RECENT DEVELOPMENT

Reforming Welfare After Welfare Reform

Reynolds v. Giuliani, 118 F. Supp. 2d 352 (S.D.N.Y. 2000)

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INTRODUCTION

> My philosophy has been, first make the changes and have them moving in a very, very strong way—then, announce them. [At that point] there isn't terribly much that people that oppose it can do.
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> —Mayor Rudolph W. Giuliani[1]

When elected mayor of New York City in 1993, Rudolph W. Giuliani promised to "end welfare by the end of this century completely."[2] The cornerstone of his plan was the conversion of the city's Income Support Centers (as the welfare offices were called) into Job Centers. Job Centers were ostensibly designed to steer applicants into jobs and alternative forms of assistance such as family and private charities. Although Mayor Giuliani claimed the Job Centers would help people find employment and end the "culture of dependency,"[3] poor New Yorkers and their advocates asserted that the Centers' main function was to discourage people from applying for benefits at all.[4] Instead of focusing on helping applicants find jobs, the city set out to cut the welfare rolls procedurally by erecting numerous obstacles to the application process, encouraging staff to divert

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[1] Jason DeParle, *What Welfare-to-Work Really Means*, N.Y. TIMES, Dec. 20, 1998, § 6 (Magazine), at 59.

[2] *Id.* at 52.

[3] Nina Bernstein, *Giuliani Proclaims Success on Pledge to Curb Welfare*, N.Y. TIMES, Dec. 29, 1999, at A1.

[4] *Id.*

potential recipients, and even providing false or misleading information to applicants.[5] In response to the Job Center conversions, attorneys from several advocacy organizations filed *Reynolds v. Giuliani*,[6] a class action accusing Mayor Giuliani of attempting to "'end welfare' bureaucratically despite the fact that the laws providing for food stamps, Medicaid, and cash assistance continue in full force."[7]

This Recent Development argues that the seemingly prudent, incremental approach of the district court in *Reynolds* failed to effect true and swift change given the discretionary regime of welfare administration established by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA").[8] By allowing states and localities to discourage dependence on public assistance, PRWORA masks the fundamental conflict between public benefits laws guaranteeing access to urgently needed benefits and the institutional culture of the Job Centers. This Recent Development calls for a rethinking of what constitutes prudent adjudication in the context of the new, discretionary welfare regime. It suggests that under this new system, judges must be more attentive to the ways in which discretionary practices may conflict with applicable law, and that judges should be authorized to rein in discretion where it is improperly used.

Following in the footsteps of institutional reform cases that helped establish the legal rights of poor people, the plaintiffs in *Reynolds* asked a federal court to vindicate their rights by restructuring the operations of a public entity.[9] Yet *Reynolds* also represents a new type of lawsuit under the devolution of welfare policymaking to states and municipalities. Since PRWORA, welfare administration has moved from a model based

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[5] *See infra* text accompanying notes 43–58.

[6] Reynolds v. Giuliani, 35 F. Supp. 2d 331 (S.D.N.Y. 1999) ("Reynolds I"); Reynolds v. Giuliani, 43 F. Supp. 2d 492 (S.D.N.Y. 1999) ("Reynolds II"); Reynolds v. Giuliani, 118 F. Supp. 2d 352 (S.D.N.Y. 2000) ("Reynolds III").

[7] Class Action Complaint ¶ 68, *Reynolds I* (No. 98 Civ. 8877 (WHP)), http://www.welfarelaw.org/jobsctr/com1215.htm.

[8] Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

[9] Institutional reform litigation, also termed "public law litigation" or "structural reform litigation," is considered to have started when the Supreme Court called on the federal district courts to maintain jurisdiction over desegregation cases. *See* Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955). For seminal descriptions and legitimations of institutional reform litigation, see Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976), and Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). These pieces offer a contrasting view to the notion of adjudication as private dispute resolution, as expressed in Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

Cases that helped establish rights of the poor include *Goldberg v. Kelly*, 397 U.S. 254 (1970), which held that the Due Process Clause requires a hearing before welfare benefits can be terminated, and *King v. Smith*, 392 U.S. 309 (1968), in which the Court found that a state's "man-in-the-house" statute could not be used to deny welfare benefits to those who were categorically eligible under federal law.

