Reconciliation Act of 1987, Congress forbade the Secretary of Health and Human Services to implement the December 14 regulation before October 1, 1988.<sup>90</sup> After the initial calamity was averted, the pressure continued. In a congressional hearing held the following March, governors, senators, congresspersons, mayors, county executives, directors of state and county social services departments, attorneys, and even a few homeless people decried the callousness of the temporarily moribund regulation, and emphasized that, contrary to what HHS stated in its preface to the proposed regulation, at present, no realistic alternative to welfare-funded emergency shelter existed. The message was conveyed. Congress has extended its moratorium on implementation of the EANFC and special needs restrictions through October 1, 1990.<sup>91</sup>

This may be the final extension. The provision does allow regulations to take effect before October 1 which will incorporate HHS' recommendations to Congress, as contained in a study mandated in Section 902(b) of Pub. L.

86. 52 Fed. Reg. 47422 (1987).

87. *Id.* at 47421.

88. *Id.* at 47420.

89. And from the political point of view of any federal legislator, the headlines had to look none too good. For example, see May, *U.S. To Reduce Shelter Funds for Homeless: New York City Impact Is Said to be \$70 Million*, N.Y. Times, Dec. 12, 1987, p. 33.

90. H.R. , 100th Cong., 1st Sess., 133 CONG. REC. H12192 (daily ed. Dec. 21, 1987).

91. See, Use of AFDC Funds for Homeless Families: Joint Hearing before the House Subcomm. on Public Assistance and Unemployment Compensation of the Comm. on Ways and Means, and the Senate Subcomm. on Social Security and Family Policy of the Comm. on Finance, 100th Cong., 2nd Sess. (1988). Congress used the McKinney re-authorization act to amend OBRA of 1987, to extend the prohibition through Sept. 30, 1989. 42 U.S.C. § 1383c (1987), as amended by Act of Nov. 7, 1988, Pub. L. No. 100-628, § 901 (102 Stat. 3224, 3257). § 8005 of the OBRA of 1989 further extends the prohibition until Oct. 1, 1990. H.R. 3299, 101st Cong., 1st Sess., 135 CONG. REC. H9438 (daily ed. Nov. 21, 1989).

100-628, the 1988 extension of the Stewart B. McKinney Homeless Assistance Act.<sup>92</sup> These recommendations resemble the old proposed rule in their time limitations on the use of emergency assistance funds. But they diverge in several important areas. They allow the use of EANFC money to pay the first month's rent and security deposit— an expenditure arguably allowable under the thirty day limitation anyway, but never explicitly so stated— and permit states to set different special needs rates for different kinds of shelter.<sup>93</sup>

That expenditures in these amounts could be productively diverted to the supplementation of rents, or even to the creation of new housing units, has not passed everyone's notice. AFDC and its regulations contain no provisions for funding capital projects.<sup>94</sup> Several proposals have involved amending Title IV-A explicitly to allow the allocation of AFDC funds for capital costs.<sup>95</sup> Some counties have not waited for legislative change. One recent newspaper article has described ventures in Westchester County, New York, in which private landlords designate some units as "emergency shelter" in order to qualify the state and county for federal emergency reimbursement. With the excess (and excessive) funds, the private owners agree to renovate, to pay off their mortgages, and consequently to operate the buildings as low-rent housing.<sup>96</sup>

One measure targeted specifically at emergency assistance is noteworthy, because of its original inclusion in the omnibus 1987-88 reform of the

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92. H.R. 3299, *supra* note 86.

93. DEPARTMENT OF HEALTH AND HUMAN SERVICES, USE OF THE EMERGENCY ASSISTANCE AND AFDC PROGRAMS TO PROVIDE SHELTER TO FAMILIES 26 (1989).

94. Pub. L. No. 87-543, 76 Stat. 172, 200 (1962) (presently codified as 42 U.S.C. § 1319) added to Title XIII of the Social Security Act a provision allowing federal financial participation of up to \$500 for repairs made to the home of an AFDC recipient, if such repairs were necessary to make the home habitable.

95. See, e.g., *Homeless Families: A Neglected Crisis*, House Comm. on Government Operations, 99th Cong., 2d Sess. 19 (1986) (recommending that Congress amend Title I of the Social Security Act to allow emergency assistance funds to be used for the purchase, construction and rehabilitation of emergency shelters); H.R. 4938, 99th Cong., 2d Sess., reprinted in *Use of Emergency Assistance Funds for Acquisition of Temporary and Permanent Housing for Homeless Families*, 99th Cong., 2d Sess. 18-19 (1986) (amending the definition of "emergency assistance for needy families with children" at 42 U.S.C. § 606(e), to include site acquisition, construction and renovation); *Use of AFDC Funds for Homeless Families*, Joint Hearing before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means and the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance, 100th Cong., 2d Sess. 100 (testimony of Andrew Cuomo, President, HELP, Inc., including text of proposed 42 U.S.C. § 602(a)(40), which would allow states under their AFDC plans to pay non-profit entities to house homeless persons).

96. Schmitt, *Suburbs Trying Alternatives to Hotels for Their Homeless*, N.Y. Times, Nov. 27, 1989, at A1, col. 5.

AFDC program. This provision would have granted money to states with high welfare hotel caseloads in order to construct or rehabilitate units of low income housing. The states would have had to show that the costs of construction did not exceed the costs of the expenditure on hotels, and that, unless demand for emergency housing increased, they would close down the hotels upon the production of the permanent housing units.<sup>97</sup> The measure disappeared from P. L. No. 100-485, the final version of the Family Support Act.<sup>98</sup>

The attempt to re-allocate emergency assistance payments to cover housing costs did not die; it was transmogrified, and it is instructive to note how. The 1988 re-authorization of the Stewart B. McKinney Homeless Assistance Act of 1987, the first of any appropriations bills targeted specifically at meeting emergency needs of homeless people, contains a \$20 million authorization for up to three demonstration projects. As did its predecessors, this program also aims to reduce hotel placements. The difference is the mechanism. Here, the grants are channeled into the construction of "transitional housing," not permanent housing. Also, while in the earlier versions of the Family Support Act the units of permanent housing were to replace the hotel placements, in this new version the states first build the transitional housing, and then convert it to permanent housing once the transitional housing is no longer needed.<sup>99</sup> An unavoidable question is, given that the residents will have nowhere else to go, how the transitional housing will become superfluous. The McKinney Act version represents a retreat from the imaginative attempt to make AFDC into a housing program, and does so in two ways. First, it substantively rejects the goal of creating permanent housing as an antidote for homelessness. Second, the very inclusion of this measure in an emergency shelter statute— not an AFDC statute or a housing statute— suggests avoidance: avoidance of conceptualizing housing as an entitlement, as it would arguably be as an AFDC benefit; and avoidance of recognizing scarcity of housing as a permanent problem.

The endurance of the concept that localities cannot allocate EANFC funds to rent supplements or to the construction of permanent housing is a tribute to the pervasive power of myth. Everyone believes, not merely that the

97. § 1511, the Family Security Act of 1988; Title V, Demonstration Projects; § 501, Demonstration Program of Grants to Provide Permanent Housing for Families that would Otherwise Require Emergency Assistance, 134 CONG. REC. 7631, 7643 (daily ed. June 13, 1988); H.R. 1720, The Family Welfare Reform Act of 1987, § 805, Demonstration Program of Grants to Provide Permanent Housing for Families that would Otherwise Require Emergency Assistance.

98. The conference committee report simply noted under Title V. A., Grants to Provide Permanent Housing for Families, that §§ 501 and 805 of the Senate and House bills did not appear in the conference agreement. Conference report, to accompany HR 1720, H.R. 100-998, 100th Cong., 2d Sess. 185 (Sept. 29, 1988). A similar, subsequent attempt to subsidize the construction of permanent low income housing through the AFDC program was introduced, but did not progress, in 1989. H.R. 363, 101st Cong., 1st Sess. (1989).

99. Act of Nov. 7, 1988, Pub. L. No. 100-628, § 903, 102 Stat. 3224, 3258.

Social Security Act does not sanction the direction of public benefits towards building or subsidizing affordable housing, but that it actively prohibits it. Summarizing his proposal to amend the AFDC statute to allow the application of EANFC funds to the construction of permanent housing, Representative Charles Schumer enunciated the conventional wisdom:

Why *don't* cities like New York use the millions of dollars they are now spending on temporary welfare hotels to build instead permanent homes for the homeless?

The answer is simple. Current federal law makes such a wise policy illegal. Cities like New York would love to leave the scandal of welfare hotels behind them, but federal law gives them no choice.<sup>100</sup>

The truth about whether welfare dollars can go to housing programs is much murkier than "conventional wisdom" suggests. Nothing in the AFDC statute or regulations plainly authorizes the spending of public benefits funds on housing assistance, but nothing expressly forbids it either. While basic principles of appropriations, as enunciated in the United States Code, allow congressionally mandated funds to be "applied only to the objects for which the appropriations were made except as otherwise provided by law,"<sup>101</sup> it seems clear that the current diversion of AFDC and EANFC funds into exorbitant hotel placements was no more contemplated by the original goals of the Social Security Act than would be the expenditure of those funds for housing.

Arguably, to provide an indigent family with either a dignified home, or the means to rent space in one, serves the original purpose of the Social Security Act admirably. As the legislative history indicates, and historians have noted, Title IV-A of the Act was to assume some of the burden of the states' mothers' pension programs. These were designed specifically to save impoverished widows from the agonizing expedient of institutionalizing their children for want of resources to care for them at home.<sup>102</sup> The more

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100. Use of Emergency Assistance Funds for Acquisition of Temporary and Permanent Housing for Homeless Families, Hearing before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 99th Cong., 2d Sess. 7-8 (1986) (written submission of Charles E. Schumer, congressman from New York) (emphasis in original). See also Schmitt, *supra* note 96, at B6, col. 1 ("Federal regulations prohibit spending the money, which comes from the Department of Health and Human Services, on housing").

101. 31 U.S.C. § 1301(a)(1985).

102. The House report on the Social Security Bill of 1935 noted that forty-five states had enacted mothers' pension laws for families left fatherless through death or abandonment, but that these programs could not address the depth of the need. The report stated specifically that one result of the mothers' pension program was "to keep the young children with their mother in their own home, thus preventing the necessity of placing the children in institutions." H.R. Rep. No. 628, 74th Cong., 1st Sess. 17 (1935). For an analysis of the spread of mothers' pension legislation as a development in the intellectual history of public welfare, see Leff, *Consensus for Reform: The Mothers' Pension Movement in the Progressive Era*, 47 SOC. SERV. R. 397 (1973).

recent EANFC legislation also explicitly denotes as a goal the care at home of the indigent child.<sup>103</sup> Accommodations of a transient type are not homes; to subsidize continued occupancy of them is a travesty of legislative intent, while to build decent permanent housing for families would be an affirmation of it.

If the purpose seems clear, and the impediments cloudy, why then the reluctance to use either AFDC special needs or EANFC money as rent, or as seed money for renovation or construction? The Massachusetts Supreme Judicial Court has raised one reason, which explains the thrust of welfare policy elsewhere: using welfare money to subsidize housing for those families that currently occupy temporary shelter might seem like an unfair supplemental subsidy, insofar as the subsidy is not available to families that already live in conventional housing and pay for rents out of their regular AFDC grants.<sup>104</sup> I will discuss in more detail how this generalized concern about equalizing benefits among welfare recipients has informed other areas of policy in which welfare and housing issues intersect. But another, broader reason suggests itself: that is, as one student commentator has astutely noted, that while "home" is central to the American dream of self-sufficiency, it remains alien to the historical American concept of what a family on welfare deserves.<sup>105</sup>

#### IV. THE QUALITY OF LIFE, OR OTHER OXYMORONS, IN THE CULTURE OF SHELTER

Our notions of "home" are complicated. They involve more than the concreteness of physical structures; they entail inchoate feelings about stability, privacy and familiarity that have historically both informed the physical structures of "home," and been informed by them.<sup>106</sup> The models of mass shelter deny all these feelings. At two of the "Tier I" barracks shelters in New

103. For a description of the development of the EANFC legislation in 1967, see *infra* notes 132-145 and accompanying text.

104. *Massachusetts Coalition for the Homeless v. Secretary of Human Services*, 400 Mass. 806, 511 N.E.2d 603, 613 n. 16. (1987). For a discussion of the philosophy of equalizing welfare benefits through recoupment of advances and through limiting emergency housing payments to the level of the welfare shelter allowance, see *infra* notes 189-206 and accompanying text.

105. Paterson, *Recent Developments: Between Helping the Child and Punishing the Mother: Homelessness Among AFDC Families*, 12 HARV. WOMEN'S L. J. 236, 256 (1989).

106. In his evocative and accessible treatise about the evolution of the concept of "home," Witold Rybczynski explains "comfort" as a historical accretion of ideas about privacy, intimacy, domesticity, and ease. W. RYBCZYNSKI, HOME: A SHORT HISTORY OF AN IDEA 230-231 (1986). The excerpt from Frost's *Death of a Hired Man* has been over-quoted perhaps because it rings so true:

'Home is the place where, when you have to go there,  
They have to take you in.'

York City, as described in *Slade v. Koch*,<sup>107</sup> men, women and children slept in rows in open rooms, and used the same toilet facilities. Contagious diseases and diarrhea were rampant.<sup>108</sup> Hazards consisting in part of peeling lead paint, and asbestos in another Tier I shelter, the Catherine Street shelter, prompted litigation not only to eliminate the conditions, but to prohibit placement in the shelter for pregnant women or children under the age of seven.<sup>109</sup> Hotel shelter may offer more privacy, but no less privation. Residents may still sleep three or four to a room. Without access to kitchens, residents use hot plates, or receive an allowance for prepared food; without recreation areas, children play in the hallways.<sup>110</sup> Shelter-living of any kind interrupts the rhythms of family life: meal times, study times, play times.

What receives the most attention is, first, the squalor, and second, the expense. What is less immediately obvious, perhaps precisely because it is so overwhelming, is the disorientation. The lock-outs complained of in *Walls v. Barry* deprived the residents of more than simple shelter: they forced on them a nomadic schedule, one of wandering from 7:30 a.m. when they were ejected from the shelters, to 7:00 p.m., when they were let back in.<sup>111</sup> The plight of homeless families in Westchester County arises as much from the great distance from their original neighborhoods at which they are housed, as from the actual fact of their homelessness. The county houses some families in motels two hours away, in an area devoid of public transportation. Mothers have no access to jobs, other family or friends.<sup>112</sup>

For families in need, for whom the tie to welfare benefits or social services is crucial, the difficulties of maintaining contact with the social services system are significant. "Churning"—the rapid administrative closing and re-opening of welfare cases—is a process that seems particularly to afflict homeless families. In congressional testimony, Steven Banks noted that half

'I should have called it

Something you somehow haven't to deserve.'

R. FROST, *The Death of the Hired Man* in *SELECTED POEMS OF ROBERT FROST* 25, 29 (1962 ed.).

107. *Slade v. Koch*, 135 Misc. 2d 283, 514 N.Y.S.2d 847 (N.Y. Sup. Ct. 1987), modified to extend prior order to state defendants, 136 Misc. 2d 119, 517 N.Y.S.2d 389 (N.Y. Sup. Ct. 1987).

108. *Id.* at 514 N.Y.S.2d 847, 849. One of the two Tier I shelters described in *Slade*, the Roberto Clemente shelter, has been closed since July of 1986. HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK, *supra* note 3, at 6.

109. *Barnes v. Koch*, 136 Misc. 2d 119, 518 N.Y.S.2d 539 at 539-40, 543 (N.Y. Sup. Ct. 1987).

110. Schmitt, *Westchester Homeless Linger in a Connecticut Hotel*, N.Y. Times, Nov. 13, 1989, at B1, col. 1, at B8, col. 5-6.

