

**Courts and the Making of Public Policy  
*and* The Social Contract Revisited**

## The 'Homeless Families with Children' Litigation

A Case Study of Court Enforcement  
of Socio-Economic Rights

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## Executive Summary

- In the United States, courts have played a key role in defining socio-economic rights and in enforcing the government's obligations to provide and protect those rights.
- While judicial pronouncements on the existence of socio-economic rights can themselves be controversial, those pronouncements are frequently followed by long-term enforcement issues that force the courts to be involved in detailed oversight of the policies and practices of local officials.
- Such long-term judicial oversight has provoked political debate over the proper role of the courts versus the executive branch. That debate has five key aspects: (1) declaring the right at issue, including the source of that right; (2) defining the scope of the right; (3) enforcing the right; (4) the (alleged) downsides of long-term judicial oversight; and (5) defining when the court should end its role.
- This policy brief uses the 'Homeless Families with Children' litigation (*McCain v. Bloomberg*) as a case study.
- The court found a right to government-provided shelter in the New York State Constitution. The court's view was that it was recognizing an existing right established through the constitutional process, rather than creating such a right itself, even though the word 'shelter' does not appear in the Constitution.
- The role of the court in defining the scope of the right and enforcing the right, by ruling on specific, repetitive fact patterns, has been a direct response to the failure of the executive to be active.
- Long-term judicial oversight has provoked debate over (1) which branch of government has more expertise in the area at issue; (2) whether judicial oversight stifles creativity on the part of the professional administrators; (3) whether judicial oversight discourages the executive from taking ownership of the provision of the relevant socio-economic right; and (4) whether long-term judicial oversight is anti-democratic or interferes with electoral accountability. In the context of the *McCain* litigation, these critiques are not supported by the facts.
- Courts should end their long-term oversight function when the executive has successfully demonstrated that it is ready, willing, and able to provide the socio-economic right at issue in compliance with applicable legal standards and without the necessity for core judicial decrees as a safeguard against a return to prior inadequate practices by the current administration or its successors. It is for the court to decide when its oversight role is finished.

## The 'Homeless Families with Children' Litigation

### A Case Study of Court Enforcement of Socio-Economic Rights

In the United States, the debate over socio-economic rights – what they are (or should be), and how they should be provided, to whom and by whom – frequently spills into the arena of litigation. Accordingly, courts (both federal and state) have played a key role both in defining socio-economic rights and in enforcing the government's obligations to provide those rights. While many key judicial pronouncements of the existence of socio-economic rights are well known, what is less well known are the long-term oversight and enforcement issues that have followed those declarations of rights, resulting in extended debate over the proper role of the courts versus the executive branch (and, in the US system, the proper cross-jurisdictional allocation of functions between the federal courts and state or local executives).

One case study for the role of the judiciary in defining and enforcing elements of the social contract is the 'Homeless Families with Children' litigation, formally known as *McCain v. Bloomberg*, which has been pending in the New York state courts for twenty-five years. At issue is the legal obligation of New York City to provide shelter to families who are too poor to afford housing and have nowhere else to live. The *McCain* litigation serves as a useful case study of how courts go about defining and enforcing elements of the social contract, and the political/governance issues that arise when the courts step into that role. In particular, through *McCain* we can examine five aspects of the debate on the social contract and the role of the courts: (1) declaring the right at issue, and the source of that right; (2) defining the scope of the right; (3) enforcing the right; (4) critiques of judicial oversight; and (5) defining when the court should end its ongoing oversight role.

#### **Declaring the right**

When the *McCain* litigation was filed in 1983, there were various federal and state programmes in place to try to deal with the growing problem of homelessness. However, these programmes, to the extent they related to shelter, focused largely on short-term emergency help. The *McCain* litigation was filed by the Legal Aid Society on behalf of homeless families with children, to address the availability and quality of short-term shelter and services and the need for long-term relief.

The first issue was to find the source for a substantive right to shelter. The existing federal and state programmes were viewed by the City agencies administering them as benefits, not legal entitlements. Under that theory, there would be little role for the court because the executive could decide what type of shelter (if any) to provide, for how long and to whom, subject only to challenges of illegal discrimination (for example, on the basis of race). The plaintiffs needed to define a legal source for the substantive *right* to shelter against which programmes could be judged.

