WELFARE LITIGATION TO PREVENT HOMELESSNESS†

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INTRODUCTION

The 1980s have witnessed an extraordinary increase in homelessness among families with children.[1] These families' lives are completely disrupted. Such families depend on temporary shelter that is often the most makeshift, squalid, and overcrowded of accomodations.[2] They are exposed to disease and other health hazards.[3] Their children are discriminated against in education.[4]

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1. In New York City, the number of homeless families with children seeking emergency shelter grew from 280 in July 1981 to 4560 in November 1986. *See* NEW YORK CITY SERVICES TO HOMELESS FAMILIES, A REPORT TO THE MAYOR App. A (Oct. 1983) (1981 statistics); A SHELTER IS NOT A HOME — REPORT OF THE MANHATTAN BOROUGH PRESIDENT'S TASK FORCE ON HOUSING FOR HOMELESS FAMILIES 16 (Mar. 1987) (1986 statistics). Recent statistics from other cities show substantial increases in the number of homeless families in need of shelter throughout the country. A twenty-nine city survey conducted in 1987 found that the demand for shelter had increased an average of thirty-one percent in a two-year period in ninety-seven percent of the cities surveyed. UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HOMELESS FAMILIES IN AMERICA'S CITIES 5 (May 1987) [hereinafter MAYORS' REPORT]. Nine out of ten cities surveyed expected the number of homeless families to continue to increase. *Id.* at 4.

2. *See* McCain v. Koch, 117 A.D.2d 198, 205-07, 502 N.Y.S.2d 720, 724-25 (1st Dep't 1986), *rev'd in part*, 70 N.Y.2d 109 (1987) (describing conditions in homeless shelters); J. KOZOL, RACHEL AND HER CHILDREN 102-10 (1988).

3. The record in the *McCain* case outlined the hazardous conditions in New York's emergency housing system, including filthy conditions diagnosed as the cause of sores and inflamed rashes. Supplemental Appendix, Record at 273-74, 1885, McCain v. Koch. The conditions in these welfare hotels no doubt contributed to their high infant mortality rates. The New York City Department of Health has found that these hotels have higher infant mortality rates than

They lose all semblance of normal family life.[5] Indeed, the prospect of raising children in shelters for the homeless leads some parents to place their children in foster care, thereby cutting the child off from both parents and siblings.[6] As Jonathan Kozol has written, our policies affecting homeless children are creating a new underclass which is not only beset with the material problems of extreme poverty but also with virtually no basis to hope for a better life.[7]

The growth in homelessness coincides with both a drop in the level of benefits provided to poor families and a statutory and judicial retrenchment in protections afforded to applicants for, and recipients of, public assistance. Between 1975 and 1987, benefit levels for a family of three declined by an average of sixty dollars per month in real terms.[8] In twelve states, the value of benefits declined by over one hundred dollars per month.[9] There is not a sin-

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the City's poorest neighborhoods. Basler, *Infant Death Rate Is High in Welfare Hotels*, N.Y. Times, June 10, 1986, at B3, col. 1.

4. The MAYORS' REPORT notes that seventeen of the twenty-nine cities surveyed listed "unstable school attendance and a lack of access to education" as a serious problem. MAYORS' REPORT, *supra* note 1, at 7. The specific problems observed included difficulties in registering children in schools, difficulty traveling to schools from temporary shelters, and children being sent home from school because they were dirty or had frequently changing residences. *Id.* Furthermore, the conditions at their temporary residences make it difficult for these children to do their homework or get a sufficient night's rest. The principal of one New York City school estimates that a quarter of the children from hotels for the homeless are between two and three grades behind their peers in academic skills. *See* J. KOZOL, *supra* note 2, at 87.

5. The very structure of shelters for the homeless makes it difficult for parents to fulfill their traditional role with their children. As one observer has noted: "The parents lose dignity, partly because the staff takes over and runs the lives of the family, tells them when to get up, when to go to bed, where they can play, where they can't." M. HOPE & J. YOUNG, THE FACES OF HOMELESSNESS 246 (1986).

6. These children are hardly protected from the lack of stability inherent in systems of housing for the homeless. In New York City, children placed in foster care have been left to sleep overnight in offices for days at a time or have been subjected to placements that change on a daily basis. *See* Doe v. New York City Dep't of Social Services, 670 F. Supp. 1145 (S.D.N.Y. 1987). Advocates for the homeless in New York have unsuccessfully argued that the state has a statutory duty under preventive services laws to keep families together rather than allow children to be put in foster care when their parents face homelessness. *See* Grant v. Cuomo, 73 N.Y.2d 820, 537 N.Y.S.2d 115 (1988). *But cf.* Martin A. v. Perales, 138 Misc. 2d 212, 524 N.Y.S.2d 121 (N.Y. Sup. Ct. 1987) (city must consider whether housing services are appropriate preventive services).

7. Kozol provides a compelling description of the impact of homelessness on the outlook of poor children:

> The consequence [of homelessness] is seen in the stifling of hope among poor children. People in shelters feel that they are choking. The physical sense of being trapped, compacted, and concealed — but, even more, the vivid recognition that they are the objects of society's avoidance or contempt — creates a panic that they can't get air enough into their lives, into their lungs. This panic is endemic. The choking sensation is described repeatedly by many adults and children. Physicians often hear the words "I can't breathe," in interviews with homeless patients.

J. KOZOL, *supra* note 2, at 39.

8. CENTER FOR LAW AND SOCIAL POLICY, ANALYSIS OF 1987 BENEFIT LEVELS IN THE PROGRAM OF AID TO FAMILIES WITH DEPENDENT CHILDREN (1987).

9. *Id.* These twelve states include New York and New Jersey, two of the states in which there has been recent litigation over the adequacy of benefit levels. *See infra* text accompanying notes 51-62, 65-68.

gle state that provides a combined allowance of Aid to Families with Dependent Children (AFDC) benefits and food stamps that is equal to the poverty level. Meanwhile, courts have upheld increasingly restrictive provisions for determining eligibility for welfare benefits and procedures for their reduction and termination.[10]

The correlation between growing homelessness and restrictive welfare policies is far from coincidental. Studies of homeless families demonstrate that these families often became homeless because they were unable to pay their rent.[11] Welfare policies can contribute to this problem in numerous ways: benefit levels may be set too low to allow a family to maintain its housing; the manner in which the welfare program is administered may lead to the improper denial, termination, or reduction of benefits, thereby causing families that otherwise should be able to meet their housing costs on current welfare budgets to lose their housing nonetheless; substantive provisions for determining eligibility may operate to exclude persons who are in fact needy and who face homelessness in the absence of aid; and sanctions for noncompliance with program requirements may be set at levels where imposition of the sanction

10. In 1981, Congress passed a package of legislation that constituted a full scale assault on the way in which AFDC eligibility is determined. The new rules generally presume that families have income available to them that might not actually be available and that expenses are no more than statutorily prescribed fixed maxima. The presumed income provisions of the Omnibus Budget and Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357, effectively repealed many judicial decisions that had mandated that income calculations be based on income that is actually available to the family. *See infra* notes 112-13 and accompanying text. For example, in Shea v. Vialpando, 416 U.S. 251 (1974), a unanimous Supreme Court ruled that states cannot arbitrarily limit work expense deductions to a fixed dollar amount. Section 2301 of OBRA overturned this case law by imposing a statutory maximum on work expense deductions. 42 U.S.C. § 602(a)(8)(A)(ii) (1982). Similarly, in Van Lare v. Hurley, 421 U.S. 338 (1975), the Supreme Court held that income calculations must be based solely on income that is actually available to the family or that is available through legally enforceable obligations to support the family. Section 2306(a) of OBRA effectively overturned this decision by requiring states to presume that income from stepparents living in the same home is available to the family even if the stepparent has not adopted the child and has no legally enforceable obligation under state law to support the child. 42 U.S.C. § 602(a)(31) (1982).

11. In Massachusetts, the state has acknowledged that low welfare benefits cause homelessness. *See* Massachusetts Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 808, 511 N.E.2d 603, 605 (1987). In the *Jiggetts* litigation, by contrast, New York City, the defendant, is arguing that there is no proven correlation between low grant levels and homelessness. *See* Reply Affirmation of George Gutwirth (Apr. 20, 1987), at ¶¶ 9, 10, Jiggetts v. Grinker, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988) (No. 40582/87) [hereinafter Gutwirth Affirmation]. In support of this position, the City relies on preliminary studies which it conducted in welfare hotels where City officials interviewed families about their prior housing. As plaintiffs argued in *Jiggetts*, such studies distort the degree to which welfare policies cause families to lose their homes and become homeless. Reply Memorandum in Response to Defendants' Supplemental Briefs (Apr. 20, 1987), at 9-15, Jiggetts v. Grinker, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988) (No. 40582/87). For example, many families in the City's study reported that their most recent residence was a temporary residence where the family lived doubled up with relatives or friends. Gutwirth Affirmation, *supra*, at App. A. These families did not give eviction for nonpayment as the reason for leaving their most recent residence, despite the fact that they may have been evicted for nonpayment of rent from their most recent permanent home. *Id.* Even with this distortion, many families interviewed by the City stated that they had left their most recent accomodation because they could not pay the rent. *Id.*

forces the family to lose its shelter. In short, any rule or procedure that has the effect of keeping a family from paying its rent can result in homelessness.