on rules to one based on discretion.[10] The *Reynolds* court followed traditionally accepted maxims of court-ordered reform and remained mindful of federalism and judicial legitimacy concerns. Under the new, discretionary welfare regime, however, in which institutional culture can affect individuals as much as rules and regulations can, the court's graduated actions came at a high price: delaying effective reform that attends to the urgent needs of poor people. This delay allowed Mayor Giuliani to engage in symbolic politics, professing to help the city's neediest residents when his primary goal was to exclude people from the welfare rolls in order to proclaim the victory of ending welfare. Thus, while the plaintiffs achieved several legal victories resulting in some important changes in the welfare application process, their ultimate goal of reversing the systematic diversion, discouragement, and deterrence of potential welfare applicants was thwarted.

Part I of this Recent Development provides background on welfare in New York City and describes conditions at the Job Centers. Part II describes the *Reynolds* litigation from the filing of the complaint through the judge's third major opinion. Part III analyzes the *Reynolds* court's attempt to compel institutional change in the context of the new discretionary regime. This Recent Development argues that while *Reynolds* to some extent demonstrates the continuing effectiveness of utilizing reform litigation to assert the rights of poor people, courts must be vigilant in rooting out improper uses of discretion in the new federal welfare regime.

I. BACKGROUND

A. Statutory Background of Welfare in New York City

In New York City, the terms "public assistance" or "welfare" once referred to Aid to Families with Dependent Children ("AFDC") and Home Relief ("HR").[11] AFDC offered federal cash assistance primarily to single parents and their children, while HR provided state cash assistance for those not eligible for federal benefits—mostly single adults and couples without children. When William Jefferson Clinton became President in 1993, he promised to "end welfare as we know it," and after 1994 the newly elected Republican congressional majority also expressed a com-

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[10] Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1145–63 (2000). *But cf.* Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL'Y REV. 115, 115–16 (1998) (arguing that states cannot do "almost anything they want" under PRWORA, but rather that they are limited by "the Act's mandates and penalties").

[11] Comm. on Soc. Welfare Law, *The Wages of Welfare Reform*, 54 REC. ASS'N B. CITY N.Y. 472, 474 (1999).

mitment to enacting a major reformation of welfare.[12] The combination produced PRWORA, ending the entitlement to cash assistance that had existed under federal law for sixty-one years and replacing it with a block-grant program: Temporary Assistance to Needy Families ("TANF").[13] TANF created time-limited benefits[14] and work requirements,[15] and it granted considerable discretion to states and their localities in administering benefits and determining eligibility rules.[16]

In response to PRWORA, the state of New York enacted the Welfare Reform Act of 1997, replacing AFDC and HR with Family Assistance and Safety Net Assistance, respectively.[17] Family Assistance provides up to five years of cash assistance to parents of minor children and pregnant women.[18] Safety Net Assistance now serves as a catch-all program for people who do not qualify for other benefits (mostly childless adults), and is limited to two years.[19]

In addition to the state-administered cash assistance programs, the poor are also eligible to receive food stamps[20] and Medicaid,[21] which remain federal programs with entitlement status.[22] Any state participating in the food stamp program is bound to comply with all federal requirements,[23] including the requirement that application procedures identify households eligible for expedited food stamps, which must be provided to particularly poor families within seven days of application.[24] Medicaid also requires participating states to comply with federal requirements, including the processing of applications in a timely manner.[25]

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[12] Senate Majority Leader Bob Dole's Response to President Clinton's Weekly Radio Address (Dec. 30, 1995).

[13] 42 U.S.C. §§ 601–619 (1994 & Supp. II 1996). TANF states that the law "shall not be interpreted to entitle any individual or family to assistance under any State program funded under [PRWORA]." *Id.* § 601(b).

[14] *Id.* § 608(a)(1)(B) (forbidding states from using TANF money to assist a family if an adult in that family has received benefits for sixty months).

[15] *Id.* § 607 (detailing mandatory work requirements for those receiving TANF benefits).

[16] *See id.* § 617 (limiting the ability of the federal government to regulate the states with regard to TANF).

[17] *See* N.Y. Soc. Serv. Law §§ 157–165, 343–360 (Consol. 2001).