The court found the source for the right to shelter in the New York State Constitution, Article XVII, Section 1: 'The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine'. This provision had been added to the State Constitution in 1938, following the Great Depression, for the express purpose of establishing public assistance for the needy as a positive duty and not just a matter of executive or legislative grace. While by its terms the constitutional provision provided the legislature with discretion to determine

the 'manner and . . . means' to provide public assistance, the drafters considered the provision to be a concrete social obligation. In the words of its sponsors, the provision had two purposes: 'First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government' (III Revised Record of the Constitutional Convention at 2126 [1938]).

Of course, the word 'shelter' does not itself appear in Article XVII, Section 1. It fell to the court in *McCain* to interpret the lofty aspirational language of the New York State Constitution of 1938 in the concrete setting of families sleeping on park benches or in rodent-infested emergency housing in New York City in 1983. In so doing, the court clearly felt the need to identify an existing constitutional source for the right to shelter, and did not view itself as creating such a right; rather it was simply recognizing and enforcing an existing right duly established through the constitutional process.

### **Defining the scope of the right**

Simply recognizing a substantive right to shelter did not, of course, solve the issue. The next critical step was for the court to define the scope of that right. Notwithstanding existing programmes and the recognition of legislative discretion over manner and means of assistance, the court was faced with a series of very concrete and troubling fact patterns that required prompt judicial relief in the face of inaction by the legislative and executive branches. Three issues serve as examples.

### **Who is entitled to shelter?**

Article XVII, Section 1 speaks of 'the needy', which leaves substantial room for interpretation. Over time, the issue of who is entitled to shelter has tended to devolve into the question of whether the applicant family (assuming it meets the administratively defined economic criteria to qualify for public shelter) has adequate alternative housing available, such that public shelter is not required. (I will pass

over the contentious threshold issue of who has the burden of proof: must the economically qualified applicant family prove it is entitled to public shelter because it has nowhere else to live, or must the City prove that shelter is not needed because the family has adequate alternative housing available?)

But what are the criteria for whether the alleged alternative is 'adequate' and 'available'? It is for the responsible City administrative agency to decide in the first instance, on a family-by-family basis, with a state fair hearing review process which (at least in theory) independently reviews specific denials of shelter if so requested by the rejected applicant.

Over the course of the litigation, and frequently as a result of court orders, an administrative sensitivity has been developed to such issues as safety, health, and the threat of domestic violence at the 'alternative' housing. And yet even now, twenty-five years later, there is still litigation over categories of errors in denying shelter, with fact patterns that seem to repeat themselves with surprising frequency, including: (1) the allegedly available alternative housing is with an elderly family member (such as a grandmother) who is herself living in government-provided housing that is strictly for senior citizens, and having young grandchildren live with her subjects the grandmother to potential eviction; or (2) the allegedly available alternative housing poses health or safety risks to the family, particularly the children, such as placement of children with severe asthma with a relative who is a chain smoker living in an already overcrowded one-room apartment, or requiring the applicant family to return to housing where there has already been an incident of violence or abuse by the primary tenant (for example, a current or former boyfriend) against one of the family members.

Whether these categories are simply the result of human error or reflect systemic problems with the application process remains a contested issue. A few statistics help to frame the magnitude of the dispute. Approximately 2700 families were initially denied shelter in the final ten months of 2007; of those, almost 1800 families (two-thirds) reapplied in a very short period of time (within

ninety days, but often after only a day or two), and of those, nearly 700 families, or almost 40 per cent of the reapplicants, were found eligible on reapplication. Does that nearly 40 per cent reversal rate on reapplication constitute evidence of systemic error, such as inadequate intake procedures or inadequate training of intake workers (as plaintiffs contend), or better/clearer/new information on reapplication from a largely uneducated or undereducated applicant pool that is not communicating well initially (as defendants contend)? That is an issue the court must decide.

### *What are the minimum standards for public shelter?*

When the *McCain* litigation began, the court was forced to address very basic issues relating to minimum standards for sanitation, safety, and decency. Thus, court orders had to be entered requiring that the shelter provided by the City have (1) a bed or crib for each family member; (2) clean mattresses, sheets, and blankets; (3) clean towels; (4) access to a sanitary bathroom with hot water; (5) heat in the winter; and (6) locks on the outside doors. Over time, there has been substantial improvement in the quality of the shelter system. However, even today there are quality issues, particularly regarding shelters that may contain lead paint dangerous to children. Again, the court is being asked to distinguish between systemic issues requiring broad-based relief and one-off problems that are inherent in any project of the magnitude of a public shelter system. The former warrants ongoing, class-wide judicial oversight, whereas the latter may not.