Ironically, the homelessness caused by restrictive welfare policies may be the key to challenging the policies themselves. This Article suggests that, in each major area of welfare litigation, the severe consequences of homelessness for families with children provide a basis for the courts to play a more active role in reviewing the legality of welfare policies.[12] Although the courts have begun to play this role with respect to enforcing state standards for assessing the adequacy of welfare benefits, some courts have adopted a very restrictive view of their power to provide meaningful relief. With respect to other areas of welfare litigation, courts have not yet examined the implications of homelessness on the appropriate degree of scrutiny for evaluating welfare policies. This Article suggests some ways in which the prevention of homelessness should be considered in enforcing welfare rights.

Part I discusses the use of litigation to enforce state standards of benefit adequacy and the way in which the dire consequences of homelessness allow for the enforcement of state statutory and constitutional adequacy standards that have previously remained unenforced by the courts. Part II explores how homelessness provides a basis for more rigorous scrutiny of welfare policies under due process and equal protection analysis.

I.
ENFORCEMENT OF STATE STANDARDS OF BENEFIT ADEQUACY

In light of the drop in real welfare benefit levels to meet housing costs, one of the most direct strategies for prevention of homelessness is litigation that will increase the funds available to welfare families. Such funds provide families with the financial wherewithal to secure and maintain housing.

In prior years, welfare litigation to increase benefit levels met with limited success.[13] Recent cases, which rely on the clear inadequacy of benefit levels in light of homelessness, have been more successful although courts have been reluctant to provide extensive relief.[14] In restricting their remedial orders, some courts have failed to examine the implications of homelessness on the

12. Similar arguments can be made with respect to the threat of homelessness for single adults. There is good reason, however, to treat the plight of children separately. First, a number of statutory arguments for judicial intervention under state law are based on laws that relate directly to aid to poor children. *See, e.g., infra* text accompanying note 66. Second, it is more obvious in the case of children that the persons suffering the harm bear absolutely no responsibility for their predicament. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982). Although arguments that blame the victim ring hollow in any context, no one could even credibly attempt to blame poor children for the homelessness they face.

13. *Compare* RAM v. Blum, 77 A.D.2d 278, 432 N.Y.S.2d 892 (App. Div. 1980) *and* Weinhandler v. Blum, 84 A.D.2d 716, 444 N.Y.S.2d 3 (App. Div. 1981), *appeal withdrawn*, 56 N.Y.2d 649 (1982) (rejecting challenges where the real value of benefits had declined because of inflation) *with* State *ex rel.* Ventrone v. Birkel, 54 Ohio 2d 461, 377 N.E.2d 780 (1978) (finding that $43.00 per month maximum grant violated statutory adequacy standard).

14. *See infra* text accompanying notes 72-84.

power of the courts to intervene and provide meaningful relief. The same logic that led these courts to find the adequacy of state benefit standards to be justiciable provides grounds for more vigorous enforcement of state standards.

A. State Standards of Benefit Adequacy

Although the express purpose of the federal AFDC statute[15] is to protect children by enabling them to maintain a normal family life,[16] the statute provides no safeguard against inadequate benefits. On the contrary, the federal statute contemplates that states may set benefits that are inadequate.[17] Under the federal statute, states are required to calculate a standard of need and then to determine what percentage of this need they will meet through their standard of payment. Federal law places virtually no restraint on these calculations. The only federal limitation on the calculation of the standard of need is that it cannot fall any lower than the dollar level of benefits provided by the state in 1969.[18] Once this standard of need is computed, however, the state is not constrained from setting a standard of payment that is insufficient to meet the state's own standard of need. In essence, the only federal requirement related to benefit levels is that states be honest about any decision to set benefits at a level lower than those existing in 1969. As a result, the only meaningful source of law for litigation on the amount of benefit payments is state statutory and constitutional law.

In many states, standards of adequacy for welfare benefits predate the enactment of the federal AFDC program. Although there was no national program for aid to families until 1935, there was a nationwide movement several decades earlier to protect mothers and children from poverty.[19] This movement established basic standards for benefit adequacy that remain a part of the legislation of some states.[20] These statutes do not set dollar amounts for benefits but instead set the standards against which the adequacy of benefits may be measured.

The early statutes have been particularly helpful in recent litigation because they grew out of a movement to allow poor children to be raised in the home.[21] Prior to the passage of these laws, the primary form of public support for poor children was to place them in institutional settings, such as orphanages.[22] Public assistance in the form of widows' pensions was designed to protect children from being placed in such institutional settings. As President

15. 42 U.S.C. §§ 601-615 (1982).

16. *Id.* § 601 (1982).

17. *See* Rosado v. Wyman, 397 U.S. 397 (1970); 42 U.S.C. § 602(a)(23) (1982).

18. *Id.*

19. *See* G. ABBOTT, FROM RELIEF TO SOCIAL SECURITY 262-89 (1966).

20. *See infra* text accompanying notes 27-28.

21. G. ABBOTT, *supra* note 19, at 263.

22. *See* S. TIFFIN, IN WHOSE BEST INTEREST?: CHILD WELFARE REFORM IN THE PROGRESSIVE ERA 63-64 (1982).

Theodore Roosevelt explained in convening the White House Conference on the Care of Dependent Children in 1909:

> Home life is one of the highest and finest products of civilization. Children should not be deprived of it except for urgent and compelling reasons. Surely poverty alone should not disrupt the home.[23]

The first point of the fourteen-point program adopted by the 1909 Conference was that "[c]hildren of worthy parents or deserving mothers should, as a rule, be kept with their parents at home."[24] Within six years, twenty states had adopted legislation to further this goal by providing assistance to needy single mothers.[25] By 1935, when the federal AFDC legislation was passed, all but two states had adopted such legislation.[26]

Many of the early statutes to protect needy children did not set dollar amounts for benefit payments.[27] Instead, these statutes were phrased in terms of providing a level of benefits that would be adequate to raise a child properly or to raise a child in the home. In states where they remain on the books, these statutes have provided the basis on which courts have invalidated state benefit schedules that are so low as to cause homelessness.[28] Other states have adopted similar guidelines for setting either the standard of need or the standard of payment for state AFDC benefit levels since the institution of the national AFDC program.[29]

Just as state statutory provisions may contain a direct duty to provide adequate benefit levels, so too state constitutional provisions may establish standards requiring that benefits be sufficient to prevent homelessness.[30] The

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23. *See* Conference on the Care of Dependent Children, Proceedings, at 5 (quoted in D. SCHNEIDER & A. DEUTSCH, HISTORY OF PUBLIC WELFARE IN NEW YORK STATE, 1867-1940 (1941)).

24. *Id.* at 6.

25. *See* G. ABBOTT, *supra* note 19, at 263.

26. *Id.*

27. The states with no ceiling on benefit levels in 1934 were: Arizona, Colorado, Kentucky, Maine, Maryland, Massachusetts, Mississippi, New Jersey, Rhode Island, Virginia, Wisconsin, the District of Columbia, and Hawaii. In New York, benefits were limited to the cost of institutional care before 1935. *See* G. ABBOTT, *supra* note 19, at 276-77 n.36. This limitation was eliminated by legislation enacted in 1935. 1935 N.Y. Laws, ch. 547.

28. Two of the states in which there has been litigation over the adequacy of AFDC benefits had statutes without any dollar limitation when the AFDC program first began. The statute at issue in Massachusetts Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 511 N.E.2d 603 (1987), dates from 1913. It provides that "[t]he aid furnished shall be sufficient to enable such parent to bring up such child or children properly in his or her own home." MASS. GEN. LAWS ANN. ch. 118, § 2 (West 1969). The New York statute at issue in *Jiggetts* provides that "[a]llowances shall be adequate to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child. . . ." N.Y. SOC. SERV. LAW § 350.1(a) (McKinney 1983). This section of the statute remains essentially unchanged since 1935. *See* 1935 N.Y. Laws, ch. 547, § 1.

29. *See, e.g.*, ARK. STAT. ANN. § 20-76-407 (1987); CONN. GEN. STAT. ANN. §§ 17-82d (West 1988); FLA. STAT. ANN. § 409.185 (West 1986).

30. Unlike the federal Constitution, which is phrased almost entirely in negative terms, state constitutions often include affirmative duties and rights. *See, e.g., Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1399-1400 (1982)

phenomenon of homelessness may be especially important in obtaining enforcement of these constitutional guarantees since they tend to speak in broad terms. With these provisions, it may be a good deal easier for a court to conclude that a system which causes homelessness fails to meet the applicable constitutional standard, even if it is difficult to state precisely what the constitutional standard requires.