111. See *Walls v. Barry*, *supra* note 4.

112. Foderaro, *Westchester's Farthest-Flung Homeless*, N.Y. Times, July 11, 1989, at B1, col. 2. As of November, 1989, Westchester County's Department of Social Services was housing thirty-nine families in the Coachman Hotel in Stamford, Connecticut, at a rate of \$75 per room per night. Schmitt, *supra* note 110.

of the homeless families entering New York City's Emergency Assistance Units (EAUs) for placement in temporary shelter had had their welfare cases administratively closed.<sup>113</sup> A study produced by the Manhattan Borough President's task force revealed that homeless families in that city's shelters were twice as likely to have their public assistance cases administratively closed as were housed families. The reason posited for the termination of benefits was the inability of the homeless families to document financial and other conditions of eligibility.<sup>114</sup>

Perhaps the most troubling effects of the dislocation from familiar surroundings are felt by children. Ellen Bassuk has described the psychological problems manifested by children she has interviewed in Massachusetts shelters: for some, their depression, sleep disorders, and anxiety were sufficiently severe to warrant further psychiatric attention.<sup>115</sup> Homelessness also compromises children's physical health. Access to continuous health care, with the same pediatrician, is a luxury that children lose once they are moved from their communities into shelter. In the absence of on-site units, children may find their only way to health care through the hospital emergency room.<sup>116</sup> The logistical difficulties in organizing routine pediatric check-ups for children in shelters allow asthma and acute ear infections to go untreated. In almost half of the seven thousand on-site visits made by a mobile pediatric unit to children in New York City shelters, the health care workers found that the children were not immunized against polio, diphtheria, or tetanus.<sup>117</sup> Other investigators in New York shelters have documented numerous cases of uncontrolled diarrhea in children.<sup>118</sup>

One extremely concrete result of placelessness is the deprivation of edu-

113. *Use of AFDC Funds for Homeless Families*, *supra* note 25, at 137 (statement of Steven Banks, attorney, Homeless Family Rights Project, Legal Aid Society of New York). For an abstract of results of a continuing study on the effects of welfare case "churning," see Dehavenon, *Administrative Closings of Public Assistance Cases: The Rise of Hunger and Homelessness in New York City*, 16 N.Y.U. REV. L. & SOC. CHANGE 741 (1987-8).

114. J.R. Dumpson, *supra* note 46 at, 78-79. Concern over the problems experienced by homeless families in receiving benefits by mail and verifying their eligibility, led to passage of Title XI of P.L. No. 99-570, the Homeless Eligibility Clarification Act, 100 Stat. 5220. The Act amended the Food Stamp Act of 1977 (codified at 7 U.S.C. § 2012(g)) to allow for use of food stamps in shelters and to guarantee receipt of food stamps by individuals lacking fixed residential addresses, 100 Stat. 5220, 5221, and required the Secretary of HHS to issue guidelines to the states for providing AFDC benefits to homeless children, 100 Stat. at 5222.

115. Bassuk and Rubin, *supra* note 48, at 281-2.

116. *Homelessness During Winter 1988-1989: Prospects for Change*, *supra* note 3, at 18 (oral statement of Dr. Irwin E. Redlener, Director of New York Children's Health Project).

117. *Id.* at 62-3 (written statement of Dr. Irwin E. Redlener).

118. J. Molnar, *supra* note 41, at 36. See also COMMITTEE ON HEALTH CARE FOR HOMELESS PEOPLE, *supra* note 23, at 66.

ational opportunity. Some homeless children commute daunting distances to school; for children sheltered outside their home county of Westchester, the round trip is 180 miles to attend their former schools in Yonkers.<sup>119</sup> This is the price that homeless children may pay in order to maintain their connections to the classroom teachers who know them best. In fact, the Stewart B. McKinney Homeless Assistance Act of 1987 protects this connection by guaranteeing homeless children the choice of attending either the school within the district of their shelter, or their former school.<sup>120</sup> Aggressive intervention to ensure the kind of extraordinary transportation and coordination necessary to accomplish this goal may not always take place. Children do get lost in the educational system. A recent study by the Maryland State Department of Education reported that, of the 3,795 school-aged children estimated to be homeless during school year 1988-9, 32.7% did not attend school or attended irregularly.<sup>121</sup> A study of children sheltered in New York City found that, by Labor Day, 1987, 583 out of 6,000 school age children were registered for school;<sup>122</sup> by Thanksgiving, half of the children were in fact attending.<sup>123</sup>

I have described cursorily situations in which the loss of a permanent home has disrupted patterns of access to education, income and health care. In creating these dislocations, homelessness imposes temporary, shifting time frames. The irony is that the sense of temporariness extends over what has become a temporally permanent situation. In reviewing any of the scattered data on occupancy of mass shelter, or hotel shelter, one learns quickly that "temporary shelter" is a misnomer. Data kept by the Human Resources Administration of New York City indicate that, as of May, 1989, the average length of stay of a family in city-operated shelter was 278 days. Of the 4152 families then in shelter, 1,728 had lived there for from six months to one year; 1,106 had lived in shelter for from one to seven years.<sup>124</sup> Families housed in two motels in Westchester County have joined in lawsuits to compel housing code enforcement against the motel owners, based in part on the theory that the hotel rooms are in fact functioning as permanent housing.<sup>125</sup> Families

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119. Foderaro, *supra* note 112, at B1, col. 2.

120. The Stewart B. McKinney Homeless Assistance Act of 1987, Pub. L. No. 100-77, § 722(e)(3) requires each state plan to contain a provision directing local school districts to enroll the child in either school district, depending on the child's best interest.

121. MD. STATE DEPT. OF EDUCATION, A TRACKING SYSTEM FOR HOMELESS CHILDREN IN MARYLAND 2 (1988-9).

122. J. Molnar, *supra* note 41, at 8.

123. *Id.* at x-xii.

124. HUMAN RESOURCES ADMINISTRATION OF THE CITY OF NEW YORK, *supra* note 3 at 7-8 (1989).

125. Henry, *Homeless Families in "Welfare Motels" Want Them Closed*, 10 YOUTH L. NEWS 12 (July-Aug. 1989). The procedural cast of these cases is somewhat complicated. In both, the homeless residents of the hotels, one in White Plains in Westchester County, one in Putnam County, complained to city officials about hazardous



had lived in the Fox Ridge Motor Inn, as many as four individuals to a single room, for from five months to four years.<sup>126</sup>

## V. A CONCLUSION— THE IMPORTANCE OF RECOGNIZING THE FICTIONS SUPPORTING TEMPORARY PERMANENT SHELTER

The instinct to create a "home" out of materials inimical to any idea of home is powerful. The tenants— for they were tenants, not occupants— of the Fox Ridge Motor Inn hung honor roll awards and family photographs on the walls of their one-room dwellings, and taped pictures of Alf on the bathroom doors.<sup>127</sup> In finding that the Fox Ridge Inn was operating as a "domicile" for its homeless tenants, not as a "TR" (temporary residence),<sup>128</sup> a hearing officer noted that these conditions of tenancy were as dispositive as were the lengths of the tenants' stays. What distinguished "domicile" from "hotel room" for him was evidence that the tenants had tried to recreate not only all the patterns of home— cooking, eating, receiving mail, sleeping, reading— but also the associations of home— the photographs and pos-

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living conditions. Prior case law required the plaintiff counties in the ensuing enforcement actions to serve the residents and the Westchester County Department of Social Services, which had placed the homeless families in this housing, as co-defendants. See *Town of Brookhaven v. Marion Chun Enterprises*, 71 N.Y.2d 953, 528 N.Y.S.2d 822 (1988). In *City of White Plains v. Universal Motor Lodges*, Index No. 9713/88 (N.Y. Sup. Ct. filed Oct. 4, 1988), the county sought an injunction directly in New York State Supreme Court to compel compliance with housing and fire code standards. The residents submitted no answer to the City's complaint, and joined in the City's motion to close the hotel for housing code violations. *Id.*, Memorandum of Law for Coachman Tenants at ii-iii. After receiving similar complaints from the residents of the Fox Ridge Motor Inn in Putnam County, the Putnam County Board of Health ruled administratively that the motel was violating conditions of its temporary residence permit. Hearing Officer's Report: In the Matter of the Complaint against John Gillen, Department of Social Services, John and Jane Doe, (tenants of the Inn) and the Fox (Division of Environmental Health Services, County of Putnam, State of New York, Dec. 5, 1988). The order terminating the motel's permit, and, consequently, forcing the relocation of the tenants, was stayed until April 5, 1989, when the New York State Supreme Court ordered it enforced. *John Gillen and Nimby Food Services, Inc., v. Putnam County Department of Health, and John and Jane Doe v. The Board of Health of the County of Putnam*, Index No. 3737/89 (N.Y. Sup. Ct. April 5, 1989). With the Fox Ridge closed, the tenants have dispersed to other hotels; the owner's appeal is pending. Telephone conversation with Jerrold Levy, Westchester Legal Services, Inc., attorney for Fox Ridge Tenants' Association, Feb. 8, 1990.

126. In the Matter of the Complaint against John Gillen, *supra* note 125, Proposed Findings of Facts, Proposed Conclusions of Law and Proposed Recommendations, at 7-8.

127. *Id.* Respondents Fox Ridge Tenants Association's Proposed Findings of Facts, Proposed Conclusions of Law and Proposed Recommendations at 8 (Nov. 4, 1988).

128. *Id.*, at 11.

ters.<sup>129</sup> As I have noted, the disorientation created by relocation in emergency shelter disrupts such patterns and associations. The experience of the Fox Ridge and Coachman tenants suggests that families *must* make homes. But years of housing families in transient accommodations for months and years has created a truly oxymoronic category of shelter: that of permanent temporary housing. The fiction of temporariness that supports this category makes it impossible for families to create true homes, behavioral structures of living over which they have control, within the physical structure over which they also have control. The reality of permanence has created the kinds of physiological, economic, and psychological harm to children and their mothers that I have described.

In her dissent in the mid-level appellate opinion of *Franklin v. New Jersey Department of Human Services*, a case challenging the state's five month limit on emergency shelter assistance, Judge Pressler noted a truth about welfare motels as emergency shelter: "The equation of emergency assistance with that form of shelter is historical and empirical — not conceptual."<sup>130</sup> If one reads "conceptual" as meaning "necessary" or "natural," one can only agree. There is nothing conceptually inevitable about associating a hotel room with shelter, let alone with a home. What is innovative about the Westchester County actions, setting them apart from other important suits brought to improve conditions of shelter,<sup>131</sup> is that they call a duck a duck. If

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129. *Id.*, at 9-10.

130. *Franklin, v. New Jersey Department of Human Services, and McCurdy v. New Jersey Department of Human Services*, 225 N.J. Super. 504, 543 A.2d 56, 78 (N.J. Super. Ct. App. Div. 1988) (Pressler, P.J.A.D., dissenting); *aff'd*, 111 N.J. 1, 543 A.2d 1 (1988).

131. Chief among these, and illustrative of the treatment of emergency shelter as temporary housing, governed by standards unique to temporary housing, is *McCain v. Koch*, 127 Misc.2d 23, 484 N.Y.S.2d 985 (N.Y. Sup. Ct. 1984), *rev'd*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (N.Y. App. Div. 1986); *rev'd*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987); *original order reinstated*, 136 A.D.2d 473, 523 N.Y.S.2d 112 (N.Y. App. Div. 1988). The four reported cases in the *McCain* series only reflect part of the decisional history in the case; a summary of some of the interim orders is contained in the first Appellate Division decision at 117 A.D.2d 198, 502 N.Y.S.2d 720, 725-7. Implicitly regarding shelter as an entitlement enforceable by expectation, rather than one created explicitly by statute or the state constitution, the trial court then affirmed its interim creation of standards of occupancy. *McCain, supra*, at 484 N.Y.S.2d 985, 987. These standards, as reiterated by the Court of Appeals, drew in part from residential housing codes, and in part from consideration of survival needs, such as bedding. *McCain, supra*, at 517 N.Y.S.2d 918, 920. The Appellate Division reversed this order as an inappropriate intrusion into administrative agency practice. 502 N.Y.S.2d 720, 732. But in reversing another trial court's denial of preliminary relief for a group of intervenors, the Appellate Division in the same decision found an obligation initially to provide shelter, based on state law under the state's AFDC plan. *Id.* at 728. When the Court of Appeals concluded that the trial court's initial setting of standards for shelter quality was a valid equitable exercise in the absence of any administrative standards (standards were subsequently formulated), the issue be-

hotel shelter is used as housing, wholly unsuitable as it is for that purpose, then it is housing. For the state to persist in regarding such dwellings as temporary shelter is to engage in a temporizing expedient that denies the reality of housing shortages and poverty. By invoking those standards of safety and occupancy that are usually applied to permanent homes, the Westchester enforcement actions severed the fictive connection between hotel rooms, conceptualized as transitory accommodation, and shelter.

## **VI. THE DISHARMONIOUS CONVERGENCE OF HOUSING AND WELFARE: THE RELATIONSHIP BETWEEN AID TO FAMILIES WITH DEPENDENT CHILDREN AND THE EMERGENCY ASSISTANCE TO NEEDY FAMILIES WITH CHILDREN PROGRAMS**

I mentioned earlier that welfare became a housing program by default; unlike federal housing programs, AFDC is an entitlement program with no budgetary ceiling. The result is the \$37,000 per year welfare hotel room, the conspicuous anomaly that outrages critics of the welfare hotel system. Another senseless feature of the shelter-as-welfare system is this: that a state welfare department will authorize a local jurisdiction to pay between \$60 and \$160 per family, per night to a private, commercial operator of a motel or barracks-style dormitory, but will prohibit the subsidy of that family, at less than half the cost, in an apartment. To understand both aberrations, one must examine the intersecting histories of the two federal programs which provide the primary source of shelter assistance to needy families— AFDC and its offspring, Emergency Assistance to Needy Families with Children (EANFC).

At one level, the explanation is simple. States can receive unlimited matching federal reimbursements for the money they allocate to the EANFC program. While the federal government may pay an even higher share of the expenses of the on-going AFDC programs in the poorest states, the EANFC match at least equals the lowest rate of federal reimbursement for AFDC.<sup>132</sup> Another intended attraction of the EANFC program is its flexibility. Criteria for assistance are broad, and states interpret their discretion to set more particularized criteria broadly. The criteria have also been consistent over time. Un-

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came fixed as one concerning a court's ability to set and enforce shelter standards. *McCain, supra*, 517 N.Y.S.2d 918, 923.

132. 42 U.S.C. § 603(a)(5) provides a federal contribution of 50% of the total spent by a state for EANFC, the lowest of the federal financial participation formulae for a Title IV-A program. For the regular AFDC program, federal payments vary from a high of 100%— that is, complete federal coverage— of state expenses incurred in implementing the verification of immigrant status program (42 U.S.C. § 603(a)(3)(A)), through a variable formula for contribution to the basic AFDC grants (42 U.S.C. § 603(a)(1)(A and B)), down to a 50% match for states' expenditures for the mandatory work program (42 U.S.C. § 603(a)(3)(D)).

like the core provisions of the AFDC program, which have changed at least five times since the inception of the EANFC program in 1968, the EANFC statute and its regulations have remained virtually untouched.<sup>133</sup>

The federal EANFC program began with what is for its current homeless beneficiaries a historical irony. The first recipients of emergency assistance were to be migrant workers and their families<sup>134</sup> who were ineligible for the regular AFDC program for at least two reasons: they could not meet the durational residency requirements which many states then imposed;<sup>135</sup> and the presence of both parents, both working, in migrant workers' families contravened the definition of "dependent child" central to the concept of AFDC.<sup>136</sup>

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133. For brief, functional description of the major changes in the AFDC program, see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 101ST. CONG., 1ST. SESS., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 517-533 (Comm. Print 1989). For a description of the EANFC program, see *Emergency Aid to Families Program: Hearing before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 2d Sess. 21-29 (1986) (statement of Jo Anne B. Ross, Associate Commissioner for Family Assistance, Social Security Administration, Department of Health and Human Services).

134. See *Blum v. Bacon*, 457 U.S. 132, 142, n.10, (1982) for a brief description of the history of the legislation creating the EAFDC program, with particular reference to its beginnings in H.R. 5710, 90th Cong., 1st. Sess. as a temporary program for migrant workers' families.

135. In its report on H.R. 12080, the Social Security Amendments of 1967, the successor to the unsuccessful H.R. 5710, the Senate Committee on Finance noted of the "Temporary emergency assistance" portion at § 206(b) of the bill that "The provision is broad enough that emergencies can be met in migrant families as well as those meeting residence requirements of the state's AFDC program." H.R.REP. No. 544, 90th Cong. 1st Sess. 109 (1967); S. Rep. No.744, 90th Cong. 1st. Sess., *reprinted in* 1967 U.S. CODE CONG.& AD. NEWS 2834, 3003. Shortly after the passage of Pub. L. No. 90-248, the Supreme Court invalidated such durational residency requirements for AFDC applicants in *Shapiro v. Thompson*, 394 U.S. 618 (1968).