[18] *Id.* § 350(2).

[19] *Id.* § 159(2).

[20] The United States Department of Agriculture ("USDA") administers the food stamp program, a means-tested benefit that allows recipients to buy food with government-issued vouchers. 7 U.S.C. §§ 2011–2015 (1994) (describing food stamp program goals, provisions, and eligibility requirements).

[21] Medicaid is a jointly financed federal-state program that provides medical care to poor people. 42 U.S.C. § 1396 (1994).

[22] It should be noted that Supplemental Security Income ("SSI") also remains a federal entitlement program, meant to help people with disabilities. 42 U.S.C. § 1382. SSI was not at issue in the *Reynolds* litigation.

[23] *Reynolds I*, 35 F. Supp. 2d at 334 (citing Rothstein v. Wyman, 467 F.2d 226, 232 (2d Cir. 1972)).

[24] 7 U.S.C. § 2020(e)(9); 7 C.F.R. § 273.2(i)(2) (2000).

[25] Rye Psychiatric Hosp. Ctr., Inc. v. Surles, 777 F. Supp. 1142, 1144 (S.D.N.Y. 1991);

In New York City, the Human Resources Administration ("HRA") administers these benefits through Income Support Centers and now through Job Centers as well.[26] HRA has approximately 18,000 employees and in 1999 processed roughly 168,000 public assistance applications.[27] Before Mayor Giuliani's conversion project, there were thirty-one Income Support Centers in New York City,[28] each serving a geographic region defined by zip codes.[29]

It is important to note that PRWORA and New York State's response to it focused on placing time limits on benefits. In contrast, the New York City welfare initiative—converting Income Support Centers into Job Centers—emphasized changing the application procedures and enforcing strict work rules.[30] The federal and state welfare-reform efforts, therefore, did not mandate the changes in New York City, but they helped "foster[ ] an atmosphere that made a program of dramatic cuts in aid to the poor more politically acceptable."[31] PRWORA also encouraged states and localities to establish modes of administration that redefined the "culture" or "message" of welfare, trying to change the perception of welfare from a permanent way of life to a temporary boost.[32] Therefore, instead of simply following rules to determine categorical eligibility, as was mandated when cash assistance was an entitlement, ground-level staff can use their discretion to promote employment and other forms of assistance. Alternatively, workers can use their discretion to discourage people from applying for assistance at all.[33] New York City seized the opportunity to use this latter form of discretion.

B. The Giuliani Administration's Welfare Reforms

As early as 1995, Mayor Giuliani started to change welfare administration in New York City, erecting new hurdles in the application proc-

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42 C.F.R. § 435.911(a)(2) (1999) (requiring that applications be processed and eligibility be determined within forty-five days generally); 42 C.F.R. § 435.911(a)(1) (requiring that applications for someone with a disability be processed in ninety days).

[26] At the state level in New York, the Office of Temporary and Disability Assistance oversees the administration of cash assistance (Family Assistance and Safety Net Assistance) and food stamps, and the Department of Health oversees Medicaid. The state offices supervise the local governmental bodies that manage the actual distribution of cash assistance, food stamps, and Medicaid. Separate food stamp and Medicaid offices manage the cases of people who are eligible only for those benefits and not for cash assistance, or who choose not to apply for cash assistance. Comm. on Soc. Welfare Law, *supra* note 11, at 474.

[27] *Reynolds I*, 35 F. Supp. 2d at 333; *Reynolds III*, 118 F. Supp. 2d at 357.

[28] *Reynolds I*, 35 F. Supp. 2d at 333.

[29] Comm. on Soc. Welfare Law, *supra* note 11, at 474 n.7.

[30] *See id.* at 475–76.

[31] *Id.* at 475.

[32] *See* Diller, *supra* note 10, at 1147, 1150–52.