A number of state constitutions contain provisions pertaining to aid for the poor. Under the New York State Constitution, for example, "the aid, care, and support of the needy" are a constitutional obligation of the state.[31] Similarly, the Kansas Constitution provides that the counties of the state "shall provide, as may be prescribed by law, for those inhabitants who by reason of age, infirmity or other misfortune, may have claims upon the aid of society."[32] The Alabama Constitution provides that "[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."[33] The North Carolina Constitution provides that "[b]eneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian [sic] state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare."[34] Like the state statutory standards for benefit adequacy, applicable state constitutional provisions may be worded somewhat vaguely and fail to provide a specific standard for measuring the adequacy of benefits.[35] These types of constitutional provisions may be enforceable through litigation if the court can determine that the relevant branch of government has reneged on a constitutional obligation. The court may determine

(observing that "[t]hirty-nine state constitutional free speech provisions are phrased in terms of an affirmative right . . . [while] the negatively phrased first amendment by its terms merely places a restraint on government action"). Although the existence of such affirmative duties does not, in itself, mean that the state courts are empowered to enforce state constitutional norms, there is a powerful argument for judicial enforcement of norms designed to protect the poor and the disenfranchised. Because of the powerlessness of the poor, and especially of poor children, legislative bodies cannot be trusted to fully enforce poor children's rights under state constitutions.

31. N.Y. CONST. art. XVII, § 1. *See* Bernstein v. Toia, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977) (state's adoption of a schedule of maximum payments for shelter does not violate Article XVII); Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977) (Article XVII contains a mandatory duty to aid the needy which is enforceable by the courts). *See generally* Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272 (1986).

32. KAN. CONST. art. VII, § 4.

33. ALA. CONST. art. IV, § 88.

34. N.C. CONST. art. XI, § 4.

35. As with statutory standards of benefit adequacy, state constitutional provisions for aid to the poor vary from state to state. In some states, the constitution reflects a direct hostility to payments to the needy. In Texas, for example, the state constitution originally outlawed the use of state funds to aid the needy, except for "indigent and disabled confederate soldiers and sailors . . . and [] their widows in indigent circumstances." TEX. CONST. art. III, § 51. It was not until 1933 that Texas adopted a constitutional amendment permitting the expenditure of some state funds to aid the needy. *Id.* art. III, § 51-a (1933). Even then, the Texas constitution continued to impose dollar limitations on such aid. *Id.*

either that the responsible branch has set standards of assistance that do not meet constitutional norms or that it has failed to make a constitutionally mandated determination of need.[36]

B. Enforcement of State Adequacy Standards

Although state adequacy provisions often set a standard higher than the mere prevention of homelessness,[37] the problem of homelessness caused by inadequate benefits has made courts more willing to enforce these state law mandates. First, as a matter of proof, it is easier to establish that benefits which are so low as to cause homelessness violate applicable standards. Indeed, courts appear to consider it self-evident that state standards envision a standard of benefits sufficient to prevent homelessness.[38] Second, the imperative for judicial action is most clear when the claimed injury is immediate and irreparable in the absence of judicial action. The stark reality that children will suffer the irreversible consequences of homelessness has played a major part in encouraging courts to exercise their power to play at least some remedial role.

1. Recent Caselaw

Over the past few years there has been major litigation to increase benefit levels in Massachusetts, New Jersey, New York, California, and Florida.[39] These cases demonstrate that the horrors of homelessness can play a major

36. Where a constitutional provision, such as Article XVII of the New York State Constitution, *see supra* text accompanying note 31, creates a constitutional obligation on the part of the legislature to provide for the needy, the legislature's delegation of the authority to set benefit levels to an executive agency raises serious delegation issues. Here the legislature is delegating a specific responsibility entrusted to it by the constitution.

37. The New York statute, for example, speaks of benefits adequate to bring up the child "properly" with due regard for the child's "physical, mental and moral well-being." N.Y. SOC. SERV. LAW § 350.1(a) (McKinney 1983).

38. *See, e.g.*, Massachusetts Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 821, 511 N.E.2d 603, 612-13 (1987) (statutory duty to enable parent to bring child up in the home is not satisfied by keeping families together in shelters for the homeless; "[t]oday's emergency shelters may have more than a casual resemblance to almshouses whose use for needy families with children our remedial legislation was designed to end"); Jiggetts v. Grinker, No. 40582/87, slip op. at 45 (N.Y. Sup. Ct. Jan. 12, 1988), *official version reported at* 139 Misc. 2d 476, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988), *rev'd* N.Y.L.J. June 22, 1989, at 21, col. 3. (assistance that is insufficient to prevent homelessness "is the functional equivalent of no assistance at all"). In reversing the lower court's opinion, the Appellate Division did not question the allegations and evidence that New York's shelter schedule causes homelessness.

39. In the past several years, courts have issued decisions on the adequacy of AFDC benefits in Florida, Massachusetts, New Jersey, and New York. *See In re* 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); Jiggetts v. Grinker, 139 Misc. 2d 476, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988); Holmes v. Perales, No. 88-14777, slip op. (N.Y. Sup. Ct. Suff. Co. June 22, 1989); Godboldt v. Coler, No. 81-2862, slip op. (Fla. Cir. Ct. Apr. 20, 1987); Massachusetts Coalition for the Homeless v. Secretary of Human Services, 400 Mass. 806, 511 N.E.2d 603 (1987). A California appeals court issued a similar decision on benefits adequacy under the state's general assistance plan. *See* Boehm v. Superior Court of Merced County, 178 Cal. App. 3d 494, 223 Cal. Rptr. 716 (1986).

role in leading courts to find that the adequacy of benefits is a subject properly brought before the courts. In each of these cases, the courts found that they could adjudicate whether state benefit levels met standards set by state statutes, even though the statutes were often worded in fairly vague terms. As these cases and others progress through the courts, there is reason to hope that other jurisdictions will recognize the same concerns and find these claims appropriate for more expansive judicial relief.

In *Massachusetts Coalition for the Homeless v. Secretary of Human Services*,[40] the plaintiffs were homeless families who were unable to obtain permanent housing due to the low level of benefits provided under the state's AFDC program. The plaintiffs argued that low benefit levels violated the state's duty, under legislation enacted in 1913, to furnish aid which "shall be sufficient to enable such parent to bring up such child or children properly in his or her own home."[41] The trial court found that this duty had been violated and ordered the state welfare commissioner to develop a revised standard of assistance. In rejecting the state's argument that the state adequacy statute demands no more than that familes be kept together, the court spoke directly of the conditions facing homeless families. "Today's emergency shelters," the court noted, "may have more than a casual resemblance to almshouses whose use for needy families with children our remedial legislation was designed to end."[42]

The commissioner succeeded, however, in persuading the court that the statutory standard for adequacy required the state only to calculate an adequate budget, not actually to provide adequate benefits pursuant to that budget.[43] The court concluded that the legislature had implicitly repealed the authority of the state's department of welfare to set the standard of need through legislation directing appropriations.[44] Thus, the court's order required only that the welfare department calculate an adequate budget and that it bring any shortfall to the attention of the legislature.[45] Pursuant to this order, the commissioner recalculated the amounts required to meet the statutory standard.[46] The commissioner refused, however, to request additional funds from the legislature to pay benefits to meet that budget.[47] Instead, the commissioner informed the legislature of the shortfall from the budget and recommended alternative legislation on homelessness assistance.[48] The court ultimately ruled that the commissioner had no obligation to request funding to

40. 400 Mass. 806, 511 N.E.2d 603 (1987).

41. MASS. GEN. LAWS ANN. ch. 118, § 2 (West 1969).

42. 400 Mass. at 821, 511 N.E.2d at 612-13 (footnote omitted).

43. *Id.* at 818-20, 511 N.E.2d at 611-12.

44. *Id.* at 814-18, 511 N.E.2d at 609-10.

45. *Id.* at 824-25, 511 N.E.2d at 614.

46. Sard, *The Role of the Courts in Welfare Reform*, 22 CLEARINGHOUSE REV. 367, 385 (1988).

47. *Id.* at 386-87 n.80.

48. *Id.*

pay for adequate budgets.[49] Despite this limitation on relief, the Massachusetts litigation was successful in requiring the state human services department to calculate the actual needs of welfare recipients and appears to have been a force leading the executive department to request greater appropriations than it had initially intended to seek.[50]

The ongoing *Jiggetts*[51] litigation in New York State is based on a statute similar to the Massachusetts law. In *Jiggetts*, the plaintiffs are seeking to invalidate the schedule of allowances for housing expenses on the ground that they violate state statutory standards of benefit adequacy. As in Massachusetts, the crucial statutory provision was enacted in the early part of this century as part of the movement to provide poor mothers with sufficient funds to raise their children in the home. Under the New York law, "[a]llowances shall be adequate to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child . . . ."[52]

At the time they joined the litigation, each of the plaintiffs in *Jiggetts* faced imminent eviction and homelessness. Each was housed in an apartment for which the rent registered at a below-market level but exceeded the amount provided by the state's shelter allowance. Each had been denied assistance to pay back-rent because the rent level exceeded the state's schedule. The plaintiffs alleged that they had looked for substitute housing but could not find any within the price range of the shelter schedule.

The trial court denied the government's motion to dismiss the case and granted preliminary injunctive relief to the extent of ordering adequate shelter payments to the named plaintiffs.[53] The case is presently pending before the New York Appellate Division.[54] During the pendency of the appeal, the order requiring payment of higher benefit levels has been stayed.[55] The named plaintiffs continue to reside in their apartments, however, pursuant to the trial

49. Massachusetts Coalition for the Homeless v. Secretary of Human Services, Memorandum and Order, April 14, 1988.

50. *See* Sard, *supra* note 46, at 384.