136. The original definition of "dependent child" under Title IV, § 406(a) of the Social Security Act of 1935, as a child deprived of parental support due to the death, incapacity or absence of one parent, has remained virtually unchanged up to the present. Compare H.R. REP. NO. 628, 74th Cong., 1st Sess. 36 (1935) (definition of "dependent child" under § 406, H.R.7260) with 42 U.S.C. § 606(a) (1985, Supp. 1989). In 1962, Congress added Section 407 to Title IV to allow states the option of assisting the families of dependent children where both parents were present in the household but one parent was unemployed. See Pub. L. No. 90-248 (the AFDC-U statute, 75 Stat. 75, codified at 42 U.S.C. § 607(b)). § 203(a) of Pub. L. 90-248 amended 42 U.S.C. § 607(a) to standardize states' definitions of "unemployment," and to re-define "dependent child," under the unemployed parent option, as a child deprived of parental support as the result of the unemployment of a father. H.R. REP. No. 544, 90th Cong. 1st Sess. 17, 107-8 (1967). Congress subsequently re-defined AFDC-U to limit eligibility to dependent children in families with an unemployed "principal wage earner." See Pub. L. No. 97-35, § 2313. In the Family Support Act of 1988, Congress has for the first time required the states to include assistance to two-parent families as part of their mandatory state plans. Pub. L. No. 100-485, § 401(a)(1),

The original "Temporary Assistance for Migratory Workers" bill offered states assistance in establishing demonstration projects through which workers and their families could receive a maximum of sixty days of assistance, subject to two major conditions: that the recipients could *not* be eligible for assistance under the AFDC program, and that they could only receive as much assistance as they would receive if they *were* eligible for the AFDC program.<sup>137</sup> The rationale behind the experiment seemed clear. Without increasing their on-going AFDC caseloads or broadening the range of benefits to their own indigent residents, states could help needy transient families quickly, and, temporarily, before they moved on. The proposal treated the migrant poor and the indigenous poor equally. Although these new recipients would receive relief without the burden of meeting the normal eligibility requirements, they would enjoy no more generous benefits than their counterparts.

Many of the programs first advanced in the ill-fated H.R. 5710 re-emerged in H.R. 12080, the Social Security Amendments of 1967, which with few changes ultimately became P.L. No. 90-248.<sup>138</sup> H.R. 12080 extended the concept of an optional temporary emergency assistance program to all needy families with children, with aid to migrant families incorporated as an option within the option.<sup>139</sup> In a massive initiative focused on two often divergent legislative concerns—the physical welfare of the dependent child, and the employability of the dependent child's parent—the temporary emergency assistance provision addressed the first issue.<sup>140</sup> The House Ways and

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codified at 42 U.S.C. § 602(a)(41); § 401(a)(2)(B), codified at 42 U.S.C. § 607(b). For a comprehensive discussion of the changes in the AFDC statute between 1961 and 1981, to allow assistance to two parent families, see S. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1259 - 1261 and accompanying footnotes (1983).

137. H.R. 5710, 90th Cong., 1st. Sess 122-133 (1967).

138. For a brief, useful discussion of the political history of the omnibus welfare reform legislation encompassed in Pub. L. No. 90-248, see *Rosado v. Wyman*, 397 U.S. 397, 409-411 (1970).

139. The House Report on the bill explained that its eligibility criteria were expansive enough to allow states to assist migrant workers' families, H.R. REP. NO. 544, 90th Cong. 1st. Sess. 109, but the bill itself nowhere specifically guaranteed their eligibility, H.R. REP. NO. 544 at 181. The Senate's amendments made such eligibility explicit. S. REP. NO.744 *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 3206.

140. Curiously, this and other expansions of the federal assistance program appeared in a bill ostensibly concerned with the failure of previous welfare reforms to induce "independence and self-support," and to curb "rapidly increasing costs to the taxpayers." See H.R. REP. NO. 544, 90th Cong., 1st Sess. 96 (1967). The idea was to pay now, to stop paying later. Most of the admittedly expensive new programs proposed in H.R. 12080 focused on work incentives, defined broadly. Viewed as measures to restore "employment and self-reliance" were such diverse provisions as those allowing working AFDC recipients to retain some of their earnings, requiring them to attend vocational school or "community work" programs, offering higher payments to foster care parents, and requiring the states to institute family planning. *Id.*, at 96-97.

Means Committee Report ("House Report") on H.R. 12080 emphasized that a child's well-being could depend on the ability of a social services' department to respond immediately to crisis: eviction, shut-off of utilities, accidental death of a parent, or "when an alcoholic parent leaves children without food."<sup>141</sup>

The House version took from H.R.5710 the idea that applicants for extraordinary relief need not meet the non-financial eligibility criteria of the long-term AFDC program. Whatever their status, applicants for extraordinary relief would have to show the absence of other "available resources" to alleviate the crisis. The House Report noted that, since the major financial eligibility criterion for the program would be destitution, many applicants either could meet the comparable financial criteria for AFDC, or in fact would be AFDC applicants, forced into applying for emergency assistance because of the sluggishness of the AFDC application process.<sup>142</sup> The House limited the duration of relief available to thirty days within any twelve-month period. To provide the states both flexibility and financial incentive, the bill gave wide latitude in the type of assistance states could provide, and offered federal financial participation of 50% for cash payments, and 75% for services.<sup>143</sup> In its version of the bill, the Senate re-emphasized the measure's pre-occupation with employability by forbidding federal funding to ameliorate emergencies arising from the needy child's or caretaker relative's refusal to accept employment or employment training.<sup>144</sup>

P.L. No. 90-248 retained the voluntary nature of the program, the discretion as to the type of emergency benefit offered, the House's funding formula, the thirty day limit on relief, and the Senate's work-related prohibition. Codi-

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141. H.R. REP. NO. 544, 90th Cong. 1st Sess. 109, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 3002.

142. As the House Committee on Ways and Means noted, "The committee understands that the process of determining AFDC eligibility and authorizing payments frequently precludes the meeting of emergency needs when a crisis occurs." H.R. REP. NO. 544, 90th Cong. 1st Sess. 109, *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 3002. Regarding the issue of the relationship of eligibility for AFDC to eligibility for the new emergency program, the Committee stated, "The families do not have to be receiving or eligible upon application to receive AFDC (although they are generally of the same type), but they must be without available resources and the payment or service must be necessary in order to meet an immediate need that would not otherwise be met." *Id.*, at 109, *reprinted at* 3003.

143. *Id.*, at 109, *reprinted at* 3003. The Senate's version of the bill would have retained the older, more generous sixty day maximum for emergency assistance. S. REP. NO. 744, 90th Cong. 1st Sess., (1967), *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 3003.

144. S. REP. NO. 744, 90th Cong. 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2834, 3127. The conference committee product retained the thirty day limitation on assistance, the migrant worker provision, and the prohibition on assistance to families destitute as a result of a refusal to accept work or job training. 1967 U.S. CODE CONG. & AD. NEWS at 3206.

fied at 42 U.S.C. § 606(e)(1), with the funding formula at § 603(a)(5), the substance has remained substantially unchanged up through the present.<sup>145</sup> The final form of the legislation actually clarified the legislative goals, to the extent that it allowed emergency aid "to avoid destitution of such child or to provide living arrangements in a home for such child."<sup>146</sup>

If both the intent and the plain meaning of the EANFC statute seem to expand and complement the goals of the AFDC program, there is one aspect in which the emergency program is far more restrictive, and, to a degree, punitive. The work requirement in EANFC, as enacted and as currently in place, in some ways tracks the current AFDC provision. But the EANFC statute absolutely disqualifies an entire family from assistance if its "destitution or need for living arrangements" results from the refusal of "such child or relative" to accept a job without good cause.<sup>147</sup> "Relative" is defined by the AFDC definition, as any one of a number of individuals sharing a home with the "dependent child," and connected to her by biology or marriage.<sup>148</sup> Under the current AFDC work requirements, disqualification of the household from benefits will result only from the "principal wage-earner's" unjustifiable rejection of employment; under the amended AFDC statute, only the wage-earner and her spouse will lose eligibility.<sup>149</sup> Thus, the EANFC statute does go beyond its parent legislation in penalizing a needy child for the conduct of adults, adults who may be only tangentially related to her.

145. 42 USC § 603(a)(5) was amended in 1972, to reduce the 75% federal funding figure for emergency services to 50%. State and Local Fiscal Act of 1972, Pub. L. No. 92-512, 86 Stat. 946, 947. See also 34 Fed. Reg. 393 (Jan. 10, 1969), (codified at 45 C.F.R. § 233.120(b)(2)), amended at 39 Fed. Reg. 5316 (Feb. 12, 1974) (codified at 45 C.F.R. § 233.120(b)(2)).

146. Pub. L. No. 90-248, § 206(b).

147. 42 U.S.C. § 606(e)(1).

148. 42 U.S.C. § 606(e)(1) defines needy child as one living "with any of the relatives specified in subsection (a)(1)." 42 U.S.C. § 606(a)(1) enumerates the qualifying blood or married relatives.

149. 42 U.S.C. § 602(a)(19)(F)(i)(1985) stated that any relative's refusal to accept a suitable job or to register in a work incentive program would disqualify *that relative* from being assisted as part of the AFDC family unit. If a parent designated as the "principal earner" in the "Unemployed Parent" program, 42 U.S.C. § 607, refused such participation, then that refusal disqualified the entire family. 42 U.S.C. § 602(a)(19)(F)(ii) (1985). Effective October 1, 1990, the Family Support Act of 1988, Pub. L. No. 100-485, continues the same disqualification for the uncooperative family member. 102 Stat. 2343, 2359 (to be codified at 42 U.S.C. § 602(a)(19)(G)(i)(I)). In a two-parent family, only the unemployed wageearner and her/his non-working spouse will be disqualified from assistance for refusal to participate in "JOBS," the new vocational training and education program. 102 Stat. 2343, 2359 (to be codified at 42 U.S.C. § 602(a)(19)(G)(i)(II)). Under the Family Support Act, the "unemployed parent program," at 42 U.S.C. § 607, which gave states the option to assist two parent families with AFDC, becomes mandatory for all the states. 102 Stat. 2343, 2393 (to be codified at 42 U.S.C. § 602(a)(41)).

But if the final provisions of the EANFC legislation in some ways sharpened the program's substantive goals, they confused the future of the program's implementation by muddling its relationship with AFDC. Recall that the germ of the EANFC concept, in the migrant worker proposal, made the demarcations clear: recipients were those *ineligible* under the non-financial criteria of AFDC, and they were to receive no more than the equivalent of AFDC benefits. The legislative history of the successor program greatly expanded the federal government's role, but did so with equal clarity. Emergency assistance would be available to meet the catastrophic needs of *any* destitute child, regardless of whether that child's family already received government benefits. But this is the point at which the historical and the statutory clarity ends. Congress leaves two administrative issues un contemplated. First, in giving the states *carte blanche* in choosing the amount and kind of emergency benefits, the legislative deliberations and statute never explicitly addressed the issue of whether such benefits should meet, exceed, or in any way be measured against the benefits that families receive continuously under the AFDC program. Second, neither the legislative history nor the statute make crystalline under what structure states should administer their EANFC programs.

One could justifiably say that, given the sweep of the legislation, such concerns deserve to be dismissed as quibbles. With regard to comparability of benefits between the two programs, Congress seemed unconcerned. The issue was not how minutely to calibrate the degree of assistance; the goal was to meet the economic needs of children in crisis, with whatever resources were necessary to the task. A structure for the program's administration already existed. The committee deliberations included emergency assistance as one stick in a bundle of welfare reforms, some binding upon the states and some optional. The historical implication was that all of these improvements, once adopted by the states, were to be included in the states' AFDC plans, and thus all were to be subject to federal review.<sup>150</sup> Section 206(b) of P.L. No. 90-248, codified at 42 U.S.C. § 606(e)(1), implies strongly that, if a state wishes to participate in the EANFC program, the state must include its EANFC plan in the overall AFDC plan it submits to the Secretary of Health and Human Services.<sup>151</sup>

But such quibbles have dictated the course of all future litigation about EANFC, up to, through, and past Supreme Court pronouncements on the issues. Until recently, as noted earlier in this article, this was a modest program, provided by few states—within ten years of the date of enactment, only twelve states, plus the District of Columbia, participated; at present, 30 juris-

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150. H.R. REP. NO. 544, 90th Cong., 1st Sess. 96-97 (1967).

151. 42 U.S.C. § 602(a)(1989) imposes upon the states the basic structure and substantive minima of the federal AFDC program. Federal financial participation under 42 U.S.C. § 603 is conditioned upon the Secretary of Health and Human Services' approval of the state plan, under 42 U.S.C. § 602(b)(1989).



dictions offer the program.<sup>152</sup> Yet the smallness of the stakes has belied the energy which some legislatures and local welfare departments have put into circumscribing every aspect of the program. A review of the history of general litigation under the EANFC statute will show the domination of two issues: whether the broad outlines of the federal statute circumscribe the circumstances under which the states must provide emergency relief, and the identity of the recipients to whom the states must provide it; and how the states must balance their emergency and non-emergency welfare programs. It is through a small body of state and federal case decisions, plus the Supreme Court's two decisions interpreting the EANFC program that these issues have been aired, if not clarified.<sup>153</sup> The problems arising from these issues have not changed over time. What has changed has been the nature of the "emergency" service sought: the provision of long-term shelter.

In his study of the local administration of welfare programs, Joel Handler noted a possible conflict between two goals of welfare reform. One goal consists of the promotion of "equity": whether relief programs distribute equal resources, equally among all applicants entitled to them. A second goal emphasizes compassion to individuals: whether a bureaucracy can bend to meet special needs. Accomplishment of the first objective was the strategy of welfare reform efforts of the late 1960's; in part, the passage of the federal emergency assistance program in 1968 constituted a corrective to the resulting standardization and bureaucratization of public benefits.<sup>154</sup> The law of emergency relief has raised a third issue, one related to the perception of the incompatibility between standardization and attention to unique circum-

152. Department of Health and Human Services, Family Support Administration, Office of Family Assistance; ASAP: Automated State AFDC Plans: Reports based on State Plan Amendments Effective on or before January 1, 1989 and received by April 1, 1989; Report No. 21, "Emergency Assistance." Report No. 21 also indicates that twenty-four of the thirty EANFC jurisdictions have opened their emergency programs to migrant workers' families. It should be noted that this report gives July 1, 1976 as the earliest date of entry of various jurisdictions into the EANFC program, that being the date on which the Office of Family Assistance generated the first "ASAPs," computer-generated profiles of the states' Title IV-A plans. As the litigation concerning EANFC reveals, several states enlisted in the EANFC program shortly after the effective date of the legislation, on Jan. 2, 1968.

153. As I will describe in greater detail further on, these Supreme Court decisions are *Quern v. Mandley*, 436 U.S. 725 (1978) and *Blum v. Bacon*, 457 U.S. 132 (1982).

154. HANDLER, *LAST RESORTS — EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE*, 4-12 (1983) [hereinafter "LAST RESORTS"]. In one among many surveys described in *LAST RESORTS*, Handler compared how state and county welfare officials ranked the importance of 17 welfare system goals, both as actual goals of the programs they administered, and as desirable goals. "Make sure clients are treated equally" ranked high among both actual and hortatory goals, with "Be sensitive to unique financial circumstances" listed as a lower priority. *Id.* at 49-51.

stances: whether the formalistic equity sought in the regular welfare system is possible or desirable in a system designed to respond to crisis.

This third issue has been approached through litigation over whether the rules that promote equity in the AFDC structure apply to EANFC. The bulk of litigation over the Social Security Act (SSA) in the late 1960's and early 1970's involved attempts to define the bounds of the states' discretion to run their AFDC programs, primarily as to two points: who was eligible, and for what benefits. The principles easily inferred from the litigation were that the states enjoyed enormous discretion in setting the dollars and cents of benefit levels,<sup>155</sup> but virtually no discretion to depart from the terms of the SSA in defining eligibility.<sup>156</sup> The Court's decisions reinforced the supremacy of certain content-bound federal welfare statutes, as well as a principle of horizontal equity: that, as set forth in 42 U.S.C. § 602(a)(10), the states were to furnish AFDC equally to "all eligible individuals," and that, in the absence of a federal exclusion of any one group from eligibility, any state standard which narrowed eligibility for AFDC below the federal standard was invalid.<sup>157</sup>

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155. Although states must disclose their "standard of need," 42 U.S.C. § 602(a)(23) (1985), they may fund their benefits at any level. See *Dandridge v. Williams*, 397 U.S. 471, 482-3 (1970) (validating Maryland's structure of maximum AFDC grants); *Jefferson v. Hackney*, 406 U.S. 535, 549 (1972) (allowing Texas' system of "ratable reductions" which permitted lower grants for AFDC recipients than for recipients of old age assistance).