### *What are the procedural rules governing the application process?*

At the beginning of the litigation, the court was also obligated to set standards for an acceptable application process. For example, families were being forced to spend the night, or even multiple nights, in the agency's application office, sleeping on the floor, in desk chairs, or on/under desks, while their applications were being processed. The court, faced with serious problems and administrative inaction,

was forced to put into place detailed orders governing the application process. Again, there has been substantial improvement over time, but families are still spending long days at the intake office, sometimes followed by a 10.00 P.M. (or later) bus ride to special overnight, interim shelters and an early morning bus ride back to the office while their applications are processed. Since as a practical matter all family members are present for various interviews during the application process, this puts a special burden on children who miss multiple days of school until their application is resolved.

There are numerous other examples of areas in which the court has been forced to set specific guidelines in order to establish the scope of the substantive right to shelter. They share a common feature: a failure by the responsible executive officials to take prompt, appropriate action in the face of very concrete and disturbing factual patterns.

### ***Enforcing the right***

The *McCain* litigation has been highly contentious. Over ninety different court orders are currently in place, most of which essentially require the same thing: the provision of adequate shelter to eligible families. The court's orders can be described as a combination of (i) declaratory, (ii) mandatory or injunctive and (iii) supervisory orders. Overall, the court has endeavored to issue interim relief in small steps, where possible leaving leeway for the executive to select the manner of compliance, but the result over time can be described as programmatic reform.

Progress in improving the shelter system was extremely slow over many different administrations. Some City officials were held in contempt of court for their failure to execute the court's orders. This long-running battle has highlighted in practice what is a fairly common philosophical debate within the United States: what is the legitimate role of the court in enforcing social rights, particularly in an area requiring substantial systemic reform and oversight (and public expense), where the executive for some reason has been unwilling or unable voluntarily to assume the lead in that reform effort?

There is an oft-invoked paradigm in the United States that the legislative branch writes the law, the executive branch enforces the law, and the limited role of the court is to be the 'umpire' when there is a dispute between the government and the citizens over the application of the law. In the words of Chief Justice Roberts, delivered during his confirmation hearings in 2005: 'Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply them. . . . They make sure everybody plays by the rules, but it is a limited role'. Cases such as *McCain* provoke accusations that the court has overstepped its bounds. This is particularly the case when the social right, in this case, the right to shelter, is expressed in highly generalized terms that are far from self-executing. From the plaintiffs' perspective, the court is simply 'applying the law'; from the defendants' perspective, the court is 'making the law' or even 'running the shelter system'.

The plaintiffs see the court as protecting the legal rights of a seriously disadvantaged and politically powerless subgroup of society from a recalcitrant bureaucracy; the defendants see the court as engaged in unchecked judicial activism, creating detailed administrative regulations for which it lacks the expertise, which impose unnecessary expense and red tape on an agency doing the best it can.

Certainly some past administrations can be fairly criticized for being indifferent to the shelter programme. Even critics have grudgingly acknowledged the role of the court in establishing minimum standards and in forcing the executive to live up to the promise of Article XVII, Section 1. The current administration, on the other hand, says it has embraced a desire to improve the shelter programme. That change in outlook is reflected in the two-year voluntary moratorium in the litigation, in which both sides sought to negotiate their disputes in good faith, without court involvement. Obviously, an active executive branch with its 'heart in the right place' is far more likely to reduce the role of the judiciary to that of only a residual (but necessary) protection against arbitrariness or discrimination. On the other hand, as *McCain* demonstrates, for a

disadvantaged and politically powerless group that is being denied one of the basic necessities of life – shelter from the elements – litigation, and in particular temporary restraining orders, preliminary injunctions, and other forms of emergency relief, may still be the only procedure by which speedy and effective relief can be obtained.