51. 139 Misc. 2d 476, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988) (No. 40582/87).

52. N.Y. SOC. SERV. LAW § 350.1(a) (McKinney 1983).

53. Jiggetts v. Grinker, 139 Misc. 2d at 477-87, 528 N.Y.S.2d at 464-70.

54. While this Article was going to press, the Appellate Division reversed the trial court's decision in *Jiggetts* and dismissed the complaint. Jiggetts v. Grinker, N.Y.L.J., June 22, 1989, at 21, col. 3. The Appellate Division concluded that statutory adequacy provisions for children were conditioned by later legislation that delegated the task of computing shelter schedules to the State Commissioner of the Department of Social Services. Plaintiffs have sought leave to appeal to the Court of Appeals.

Meanwhile, a State Supreme Court justice in Suffolk County granted a class-wide preliminary injunction on claims parallel to the *Jiggetts* case. Holmes v. Perales, No. 88-14477, slip op. (N.Y. Sup. Ct. Suff. Co. June 22, 1989). Because Suffolk County is in the Second Department of New York's Appellate Division, the First Department's ruling in *Jiggetts* does not control the *Holmes* case.

55. Under New York law, a judgment against a governmental entity is automatically stayed on the filing of a notice to appeal. N.Y. CIV. PRAC. L. & R. § 5519(a)(1) (McKinney 1983).

court's separate order that their evictions be stayed pending payment of increased allowances by the state.[56]

There can be no question that the threat of homelessness has played a crucial role in the *Jiggetts* litigation. Prior to the filing of *Jiggetts*, the New York courts had rejected two direct challenges to inadequate benefit levels.[57] In *RAM v. Blum*,[58] the plaintiffs challenged legislatively set amounts for food, clothing and other expenses on the ground that the prescribed amounts violated the state's obligation, under the New York State Constitution, to care for the needy. In that case, the plaintiffs showed that the actual value of the benefits had been eroded by years of inflation. The Appellate Division upheld the dismissal of the complaint on the ground that it did not state a cause of action.[59] A subsequent case, *Weinhandler v. Blum*,[60] challenged state shelter allowances, which are set by the state Department of Social Services, as not meeting statutory and constitutional standards. As in *RAM*, the plaintiffs in *Weinhandler* relied on the fact that the levels of benefit payments had eroded substantially as a result of inflation. The court rejected the idea that inflation, coupled with proof that a sizable percentage of recipients paid rent exceeding the shelter schedule, was sufficient to prove that grant levels were inadequate.

The trial court's decision in *Jiggetts* distinguished this prior case law on the ground that it did not directly address the state's obligations to aid children. The litigation has been clearly affected, however, by the record evidence that the shelter allowances are so inadequate that they cause homelessness. Further, the irrationality of allowing families to become homeless has played a major role in the litigation. The record is replete with evidence that low allowances for shelter cause families to become homeless and that the city government spends far more to house families in emergency conditions than it would pay to keep them in their own homes.[61] Furthermore, at every stage of the case, the named plaintiffs faced eviction if preliminary relief was denied or

56. *Jiggetts*, 139 Misc. 2d at 486-87, 528 N.Y.S.2d at 470.

57. The New York Court of Appeals had also rejected a challenge to the state's adoption of a schedule of maximum benefit payments. *See* Bernstein v. Toia, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977).

58. 77 A.D.2d 278, 432 N.Y.S.2d 892 (1st Dep't 1980).

59. *Id.* The panel of five judges issued three opinions, none of which carried a majority of the panel. Justice Ross, joined by Justice Yesawich, concluded that the case was not justiciable since it constituted a direct attack on legislation. *Id.* at 893. Justice Fein wrote separately, finding that the case was justiciable but that on the record presented there was insufficient evidence to conclude that the legislature had violated its obligation under the state constitution. *Id.* at 895. Justice Sandler wrote a separate concurrence stating that the grant levels, while inadequate, were more than a mere "token" and were thus constitutional. *Id.* at 896. Justice Carro dissented, finding that the lack of an increase in the level of benefits amounts to an "unconscionable failure of the Legislature to implement the mandate of . . . the State Constitution." *Id.* at 897.

60. 84 A.D.2d 716, 444 N.Y.S.2d 3 (1st Dep't 1981), *appeal withdrawn*, 56 N.Y.2d 649 (1982).

61. *See* Affidavit of Michael Stegman, Jiggetts v. Grinker, 139 Misc. 2d 476, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988) (No. 40582/87); Affidavit of James Dumpson, Jiggetts v. Grinker, 139 Misc. 2d 476, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988) (No. 40582/87).

stayed. As Justice Smith observed during the oral argument on appeal, the posture of the tenants' pending housing cases meant that the real question before the court was whether these families should be removed from their permanent housing and consequently be made homeless.[62]

Litigation in Florida and New Jersey has addressed the state standard of need for determining eligibility for AFDC benefits rather than the actual level of benefit payments. Although the standard of need does not directly affect benefit levels, it does determine the scope of the class eligible to receive benefits.[63] Litigation on the standard of need can also serve as a first step in a strategy to increase benefit payments. Once the state is required to acknowledge the inadequacy of payment levels, there may be greater political pressure or additional litigation that can result in translating the concession of inadequate payments into actual increased benefits.[64]

The New Jersey case, *In re Petitions for Rulemaking*,[65] was framed as a petition to the New Jersey Department of Human Services to engage in rulemaking on the standard of need. To prove the need for rulemaking proceedings, the petitioners submitted evidence that the standard of need in New Jersey did not provide families with funds necessary to maintain a minimal standard of living. The petitioners argued that such insufficient funds violated the purpose of the state program, as expressed by statute. These purposes include: providing for dependent children "in their own homes or in the homes of relatives, under standards and conditions compatible with decency and health" and helping to "maintain and strengthen family life."[66]

62. Author's notes from oral argument in *Jiggetts v. Grinker*, Index No. 40582/87 (1st Dep't argued October 25, 1988) (on file at New York University Review of Law and Social Change).

63. The standard of need affects eligibility for benefits in six basic ways. First, under the gross income tests enacted in the 1981 OBRA amendments, as modified in 1984, Deficit Reduction Act, Pub. L. No. 98-369, § 2621, 98 Stat. 494, 1134 (1984), a claimant is ineligible for benefits if her gross income is equal to 185 percent of the state's standard of need. 42 U.S.C. § 602(a)(18) (1982 & Supp. IV 1986). Second, the "lump-sum" rule imposed by OBRA requires AFDC families to spend lump sum grants at a rate no greater than the state's standard of need. *Id.* § 602(a)(17). Third, under the OBRA amendments, the standard of need determines the extent to which earnings in one month disqualify the family from receiving benefits in subsequent months. *Id.* Fourth, pursuant to OBRA, the degree to which the state deems income from non-legally responsible adults depends on the standard of need. Only income exceeding the standard of need may be deemed as income. *Id.* § 602(a)(31). Fifth, the standard of need determines the extent to which the state must deem income from an alien's sponsor. *Id.* § 615(b)(1). Sixth, the standard of need determines whether a working family applying for AFDC may receive an "earned income disregard." *Id.* § 602(a)(8). Thus, litigation to increase the standard of need has the direct effect of increasing the number of families that are eligible for assistance as well as the amount of benefits families may receive.

64. *See* Sard, *supra* note 46, at 387. Indeed, the Supreme Court has recognized that a purpose of the federal requirement that states establish a standard of need is to require states "to lay bare the extent to which their programs fall short of fulfilling actual need; [and] to prod the States to apportion their payments on a more equitable basis." Rosado v. Wyman, 397 U.S. 397, 412-13 (1970).

65. 223 N.J. Super. 453, 538 A.2d 1302 (App. Div. 1988), *cert. granted*, 111 N.J. 638, 546 A.2d 550 (1988).

66. N.J. STAT. ANN. § 44:10-1(a)(1), (2) (West 1940 & Supp. 1988).

The New Jersey Department of Social Services denied the petitions for rulemaking. On appeal, the Appellate Division of the Superior Court of New Jersey reversed. The court did not discuss in detail the proof of the inadequacy of benefit levels, finding that it was fully recognized, even by the state, that the levels of assistance were insufficient to meet basic living needs. But the court's decision reflects a clear recognition that those denied adequate benefits faced homelessness. The court referred to its prior decision in *Maticka v. City of Atlantic City*[67] as a formal recognition of the consequences of the inadequacies of the state's AFDC program. *Maticka* directly addresses the problem homeless families face when attempting to locate permanent housing on their welfare budgets.[68]

The Florida litigation, *Godboldt v. Coler*,[69] succeeded in increasing the state's standard of need to amounts mandated by the court. The plaintiffs in *Godboldt* were recipients of AFDC and applicants who were adversely affected by the state's existing standard of need. They argued that the state's standard of need did not comply with the state's statutory requirement that the standard reflect "the full money value required to provide basic and special needs recognized by the state, as defined by the Legislature, as essential for applicants and recipients."[70]

On motions for summary judgment, the court found that there was no issue of material fact as to the inadequacy of the state standard of need. The most convincing evidence for the court included studies conducted by the state on homelessness and hunger in the state of Florida.[71] Perhaps most importantly, the state's Department of Health and Rehabilitative Services essentially sided with the plaintiffs in concluding that the standard was too low, arguing only that the court lacked the power to order an interim standard of need. The court rejected this argument, finding that it had inherent power to remedy violations of state law.