156. The two major areas of state-federal conflict over terms of eligibility involved state definitions under 42 U.S.C. § 606(a) of "dependent child," and of what contributions to the household of the dependent child could be deemed to be "income" countable against the household's financial eligibility. Under the first category, see *Burns v. Alcalá*, 420 U.S. 575, 578 (1975) (the Court upheld as consistent with the SSA an Iowa statute which excluded fetuses from the definition of "dependent child" and therefore from AFDC coverage); *Carleson v. Remillard*, 406 U.S. 598, 602 (1972) (California exclusion of military personnel from the category of "absent parent," and thus of the children of military personnel from the category of "dependent child," violated the SSA); *Townsend v. Swank*, 404 U.S. 282, 285 (1971) (Illinois statute which continued AFDC grants to high school or vocational school students, ages 18 to 20, but not to college students of the same ages, violated the SSA definition of "dependent child" as anyone under age 21 attending any kind of school). Under the second category, see *Van Lare v. Hurley*, 421 U.S. 338, 346-347 (1975) (New York state regulations which reduced the shelter portion of a family's AFDC grant, based on the presumption that non-rent-paying lodgers were contributing to the household, conflicted with federal statutory and regulatory prohibitions against deeming anything other than actual, countable income to the household); and *Shea v. Vialpando*, 416 U.S. 251, 253 (1974) (Colorado's substitution of a standardized schedule for deductible work expenses violated the SSA's requirement that, in proving financial eligibility for AFDC, AFDC recipients be allowed to deduct the actual amount of their work expenses from income).

157. *Townsend v. Swank*, 404 U.S. 282, 286 (1971); *King v. Smith*, 392 U.S. 309, 333 (1968), (relying on the statute, then codified at 42 U.S.C. § 602(a)(9)). Constant from 1971 through to the present, an "equal treatment" regulation has amplified the

Before the Supreme Court's ruling in *Quern v. Mandley*, advocates had invoked both of the AFDC principles (that the SSA controls the content of state welfare plans, and that, consequently, the federal "all eligible individuals" statute compels states to extend all of the benefits to all the intended beneficiaries) in their efforts to advocate for the broadest possible distribution of EANFC benefits. Vignettes emerging from the scattered litigation attest to the divergence among states' plans for emergency relief. Already enduring the cold frigid house after their gas was shut off, an unemployed couple and their children faced eviction over unpaid rent; they could receive nothing under the Wisconsin EANFC statute because their emergency did not result from fire or flood.<sup>158</sup> New Jersey's department of social services interpreted its administrative code to require homelessness as a precondition to the award of emergency relief, and denied aid to a family that lost its money to buy food.<sup>159</sup> In these and other cases,<sup>160</sup> plaintiffs often succeeded in arguing that the federal law prohibited the states from so drastically constricting the concept of "emergency."

Published case decisions are of course poor documentation for a history of social welfare policy. But HEW's summary from 1976 of state AFDC plans

statutory principle that all AFDC recipients eligible under federal criteria must receive their statutorily mandated benefits:

45 C.F.R. § 233.10 (1988)

(a) State plan requirements. A State plan under title. . . IV-A of the Social Security Act must:

(1) Specify the groups of individuals. . . and all the conditions of eligibility. . . . The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act. . . .

The original "equal treatment" rule, first implemented at 36 Fed. Reg. 3866 (Feb. 27, 1971), contained virtually identical language, paragraphed differently.

158. See *Kozinski v. Schmidt*, 436 F.Supp. 201, 202 (E.D. Wisc. 1977). Citing *Dandridge v. Williams*, 397 U.S.471 at 487 (1970), the court ruled that the state had properly exercised its legitimate objective to distribute scarce welfare resources, and dismissed plaintiffs' claims that the statute had impermissibly narrowed the relief mandated by the federal EANFC statute. *Kozinski*, 436 F.Supp. at 205. See also *Williams v. Wohlgemuth*, 540 F.2d 163, 168-9 (3d Cir. 1976) in which the court struck similar limitations in Pennsylvania's emergency assistance statutes (need only assisted if caused by natural disaster or civil disorder) as abusing the limited discretion left to the states under 42 U.S.C. § 606(e).

159. *Burton v. New Jersey Department of Institutions and Agencies, Division of Public Welfare*, 147 N.J. Super. 124, 370 A.2d 878, 880 (N.J. Super. Ct. App. Div. 1977).

160. For a comprehensive review of early litigation contesting the failure of state statutory or regulatory measures to provide the full range of benefits contemplated by the federal statute, see *Note, Meeting Short-Term Needs of Poor Families: Emergency Assistance for Needy Families with Children*, 60 CORNELL L. REV. 879, 885-892 and footnotes (1975).

supports the impression of a wide range of emergency assistance policies, some seemingly bound only by the imagination of the policy planners.<sup>161</sup> What some—not all—shared were definitions of what circumstances were suitable for emergency assistance, definitions that bore little relationship to the plain language or goals of the federal statute. Even less obvious was how assisting a family made homeless by the devastations of fire or flood, but not one made homeless through eviction, would serve the purpose of rescuing all children from desperate need.

What the *Quern* case added to this pattern of inconsistency was to endorse it. The case began as a challenge to two classifications which Illinois created in its federally funded emergency assistance program: of recipients (only AFDC families were eligible)<sup>162</sup> and of emergency (the only ameliorable emergency was homelessness resulting from destruction of the dwelling, and not from eviction due to nonpayment of rent).<sup>163</sup> It ended in a muddle. After the Seventh Circuit ruled that the Illinois scheme violated 42 U.S.C. § 606(e) by differentiating among needy children, the state used the ultimate weapon in any welfare program: it pulled out of the EANFC program altogether. Illinois incorporated the former emergency program into its AFDC structure as a "special needs" program. Plaintiffs cried subterfuge: the state was simply trying to avoid extending emergency assistance to families not already on welfare. According to plaintiffs, Illinois' ill-concealed goal was to evade both the mandate of the EANFC statute and the well-established Social Security principle of equal provision of benefits to eligible applicants.<sup>164</sup>

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161. See U.S. Department of Health, Education and Welfare; Social Security Administration, Assistance Payments Administration; Characteristics of State Plans for Aid to Families with Dependent Children under the Social Security Act, Title IV-A (Oct. 1976) (hereinafter "*Characteristics, 1976*"). Of the twenty-six jurisdictions reporting an EANFC program in place as of October, 1976, four—Kentucky, *Characteristics* at 76; Montana, *Characteristics* at 114; New Jersey, *Characteristics* at 129; and Utah, *Characteristics* at 193-4 — limited their definitions of "emergency" to situations arising from circumstances that were "unforeseeable" or beyond the applicants' control or ability to plan. Three jurisdictions — Pennsylvania, *Characteristics* at 166; South Dakota, *Characteristics* at 182; and Virginia, *Characteristics* at 205 — confined "emergency" to natural disaster, *but see* discussion of Pennsylvania's statute in *Williams v. Wohlgemuth*, *supra*, at n. 158. In a unique provision, Oregon allocated EANFC funds for transportation, for the return of non-resident families to their state of former residence. *Characteristics* at 162.

162. As did Illinois, Connecticut, Delaware and New Jersey restricted emergency assistance to applicants already receiving public assistance. *Characteristics* at 28, 32, 129. See also *Baxter v. Minter*, 378 F.Supp. 1213, 1219-20 (D.Mass. 1974), in which the court ruled that Massachusetts' limitation of federally funded emergency assistance benefits to recipients of or applicants eligible for public assistance was permissible, based on the wide latitude which Congress and the Supreme Court had given to states to set levels of relief under the AFDC program.

163. *Quern v. Mandley*, 436 U.S. 725, 729 (1978).

164. *Quern*, 436 U.S. at 730-1.

The Court ruled, first, that such a subsumption of one program's elements under another program's structure was permissible.<sup>165</sup> This part of the decision underscored the principle that a state's participation in EANFC, as in any public benefits program, is wholly voluntary. Second, the Court decided that even under the prior structure, nothing in the federal law of public benefits required Illinois to extend every possible emergency benefit equally to every potentially eligible applicant. Citing sparingly from legislative history, the Court concluded that Congress had conceived of the federal emergency assistance program as an entity totally separate in structure and goals from AFDC. As a result, none of the principles controlling in AFDC, particularly the "equal treatment" provision of 42 U.S.C. § 602(a)(10), applied to EANFC.<sup>166</sup>

But Illinois' conversion of its emergency program into an adjunct of the AFDC program set two significant precedents for how states could address extraordinary needs. Most obviously, by providing such assistance only through the AFDC program, a state by definition could exclude an entire class of recipients clearly intended to benefit from the EANFC program. The main benefit of such exclusion to the state is financial. If, for instance, a state confined emergency rent payments to participants in the AFDC program, it could designate such assistance as a supplemental special needs grant,<sup>167</sup> or as an advance on prospective AFDC payments. Under either designation, the state could (and arguably would be required by federal regulation to do so) treat such additional payments as "overpayments," and deduct them from future AFDC grants. Such "recoupment" is clearly not possible from a grantee who is not, and does not plan to be, a recipient of AFDC.<sup>168</sup> As I will

165. *Quern*, 436 U.S. at 737. The history of the litigation after the Seventh Circuit invalidated Illinois' EANFC program is described at 436 U.S. 730-734. After the Seventh Circuit had remanded the case to the district court, both state and federal defendants moved to dismiss, based on Illinois' planned withdrawal from the EANFC program. The district court dismissed. The circuit court reversed, finding that the change in designation of the emergency assistance program to an AFDC special needs program did not excuse the state's obligation to comply with the broad dictates of the federal EANFC statute.

166. *Quern*, 436 U.S. at 744.

167. See HANDLER, *supra*, n. 37, at 23-4, for a discussion of the development of the "special needs" mechanism.

168. 45 C.F.R. § 233.20(a)(13)(i) (1988) defines "overpayment" as an amount given to an AFDC family which exceeds the amount which the family was eligible to receive in that month. The regulation specifically addresses the situation in which a family receives benefits pending the decision of a hearing examiner on the family's eligibility. But the regulation clearly also could apply to a family already determined to be eligible, but forced to seek a special needs income supplement, in excess of the normal monthly AFDC check, for rent or food for that month. The state must recoup that excess from the AFDC family, either through immediate repayment or through subsequent reductions of that family's grant. 45 C.F.R. § 233.20(a)(13)(i)(A)(1-3) (1988). However, for "an individual no longer receiving aid," where pursuing the

discuss later in this article, several recent cases show how this and related policies can work a severe hardship for AFDC families on the brink of eviction, and, consequently, of homelessness.

The other lesson derives from *Quern's* interpretation of the legislative history's significance: that the supposed divergence in the histories of AFDC and EANFC means that the principles of equity that control the one program have no bearing on the administration of the other. *Quern* thus represents the idea that states can do whatever they want with their emergency assistance plans, unlimited by any federal strictures. At its most extreme interpretation, *Quern* allows states to extend (or withhold) any kind of emergency relief, in any amount, to any applicant.

*Blum* cases address issues certainly present in *Quern*, but unemphasized in its holding. During the first ten years of implementation of the EANFC program, many states' plans for EANFC treated AFDC applicants more stingily than non-AFDC recipients: the states' statutes or regulations exacted more dramatic showings of catastrophe from, or conferred less generous benefits upon, applicants already receiving AFDC. For example, Vermont extended EANFC to AFDC families for only four "catastrophic situations."<sup>169</sup> Massachusetts refused emergency assistance to AFDC recipients alone to cover arrearages in rent or utilities payments, but allowed emergency supplements to all applicants for expenses associated with home ownership: mortgages, taxes and fuel.<sup>170</sup> Administrative regulations in New York denied virtually all emergency assistance to AFDC recipients, under the theory that "special needs grants" should cover most exigencies.<sup>171</sup> As noted

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former recipient for collection proves onerous, the state may choose to forget about the overpayment. 45 C.F.R. § 233.20(a)(13)(vi)(1988). It should be noted that these recoupment requirements apply only to that portion of the AFDC grant for which the state receives federal reimbursement. If the state wished to use its own funds to assist a needy child with a special needs grant, that supplement would not be counted as income, would not affect the family's eligibility, and thus would not be recouped. 45 C.F.R. § 233.20(a)(3)(iv) (1988) (limiting this exception to states whose Title IV-A plans have contained such a provision since before Jan. 1, 1979).

169. *Lynch v. Philbrook*, 550 F.2d 793, 795-6 at n.4 (2d Cir. 1977). Vermont defined eligible "emergency need" for AFDC families applying for EANFC assistance as it defined such need for applicants to the state-financed, general assistance program: need occasioned by death of a spouse or dependent child, court-ordered eviction, natural disaster, or medical emergency.

170. *Ingerson v. Sharp*, 423 F.Supp. 139, 141 (D. Mass. 1976).

171. Several cases litigated in federal court under the SSA addressed New York state regulations that foreclosed from eligibility for federal emergency assistance grants any public assistance recipients whose needs could be met through the mechanism of recoupable, special needs grants. In *Davis v. Smith*, 431 F.Supp. 1206, 1207 (S.D.N.Y. 1977), *aff'd.*, 607 F.2d 535 (2d Cir. 1978) plaintiffs challenged then 18 N.Y.C.R.R. § 352.7, which channeled emergency utilities assistance to avoid shut-off through special needs grants. Referring to the explicit mention of impending shut-off as a covered emergency situation in the legislative history of P.L. No. 90-248, the

above, this last discrimination was implicitly endorsed though not explicitly addressed in the *Quern* decision.

In the litigation contesting these policies of differential treatment, plaintiffs asserted the guiding judicial interpretations of AFDC— that states had to define eligibility and relief as expansively as the federal statute dictated— to challenge these policies. Not only did the federal statute fail to discriminate among types of emergency or kinds of aid, but it posited no difference between the income status of the parents of needy children. The restrictions in question served neither the explicit statutory purpose nor the legislative intent. The *Quern* decision could have adjudicated these questions as to the substance of the EANFC programs, but its tortuous procedural past directed its focus to the broader issues of supremacy in the federal-state administration of public assistance. While *Quern* arose from a challenge to a state EANFC plan which raised similar issues of discriminatory treatment between AFDC and non-AFDC recipients, the decision only affirmed generally the states' freedom from federal strictures in the operation of their emergency assistance efforts. The Court only implicitly addressed the question of whether that freedom extended to conferring different kinds of relief, based on the applicants' economic status.

*Blum* attacked that issue head-on. Under contention in *Blum* was the "no cash" provision in New York state's Social Services Law. This section precluded the grant of cash as emergency relief to AFDC recipients, or to persons eligible for AFDC, and denied reimbursement of lost or stolen cashed public assistance checks to all public assistance recipients.<sup>172</sup> Relying on 45 C.F.R. § 233.10,<sup>173</sup> the Department of Health, Education and Welfare rejected New York's provision as effectively excluding an entire class of recipients from a kind of relief.<sup>174</sup> Although its earlier ruling in *Quern* would seem to preclude this result, the Court approved the Department's application of the AFDC "equal treatment" rule to the EANFC program.

court found that the regulation violated the EANFC Act. *Davis*, 431 F.Supp. at 1213. In *Hagans v. Berger*, 536 F.2d 525, 528-9 (2d Cir. 1976), the Court ruled that a related regulation, which required disbursement of emergency rent money through recoupable special needs grants, conformed to the letter and intent of the AFDC statute, 42 U.S.C. §§ 602(a)(7) and (10). The court also denied appellees' claim that the regulation violated the EANFC. *Hagans*, 536 F.2d at 532. For a discussion of how the philosophy underlying the regulation disputed in *Hagans*, and its successors, affects indigent families at risk for homelessness, see *infra* notes 198-202 and accompanying text.

172. *Blum v. Bacon*, 457 U.S. 132, 133 (1982). After the district court in *Bacon v. Toia*, 493 F.Supp. 865, 875 (S.D.N.Y. 1980) had ruled that the statute did in fact permit the state to issue replacements for lost or stolen grants in situations of dire emergency, plaintiffs dropped that part of their claim. *Blum*, 457 U.S. at 135, n.3.

173. See *supra* note 157, for contents of the "equal treatment" regulation, and corresponding text for discussion of its relationship to the AFDC statute at 42 U.S.C. § 602(a)(10).

174. *Blum*, 457 U.S. at 140-41.