[33] *Id.*

ess and imposing stringent work requirements.[34] HRA implemented a draconian program of eligibility verification to screen applicants for fraud. All applicants, regardless of where they lived, were now required to report to an office in Brooklyn to undergo questioning about their documentation for eligibility, even though the Income Support Centers already required proof of eligibility with the same documents.[35] In addition, fraud investigators wearing badges that resembled those of the police started making unannounced visits to verify applicants' places of residence. Upon arrival, investigators would announce themselves as "the FEDS," using the acronym for Front-End Detection System.[36] According to the city, these precursors to the Job Center initiative more than doubled the denial rate for HR applications.[37] Mayor Giuliani celebrated this development.[38]

After the federal PRWORA and New York's WRA were enacted, the atmosphere was ripe for more change. In 1998, Mayor Giuliani appointed Jason A. Turner as Commissioner of HRA.[39] Turner was known for his role in designing and administering the Wisconsin Works program, which had received nationwide publicity for dramatically reducing the welfare rolls in Wisconsin through time limits and work requirements, and by discouraging reliance on public benefits.[40] Many people associated with the Wisconsin Works program accompanied Commissioner Turner to HRA to implement the Job Center initiative, using the Wisconsin program as a model.[41] The program began in March 1998, and by the end of the year, thirteen Income Support Centers had been converted. The rest were to be completed by the spring of 1999.[42]

C. Conditions in the Job Centers

At the Job Centers, applicants first encountered a receptionist who was supposed to explain the application procedure,[43] yet advocates for the poor alleged that receptionists would often try to discourage or divert

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[34] Comm. on Soc. Welfare Law, *supra* note 11, at 477–78.

[35] *Id.*

[36] *Id.* at 478 n.16.

[37] Twenty percent of HR applications were denied in the first quarter of 1994, whereas fifty-six percent were denied in the first quarter of 1995. David Firestone, *New Policy Cuts Number on Relief in New York City*, N.Y. TIMES, Apr. 19, 1995, at A1. The verification and work requirements were first applied to HR and later to AFDC. Comm. on Soc. Welfare Law, *supra* note 11, at 478.

[38] *See* Firestone, *supra* note 37.

[39] Alexandra Marks, *Now, the Hard Part of Welfare Reform*, CHRISTIAN SCI. MONITOR, Apr. 6, 1999, at 1.

[40] *E.g.*, *id.*

[41] Telephone Interview with Rebecca Scharf, Attorney, Welfare Law Center (Oct. 29, 1999).

[42] *Reynolds I*, 35 F. Supp. 2d at 342.

[43] Comm. on Soc. Welfare Law, *supra* note 11, at 480.

people from applying at all. For example, some applicants who arrived after 9:30 A.M. were told it was too late in the day to apply.[44] Others were told that "welfare" no longer exists, or that all benefits were time limited, though in fact, food stamps and Medicaid are not.[45] Job Center receptionists then required applicants to fill out a form used to determine whether alternative forms of support were available, such as help from family or friends.[46] Some applicants who listed potential help were told to withdraw their applications or provide proof that the relative or friend could not provide support.[47] On the last page of the form were two lines for signature: Signing the top line gave consent to be investigated for fraud—a requirement for receiving benefits. Signing the one just below indicated that the applicant was withdrawing her application.[48] This confusing format led some applicants to withdraw inadvertently.[49]

Applicants who made it past these obstacles went on to a second step: meeting with a "financial planner." While waiting for this appointment some applicants heard announcements from a loudspeaker: "Welfare is now temporary. It is no longer permanent. Our goal is to make you independent and self-sufficient."[50] Signs posted in the waiting rooms read: "Welfare is time limited," and, "A job is your future."[51] Financial planners reviewed the information provided by applicants and suggested alternative sources of support, such as family or private charities. While the planners were ostensibly just describing or suggesting alternatives, advocates for the poor claimed that planners actively discouraged applicants from relying on public benefits, regardless of whether doing so was in each of the applicant's best interests.[52] Some planners would spend two or three hours trying to convince applicants to withdraw.[53] Financial planners were also supposed to determine eligibility for emergency benefits, but they would often refer people in desperate need to food pantries (which were sometimes closed or out of food) or tell people with urgent medical problems that they would have to wait for their application to be approved before benefits would start (contrary to legal requirements).[54]

The applicant next saw an "employment planner" who arranged for job search activities. Applicants were given a six-week schedule of job-