2. *The Role of Homelessness in Obtaining Expansive Relief*

A major limitation on the effectiveness of litigation under state adequacy statutes has been the reluctance of state courts to order relief that requires the expenditure of funds. In *Massachusetts Coalition for the Homeless*, for example, the court ordered that the state agency compute the amounts necessary to meet adequacy standards but did not order payment at a higher level pending legislative action.[72] Similarly, the posture of the New Jersey case meant that its relief was limited to ordering rulemaking proceedings to review the stan-

67. 216 N.J. Super. 434, 524 A.2d 416 (App. Div. 1987).

68. "The legislature has for decades recognized the problems of low-income families . . . [in] a housing market in which the poor and, increasingly, persons of moderate income as well, cannot compete for safe, sanitary, and decent shelter." *Id.* at 448.

69. No. 81-2862, slip. op. (Fla. Cir. Ct. Apr. 20, 1987).

70. FLA. STAT. ANN. § 409.185(4) (West 1986).

71. *Godboldt*, slip op. at 9 n.8.

72. 400 Mass. 806, 824, 511 N.E.2d 603, 614 (1987).

dard of need, rather than any direct increase in either the standard of need or the standard of payment.[73] The New York and Florida courts, in contrast, have ordered actual payment of benefits pending review of current standards by the agency or legislature.[74]

These cases suggest that despite the power of the homelessness issue in leading courts to scrutinize the adequacy of benefit levels, the very magnitude of the homelessness crisis can cause courts to be reluctant to provide meaningful relief. First, the courts appear to be reluctant to engage in the calculation of an interim benefit standard, partly because of the usually large increase necessary for benefits to be made adequate.[75] Second, even where the proper amounts have been calculated by the appropriate government agency, as they were in Massachusetts, the magnitude of the expenditure appears to make the courts reluctant to order the increased benefit payments across the board. The different outcomes in Massachusetts and Florida can, in part, be attributed to the fact that the Massachusetts case sought increases in the actual level of benefit payments, rather than the standard of need, and was therefore perceived as having a substantial budgetary impact.

To the extent that courts are reluctant to give class relief because increased benefit levels are perceived as encroaching on the legislature's ultimate authority to determine appropriations, these decisions miss the essence of an entitlement program.[76] Although some budget items may be expressed in

73. Litigation under California's general assistance plan shows that an order requiring the state to conduct rulemaking may be several steps removed from obtaining adequate relief for public assistance households. In California, there has been litigation in a number of counties challenging the adequacy of county general assistance schedules. In many of these cases, the court has ordered the county to conduct studies to determine the adequacy of county grant levels. *See, e.g.*, Boehm v. Superior Court, 178 Cal. App. 494, 223 Cal. Rptr. 716 (1986); Guidotti v. County of Yolo, No. 53884, slip op. at 2 (Cal. Super. Ct. Dec. 5, 1986), *appeal pending*. Although the courts have rejected studies that failed to account for some items of need, they have been reluctant to review the adequacy of the county computations of adequate grant levels or to set interim or final grant levels. *Id.* The result has been substantial delay in obtaining adequate allowances.

74. The New York court, however, refused to provide this relief on a class basis, even though the case is certified as a class action. The *Jiggetts* individual injunctions were vacated on appeal. N.Y.L.J., June 22, 1989, at 21, col. 3. However, class-wide relief was recently granted in another New York County Court. Holmes v. Perales, No. 88-14477, slip op. (N.Y. Sup. Ct. Suff. Co. June 22, 1989).

75. According to the undisputed evidence before the trial court in *Jiggetts*, the maximum shelter benefit would have had to be increased by approximately two-thirds. *See* Affidavit of Michael Stegman, ¶ 21, Jiggetts v. Grinker, 139 Misc. 2d 476, 528 N.Y.S.2d 463 (N.Y. Sup. Ct. 1988) (No. 40582/87). Of course, that hardly means that increasing shelter grants would have an adverse effect on the budget. Under New York regulations, shelter payments are made up to the amount of a family's rental obligation. N.Y. COMP. CODES R. & REGS. tit. 18, § 352.3(a) (1987). Since more than seventy percent of the poor renter households in New York City live in rent regulated apartments, *see* C. FELSTEIN & M. STEGMAN, TOWARDS THE 21ST CENTURY 90 (1987), the cost of increased shelter allowances would be controlled by the rent regulation presently in force. Furthermore, increased shelter benefits would result in cost savings resulting from reduced expenditures on emergency housing and care for the homeless.

76. In Massachusetts, the court concluded that a series of appropriations statutes had repealed the state department's authority to set budgets of assistance. *Massachusetts Coalition for*

terms of a precise outlay of funds, the budget for an entitlement program is by its nature based on a series of estimates as to the number of persons who will meet the eligibility requirements and the dollar payment that will be made to those individuals. If, for example, local economic circumstances change, the number of persons who are eligible will change. So too, changed circumstances may alter the benefit levels required to meet substantive standards under state law. In the absence of an express legislative statement that the legislature contemplates a given level of payments irrespective of the substantive standards imposed by state law, judicial refusal to enforce such standards actually operates to undermine the will of the legislature.[77]

Since it is hardly unusual for a court to order relief that involves the expenditure of some state funds, the important question is why benefit adequacy cases should make courts any more or less willing to order such relief. An unstated concern of the *Massachusetts Coalition for the Homeless* court appears to have been that remedying inadequate benefit levels is a more expensive proposition than that presented by the average case.[78] But as the *Jiggetts* court recognized, it is far from clear that allowing families to become homeless saves the government any money.[79] Housing such families in shelters for the homeless can cost more than ten times as much as maintaining them in their homes.[80] Furthermore, in regulated housing markets, each time a family becomes homeless, an extremely valuable asset — low-cost housing — is potentially no longer available to the poorest families.[81]

A concern raised more directly by the *Massachusetts Coalition for the Homeless* court is the competence of the judiciary to order relief when benefit levels have been found to violate applicable legal standards. As to this issue, the posture of the litigation may prove to be crucial. With the *Jiggetts* litiga-

the Homeless, 400 Mass. at 814-15, 511 N.E.2d at 609. In Florida, the court rejected a similar line of reasoning, relying on Florida state law provisions that prohibit implied repeals by appropriations statutes. Godboldt v. Coler, No. 81-2862, slip op. at 10.

77. Of course, state doctrine differs on the degree to which the appropriations process may override substantive legal provisions. In Massachusetts, the legislature expressly stated the dollar standard of need in its appropriations bill. The court held that this appropriations measure could override the state's substantive law. *Massachusetts Coalition for the Homeless*, 400 Mass. at 814-18, 511 N.E.2d 609-10. In New York, the state argued that the legislature had similarly acted to override the substantive standard. The New York court, however, was not faced with a clear statement from the legislature that the appropriations measure was intended to override substantive provisions on benefit adequacy. Furthermore, the appropriations bill did not contain a line item attributable to shelter costs. Even if the New York legislature had attempted to legislate a shelter schedule in an appropriations bill, there is ample precedent to refuse to allow substantive law to be amended through appropriations measures. *See* Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978).

78. One of the plaintiffs' counsel has estimated that an order mandating full relief would have "precipitated at least a minor budget crisis, since the added cost of the increased standard of need was estimated to be between $15 and $150 million annually." Sard, *supra* note 50, at 386 n.76.

79. Jiggetts v. Grinker, 139 Misc. at 483-84, 528 N.Y.S.2d at 468.

80. *Id. See also* Holmes v. Perales, No. 88-14477, slip op. at 4-5 (N.Y. Sup. Ct. Suff. Co. June 22, 1989).

81. *See infra* notes 88-89 and accompanying text.

tion, the court was in a unique position to provide relief to the plaintiffs. These families faced imminent, irreversible harm that would have occurred within days had the court failed to stay their evictions pending payment of adequate benefits. There could be no argument that these families should await the conclusion of a study by the state department or the legislature. In essence, the need for immediate preliminary relief helped prove the propriety of judicial intervention. In *Massachusetts Coalition for the Homeless*, in contrast, the named plaintiffs were already homeless. The irreparable harm they suffered was the same from one day to the next. Moreover, the court was not asked to step in and take immediate action to prevent this injury. Instead, it was asked to order the state department to calculate a budget of adequate benefits and then report to the legislature to obtain appropriations. Once the state department did its calculations and submitted its report to the legislature, the special role of the court became less clear. Although the court remained a forum in which it was possible to obtain more immediate relief, the state's submission of its report to the legislature, together with the state's proposal of alternative forms of relief, directly raised the question whether the courts could order an allocation of public funds rejected by the state executive and, arguably, implicitly rejected by the inaction of the legislature.