The Court distinguished *Quern* as only addressing generally the mandatory nature of standards for relief in the EANFC legislation. The distinction seems almost deliberately disingenuous. Construing virtually the same legislative history as it had in *Quern*, the Court read the EANFC as an extension of AFDC, with an identical, not divergent, legislative goal to assist the "dependent child."<sup>175</sup> As such, the "equal treatment" principle of AFDC did apply, and a state was not free to treat AFDC recipients discriminatorily either by denying emergency relief to them, or by awarding them relief different from that accorded to other applicants.<sup>176</sup>

The preceding discussion suggests that *Blum*, without saying so, virtually overrules *Quern*. The principles emerging from the cases are almost irreconcilable. One can perhaps best read the cases as illustrating two topics of never-ending discussion in the joint federal and state administration of emergency welfare programs. One issue touches the "macro" aspects of program design. *Quern* echoes and amplifies for the emergency assistance program the major tenet of federal-state welfare law: a state's choices to operate an emergency welfare program, to pick beneficiaries, and to select types of aid, are its own, uncoerceable by the federal funding source.

*Quern's* most important legacy may have been to sanction criteria for the giving of emergency relief which evoke historical issues of "deserving" and "undeserving" destitution. It is important to note what criteria *Quern* left as permissible. Despite the intent inherent in the EANFC as in the original Social Security Act to succor the blameless child, blame is a constant criterion in the programs. Only barely subliminal throughout the state emergency assistance programs described above are notions of "fault"—the presumption that purely economic disasters result only from improvidence. Thus, homelessness arising from tornado or flood is an "emergency," but not so if it results from non-payment of rent.<sup>177</sup> As a corollary, a victim of an "avoidable emergency"—surely an oxymoron—may not qualify for assistance. An example of an "avoidable emergency" would, again, be eviction for non-payment of rent, or a utility shut-off from non-payment of a gas and electric bill. The assumption is that, since the consequences of failing to pay rent or bills are fully foreseeable, they must also be avoidable. As I have discussed earlier, living

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175. *Id.* at 142-44.

176. *Id.* at 145-46.

177. The Illinois statute offers an excellent example of how, after *Quern* and *Blum*, a state may legitimately limit the circumstances under which it will provide emergency assistance, and the recipients to whom it will offer it. Recipients are those already receiving or financially eligible to receive AFDC. ILL. ANN. STAT. ch. 23, § 4-12 (Smith-Hurd 1988). Events triggering eligibility for "Special Assistance," the state-funded part of the program, include homelessness for reasons *other* than non-payment of rent. ILL. ANN. STAT. ch. 23, § 4-12(a). "Emergency assistance," funded by the federal program, allows assistance for eviction due to non-payment of rent, but only if the applicant can prove that "documented theft or documented loss" of cash led to the crisis. ILL. ANN. STAT. ch.23, § 4-12(b).



on the AFDC margin generates its own assumptions: that the failure to pay rent is fully foreseeable and virtually always unavoidable.<sup>178</sup> The difference between the assumptions contained in some EANFC programs, and this second group of assumptions, is that the former are anachronisms; the latter are provable from data that intimate what it means to live on the margin.

*Blum* addresses the other major issue in welfare policy: the "micro" issue of resource adjustment among beneficiaries, after beneficiaries are chosen and overall resources are allocated. Under *Blum*, once a state does commit itself in an emergency welfare program to extend benefits to different classes of recipients, it must offer equal benefits equally: the state scheme clearly cannot work to the disadvantage of AFDC recipients. At that point, the state's EANFC program operates, as would its AFDC program, under the same federal programmatic constraints. Explicitly or implicitly, the controversy adjudicated in *Blum* reflected—and, as we shall see, continues to reflect—a tension forever alive in the politics of welfare policy: whether dispensing extraordinary relief to individuals already receiving support from the state constitutes "double dipping," and accords them an unfair economic advantage over not only their contemporaries who receive only periodic welfare payments, but also over their neighbors who receive no welfare at all.

Recent emergency assistance cases, whether litigated in state or federal fora, reveal a patternless patchwork of statutes, regulations, guidelines, and practices. Plaintiffs have challenged social workers' refusal to characterize utility shut-offs as "unanticipated emergencies," and thus as triggering eligibility for emergency aid;<sup>179</sup> a state's practice of forcing applicants to wait twelve months in between applications;<sup>180</sup> state regulations limiting emergency assistance to children under nineteen and withholding it altogether from families in which parental fault contributed to eviction;<sup>181</sup> and a jurisdiction's failure, despite its maintenance of an emergency program on paper, to

178. See *supra* notes 71-76 and accompanying text, concerning relationships between HUD's "fair market rents" and AFDC payments.

179. In *Wenzel v. Meeker County Welfare Board*, the social services department denied emergency utilities assistance to two families with unemployed custodial parents, one laid-off, one incapacitated by alcoholism. Both families subsisted on AFDC. The reason for the denial was that utility shut-off was the "foreseeable result of non-payment of utility bills." *Wenzel*, 346 N.W.2d 680, 682 (Minn. Ct. App. 1984). The court found no justification for this construction in the state statute or regulations. *Wenzel*, 346 N.W.2d at 684.

180. *Mullaney v. Commissioner of Public Welfare*, 9 Mass. App. Ct. 613, 403 N.E.2d 427, 429 (1980) (state's administrative practice of requiring twelve months to elapse between applications for EANFC is a permissible interpretation of state and federal EANFC prohibition on distributing emergency assistance more frequently than for one thirty day period every twelve months).

181. *Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services*, Civ. Action Docket #88-0288-B, partial consent order entered (D.Me. February 15, 1989) (challenge under the SSA to departmental manual provisions).

provide service consistently and quickly at all.<sup>182</sup> Indeed, apart from the all-consuming area of emergency shelter, all that remains of litigation over emergency assistance seems to be disputes over implementation of concededly permissible state legislative and regulatory standards.

There are two exceptions. *French v. Mansour*,<sup>183</sup> is significant for its treatment of the confluence of AFDC and the emergency program. The Sixth Circuit's decision reveals a perversely logical extension of *Blum v. Bacon*: that if a state must treat AFDC recipients as well as any other applicants for EANFC, then it must treat EANFC applicants as poorly as it does AFDC recipients. Michigan's Department of Social Services originally denied AFDC benefits to the plaintiff in *French* because she had refused to disclose the identity of the father of one of her children. While Ms. French received no money for herself from AFDC, her three children received their share of the grant, described by the court as including allowances for shelter and utilities.<sup>184</sup> The administrative guidelines for Michigan's Emergency Needs Program required a family to have exhausted all other resources before applying.<sup>185</sup> Since Ms.

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182. *Feeling v. Barry*, Civil Action No.82-2994, consent judgment entered (D.D.C. March 12, 1986); order deferring ruling on plaintiffs' petition for contempt entered (January 28, 1988). Plaintiffs in *Feeling* originally alleged violations of the SSA and Fifth Amendment due process violations for the District of Columbia's failure to provide immediate emergency relief, or to offer any mechanism for expedited hearings after denials of claims. Consent Judgment at 1. The Consent Judgment required distribution of emergency assistance within eight days from completion of the application, Consent Judgment at 2; filing of applications and interviewing of applicants on the day on which applicants apply, Consent Judgment at 3; and rendering of any hearing decision within forty days after the applicant requested a hearing, Consent Judgment at 4. The District's recently enacted "Emergency Assistance Program Act of 1988," D.C. Reg. 553 (1989), codified at D.C. CODE ANN. § 3-1001 *et seq.*, sets a time limit of eight business days from application to distribution of the emergency aid, D.C. CODE ANN. § 3-1004(a); sets income eligibility standards for applicants, D.C. CODE ANN. § 3-1008; and defines "emergency" as "a . . . situation in which immediate action is necessary to avoid destitution, establish or re-establish a home, or provide for the immediate needs of an eligible applicant to relieve or prevent serious harm or prevent displacement from a home." D.C. CODE ANN. § 3-1001(6).

183. *French v. Mansour*, 834 F.2d 115 (6th Cir. 1987).

184. *French*, 834 F.2d at 117. Title IV of the Social Security Act compels the disclosure of the paternity of a dependent child as a condition of assistance. If the applicant for assistance, presumably the mother, refuses to reveal the identity of the child's father, she will be excluded from the AFDC unit. Her children will receive benefits, but only as paid through a protective payee. See 42 U.S.C. § 602(a)(26)(B) (1985, 1989 Supp.) .

185. The text of the applicable portion from Michigan's Emergency Needs Manual was quoted by the court as follows:

An applicant must pursue all potential resources in order to qualify for Emergency Needs Program. This means agreeing to take all reasonable actions necessary to obtain a resource and refraining from actions that cause the loss or delay in receipt of any income or resource.

French had refused to comply with AFDC requirements, and thus had not taken advantage of that resource, the agency rejected her subsequent request for emergency assistance to prevent termination of her utilities service.<sup>186</sup>

The district court had stricken the administrative guideline as violating the "equal treatment"<sup>187</sup> regulation under the AFDC program. This result was clearly unwarranted in light of *Quern*, since *Quern* had ruled that the equal treatment rule of AFDC did not apply to the historically distinguishable federal emergency assistance program.<sup>188</sup> Arguably— but not strongly—the lower court's interpretation was justifiable under *Blum*, which viewed EANFC as a natural scion of the original AFDC scheme, bound by the same intent and principles. The appellate court overruled, and upheld the offending guideline under exactly the same rationale: if an applicant's behavior disqualified her for AFDC, then it disqualified her for EANFC.<sup>189</sup>

*French* underscores confusions that underly the emergency assistance program's implementation. Nothing could be clearer than that the *French* holding violates the intent of the EANFC legislation, since emergency assistance was originally meant for those ineligible for AFDC. As noted earlier, under EANFC as originally conceived, benefits could be denied to an entire family if its destitution arose from only one member's refusal to accept work. It was a punitive, over-inclusive disqualification, one more brutal than the typical disqualification from AFDC for failure of one family member to comply with a condition of eligibility. But it was the only non-financial, implied criterion for eligibility in the program, and the only federal legislative basis for exclusion from it. In contrast, as the circumstances in the *French* case suggest, there are many conditions of cooperation for receiving AFDC. Disclosure of the paternity of a dependent child is one; work registration is another;<sup>190</sup> refraining from going out on strike is a third.<sup>191</sup> Tying eligibility for emergency aid to eligibility for AFDC presents a whole host of possible other situations under which one family member's refusal to cooperate with the AFDC pro-

*French*, 834 F.2d at 117.

186. *Id.* at 117.

187. *See supra* note 157.

188. *See supra* note 166 and accompanying text.

189. *French*, 834 F.2d at 118.

190. *See supra* notes 147-153 and accompanying text.

191. 42 U.S.C. Sec. 602(a)(21)(A) (1985) excludes being out on strike as "good cause" sufficient to justify unemployment of a family member. This provision also disqualifies the entire family of a striker from assistance during the month of participation in the strike. 42 U.S.C. § 602 (a)(21)(B) (1985). After the amendments under the Family Support Act become effective, the striker provision will remain as the only part of Title IV-A of the SSA which eliminates an entire family from the AFDC rolls as the result of the activity of one member of the family. For the upholding of a similar absolute disqualification of the family of a striker from receiving food stamps, at 7 U.S.C. § 2015 (d)(3)(1985), *see Lyng v. Automobile Workers*, 485 U.S. 360, 108 S.Ct. 1185 (1988).

gram may exclude not only that member from AFDC, but also the whole family from EANFC.

Particularly under the major amendments to the AFDC program contained in the Family Support Act of 1988, any extension of the *French* reasoning could hold calamitous consequences for hard-pressed families. The Act expands the conditions of cooperation, and thus creates more opportunities for disqualification. It re-emphasizes the sanctions for failure to cooperate with its child support enforcement mechanisms,<sup>192</sup> and adds new programs, for which the cost of refusing to participate is the forfeiture of the recalcitrant recipient's AFDC benefits. Most notable among these programs is the "JOBS" program, which requires AFDC recipients to enroll in work, training, or basic educational programs, and also assists states in providing day care and transportation services.<sup>193</sup> Early criticism of "JOBS" and of drafts of its regulations suggests that many participants will find the logistics of participation to be extraordinarily onerous.<sup>194</sup>

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192. Effective July 1, 1989, Title IV-A of the Social Security Act was amended to emphasize a state's responsibility to require applicants and recipients of AFDC ". . .to cooperate in the establishment of paternity and the enforcement of child support obligations. . . ." Family Support Act of 1988, Pub.L. No. 100-485, 102 Stat. 2343, 2409 [to be codified at 42 U.S.C. § 602(a)(44)(B)]. The Family Support Act left undisturbed the disqualification from assistance of the applicant who refused to disclose the identity of the father of the dependent children. See 42 U.S.C. § 602(a)(26) (1985, 1989 Supp).

193. Title II of the Family Support Act of 1988, 102 Stat. 2343, 2356, establishes the Job Opportunities and Basic Skills Training Program ("JOBS"). Title II amends the Social Security Act in two ways: by adding the substance of the "JOBS" program, 102 Stat. 2343, 2360 (to be codified at 42 U.S.C. § 681-684); and by amending the former work and training requirements at 42 U.S.C. § 602(a)(19) to conform to the new substantive provisions. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 2356. As I mentioned earlier, see *supra* note 149, the previous version of the SSA penalized any one family member who refused without good cause to work.

194. Early criticism of the Department of Health and Human Services' proposed regulations has focused on the narrowing of eligibility for child care; on the federal funding formulae that provide incentives to states to encourage participation in potentially unproductive activities, such as make-work community service jobs or job hunting; and on burdensome standards, such as those which require a recipient to enroll in work or work-related activities as far as two hours away from her home. GREENBERG, JOBS REGS: A FIRST LOOK AT SOME BIG PROBLEMS (Center for Law and Social Policy reprint, 1989). The Department has issued the regulations in final form, with little change. 54 Fed. Reg. 42146 (October 13, 1989). It should also be noted that the "JOBS" program benefits in some ways depend upon the requirements pertaining to the disclosure of paternity. Effective April 1, 1990, under the Family Support Act, 102 Stat. 2343, 2384 [to be codified at 42 U.S.C. § 602(g)(1)(A)(vi)(II)], a recipient who has refused to cooperate with the child support enforcement requirements will also lose her eligibility for child care services. Arguably, this exclusion might make no difference. A recipient who has withheld information about the paternity of her child will already have lost her share of AFDC. If loss of her child care makes it impossible for

The amended AFDC statute offers more chances to disqualify certain recipients from assistance. But even with some family members excluded from the grant, the dependent children in the family should still receive their share of the monthly check. In contrast, as the experience of the French family suggested, the family excluded in part from AFDC is excluded in full from EANFC. The reasons are practical, and not explicitly spelled out in any state emergency assistance statute. While a monthly AFDC grant consists of cash, and is apportionable, emergency assistance is likely to take non-divisible forms: a voucher, or vendor payment to the landlord or the utility, for the exact amount of rent or of the fuel bill; or in-kind contributions of food, clothing, or furniture. One can all too easily fill in the facts from the French, or any indigent, family's story: one family member flubs her AFDC-mandated work assignment; she loses her eligibility for AFDC, and the whole family's income shrinks; the family comes up short for the rent or the electric bill; the family seeks an emergency relief check to avert the disaster, and is turned away. This outcome is possible in any state that requires exhaustion of all resources as a prerequisite to applying for emergency relief, and that considers AFDC to be a resource.<sup>195</sup>

The importation into the federal emergency assistance program of AFDC's burgeoning eligibility criteria would change emergency assistance from a program the sole goal of which was to prevent complete destitution, to one that is simply another enforcement mechanism for the broader social goals of AFDC. AFDC's non-financial criteria clearly seek to encourage or punish certain behaviors. EANFC initially served no such purpose. It was a program meant to provide quick, economic relief. Relief could be unconditional precisely because it was intended to be temporary; there was no need to attach strings to one-time grants. It was never contemplated that benefits would be denied because a family's destitution arose from one member's disqualification from AFDC, even if *that* disqualification resulted from a refusal to seek work. Of course, in 1968, when EANFC was legislated, it was never contemplated that "emergency shelter" was a condition that could last for months.

So far, there is no evidence that significant numbers of families who receive AFDC, and who depend not once, but month after month on the emergency assistance structure to cover their shelter costs, are being thrown off

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her to continue working, she will suffer no further penalty, since the loss of the individual's share of AFDC benefits is also the cost of failure to participate in the JOBS program.