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[44] *Id.* at 481.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.* at 482.
[50] Rachel L. Swarns, *Welfare's "Job Centers" Bring High Hopes and Thin Results*, N.Y. TIMES, Feb. 23, 1999, at A1.
[51] Rachel L. Swarns, *Stiff Rules Gut Welfare at Two Offices*, N.Y. TIMES, June 22, 1998, at A1.
[52] Comm. on Soc. Welfare Law, *supra* note 11, at 482.
[53] *Reynolds I*, 35 F. Supp. 2d at 343.
[54] Comm. on Soc. Welfare Law, *supra* note 11, at 482.

related appointments and daily job search activities at the Job Center.[55] Planners explained that missing any appointment would result in denial of their applications.[56]

The three steps outlined above were supposed to take place on the first day of contact with the Center. Some time after completion of the three steps, applicants were scheduled to return several days later for a required "I" interview—the full application interview.[57] If they provided all required documentation and attended all scheduled appointments, the Job Center would finally determine their eligibility for benefits.[58]

Lakisha Reynolds, the lead plaintiff in *Reynolds v. Giuliani*, was a twenty-five-year-old mother of one who had been laid off from a temporary job as a receptionist and fell behind on her rent payments. When she applied for food stamps and cash assistance at a Job Center, she had less than one dollar and "some chicken, two cans of vegetables, three tangerines, some hot cereal, a little rice and some carrots."[59] The complaint alleged that Ms. Reynolds should have qualified for expedited food stamps and emergency cash assistance but was told erroneously by her financial planner that such benefits no longer existed.[60] The financial planner then set up appointments to begin the application process on later dates and referred her to a local food pantry that was supposedly open from 12:00 P.M. until 2:00 P.M. every weekday.[61] Ms. Reynolds found that the pantry actually opened at 9:30 A.M. and was out of food when she arrived.[62] Returning the next Monday morning, when she was told the pantry would be restocked, she finally obtained food for herself and her son.[63] Unfortunately, her first appointment at the Job Center had been scheduled for the same day, and when she arrived she was told she was too late and would have to begin the application process anew.[64]

Another plaintiff was a seventeen-year-old high school student living with her one-year-old daughter in a friend's apartment.[65] According to the complaint, although the plaintiff's parents refused to support her and she lacked food and diapers for her child, a Job Center worker erroneously told her that she was too young to apply for food stamps and other assistance on her own behalf.[66] She was subsequently told that she would have

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[55] *Id.* at 483.
[56] *Id.*
[57] *Reynolds I*, 35 F. Supp. 2d at 335, 336.
[58] *Id.* at 336.
[59] Class Action Complaint ¶ 108, *Reynolds I* (No. 98 Civ. 8877 (WHP)).
[60] *Id.* ¶ 111.
[61] *Id.*
[62] *Id.* ¶ 114.
[63] *Id.*
[64] *Id.* ¶ 115.
[65] *Id.* ¶¶ 126–27.
[66] *Id.* ¶¶ 128–43.

to work to receive any assistance, without being told that she could remain in school.[67]

Still another plaintiff, homeless, pregnant with twins, and anemic, wanted to apply for benefits but was confused when she saw the sign saying "Job Center."[68] The complaint asserted that when she asked whether the office was a "welfare center," a Job Center official told her that it was not and that she must work for benefits.[69] After explaining her desperate need for food stamps and Medicaid, she was informed that expedited food stamps did not exist and that she would have to go through the regular application procedure.[70] On subsequent visits to the Job Center, her documents were lost twice, and at one point the Job Center gave her no reprieve for missing a scheduled appointment during a medical emergency so grave that her doctor refused to let her leave his office.[71] Each of these obstacles had the effect of delaying her application, and as her high-risk pregnancy progressed, she remained homeless and hungry.[72]

II. THE *REYNOLDS* OPINIONS

A. Reynolds I*: Evidence of Improper Discretionary Tactics*

1. The Complaint and Initial Hearing

In December 1998, attorneys representing seven plaintiffs who had been denied benefits under the Job Center regime filed a lawsuit in United States District Court, Southern District of New York, against Mayor Giuliani, Commissioner Turner, and state officials in charge of administering welfare.[73] The complaint, brought on behalf of the named

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[67] *Id.* ¶¶ 126–43.