With respect to judicial enforcement of state constitutional provisions, there are additional separation of powers issues in obtaining adequate relief through the courts. Whereas the statutory cases pose the question whether the courts should enforce statutes, or whether the legislature should be responsible for overseeing the implementation of the legislature's own standards, the constitutional cases require the courts to address their competence to judge the legislature's adherence to state constitutional norms. A violation of state constitutional norms alone does not mean that the state constitution contemplates that the courts are to be the appropriate enforcing body. But here, again, state courts have indicated a willingness to play a more active role when the circumstances indicate a failure by the legislative branch to face up to its obligations. Thus, the New York Court of Appeals has held that it will review the adequacy of assistance to determine whether it is more than mere token assistance.[82] Even courts that have indicated an aversion to interfering with legislative enforcement of constitutional norms have, at the same time, indicated that they may enforce affirmative obligations when necessary. For example, while upholding a statute that required relatives to support their parents and adult children, the Alabama Supreme Court observed that "there is no way to force the legislature to perform [its] duty [to make adequate provision for the poor]."[83] But even while it shied away from adopting a broad reading of that state's constitutional provisions to protect the poor, the same court appeared to recognize that, in extreme circumstances, it is appropriate for courts to intervene. Thus, the court proceeded in that same case to note

82. *See* Bernstein v. Toia, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977).
83. Atkins v. Curtis, 259 Ala. 311, 315, 66 So. 2d 455, 458 (1953).

that the legislature has free reign to determine who is a poor person, "provided their act in doing so is a fair exercise of their authority."[84] As with enforcement of state statutory standards, the catastrophic consequences of homelessness, especially homelessness among needy children, provides a compelling case for judicial enforcement.

II.
INDIRECT DUTIES TO PREVENT HOMELESSNESS

Regardless of whether state law provides an absolute duty to provide benefits sufficient to prevent homelessness, state welfare policies should be subjected to careful scrutiny when they run the risk of causing homelessness. As with the state adequacy cases, the circumstances of today's welfare families and the high risk of homelessness that they face provides reason to reevaluate the role that litigation can play in furthering welfare rights. Whether evaluated as a matter of equal protection or due process, homelessness changes the calculus in assessing the legality of benefit policies and, therefore, expands the theories that may succeed in litigation.

Under traditional due process and equal protection analysis, the harm caused by a governmental policy or classification plays an important role in determining the degree to which courts will scrutinize governmental policies and procedures. Within this analytical framework, policies and procedures that might be found acceptable when the consequences of an interruption or denial of benefits would be less severe should have more difficulty passing constitutional muster under today's conditions. Policies that run the risk of causing homelessness should bear a very heavy burden of justification.

A. Factoring Homelessness into Due Process Analysis

Under the traditional balancing analysis for evaluating the dictates of due process, the threat of homelessness can prove decisive in determining the legality of policies. Under the test set forth in *Mathews v. Eldridge*:[85]

> [T]he specific dictates of due process generally require consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the functions involved and the fiscal or administrative burdens that the additional or substi-

84. *Id.* at 316.

85. 424 U.S. 319 (1976). Although this test has been the subject of much scholarly criticism, *see, e.g.*, Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 994 (1987); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976), it remains the standard judicial approach to questions of what process is due.

tute procedural requirement would entail.[86]

Because AFDC benefits are subsistence benefits, the private interest against an erroneous deprivation is generally recognized to be extremely strong. As the Court noted in both *Mathews* and *Goldberg v. Kelly*,[87] public assistance benefits stand between the recipient and the most "brutal need." Homelessness, however, has made this "brutal need" all the more brutal. As is set forth above, any disturbance in the flow of benefits threatens not only a family's ability to meet its most basic day-to-day needs, but also its ability to maintain any stable existence in the future. If a denial or disruption of benefits results in loss of the family home, a family might find it impossible ever to return to permanent housing and a stable family life.

The threat of homelessness also affects consideration under the second *Mathews* factor, the "probable value" of procedural safeguards. Probable value depends on two sub-factors: the likelihood that the procedure would change the result in any given case and the degree of injury caused by an erroneous result. Here the extreme consequences of homelessness mean that due process can tolerate only a very low risk of erroneous decisions. Even a very small chance of causing very grave injury is intolerable when that risk may be avoided without extraordinary expense.

Finally, the threat of homelessness alters the calculus with respect to the third *Mathews* factor. Although procedural safeguards can typically be assumed to involve some measure of governmental cost and burden, implementing procedures that help prevent homelessness may actually serve to save the government money. When a family risks losing its housing, especially relatively low-rent housing, the community stands to lose an irreplacable resource. The housing will not necessarily go to another low-income or public assistance family. Indeed, the housing could be lost from the rental market altogether.[88] At the same time, in rent-regulated markets, there is a high likelihood that the family will not be able to find less expensive alternative housing. This follows

86. *Mathews*, 424 U.S. at 335.

87. 397 U.S. 254 (1970).

88. The New York experience illustrates the myriad ways in which a public assistance family's loss of its home adds to the shortage of low-income housing. First, under rent regulations, every vacancy is an opportunity for the landlord to increase the rent. The landlord has the greatest ability to raise rents in rent-controlled apartments since these rents increase to market levels following a vacancy. *See* Rent & Eviction Regulations § 2201.4 (McKinney's Unconsol. Laws 1987). Similarly, rents in rent-stabilized apartments can be raised by a fixed percentage when they are vacated. *See, e.g.*, Rent Guidelines Order No. 19, *reprinted in* NEW YORK LANDLORD AND TENANT RENT CONTROL AND RENT STABILIZATION (Lawyers Co-op. Pub. Supp. 1988); Rent Stabilization Code § 2522.2 (McKinney's Unconsol. Laws 1987). Additional increases are permitted when the landlord makes major capital improvements. *See* Rent Stabilization Code § 2522.4(2) (McKinney's Unconsol. Laws 1987). Apart from legally authorized rent increases, vacancies provide the landlord with an opportunity to rent the apartment at illegally high rates to a new tenant who is unaware of past rent levels and legal restrictions on rent increases. Vacancies also provide an opportunity to take housing off the rental market, for example, when a landlord warehouses the apartment in the hope of making money on a cooperative conversion.

directly from the fact that rent regulation is designed to protect renters from market rental rates. As a result, the loss of the family's permanent home could place family members in a quasi-permanent state of homelessness, where the cost to the state of providing temporary shelter is extremely high. Under these circumstances, it cannot be assumed that additional procedural protections to prevent homelessness will actually result in an increased expenditure of state funds.[89]

A stricter constitutional evaluation of procedures for administering welfare programs could lead to results that differ from those adopted by courts under less extreme circumstances. For example, evidentiary policies to determine eligibility for welfare assistance tend to require tremendous documentation, even when an applicant or recipient swears to the truth of the facts necessary to establish eligibility.[90] These documentation requirements have been challenged for causing undue delay and have resulted in court orders requiring that eligibility be determined within applicable regulatory periods, thirty or forty-five days.[91] These regulatory standards for determining undue delay under federal regulations, however, may be far too lax for families that face the possibility of homelessness. In the latter situation, it is difficult to understand how the state can justify anything but the most expedient procedures or system of preliminary eligibility determination, subject to review after a sufficient time is provided to obtain documentation.[92]

A similar issue is the state's obligation to provide for a hearing system that has the capacity to process challenges to the denial of benefits *before* the family is faced with eviction. Although due process protections for welfare recipients have long been interpreted to require notice and an opportunity for a hearing,[93] public assistance recipients are often relegated to ad hoc judicial actions in emergency situations.[94] In such an emergency, however, the second *Mathews* factor tips decisively in favor of establishing a system for expediting hearings. Here the value of the added procedural safeguard to prevent an erroneous deprivation is extremely high.[95] Without a system of expedited

89. *See, e.g.*, Jiggetts v. Grinker, 139 Misc. 2d 476, 483-84, 528 N.Y.S.2d 463, 468 (1988), *rev'd*, N.Y.L.J., June 22, 1989, at 21, col. 3.

90. Of course, in the initial eligibility context there is the preliminary question of whether the individual has a property interest in the benefits that is sufficient to invoke due process protections. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 686-87 (2d ed. 1988). This discussion follows the prevailing view of the lower courts that applicants have a property interest in receipt of benefits to which they are entitled.

91. *See* Liewant & Hasen, *Caselaw on AFDC Verification Problems*, 21 CLEARINGHOUSE REV. 215 (1987) (discussing extreme verification requirements and court challenges).

92. One New York case found that there is a special obligation to assist homeless singles to obtain necessary documentation. *See* Robinson v. Grinker, No. 40610/87 (N.Y. Sup. Ct. Nov. 25, 1987). The *Robinson* case relies on state regulations but is also supportable on basic due process grounds.

93. *See* Goldberg v. Kelly, 397 U.S. 254, 267 (1970).

94. *See, e.g.*, Uzwij v. Robins, 133 A.D.2d 695, 519 N.Y.S.2d 866 (1987) (allowing bypass of administrative procedures because of emergency); Lee v. Sipprell, 47 A.D.2d 593, 363 N.Y.S.2d 685 (1975) (same).