195. An excellent example of a state plan which predicates eligibility for assistance on actual receipt of, or eligibility for, AFDC, is that recently enacted in California. California covers emergency shelter needs through its AFDC special needs program, and conditions the funding of emergency shelter on the applying family's having "used all available liquid resources." CAL. WELF. & INST. CODE Sec. 11450(f) (West Supp. 1989). For a description of the evolution of this legislation, see *infra* notes 211-215 and accompanying text.

AFDC, and thus off EANFC, and thus out of their hotel rooms, because they are refusing either to report for work, or to disclose the identity of their children's fathers.<sup>196</sup> No data exists on whether the logistical and psychological barriers that living in shelters places in the way of work and education have prevented AFDC recipients from participating in the current mandatory work programs. As a corollary, no data exists on whether AFDC recipients who live in shelters and have been unable to work have been sanctioned in those states that had already operated mandatory work programs before passage of the Family Support Act. Nor is there any indication that AFDC families in danger of eviction, and therefore at risk for homelessness, have violated the non-financial conditions of AFDC and thereby forfeited the supplementary funds that would avert the tragedy. This problem suggests an area of potential, rather than yet proven vulnerability, for the poorest of the poor. But it does point out the risks to the stability of precariously housed families posed by the arbitrary convergence of welfare policy with "disaster" relief, risks generated in the first place by the faulty identification of shelter as an emergency need to be paid for with emergency funds.

The second area of litigation concerns the possible direction of emergency assistance to prevent homelessness. Policies setting the relationship between AFDC and emergency assistance frustrate that direction. I have already noted policies that dismiss evictions or utilities shut-offs as "foreseeable" and thus not true "emergencies," or that deny supplementary payments to public assistance recipients on the theory that they can cover the emergency through an advance on their grants.<sup>197</sup> When these two policies converge, disaster results. In a sense, the latter welfare policy differs little from the emergency assistance policy articulated by Michigan's welfare department in the *French* litigation. It, too, assumes that the welfare grant is a primary, and satisfactory, resource.

Several recent New York state court decisions suggest the harm inherent in those emergency assistance policies that ignore the truth about the

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196. Few surveys exist which actually document the sources of income for the residents of emergency shelters. See *supra* notes 44-49 and accompanying text, for a discussion of the characteristics of shelter residents, as reported in surveys conducted in New York City and Massachusetts. See also *supra* note 139 and accompanying text, not all governmentally funded emergency shelter is paid for through EANFC; some is funded through states' special needs programs, as integrated into their AFDC structures. For families in these AFDC programs, disqualification from AFDC would also mean disqualification from the special needs shelter program under AFDC. In an unpublished conference paper, the AMERICAN PUBLIC WELFARE ASSOCIATION (APWA) did note a finding by an Urban Institute study that only a third of homeless families eligible for AFDC actually receive it. *The Welfare System Response to Homelessness: A System of Last Resort* at 8 (Johns Hopkins Institute for Public Policy Studies, Nat'l Conference on Homeless Children and Youth, Apr. 25-28, 1989).

197. See *supra* note 171, on New York's "recoupable advance" policy, and *infra* notes 203-206, on a discussion in one decision about the administrative characterization of the disastrous consequences of normal economic hardship as "foreseeable."

relationship between housing costs, the possible economic reasons for displacement from housing, and the financial resources available to an indigent person. One, *Hardman v. D'Elia*, demonstrates the operation of New York's policy to cover housing emergencies through recoupable advances of an AFDC recipient's "shelter allowance," the separate part of the monthly check specifically allocated towards shelter.<sup>198</sup> The plaintiff and her children, all AFDC recipients, were evicted despite their having paid their rent. Presumably, although the decision does not so indicate, they had exhausted their shelter allowance. They received supplemental assistance to secure a new apartment— not through EANFC, but through an advance on the next month's shelter allowance. As a condition of receiving the grant, the mother agreed to allow the Department of Social Services to recoup ten percent of her grant per month until she had paid the advance back.<sup>199</sup> One does not need to read too many facts into the opinion to surmise that this was not exactly an arms'-length agreement. The trial court had vacated the recoupment, a decision that the appellate court affirmed. The decision was based not so much on the coercive aspect of the recoupment "agreement," but Department's failure to prove that the children's needs could actually be served by 90% of their usual monthly grant.<sup>200</sup>

Given the relationship between welfare grants and representative rent in the New York metropolitan area, it is of course doubtful that the Hardman family's needs could be met at 100% of their grant.<sup>201</sup> But it takes little to

198. Thirty-six AFDC jurisdictions have "fully consolidated" their need and payment standards, so that they neither separately enumerate the basic living expenses such as food, shelter, and heat which the total grant is supposed to cover, nor pay these amounts separately. New York state is one of the remaining jurisdictions which lists shelter, among other needs, separately. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, Report No.22 (*Need and Amount of Assistance, Basic Needs Standards-Consolidated*) and Report No.25 (*Need and Amount of Assistance; Shelter Separate from Basic Needs*) (1989). New York issues a separate check for shelter to the recipient, which, as of January 1988, amounted in New York City to \$286 for a family of four. *Jiggetts v. Grinker*, No.34995, 148 A.2d 1, 543 N.Y.S.2d 414 (N.Y. App. Div. 1989). The regulation which essentially treats an advance of a shelter allowance as a resource which must be exhausted before emergency assistance will be granted is codified at 18 N.Y. COMP. CODES R. & REGS. 37202(a)(2).

199. *Hardman v. D'Elia*, 141 A.D.2d 544, 545, 529 N.Y.S.2d 156, 158 (N.Y. App. Div. 1988), *appeal dismissed*, 74 N.Y.2d 716, 541 N.E.2d 430 (1989).

200. *Id.* at 544-45, 529 N.Y.S.2d at 158.

201. Each of New York's social service jurisdictions sets its own shelter allowances, and therefore its own monthly AFDC payment. Data published by the House Committee on Ways and Means lists 1989 grant levels for New York City and Suffolk County only, and not for Nassau County, the home of the Hardman family. But these levels, at \$638 and \$775 per month respectively for a family of four, in the first case barely cover and in the second do not meet HUD's fair market rents (FMRs) for even two bedroom apartments for the New York City and Nassau-Suffolk metropolitan areas: \$593 and \$789. For the figures on monthly AFDC grants, see Committee Staff,

imagine the danger to a family's stability from the loss of one-tenth of a monthly income of four to five hundred dollars, and of which, as I noted earlier, a full 60% may go immediately towards shelter. Clearly, the court in *Hardman* had no trouble with the arithmetic, or with the possible consequences of a reduction in so limited and inflexible an income: an inability to pay rent or other bills in the future, another eviction, and another application for extraordinary relief. The policy that the court enunciated, and that the defendant violated— that of tempering any recoupment decision with an appraisal of the family's potential financial suffering— is not only humane, but economically realistic. It also effectively nullifies the recoupment policy.

Just one tiny case among what is undoubtedly a plethora of unreported instances, *Hardman* tells us nothing about the times when a welfare recipient, perhaps unrepresented, never challenges a recoupment; or about how often a county decides against exacting one; or about how often evictions or homelessness ensue from the operation of the policy. But the case does raise a question: if a recoupment can be so readily excused, by a showing of hardship— which is so readily made— then why continue it? Why require of AFDC families the formalism of borrowing against their future grants, to cover unpredicted, catastrophic needs? Not only is the policy potentially honored more in the waiver than in the observance, but it is arguably illegal under the principles enunciated in *Blum* that require equitable treatment of AFDC and non-AFDC applicants for emergency assistance. Unlike Ms. Hardman, an applicant who is not already receiving and will never receive AFDC, but who may temporarily qualify financially for emergency assistance, will never have to pay anyone back.<sup>202</sup>

The reason for insistence upon the recoupment policy can only be that the concern about promoting equity and standardization *within* the welfare program demands it. The basic monthly welfare shelter allowance is supposed to take care of housing needs; theoretically, to give more to anyone who, for whatever reason, cannot stretch that allowance to meet those needs confers an unfair advantage on that one recipient. "Equity" requires that the favored individual restore the balance by paying the windfall back. As we have seen, this rationale is based on a myth: the adequacy of the shelter allowance. Since the grant may never meet the rent, trying to cover what are in effect permanent housing needs through a temporary supplement to the welfare grant can mean playing a perpetual game of catch-up.

*Nelson v. Grinker*<sup>203</sup> illustrates two problems arising from the expedient

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Background Data and Materials on Programs within the Jurisdiction of the House Committee on Ways and Means, 101st Cong., 1st Sess. 541 (1989). For the HUD Fair Market Rents for Existing Housing, see 54 Fed. Reg. 39868-39921 (Sept. 28, 1989).

202. For a discussion of the *Blum* case, see *supra* notes 172-176 and accompanying text. For a discussion of possible outcomes of *Quern v. Mandley*, which suggests that *that* Supreme Court decision may sanction precisely the sort of policy enacted by New York state, see *supra* note 168 and accompanying text.

203. *Nelson v. Grinker*, 138 Misc.2d 60, 524 N.Y.S.2d 131 (N.Y.Sup.Ct.1987).



of using extraordinary welfare grants to meet on-going housing needs. One consists of another application of this principle of welfare equity, this time extended to non-welfare recipients. The other problem shows how the *Quern* decision has allowed misconceptions about the avoidability of destitution and homelessness to be translated into an emergency assistance policy totally inappropriate to the provision of shelter.

The facts demonstrate the narrowness of the economic margin between security and disaster. The Nelsons for the 1950's— Ozzie and Harriet—made manageable monthly payments on a split-level ranch; these Nelsons for the 80's owed one thousand dollars to their landlord for back rent, and were about to be evicted. The landlord agreed to a stay in the execution of the warrant for possession, to give Mr. Nelson time to pay the money back. Immediately afterwards, both Mr. and Mrs. Nelson lost their jobs: he through a disabling back injury, she through quitting to care for her dying mother. When, after not receiving the back rent as planned, the landlord re-activated the eviction, the Nelsons applied for funds under the federal emergency assistance program. The New York City Department of Social Services (DSS) found them to be ineligible, for two reasons: their situation was predictable, and thus controllable, and therefore did not satisfy a key statutory criterion; and the amount needed to alleviate the problem exceeded the welfare shelter allowance, a regulatory criterion.<sup>204</sup>

In reversing the administrative denial of assistance, the court discussed both the agency's refusal to categorize the Nelson's situation as an "emergency," and the Nelsons as "destitute," and the wisdom of its former regulation limiting emergency housing assistance to the level of the welfare shelter allowance. The court saw the "emergency" over which the Nelsons had no control as their unpredictable loss of earned income after they agreed to a repayment plan. The court relied on these facts to find eligibility, and did not evaluate the merits of the agency's claim that the original eviction, arising as the anticipated consequence of a repeated failure to pay rent, was "controllable" and thus not an emergency.<sup>205</sup> As for the former shelter allowance policy under which the Nelsons' application was originally denied, the court interpreted its revision as proof of its irrationality.

As the court noted, "Here is an opportunity for DSS to avoid the creation of yet another homeless family."<sup>206</sup> The court recognized in the Nelsons' circumstances a case study not only of how people become homeless, but of how they end up in welfare hotels. If evicted for want of an emergency assistance grant, one denied because the amount was greater than the shelter

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204. *Id.* at 61, 524 N.Y.S.2d at 132. During the pendency of this litigation, the city's Human Resources Administration revised this guideline to allow a one-time emergency assistance grant to avoid eviction, conditioned on a showing that the applicant owed less than a year's worth of back rent, was without other resources, and had received no similar assistance within the preceding twelve months. *Id.*

205. *Id.* at 62, 524 N.Y.S.2d at 133.

206. *Id.* at 63, 524 N.Y.S.2d at 133.

allowance, then the Nelsons might well have found their only housing in the Hotel Martinique. Although the city would not pay one thousand dollars to clear up the Nelsons' back rent, and enable them to stay in their apartment, it would have proceeded to spend double that amount every month, under its special needs rate for hotel shelter.

We have seen here the operation of two welfare policies in the context of housing emergencies— not the physical destruction of dwellings by fire or flood, but the physical ejection of occupants who cannot pay rent. One policy implies that the uninnocent victims of strictly structural economic emergencies do not deserve the state's help. The other demands a strict equality among all recipients of the state's largesse. Both policies rest upon the assumption that profligacy precedes poverty; that those who cannot cover housing expenses through a welfare grant must somehow have wasted the check, and may not, without conditions, receive any more; and that the only possible justification for needing more money is the misfortune caused through totally unpredictable natural disaster. As the New Jersey Supreme Court perceptively noted in a different context, the consequence is "a paradox for administrators who are paying thousands of dollars in rent under EA while required to maintain that the standards of need under AFDC is theoretically being met in that flat AFDC grant."<sup>207</sup> The policies combine to guarantee hotel living, the biggest waste of all, and an outcome perhaps covertly regarded as fitting punishment for those perceived to be unable to manage their money.

## **VI. STRATEGIES FOR ASSERTING ENTITLEMENTS TO SHELTER THROUGH EMERGENCY ASSISTANCE**

One area in which the states' freedom to set criteria for emergency assistance has clearly affected the types and recipients of relief has been in providing emergency shelter relief for families. Consistently over the past five years, the District of Columbia has assisted two and a half times as many, and New York state more than ten times as many, families through each jurisdiction's EANFC program as has California.<sup>208</sup> Criteria for the District of Columbia's emergency assistance program are broad, and were, until recently, more or less ad hoc, allowing emergency shelter assistance to both AFDC and non-AFDC recipients.<sup>209</sup> In the wake of the *Blum* decision, New York's

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207. *Franklin v. New Jersey Department of Human Services*, 111 N.J. 1, 10, 543 A.2d 1, 5 (1988).

208. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, EMERGENCY ASSISTANCE: NUMBER OF CASES, FISCAL YEAR 1985, (June 16, 1986). In 1985 there were 734 in California, 968 in the District of Columbia, and 4,473 in New York. For fiscal 1988, these totals were 619 in California, 1,690 in the District, and 8,335 in New York. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, EMERGENCY ASSISTANCE: NUMBER OF CASES, FISCAL YEAR 1988 (Apr. 10, 1989)[hereinafter "CASES"].

209. OFFICE OF FAMILY ASSISTANCE, DEP'T OF HEALTH AND HUMAN SERVICES, CHAR-

Social Services Law now provides relief commensurate with the federal outlines, to both AFDC and non-AFDC families.<sup>210</sup> It may be unduly obvious to say so, but it is clear that those states which have exercised their options under *Quern* to impose the fewest restrictions on categories of recipients and of relief have incurred the heaviest expenses for emergency shelter.

California's example illustrates the options left open to states for structuring federal financial participation in emergency relief. Until February 1, 1988, when amendments to California's Welfare and Institutions Code provided up to a month of emergency shelter assistance to AFDC and AFDC-eligible families as a "non-recurring special need,"<sup>211</sup> California paid only limited amounts for family shelter. AFDC families who had exhausted all other resources were eligible for up to no more than \$600 of one-time assistance under the special needs program, for emergencies "caused by sudden and unusual circumstances beyond the control of the needy family." "Emergency housing needs," and replacement of clothing and furniture were the only acceptable special needs under the statute.<sup>212</sup> Emergency assistance under the EANFC program was available to only two categories of recipients: to two-parent AFDC families, in order to maintain the child in a home, and to children for emergency shelter care *outside* of the home, in instances of alleged abuse or neglect.<sup>213</sup> Neither provision assisted the one-parent destitute family already cast out on the street. That the latter provision not only failed to help such families, but actually encouraged the fracturing of homeless families for the purpose of sheltering the child, was lost on neither legislators nor litigators. Liberalization of California's welfare code closely followed litigation that successfully challenged the practice of providing emergency shelter assistance only in the guise of emergency shelter, or foster

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ACTERISTICS OF STATE PLANS FOR AID TO FAMILIES WITH DEPENDENT CHILDREN UNDER TITLE IV-A OF THE SOCIAL SECURITY ACT 66 (1988)[hereinafter "STATE PLANS"]. Under the Emergency Shelter Services for Family Program, D.C. CODE ANN. § 3-206.3 to 3-206.8 (1988), *see supra* note 19 and accompanying text, the District has stated intentions to control the physical conditions of shelter, for the AFDC and non-AFDC families residing in shelter paid for by EANFC. Under the more recently enacted Emergency Assistance Program Act of 1988, *see supra* note 182, the District has clarified financial eligibility requirements for AFDC and non-AFDC applicants, and provided a broad range of coverable emergencies fully consistent with the federal EANFC statute.