### **Critiques of judicial oversight**

Besides the basic philosophical debate of whether/when the court has stopped 'applying' the law and started affirmatively 'making' the law, the *McCain* litigation has provoked some specific critiques of long-running judicial oversight which also resonate in other areas of reform litigation, such as school desegregation and prison reform. A few of these critiques are highlighted here; while they are discussed separately, they are obviously interrelated.

### **Expertise**

When faced with a factual situation of small children who were being forced to sleep on desks in an office, or in unsafe 'hotels' on dirty mattresses with multiple family members to a bed, it was easy for the court to conclude it had the expertise to decide what needed to be done, and for the society generally to accept those decisions. As the shelter system has improved and the issues to be decided have become more nuanced, however, there has been a growing editorial chorus that the court has gone beyond its expertise and that such decisions now should be left to trained professionals. In *McCain*, the court in fact has become more deferential to the defendants' decision making under the current administration, which has articulated increased efforts to 'do the right thing' for homeless families. There are still allegations of systemic failures, requiring the court to make factual findings and legal determinations. But as the administrative agencies have developed experience and have presented increased efforts, the issue of which branch has the better expertise for decision making over the shelter system has become more relevant.

### **Creativity**

Another criticism that is receiving increasing editorial endorsement is that long-running judicial oversight stifles the creativity of the professional administrators.

This criticism comes in two forms: (1) that the litigation distracts the administrators, such that energy that could go into progressive thinking instead is diverted to courtroom activities; and (2) that fear of being second-guessed in a public courtroom discourages creativity on the part of the administrators.

There is little evidence in *McCain* that either form of this criticism is valid. Particularly with the current administration, the level of courtroom activity was substantially diminished (until the City moved to vacate all existing orders and dismiss the litigation as moot, a topic addressed below), and could not fairly be described as so arduous or time consuming as to prevent creative thinking. Moreover, the court has not in fact interfered with recent innovations proposed by the current administration. So this criticism, in either form, is more rhetorical than real. And while prior administrations were substantially more burdened with the litigation, they also plainly required substantial judicial oversight, because little creativity was forthcoming from the executive branch.

### *Ownership*

A related criticism is that long-running judicial oversight can prevent the responsible executive from taking ownership of the system for delivery of the social right. To put the issue in colloquial form, if everything is being decided by the judge, why should the administrator be anything other than purely reactive? Like the related 'creativity' criticism, this argument is more rhetorical than real in *McCain*. While some prior administrations can be fairly described as reactive, providing the minimum that judicial orders required, the current administration has presented an apparent willingness to 'own' the shelter system, and the court has largely sat back while the current administration has taken the lead in numerous areas. Again, there are disputes over whether some of those new developments have been a step backwards, and the court must be the umpire for those disputes, but the court has been quite open in its deference to the executive decision makers, now that they appear to be taking action.

### *Democracy/electoral accountability*

Another related criticism of long-running judicial oversight is whether the court is 'interfering' with the proper functioning of the elected officials who are (or should be) accountable for their actions to the electorate. Proponents of this criticism often reach beyond the specific bounds of a particular court order, and point instead to broader issues of fiscal responsibility and budgetary balancing: how can an elected official balance the budget, or expend government resources in the best manner for the electorate as a whole, if a court has 'taken over' one line item of the overall budget?

Taken to its logical extreme, of course, this argument would leave the politically powerless portion of society unprotected from the self-centered interests of the majority. One critical role of the courts in the United States has always been to protect the underprivileged from elected officials who are putting the interests of the majority too far ahead of the interests of all.

Moreover, in *McCain*, there is no evidence to support these criticisms. Even the most vocal critics of the *McCain* court have not suggested that the shelter system is overfunded, or somehow better than it needs to be, or that the priorities of City government have been skewed due to the litigation. It is much more a basic philosophical objection ('courts should not be doing this') than a complaint about the results achieved.

### *When should ongoing judicial oversight end?*

This brings us to one final topic, currently being litigated in *McCain*: when is the delivery system for a social right such as shelter 'good enough' that ongoing judicial oversight should end? There is currently legislative debate, at the federal level, over the proper standard and process for ending judicial oversight of reform litigation. There is also litigation over that same question, in the context of whether to terminate specific consent decrees.