95. In circumstances where benefits are being reduced or terminated, *Goldberg* requires

hearings, only those persons who are lucky enough to get to an attorney quickly, thereby allowing them to bypass the hearing system and go directly into court, will get a hearing prior to suffering irreparable consequences from an erroneous deprivation of housing. Because of the shortage of attorneys handling such cases, this procedure for expediting determinations in emergency cases does not constitute an adequate alternative to a system of expedited hearings.[96]

More generally, the possibility of rendering a family homeless argues for more stringent procedures to prevent improper denials of benefits throughout the system of welfare administration. Whenever an alternative procedure is available to reduce the risk of improperly subjecting a family to homelessness, the state should bear the burden of justifying its decision not to follow that alternative.

B. Equal Protection Implications of Homelessness

Recent Supreme Court decisions have left welfare advocates skeptical about the vitality of equal protection arguments in obtaining any meaningful scrutiny of welfare policies.[97] These decisions have indicated an increased aversion on the part of courts to review policies that affect the distribution of government benefits.[98] Despite the tenor of these opinions, the severity of the

that support be continued pending a hearing. 397 U.S. at 366. The continuation of benefits mitigates any injury from delay in conducting the hearing. When a recipient requests an emergency grant or is an applicant for benefits, however, delay in conducting the hearing and issuing a decision can cause similarly serious injury to the applicant. Federal regulations do not directly address the question whether states must conduct expedited hearings in emergency circumstances. Under federal regulations, the states are only required to take action on a request for a hearing within ninety days. *See* 45 C.F.R. § 205.10(a)(16) (1987). In New York, there are regulations requiring expedited hearings for emergency benefits but not for initial eligibility determinations. N.Y. COMP. CODES R. & REGS. tit. 18, § 358.28 (1982). According to advocates, these procedures are not generally followed outside the context of benefits for persons who are already homeless. Such procedures for emergency assistance programs also fail to protect those for whom the receipt of appropriate amounts of ongoing benefits is necessary to cope with an emergency.

96. The shortage of available counsel to help prevent homelessness also provides a basis for finding that *Mathews* dictates a right to counsel in housing proceedings. *See* Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 564-65 (1988).

97. *See* Sard, *supra* note 46, at 375 n.35.

98. The Supreme Court's recent opinions in Bowen v. Gilliard, 107 S. Ct. 3008 (1987), and Lyng v. United Automobile Aerospace & Agricultural Implement Workers, 108 S. Ct. 1184 (1988), are particularly distressing since they discount admittedly serious consequences to innocent children in determining the appropriate level of scrutiny for public benefits legislation. In *Gilliard*, the Court ruled that support payments made to a child living in a household with recipients of AFDC must be attributed to the entire household even if the noncustodial parent has no relationship with the other children in the household. 107 S. Ct. at 3016-18. The Court conceded that the facts on record established that some parents would stop payments and cut off their ties to their children, but it did not find this fact to be sufficient to trigger heightened scrutiny. *Id.*

In *Lyng*, the Court upheld statutory restrictions on food stamp benefits that precluded households that include a labor union striker from receiving food stamp benefits even if the

consequences of homelessness, if presented in a well-supported factual record, should lead courts to scrutinize more rigorously governmental policies that force children into homelessness.[99]

Equal protection challenges to welfare policies have been frustrated by the Court's longstanding adherence to the view that such policies are entitled to deferential rational basis review.[100] Absent discrimination on the basis of race, sex, illegitimacy, or similar classifications, welfare policies have been virtually immune to equal protection challenges. The devastating impact that homelessness can have on innocent children, however, may provide grounds for the application of heightened scrutiny to welfare policies.

The principal authority for applying heightened equal protection scrutiny to protect children is *Plyler v. Doe*.[101] In *Plyler*, the Supreme Court invalidated a Texas law denying public school education to children of illegal aliens. The Court found that although there is no fundamental right to education, education is nonetheless an important interest to be considered in determining the appropriate level of scrutiny.[102] Given the fact that this important interest

household's income, including strike fund benefits, is so low that the family would otherwise be eligible for those benefits. 108 S. Ct. at 1192-93. As Justice Marshall explained in his dissent, the Court's decision ignored the needs of dependent infants and children: "Their need for nourishment is in no logical way diminished by the striker's action. The denial to these children of what is often the only buffer between them and malnourishment and disease cannot be justified as a targeting of the most needy: they *are* the most needy. The record below bears witness to this point in a heartbreaking fashion." *Id.* at 1196 (Marshall, J., dissenting) (emphasis in original). Apparently, the Court concluded that Congress's interest in denying any subsidy to strikers overcame the childrens' right to be treated the same as other children whose families had identical income and resources. The Court did not explain its decision in these terms, however, choosing instead to treat the case as merely involving Congress's rational interest in denying favored treatment to either side in a labor dispute. *Id.* at 1192.

99. While this Article argues that even the Supreme Court's recent, dismal, equal protection case law leaves room for federal equal protection challenges to policies that condemn children to homelessness, the prospects for equal protection challenges may be brighter in the state courts. The state courts can apply more rigorous review either through the express adoption of a test of intermediate level scrutiny or through stricter application of rational basis review. The Supreme Court of Montana has expressly applied an intermediate scrutiny test in evaluating the legality of a state policy that restricted benefits to homeless adults. *See* Butte Community Union v. Lewis, 219 Mont. 426, 712 P.2d 1309 (1986). In *Butte*, the court based its application of a heightened scrutiny test on the state's constitutional provisions requiring the legislature to provide for the needy. Other state courts have rejected this approach. *See* Board of Education v. Nyquist, 57 N.Y.2d 27, 43, 439 N.E.2d 359, 453 N.Y.S.2d 643, 650 (1982), *cert. denied*, 459 U.S. 1139 (1983) (refusing to apply heightened scrutiny in an education financing case, despite state constitutional provision indicating that education is "unquestionably high on the list of priorities of governmental concern"). Even in the absence of express recognition of a general test of heightened scrutiny for policies concerning welfare benefits, state courts can choose to apply a more rigorous form of rational basis review under their state constitutional provisions. With this approach, policies that result in homelessness should receive the more rigorous rational basis examination which was applied in Plyler v. Doe, 457 U.S. 202 (1982), and City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432 (1985). *See infra* text accompanying notes 100-03.

100. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970). *See generally* L. TRIBE, *supra* note 90, at 1662-65.

101. 457 U.S. 202 (1982).

102. *Id.* at 221-23.

was being denied to children because of conduct over which they had no control — that is, their parents' decision to enter the country illegally — the Court concluded that it should apply a heightened level of scrutiny.[103] The Court expressed particular concern with the long-term consequences of denying children an education, stating that "it is difficult to understand precisely what the state hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare and crime."[104] Justice Powell's concurrence echoed this concern. He stated that "[a] legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with . . . the fundamental purposes of the Fourteenth Amendment."[105]

Courts have been reluctant to extend *Plyler* beyond its facts.[106] In cases challenging other forms of deprivation of educational benefits, courts often distinguish *Plyler* on the ground that the discriminatory policy in that case led to a complete denial of education as opposed to the type of partial deprivation that was upheld in *San Antonio Independent School District v. Rodriguez*.[107]

Although *Plyler* may be limited to extreme deprivations, nothing in the decision suggests that its analytical structure is limited to cases involving education and alienage.[108] Thus, it would be a natural extension of *Plyler* to apply

103. *Id.* at 216-17, 223-24.

104. *Id.* at 230.

105. *Id.* at 239 (Powell, J., concurring).

106. The Supreme Court ignored *Plyler* in two recent equal protection decisions on government benefits issues. *See supra* note 98. Its most extensive discussion of *Plyler*, which appears in Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481 (1988), indicates that *Plyler* could be extended to situations where children suffer extreme penalties for their parents' wrongs. In *Kadrmas*, the Court ruled that state user fees for school transportation do not violate equal protection. *Id.* at 2491. In its discussion of *Plyler*, the Court first noted that it had not extended *Plyler* beyond its "unique circumstances." *Id.* at 2488 (quoting *Plyler*, 457 U.S. at 239 (Powell, J., concurring)). It then went on to discuss the crucial facts in *Plyler* that differed from the facts in *Kadrmas*, noting that the child in *Kadrmas* had not been penalized for her parents' illegal conduct but instead for their failure to pay a standard fee. *Id.* Further, the Court found no reason to believe that the fee for transportation services would " 'promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.' " *Id.* at 2488 (quoting *Plyler*, 457 U.S. at 230 (Powell, J., concurring)). Indeed, the facts in *Kadrmas* showed that in 1985 the family paid ten times the fee charged for the school bus. Thus, the facts did not show that the school's policy was in any way resulting in the child's being denied education or otherwise being placed in danger of becoming a member of a subclass.

107. 411 U.S. 1 (1973). *See, e.g.*, Gwinn Area Community Schools v. State of Michigan, 741 F.2d 840, 845 (6th Cir. 1984); William S. v. Gill, 591 F. Supp. 422, 427 (N.D. Ill. 1984); Johnston v. Ann Arbor Public Schools, 569 F. Supp. 1502, 1505 (E.D. Mich. 1983).