210. STATE PLANS, *supra* note 209, at 204.

211. Stats. 1987, c.1353, § 1, eff. date Feb. 1, 1988, *codified at* CAL. WELF. & INST. CODE § 11450 (f)(2), (f)(2)(A) (West Supp. 1989).

212. CAL. WELF. & INST. CODE § 11450 (e)(2) (West Supp. 1989) superseded by Stats. 1987, c.1353 § 1, *codified at* CAL. WELF. & INST. CODE Sec. 11450 (West Supp. 1989).

213. STATE PLANS, *supra* note 209, at 45. CAL. WELF. & INST. CODE § 16500, *et seq.*, provide for the sheltering of homeless children, but the legislation exists in the context of removal of allegedly abused or neglected children from their homes.

care.<sup>214</sup> California's special needs expenditures for emergency temporary shelter assistance now approach in amount the EANFC funds that New York now spends for the same purpose.<sup>215</sup>

In contrast, Maryland, with a total of 6,440 children documented as homeless for school-year 1988-89,<sup>216</sup> reported only 1,859 emergency assistance cases for the average month of FY 1988.<sup>217</sup> The reason rests simply with the highly restrictive scope of benefits under the states' emergency assistance plan (for a family, limited to one grant of \$250, receivable only once in twelve months) and the equally restrictive definition of emergency need (that resulting from a court-ordered eviction or physical put-out from an on-going living arrangement).<sup>218</sup> A recent directive from the state's Department of Human Resources has narrowed further the applicability of even these criteria to exclude a homelessness shelter from the definition of "on-going living arrangement," and consequently to deny assistance to families or individuals in their transition out of shelter into more permanent living arrangements.<sup>219</sup> Maryland's statutes and regulations exemplify how much

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214. See *Hansen v. Department of Social Services*, 193 Cal.App.3d 283, 238 Cal. Rptr. 232, 236 (Cal. Ct. App. 1987). Advocates had long noted that the effect of California's restriction of emergency shelter assistance to children eligible to enter foster care was to offer families the brutal choice of remaining homeless, or finding shelter for their children in a foster family or institution. HOUSE COMM. ON GOV'T OPERATIONS, HOMELESS FAMILIES: A NEGLECTED CRISIS, H.R. No.982, 99th Cong., 2d Sess. 9 (1986) (quoting Gary Blasi, staff attorney, Legal Aid Foundation of Los Angeles); Emergency Aid to Families Program: Hearing before a Subcomm. of the House Comm. on Gov't Operations, 99th Cong., 2d Sess. 33 (1986)(Statement of JoAnne Ross). For a discussion of the *Hansen* decision, which was based on statutory construction, in the larger context of asserting the fundamental right to family integrity as a basis for claiming a right to family shelter, see Comment, Homeless Families: Do They Have a Right to Integrity? 35 UCLA L. REV. 159, 196 (1987).

215. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, USE OF THE EMERGENCY ASSISTANCE AND AFDC PROGRAMS TO PROVIDE SHELTER TO FAMILIES 16 (Report to Congress, July, 1989.)

216. Of these children, 1,524 lived with their mothers in domestic violence shelters; 1,847 were placed in motels; and 2,902 were sheltered in emergency and transitional shelters. PUBLIC SERVICES BRANCH, MD. STATE DEP'T OF EDUC., 2 (1988-89).

217. CASES, 1988 *supra* note 208.

218. MD. ANN. CODE art. 88A, § 131-137 (1985 & Cum. Supp. 1989); MD. REGS. CODE tit. 07, § 07.03-08.05B (1989).

219. Department of Human Resources, Income Maintenance Administration, *IMA Inquiry Response No. OPA 89-5-AFDC: Definition and Verification of an Eviction for EA/AFDC* at 2 (Sept. 1, 1988). My thanks to my fellow contributor, Peter Sabonis, for alerting me to and sending to me a copy of this policy statement. That my access to this information came from a friend, and not from a published source, underscores a problem in researching welfare law issues. The enormous discretion given to state legislatures under judicial interpretation of the Social Security Act, and then to state agencies under traditional concepts of administrative deference, means that most state welfare law is not in fact published: it is the creature of unpublished internal

freedom states enjoy under *Quern* to apply highly selective criteria to their emergency assistance programs— and to exclude many needy families from help.

With the latitude given to states in the content of their emergency assistance programs, it should come as no surprise that the litigation asserting entitlements to emergency shelter for families is scattered in theme. Two main types of cases emerge: those that do challenge the substance of the state's plan for delivering emergency shelter through EANFC or through the special needs component of AFDC; and those that strive to impose order on the actual delivery of emergency assistance. The best examples of the former were litigated in state courts in New York and in New Jersey. For examples of the latter, one can look to federal court, used as a forum for articulating entitlements not only to due process under the federal constitution, but also to specific treatment under the Social Security Act. Success under both scenarios has been mixed, but issues of abstention and, ostensibly, standing have clouded the results of the cases brought in the federal arena.

The case of *Maticka v. City of Atlantic City*<sup>220</sup> successfully challenged what we have already seen to be the omnipresent assumption that except in the case of cataclysmic occurrences, individuals should be able to manage on fixed incomes. Plaintiffs in *Maticka* were denied emergency shelter based on the Division of Welfare's interpretation of the state EANFC regulation. The regulation allowed the award of emergency assistance if families were homeless due to "fire, flood or other similar natural disaster, or (when) because of an emergent situation over which they had no control or opportunity to plan in advance."<sup>221</sup> The Division interpreted many situations under which tenants might have notice of imminent dispossession, such as condemnation or eviction, as ones in which tenants enjoyed an "opportunity to plan" because they received formal notice. Plaintiffs opposed this conclusion under the theory that its implied "fault" standard thwarted the purpose of the state's AFDC statute to care for the dependent child.<sup>222</sup> Despite the long history of EANFC litigation as I have described it, none of the parties argued over the general applicability of principles of AFDC to an evaluation of the state's emergency assistance program.<sup>223</sup> Referring specifically to the existence of extensive documentation of the unavailability of affordable housing, the court found it to

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agency memoranda and guidelines, and thus not uniformly accessible. This agency directive is just one example of an unpublished policy which will affect the implementation of the state's emergency assistance program, but which is only well-known to those practicing in the field. The policy at issue in *French v. Mansour*, *supra* note 185, similarly was contained not in published statutes or regulations, but in the social services agency's Emergency Needs Manual.

220. 216 N.J. Super. 434, 524 A.2d 416 (N.J. Super. Ct. App. Div. 1987).

221. *Id.* at 439, 524 A.2d at 418 (N.J.A.C. 10: 82-5.10(c)).

222. *Id.* at 440, 524 A.2d at 419.

223. *Id.* at 446, 524 A.2d at 423.

be "unrealistic and therefore arbitrary and unreasonable" for the Division to equate formal notice of impending disaster with control over it.<sup>224</sup> The court held that an assessment of "opportunity to plan" had to include an evaluation of "realistic capacity to plan for substitute housing within the notice period."<sup>225</sup> In response to the decision in *Maticka*, the state Department of Human Services subsequently incorporated the "realistic capacity to plan" standard into its criteria for eligibility for emergency shelter assistance.<sup>226</sup>

Plaintiffs in *Maticka* also addressed the ninety day regulatory maximum imposed for placement in emergency shelter. On this claim, the court also appraised the housing situation and the state's attempts to provide other solutions for homelessness, and remanded the case to the respondent state Department of Human Services for rulemaking subject to factual development.<sup>227</sup> After the state had indeed revised the regulation to increase the limit on shelter stays for families to five months, homeless families sought to raise the limit again. In *Franklin v. New Jersey Department of Human Services*,<sup>228</sup> plaintiffs argued that the state's regulatory limit violated statutory mandates under the state's AFDC and EANFC plans for the provision of shelter; and both substantive and, impliedly, equal protection provisions of the New Jersey state constitution.<sup>229</sup>

The court denied all of plaintiffs' claims. Disposing quickly of the constitutional claim, it interpreted the state constitution as guaranteeing negative rights to freedom from interference with acquiring the means of subsistence, and not as bestowing affirmative rights.<sup>230</sup> The court refuted that the state's AFDC plan required any particular type of benefit at all, let alone a quality or duration of emergency shelter.<sup>231</sup> The court instead gave its most prolonged attention to the equal protection issue: the claim that, where families with limited incomes face housing with unlimited rents, to eject homeless families from emergency shelter after five months is in no rational way related to the goal of preventing homelessness. Here the court quoted at length from reports and testimony from the state's Department of Human Resources. The majority was persuaded of the rationality of diverting funds from makeshift hotel housing to more permanent solutions. As significantly, the majority noted the Department's guarantees that case by case evaluation would as-

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224. *Id.* at 451, 524 A.2d at 425.

225. *Id.* at 452, 524 A.2d at 426.

226. *Id.* at 456, 524 A.2d at 428.

227. *Id.* at 456, 524 A.2d at 428.

228. 225 N.J. Super. 504, 543 A.2d 56 (N.J. Super. Ct. App. Div. 1988), *aff'd* 111 N.J. 1, 543 A.2d 1 (1988).

229. *Id.* at 61. Both the Superior Court Appellate Division and the New Jersey Supreme Court addressed these claims, and disposed of them similarly. I will refer in the discussion to the substantively more comprehensive review given by the Appellate Division.

230. *Id.* at 68.

231. *Id.* at 62.

sure that families could still fall back upon emergency shelter as a last resort.<sup>232</sup>

However, ultimately reasonable the goal of channeling public funds into real housing for homeless people, in her dissent, Judge Pressler found the interim result—the displacement of homeless families until such housing could be secured—less than reasonable. She suggested, first, that the maintenance of homeless families in emergency shelter until the state could locate permanent housing for them would constitute simply an extension of policy already articulated administratively.<sup>233</sup> Second, she offered that, even without such clear policy, the court could exercise its power as “*parens patriae*” to safeguard vulnerable citizens.<sup>234</sup> But, despite plaintiffs’ losses, it is instructive to remember what had happened in the process: in *Maticka*, the court had refused to sanction automatically a three month limit on emergency shelter, and had demanded serious showings from the respondents that their plans to limit emergency shelter were motivated by genuine desires to find more constructive ways of ending homelessness.

As a result of the different circumstances of the succession of plaintiffs-intervenors in New York’s *McCain* case, that litigation aired every issue possible in any controversy over governmental obligations to provide temporary shelter: the existence of any entitlement; the extent, both in duration and quality, of any that existed; and notice of the entitlement and access to it. The procedural course of the case ordained that at no time in the course of the litigation would any court issue a final ruling on the merits on any of the significant constitutional or statutory claims for relief.<sup>235</sup> But both the Appellate Division and the Court of Appeals ventured further than their New Jersey counterparts had to venture in order to support the claim of an entitlement to shelter, the insistence upon uniform administration of EAF as a component of the AFDC program, and the power of the judiciary actually to dictate some of the terms of a welfare program.

The Appellate Division found preliminarily persuasive plaintiff-intervenors’ claim that the state’s emergency assistance to families (EAF) plan im-

232. *Id.* at 64-6.

233. *Id.* at 76. In a case concerning a regulatory limit of one hundred days on emergency shelter, under the state’s AFDC special needs program, a Connecticut trial court has recently ruled that a proper interpretation of the state’s policies and its AFDC statute requires the state to maintain families in emergency housing until it can find permanent units for them. *Savage v. Aronson*, CV NH 8904-3142 (Conn. Super. Ct., Sept. 20, 1989), appeal pending, (Conn. App. Ct. filed Sept. 29, 1989), appeal taken by Conn. Sup. Ct., No. 13796.

234. *Id.* at 79. Judge Pressler’s leap of faith has precedent, although not an undisputed one. In one of the earliest “right to shelter” cases, the West Virginia Supreme Court of Appeals expanded the reach of the state’s adult protective services statute to guarantee destitute, homeless persons shelter as “incapacitated adults” — over a vigorous dissent. *Hodge v. Ginsberg*, 303 S.E.2d 245, 250 (W.Va. 1983).

235. For a description of the procedural history of *McCain v. Koch*, see *supra*, note 131.

posed a duty upon New York City to provide shelter.<sup>236</sup> Further, it found unpersuasive the city's claim that *Quern v. Mandley* allowed it to offer something less than what was mandated in the state's AFDC plan.<sup>237</sup> In addition, the court suggested that AFDC's "equal treatment" regulation required that access to that benefit be open to all eligible families.<sup>238</sup> In reinstating the first preliminary injunction to issue in the case, the Court of Appeals held that a court may indeed promulgate substantive standards, in this case, for quality of life in a shelter, in the absence of any administrative guidance.<sup>239</sup>

Several themes unite these examples. In the New York and New Jersey cases, instances in which the content of EANFC plans was at issue, there was no dispute over the applicability of the substantive and structural principles of AFDC to the programs. New Jersey's strong expressions of legislative intent to prevent homelessness,<sup>240</sup> and New York's constitutional and legislative provisions for the care of indigent people,<sup>241</sup> enabled the courts to ignore the *Quern* rule that states enjoy unlimited discretion to administer their emergency assistance programs. These factors seemed to prove equally compelling in the state courts' willingness, up to a point, to give real, not token, scrutiny to how well emergency assistance regulations effectuated the purposes of the AFDC plans—ultimately, particularly in the *Franklin* case, a highly empirically based, common sense determination. What cannot be discounted, of course, are the facts bespeaking brutal need: evidence replete in the records of these cases, and amply narrated in the decisions. Clearly, it is the combination of strongly articulated state welfare policy and wrenching portraits of deprivation that freed these courts to examine usually sacrosanct administrative directives.

Advocates for homeless families in New Jersey faced comparatively benign legal conditions in which to litigate the borders of the emergency shelter assistance program: favorable statements of legislative purpose, public commitments of support from the governor and commissioner of human services, and some level of appropriations. Where more basic issues are at stake—the actual provision of the shelter itself, of any kind, for any period of time—plaintiffs have upon occasion sought mandates from federal court for en-

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236. *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720, 728 (N.Y. App. Div. 1986).

237. *Id.* at 729.

238. *Id.* at 728.

239. *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918, 919 (1987). At this stage, and, indeed, when the New York Supreme Court issued its preliminary injunction, New York's Commissioner of Social Services had issued regulations containing more comprehensive living standards for shelters. *Id.* at 920.

240. See *e.g.*, the summary of legislation and judicial opinions concerning the state's obligation to provide housing and shelter to different constituencies, *Maticka v. City of Atlantic City*, 216 N.J. Super. 434, 448-450 (N.J. Super. App. Div. 1987).

241. See discussion in *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720, 728-730 (N.Y. App. Div. 1986).



forcement of the emergency assistance program as an entitlement under the Social Security Act. It can be argued that the very indeterminacy of case law interpreting the place of emergency assistance within the welfare program has made this necessary. Where states such as New Jersey legislatively articulate strong housing policies, advocates can feel confident of some success in litigating expansive emergency assistance rights in state courts. Where such policies do not exist, then advocates may have nothing to point to in order to hedge the discretion of legislatures or social services agencies in designing emergency assistance programs.

In several federal cases in New York, filed before and during the litigation of the *McCain* case, litigants sought to establish similar entitlements to shelter under the emergency assistance state plan. Predicated primarily on using 42 U.S.C. § 1983 to assert claims directly under the Social Security Act, these suits ended in settlement or dismissal, the latter for abstention due to the pendency of *McCain*.<sup>242</sup> The history of two similar federal district court cases filed on behalf of indigent homeless families in the District of Columbia suggests that, in addition to the desire to emphasize federal principles of administrative accountability, one motivation to bring "entitlement to shelter" cases in federal district court is to call federal defendants to account. Simple access to cash and in-kind forms of emergency assistance, already conceded as available under the District's emergency assistance plan, was the issue in *Feeling v. Barry*. The *Feeling* case remained in litigation due to the District's repeated failures to comply, some two years after the settlement.<sup>243</sup> In *Russell v. Barry*, where the problem was repeated processless denial of emergency shelter to homeless families, the plaintiffs alleged violations of the *Feeling* decree, the AFDC and EANFC statutes, and the District's own Right to

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242. In *Koster v. Webb*, 598 F.Supp.1134, (E.D.N.Y. 1983), *motion for class cert. granted sub nom* *Koster v. Perales*, 108 F.R.D. 46 (E.D.N.Y. 1985), stipulation of settlement entered 82 Civ. 2892 (E.D.N.Y. April, 1987), the court ruled that the plaintiffs had stated a survivable claim that the defendants had violated the federal emergency assistance regulations and the Social Security Act by failing to provide plaintiffs with emergency shelter services as designated in the state plan. *Koster v. Webb*, 598 F.Supp. 1134, 1137. The final settlement set out detailed standards for how families would gain initial access to emergency housing, for standards of housing, and for monitoring. *Koster, supra*, Stipulation of Settlement at 2-5. Plaintiff's case in *Canaday v. Koch*, 608 F.Supp. 1460 (S.D.N.Y. 1985), *aff'd sub nom* *Cannady (sic) v. Valentin*, 768 F.2d 501 (2d Cir. 1985) was dismissed on the grounds of abstention, since *McCain v. Koch*, reviewing similar issues, was pending. One commentator has noted how prone litigation concerning homelessness would be to dismissal for reasons of abstention; that the components of emergency assistance programs are highly discretionary and state law-based would presage this result. Spector, *Finding a Federal Forum: Using the Stewart B. McKinney Homeless Assistance Act to Circumvent Federal Abstention Doctrines*, 6 L. & INEQUALITY 273 (1988).