In the school desegregation cases, for example, the test for whether to terminate judicial oversight has focused on two basic factors: (1) whether the

defendant school board officials have complied with the decree in good faith, and (2) whether the vestiges of past discrimination have been eliminated 'to the extent practicable'. This is sometimes referred to as the Dowell/Freeman test, formulated by the US Supreme Court in *Board of Education v. Dowell* and *Freeman v. Pitts*. The burden is on the defendants to establish a right to terminate judicial oversight.

The proposed Federal Consent Decree Fairness Act (2005) takes a very different approach. It would allow the defendant officials to move to terminate a consent decree either four years from entry of the decree or at the expiration of the term of office of the highest elected official who was a party to the decree, whichever occurred earlier. The burden would be on the plaintiff to prove that the decree is still necessary to prevent the violation that caused the decree in the first place.

The debate over the Federal Consent Decree Fairness Act has stirred discussion of many of the related issues described above, particularly those of expertise and democracy/electoral accountability. The bill even includes proposed legislative 'findings' that consent decrees should be structured and administered to give due deference to the policy judgments of state and local authorities, and that the courts should avoid imposing technically complex and evolving policy choices 'in the absence of judicially discoverable and manageable standards'. Proponents of the Act see judicial oversight in reform litigation as anti-democratic, presumptively to be ended as soon as possible, with the burden on the plaintiff to prove ongoing violations. Critics of the proposed Act see judicial oversight as a necessary corollary of the executive's original violation, with the burden on the defendants to show that both their prior bad conduct and their prior bad intent have now been sufficiently rectified that repetition is unlikely.

The *McCain* litigation is in a state court, so neither the Dowell/Freeman test nor the Federal Consent Decree Fairness Act, even if enacted, directly applies. So the issue in *McCain* remains, what should be the criteria against which judicial oversight can be deemed to be no longer necessary. To put it in

layman's terms, I would suggest that the executive must demonstrate that it is ready, willing, and able to run the shelter system fairly, and in compliance with the applicable legal standards (including the lofty terms of Article XVII, Section 1), and that no core judicial decree is necessary to protect homeless families with children. Since all such systems are run by human beings, there cannot be a requirement of perfection; mistakes inevitably will be made in individual cases, requiring individual legal redress, but that is not the same as judicial oversight through class-wide reform litigation. On the other hand, proof of systemic errors that could be corrected but for the defendants' refusal to do so reasonably puts in doubt all three prongs of 'ready, willing, and able'.

The issue of whether to end judicial oversight is usually decided in a procedural posture where there has been a negotiated consent decree or a trial and a final judgment, and several years of compliance (or noncompliance, as the case may be) with that final decree or judgment. Thus, the question is whether the goals embodied by the specific final judgment have been achieved, with little or no danger of a return to the original violations. In *McCain*, because of its procedural posture, there is an added level of complication.

Notwithstanding twenty-five years of litigation, *McCain* has not yet come to trial, and there is no final judgment. Instead, there are over ninety interim and interlocutory orders, in which are embedded the specific legal standards with which the defendants currently must comply. Even the basic declaration that there is a state constitutional right to shelter is an interlocutory order, and the operative administrative directive *still* asserts that shelter for the homeless is a benefit, not a legal entitlement. If all these interim orders are now vacated, as defendants propose, then homeless families with children will again be entirely dependent upon the goodwill of whatever administration is next elected into office – not a reassuring thought for the plaintiffs, given the poor track record of prior administrations, across party lines. And if a new administration (or even the current one) reverts back

to prior practices, the only available avenue of relief will be an entirely new lawsuit which must start anew with the very first questions of whether there is a substantive right to shelter, and the scope of that right. Not surprisingly, plaintiffs oppose such a prospect, and instead seek a binding final judgment that will remove any doubt as to the substantive right to shelter. Such a final judgment would end the litigation, but would leave available prompt access to the court to enforce the judgment if necessary. The latter approach seems the more appropriate one in *McCain*, given the relatively limited recent experience with an apparently

active and engaged executive, contrasted with the extensive experience with inactive executives, and the failure of even the current administration openly to embrace the *right* to shelter.

Ultimately it is for the court to decide when its ongoing role is finished. Presumably that is an 'umpire' function, but one can safely assume that any decision to continue judicial oversight will be met with allegations by the defendants of judicial 'activism'. That is the price the court must pay for performing its role in defining and enforcing socio-economic rights.



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