108. Alienage plays an odd role in the *Plyler* case. Although alienage appears to operate to increase the level of scrutiny applied by the Court, the illegal status of the plaintiff class of children was one of the chief justifications for the governmental policy. It is difficult to believe that the Court would be more solicitous of a governmental policy that denied education to homeless children who are citizens. The crucial factors in *Plyler* would appear to be the severity of the harm and the fact that it is being imposed on children who cannot be held responsible for their situation.

a similarly heightened level of scrutiny to other governmental classifications that subject children to severe deprivations and promote the creation of an underclass.[109] In this framework, the child's interest in being protected from the ravages of homelessness seems at least as compelling as the *Plyler* plaintiffs' interest in an education. Homelessness means much more than the loss of a home. Even under the best of circumstances, homelessness seriously impairs a child's ability to attend school and obtain an education. In addition, it threatens the child's health, both physically and psychologically. Parents of homeless children have difficulty retaining employment or finding new employment and are, therefore, probably far more likely to have trouble removing their family from long-term dependence on public assistance.[110] In many cases, homelessness leads to the actual removal of the children from their families. The specter of a permanent "underclass," which was one of the Court's prime concerns in *Plyler*, is plainly raised by the situation of today's homeless children. Indeed, it is common for commentators to suggest that these children are condemned to being tomorrow's underclass. The key issues are the nature and extent of the harm caused by homelessness and the concomitant long-term costs to both the children and society as a whole. When combined with the fact that unequal public assistance policies impose these harms on children who are not responsible for their situations, and indeed threaten to create a permanent underclass, there is ample basis for applying a standard of heightened scrutiny.

For example, the threat of homelessness could lead to more careful scrutiny of state sanctions levelled at welfare recipients for noncompliance with requirements of state public assistance programs. These sanctions typically provide for the suspension from benefits for a number of months of a parent who fails to comply with a program requirement.[111] Because welfare benefits

109. Although *Lyng*, 108 S. Ct. 1184 (1988), and *Gilliard*, 107 S. Ct. 3008 (1987), contained factual records that demonstrated that children were subject to very serious injury, the Court may not have seen the long-term consequences of the policies in those cases as being comparable to the threat of the creation and perpetuation of a permanent underclass, a primary issue raised in *Plyler*. In *Gilliard*, the children were not at risk of being materially worse off than children receiving public assistance. In *Lyng*, the Court appeared to rely on a congressional judgment that the lack of food stamps operates to encourage household members not to strike, or to return to work.

110. Studies of long-term dependence on public assistance have concluded that the majority of welfare recipients receive benefits temporarily to help the family through a crisis, such as loss of a job or departure of a wage-earner. *See* G. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY 72 (1984). Because of low grant levels, a family that faces such a crisis runs a substantial risk of losing its home. If this happens, the family must contend both with the crisis of lost income as well as with all of the additional strains of being homeless. The problem is compounded in rent-regulated markets by the high cost of replacing the lost home. Such replacement costs will almost certainly be higher than the costs of the family's original housing. As a result, the family must do far more than replace its lost earnings in order to return to a permanent home.

111. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 18, §§ 385.14, 385.15 (1983) (sanctions in New York for termination of work for noncompliance with work requirements); N.Y. COMP. CODES R. & REGS. tit. 18, § 351.22 (1983) (sanctions in New York for failure to appear at an interview).

are currently so low, such a penalty can have extremely serious consequences. A seemingly minor disruption in benefits, such as a one-month suspension of benefits, can be devastating to a family that is left without sufficient funds to pay the rent. Furthermore, the consequences extend from the parent to the children. The permanence of the family's housing depends on the entire rent being paid, not on a portion of the rent being paid. Although a state may legitimately enforce the requirements prescribed for its public assistance programs, the consequences of sanctions for noncompliance may form a basis for examining whether the particular requirement has any reasonable justification or whether the penalty, which is in effect imposed on the entire family, is justified. The success of such a challenge should depend on the strength of the state interest in the particular requirement of the program. Where the state does not have a sufficiently strong interest in a given requirement, its general interest in administering the welfare programs is not sufficient reason for imposing a penalty that would result in a family with children becoming homeless.

There may also be room for equal protection challenges to welfare policies that presume family income that in fact does not exist. By ignoring that these families may have no real means of support, these policies may lose needy families through the welfare safety net and leave their children with no means of support whatsoever. For example, in the Omnibus Budget and Reconciliation Act of 1981,[112] Congress adopted a policy of treating the disposition of lump sums of income differently for families who receive welfare benefits from those that do not.[113] A welfare recipient who receives a lump sum payment, such as a personal injury award, is presumed to spend that amount on a monthly basis at the same rate as the state's welfare standard of need. In other words, although the family does not receive welfare payments,

112. Pub. L. No. 97-35, 95 Stat. 357.

113. 42 U.S.C. § 602(a)(17) (1982 & Supp. II 1984) provides in part:

> [I]f a child or relative applying or receiving aid to families with dependent children, or any other person whose need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member —
>
> (A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and
>
> (B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A).

Pursuant to amendments passed in 1984, states have discretion to create a few exceptions to the lump-sum rule, such as where the lump sum was stolen or there were other circumstances beyond the family's control. Deficit Reduction Act, Pub. L. No. 98-369, § 2632(a), 98 Stat. 494, 1141 (1984) (codified at 42 U.S.C. § 602(a)(17)). By allowing the states discretion in implementing any of these exceptions or to draft them extremely narrowly, the statute leaves states free to deny all subsistence benefits to many families that, at some time in the past, received a lump-sum payment.

it must live at a welfare standard of living. At the same time, because of its resources from the personal injury award, the family is probably ineligible for Medicaid and for a variety of emergency payment programs. If the family spends its lump sum more quickly than the state's standard of need, it is ineligible for ongoing welfare payments irrespective of how compelling its reasons were for spending the funds more quickly.[114] In contrast, a welfare recipient who does not receive a lump-sum award continues to be eligible for such emergency payments as well as for Medicaid. A similarly situated person who has never received any welfare benefits may spend the personal injury award at any rate. After the award is spent, that person can qualify for welfare payments without any presumption that the lump-sum amount is available.

The Supreme Court has considered the lump-sum rule in two cases[115] but has not ruled on any issues regarding its constitutionality. Although these decisions indicate broad acceptance of the lump-sum rule, there is further room for litigation in cases that squarely raise the extreme hardship that the rule can visit on families with children. There can be little doubt that many of the families who become homeless, reporting that they had been unable to pay the rent because their benefits had been cut off, have been the victims of policies that presume that the family has funds that are in fact unavailable. In an appropriate case, with a family about to lose its housing because it is subject to false assumptions about available income, one can argue that children whose parents' applications have been initially denied should not be subject to a complete loss of benefits and the dire consequences of homelessness. Few, if any, government interests could justify policies that contribute to the emerging subclass of children growing up in a state of homelessness.

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114. For example, in Gardebring v. Jenkins, 108 S. Ct. 1306 (1988), the plaintiff's husband had received a retroactive Social Security disability payment of $5752.00. The funds were spent within two days to pay outstanding bills, including mortgage arrears of $3863.75. *Id.* at 1308. Had the family failed to pay its outstanding mortgage bills, it may well have lost its home.

115. In Lukhard v. Reed, 107 S. Ct. 1807 (1987), the Court held that the agency's interpretation that the lump-sum rule includes personal injury awards is consistent with the Social Security Act. The Court rejected the suggestion that a personal injury award must be treated as a replacement for an existing resource and, therefore, as a resource rather than income. 107 S. Ct. at 1812. If the amount were treated as a resource, the family would be ineligible for benefits as long as its cash resources exceeded applicable limits. It would not, however, be required to limit its monthly spending to the applicable standard of need. Subsequently, in Gardebring v. Jenkins, 108 S. Ct. 1306 (1988), the Court held that there was no statutory or regulatory requirement that families receive advance notice of the application of the lump-sum rule to their future eligibility. In neither case did the Court consider any constitutional issues or how the harsh consequences of the lump-sum rule may affect the constitutional calculus. However, the majority opinion in *Gardebring* indicates that the Court might be open to a narrow challenge to applications of the rule that have extreme consequences. The Court stated:

> We are sympathetic with the plight of those AFDC recipients in this situation, and can only reiterate that our decision is an endorsement of neither the new lump-sum rule nor the absence of notice thereof. Instead, our authority is merely to determine whether the pertinent provision of the regulations required advance notice to individuals explaining the workings of the new lump-sum rule.

Id. at 1315 n.17.

CONCLUSION

The phenomenon of pervasive homelessness raises new issues for welfare litigation which were not encountered when the nation's safety net was perhaps less full of holes. However, the recent drop in real benefit levels associated with welfare assistance payments, coupled with restrictive eligibilty policies, means that courts must reach the question of how far the government may go in denying even the most minimal level of subsistence to poor children. Just as state courts have recognized that they must play a more active role in assessing the adequacy of state benefit levels, so too the consequences of homelessness require that courts look more closely at welfare policies that condemn families with children to lose their permanent housing and be caught in a cycle of homelessness. To the extent that these issues can be put squarely before the courts in a context where the judiciary views itself to be in position to protect children from becoming homeless, there is reason to be hopeful that the challenge will be met.