243. See *supra* note 182, for the procedural history of *Feeling v. Barry*.

Overnight Shelter Act.<sup>244</sup> But plaintiffs also sued the Department of Health and Human Services under the Administrative Procedure Act. They claimed that the federal defendants failed in their responsibility, dictated in their regulations, to correct these abuses because they failed to properly monitor the District's EANFC program.<sup>245</sup>

The *Russell* case also settled, with a detailed set of standards for the processing of emergency shelter applications and with the District defendants' agreement to promulgate regulations to implement the Overnight Shelter Act. One should note that nearly two years passed between the filing of the settlement and the publication of the notice of final rulemaking.<sup>246</sup>

Enforcing these agreements is a dispiriting process, undertaken painfully in the face of local government's apparent recalcitrance or inability to comply either with the federal welfare law or with its own substantive shelter law. In the *Feeling* case, resort to federal court made sense to enforce systemic relief under federal law, particularly in the absence of substantive local law conferring a right to shelter.<sup>247</sup> In *Russell*, that local cause of action had been established. Yet the District's consistent failures to implement responsible welfare programs made the call to a higher enforcement authority attractive. The necessary trade-off in the *Russell* settlement was the uncertainty of whether the court would rule the federal government accountable, against the seeming certainty of the substantive relief gained.

The disposition of *Russell* by settlement meant that the federal court never ruled on the issue of the federal defendants' monitoring responsibilities. Prior to *Russell*, in *Coker v. Bowen*,<sup>248</sup> advocates had relied on this strategy as their major cause of action. *Coker* implicated a national strategy: to use geographically diverse examples to show that administrative discretion in running emergency shelter assistance programs had resulted in administrative inequities; and that the responsibility to enforce equitable administration lay not in the local administrators of state plans, but in the federal officials who control the funding.

In *Coker*, individual plaintiffs, indigent families in Baltimore and Chicago, were denied emergency shelter and other emergency services despite their

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244. *Russell v. Barry*, Complaint at 20-21, Civil Action No. 87-2072 (D.D.C., complaint filed July, 1987).

245. *Id.* at 22.

246. *Russell v. Barry*, Order, Civil Action No. 87-2072, (D.D.C. December 21, 1987); District of Columbia, Department of Human Services, *Notice of Final Rulemaking*, Feb. 3, 1989.

247. When *Feeling* was filed, the District was contesting the validity of Initiative 17, the D.C. Overnight Right to Shelter Act, subsequently *codified at D.C. CODE § 3-601 et seq.* See *District of Columbia Board of Elections & Ethics v. District of Columbia*, 520 A.2d 671 (D.C.App. 1986).

248. *Coker v. Bowen*, 715 F. Supp. 383 (D.D.C.1989), *appeal pending sub nom.* *Coker v. Sullivan*, No. 89-5155 (D.C. Cir., filed, 1989).

eligibility under the states' emergency assistance plans.<sup>249</sup> Two national organizational plaintiffs also brought the action, and the complaint also details other states' denials of service to eligible clients.<sup>250</sup> The complaint emphasizes the Secretary's abdication of his monitoring responsibilities for the AFDC program, as extended to the EANFC program as a part of AFDC. These responsibilities include the duties to review case files and administrative records for substantive compliance with the emergency assistance plan; to examine quality control systems to guarantee correction of both erroneous awards *and* denials of assistance; to audit finances; to discuss instances of non-compliance with state officials; and to enforce compliance, impliedly by the withholding of funds.<sup>251</sup> The plaintiffs concluded that lapses in pursuing these oversight and enforcement obligations led to inequities in the administration of the state plans. One example given was Illinois' failure to assist needy non-AFDC families, although its plan did not differentiate between poor families on the basis of their status as welfare recipients—a clear violation of the "equal treatment" regulation at 45 C.F.R. § 233.10(a).<sup>252</sup> The conceptual basis of the entire argument was that the emergency assistance program is part of the structure of the Social Security Act, and, as such, requires national, uniform enforcement regardless of state-to-state variations in state plans.

This position was not without some ancillary conceptual support in case law. The Appellate Division in *McCain v. Koch* had noted that the "Social Security Act required mandatory enforcement of the State Plan" as applied to emergency assistance.<sup>253</sup> What differed here was the identity of the enforcement source. By relying on the Administrative Procedure Act, and not asserting rights of action under the Social Security Act, advocates in *Coker* emphasized the centrality of federal government responsibility in the administration of welfare programs, even where the sovereignty of state governments to control the content of those programs remains, up to the limit of broadly articulated federal purpose, indisputable.

The district court dismissed plaintiffs' case in *Coker*, on the basis of that part of standing doctrine which requires a nexus between the plaintiff's harm and the defendant's conduct. The court did not disclaim all enforcement duty on the part of federal officials. But it said that only *required* aspects of state plans were subject to such enforcement, because states could drop "optional" elements of their plans at will without fear of federal censure. Although the court's differentiation between what is a required and what is an

249. *Coker v. Bowen*, Complaint at 16-19, Civil Action No.86-2448, (D.D.C., complaint filed September 2, 1986).

250. *Id.* at 4-5.

251. *Id.* at 9-15. The regulatory duties at issue are set forth at 45 C.F.R. § 201.10(a-c); 45 C.F.R. § 201.13(b); and 45 C.F.R. § 213.1(b).

252. *Id.* at 17.

253. *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720, 728 (N.Y. App. Div. 1986).

optional component of a state plan is unclear, it stated that emergency shelter was an optional component which could be withdrawn, and that a state could withdraw from the entire emergency assistance program altogether.<sup>254</sup> The rationale seemed to be that, if the state could escape action to enforce a service simply by eliminating the service, and do that with impunity, then federal monitoring is an empty threat, and cannot possibly alleviate the harm done to plaintiffs. Conversely, a failure of federal monitoring could not possibly have caused directly the plaintiffs' injury.

The reasoning may be legally intricate, but it is factually fallacious. Illinois' action in the *Quern* litigation—to withdraw completely from the emergency assistance program rather than comply with federal strictures—offers slight historical precedent for the notion that states treat discretionary federal programs lightly.<sup>255</sup> The firestorm that followed HHS' threatened withdrawal of EANFC funds for hotel housing strongly suggests that no jurisdiction faced with hundreds of unhoused families will cavalierly drop that desperately-needed source. The legal premise is also in doubt. AFDC is also a voluntary program. But there is no question of the federal government's capability to dictate the structural, and, where applicable, the substantive features of state welfare legislation under AFDC, and, if necessary, to enforce that control through withdrawal of funds.<sup>256</sup> The court's implication—that the governing structures of AFDC apart from the substantive aspects of the program do not apply to emergency assistance—only make sense if one accepts that *Quern v. Mandley* separates the emergency assistance program completely from its parent program. If that reading is correct—and readings of *Blum v. Bacon* suggest that it is not—then it is difficult to see where homeless families can go for relief, if they are unfortunate enough to live in states that inadequately police their own emergency assistance programs.

The cases in which plaintiffs tried to enforce uniform distribution of EANFC benefits, and cases in which plaintiffs sought to change the level of the "routine" monthly benefit, attack different parts of the same assumptions that dictate the structure of the AFDC program. As we have seen, plaintiffs filed the EANFC cases as enforcement actions, with the goal of restricting the discretion usually accorded to the givers of emergency assistance, and to make them as accountable to clearly defined programmatic standards as they had become in the "regular" welfare program. The challenge posed by the "standard of need" cases is more obvious: to question not only the substantive economic givens underlying each state's payment standards, but the

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254. *Coker v. Bowen*, 715 F. Supp. 383, 390 (D.D.C. 1989).

255. For a description of the facts in that litigation, see *supra* notes 163-164 and accompanying text.

256. See, e.g., *King v. Smith*, 392 U.S. 309, 333 n.34 (1968): "There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid."

procedural assumptions about the complete discretion state legislatures assume in setting the standards.

For me to write about the standard of need cases in this article is superfluous and presumptuous. No one is better qualified to write about this area than Steve Banks, the architect of the litigation culminating in one of several "standard of need" decisions.<sup>257</sup> Others, also involved in the same and similar litigation, have described the tribulations involved in this strategy.<sup>258</sup> In the context of the emergency assistance programs, a serious question remains of whether this strategy, or the one that attempts to regularize the ad-

257. Two of the lawsuits — *Massachusetts Coalition for the Homeless v. Dukakis*, 400 Mass. 806, 511 N.E.2d 603, and *Jiggetts v. Grinker*, 139 Misc.2d 476, 528 N.Y.S.2d 462 (N.Y. Sup. Ct. 1987), 148 A.2d 1, 543 N.Y.S.2d 414 (N.Y. App. Div. 1989), *rev'd* No. 46 (N.Y. April 3, 1990), challenged the shelter components of the states' consolidated AFDC grants. In *Massachusetts Coalition*, the procedural history of which was extremely complex, the trial court agreed with plaintiffs' original assertion that the assessment of both components of a welfare payment — the official standard of need and the actual payment — was under state law the responsibility of the Department of Public Welfare, which had violated its duty under state law to maintain payments at a level sufficient to support a child in her own home. *Massachusetts Coalition*, No. 80109, Slip. Op. at 14-15, (Mass. Super. Ct., June 26, 1986). Subsequently, the trial court ruled that the DPW's placement of families in transitory shelter was an illegal substitute for the provision of sufficient income to enable children to live in actual homes. *Massachusetts Coalition*, No. 80109, Slip Op. at 12-13 (Mass. Super. Ct., January 5, 1987). The Supreme Judicial Court ruled that it was the duty of the legislature, not of the agency, to set standards of need, but the obligation of the agency to provide enough assistance to enable a child to live at home, not in a shelter. *Massachusetts Coalition*, 511 N.E.2d 603, at 609, 611 (1987). In *Jiggetts*, in overruling the Appellate Division, the Court of Appeals held that § 350(1)(a) of the New York Social Services Law required the state welfare agency to get shelter allowances commensurate with actual housing costs. *Jiggetts v. Grinker*, No. 46 Slip Op. (N.Y., April 3, 1990).

Petitioners in the consolidated petitions ruled on in *In the Matter of Petitions for Rulemaking*, 223 N.J. Super. 453, 538 A.2d 1302 (N.J. Super. Ct. App. Div. 1988), *cert. granted* 111 N.J. 638, 546 A.2d 550 (1988), *aff'd* 117 N.J. 311, 566 A.2d 1154 (1989), were recipients of AFDC and of the state's program of general assistance. The court in this litigation also found that the state's public welfare agency was statutorily obligated to adjust the standard of need. 223 N.J. Super. at 460, 538 A.2d at 1306. Similarly, in *Boehm v. Superior Court of Merced County*, 178 Cal. App. 3d 494, 223 Cal. Rptr. 716 (1986), a challenge to the county's decrease in the level of state-funded general assistance, the court held that the state Welfare and Institutions Code compelled counties to determine their assistance grants according to the results of studies in the cost of necessities. *Boehm* at 501, 223 Cal. Rptr. at 720.

258. For other descriptions and analyses of the strategy of relying on state welfare statutes and state constitutions to attack the sufficiency of the shelter components of state standards of need, see Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367, 381-8 (1988), and Morawetz, *Welfare Litigation to Prevent Homelessness*, 16 N.Y.U. REV. OF L. & SOC. CHANGE 565, 572-581 (1987-88).

ministration of EANFC as a welfare program is likely to be more beneficial as a means to force the provision of shelter or longer term housing.

As originally pleaded, both *Russell v. Barry*, and *Coker v. Bowen* were premised on the theory that EANFC is an AFDC program: that its structure, like AFDC, marries federal and state interests; that its administration, like AFDC, is ultimately conformable to federal standards and enforceable by the withholding of federal dollars. Given the gravity of the federal benefit now at stake under the emergency program—the provision of shelter—these conclusions seem desirable. Shelter is too important to be subject to a multitude of different standards of urgency, or eligibility. “Emergency assistance” as a one-time, transitory expedient creates no expectation of continued aid, and thus no entitlement; “emergency shelter,” as it continues for weeks and months, in the absence of no better governmental solution for the housing of poor people, simultaneously creates an expectation and cripples the ability of the shelter resident to seek anything better. As such, emergency shelter should also be protected as an entitlement, meaning that it should be subject to the same due process protections statutorily guaranteed in the SSA.<sup>259</sup> For purposes of standardization and predictability, it makes good litigative sense to argue that EANFC should be run according to the principles of AFDC: equal treatment of all recipients, and due process protections to all. However, the disadvantages of arguing that EANFC is an appendage of the AFDC program are visible from the possibilities raised in *French v. Mansour*: many aspects of the AFDC program bear as little relation to the realities of economic need as do the value-laden eligibility criteria of some state EANFC programs.

## **IX. CONCLUSION— IF NOT THE RIGHT TO SHELTER, PERHAPS THE RIGHT TO STABILITY?**

In discussing concepts of communal participation, Robert Fullinwider has described Benjamin Constant’s use of a highway as metaphor for the liberal view: individuals journeying individually, along a common road.<sup>260</sup> The road metaphor applies cruelly and accurately to homeless people. The very statutes and judicial interpretations which offer any support to indigent families do so with the purpose not of providing permanency of place, but of providing aid for the journey. The genesis of federal emergency assistance to families, as I described earlier, lay in plans to aid migrant workers, whose poverty and presence could be counted on to be transitory, with the assistance crafted to keep it that way. *Shapiro v. Thompson*, the Supreme Court case that comes the closest to validating a jurisprudence of need, actually

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259. See 42 U.S.C. § 602(a)(4) (1985), which requires the state to contain in its plan provisions for fair hearings for applicants for AFDC in the event of denial or termination of benefits. 42 U.S.C. § 606(e) is silent on appeals procedures.

260. Fullinwider, *Citizenship and Welfare*, in *DEMOCRACY AND THE WELFARE STATE* 276 (A. Guttman ed. 1988).

safeguards not the right to subsistence, but the right to travel in order to secure it.<sup>261</sup> Given the relatively secure status of AFDC as an entitlement, as compared to housing, it has made sense to look to the rules of that program as a way of obtaining shelter. But, as we have seen, to try to coax housing out of a system so conceptually ground in mobility, transiency, and rootlessness begs failure.

One vaunted goal in providing public assistance of any type is to decrease dependency by limiting the assistance. By providing stable housing, or incomes adequate to retain it, we might appear to be encouraging dependency. But in fact, by stabilizing the environment within which families can be educated and trained for self-sufficiency, government would in that way be more likely to produce families capable of subsisting without the government's assistance. Michael Walzer has noted the partial "decommodification" of some services, such as medical care, because the providers of these services are specialized and privileged, and because receipt of the service is essential to membership in the community.<sup>262</sup> Critics who espouse the "decommodification" of housing, the insulation of housing from market forces, do so for similar reasons.<sup>263</sup> Provision of housing is expensive, and accessible without assistance to only a few; without the base of physical stability that housing gives, no one can exercise the liberal democratic prerogatives of membership—mobility and choice. In a sense, what one can advocate for is not, given our jurisprudence, a right to subsistence, or a right to shelter, but a right to stability—the means of acquiring what we persist in seeing as economic goods. Without that adjunct right, one can indeed check out, but one can never leave.

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261. *Shapiro v. Thompson*, 394 U.S. 618, 629-631 (1968).

262. WALZER, *SPHERES OF JUSTICE* 86-91 (1983).

263. See e.g., WORKING GROUP ON HOUSING OF THE INSTITUTE FOR POLICY STUDIES, *A Progressive Housing Program for America* 25 (1987).