[68] *Id.* ¶¶ 144, 151.

[69] *Id.* ¶ 151.

[70] *Id.*

[71] *Id.* ¶¶ 156, 160.

[72] *Id.* ¶¶ 144–65. The stories of the three plaintiffs recounted above fail to explain adequately the complicated relationship between the welfare applicant population and HRA's caseworkers and other staff. For discussion of this relationship in the context of the Job Center initiative, see DeParle, *supra* note 1, noting that many HRA ground-level staff members are recent immigrants who have a genuine desire to help their clients but have difficulty understanding why long-term welfare recipients have not been able to find jobs as they have. This serves as an example of where proper staff training is crucial. *See* discussion *infra* accompanying notes 198–203.

[73] The suit was brought by several New York City organizations that advocate for the poor, including the Welfare Law Center, a national advocacy organization that has been on the forefront of welfare impact litigation for decades, having argued several of the seminal welfare rights decisions of the 1960s and 1970s. *E.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970). *See generally* MARTHA DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993). Also participating as counsel for the plaintiffs were attorneys from the New York Legal Aid Society, the Northern Manhattan Improvement Corporation, and the New York Legal Assistance Group.

The state officials named in the complaint were Brian J. Wing, Commissioner of the

plaintiffs and "a class of needy New York City families and individuals" under 42 U.S.C. § 1983, challenged the defendants' "policies [ ] and practices of deterring, discouraging, and preventing plaintiffs and plaintiff class members from filing applications for and receiving desperately needed food stamps, Medicaid, and cash assistance benefits."[74] Plaintiffs charged that the Job Centers violated the Due Process Clause of the Fourteenth Amendment by providing false and misleading information about benefits and by failing to provide notice of eligibility determinations and hearing rights to those who had been persuaded to abandon their applications.[75] More specifically, plaintiffs made claims based on federal food stamp and Medicaid statutes and regulations, charging, for example, that applicants were illegally discouraged and prevented from filing applications for food stamps on their first day of contact with the Job Centers, that the Centers failed to screen applicants for eligibility for expedited food stamps, and that the Centers failed to determine eligibility for food stamps and Medicaid separately from eligibility for cash assistance.[76] The complaint also alleged violations of New York statutes and New York City regulations.[77] For example, plaintiffs claimed that defendants were violating the requirements that applicants be given "clear and detailed information"[78] concerning programs of public assistance and that a temporary grant be provided to any applicant who appears to be "in immediate need," pending completion of the eligibility determination.[79]

Plaintiffs requested preliminary and permanent injunctions to enjoin defendants from engaging in two categories of activities at existing Job Centers. One category consisted of the discretionary tactics used by HRA staff to divert people from applying for assistance: for instance, the staff's "discouraging and deterring [people] from filing applications" and "pressuring people to withdraw their applications."[80] The other category comprised actions that violated specific rules: for example, the staff's failing to allow applications on the first day of contact with the Job Centers and failing to process applications within the time limits specified by law.[81] Plaintiffs also requested that defendants be enjoined from convert-

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New York State Office of Temporary and Disability Assistance and Barbara DeBuono, Commissioner of the New York State Department of Health. This Recent Development uses the term "defendants" to refer to the city defendants. Until the decision in *Reynolds III*, 118 F. Supp. 2d at 352, the state defendants played a minor role in the litigation.

[74] Class Action Complaint ¶ 1, *Reynolds I* (No. 98 Civ. 8877 (WHP)).

[75] *Id.* ¶¶ 263–64.

[76] *Id.* ¶¶ 255–61 (listing the specific violations of federal statutes and regulations alleged by the plaintiffs).

[77] *Id.* ¶ 262.

[78] *Id.* ¶ 43.

[79] *Id.* ¶ 58. In addition to the primary claims aimed at the city, plaintiffs charged that the state defendants had "failed to properly oversee and supervise City defendants' administration of" food stamps and Medicaid. *Id.* ¶¶ 265–66.

[80] *Id.* ¶ 4.

[81] *Id.*

ing any more Income Support Centers into Job Centers until they demonstrated that the new Centers were in compliance with the "due process clause of the United States Constitution and all applicable federal and state laws regarding the processing of applications for food stamps, Medicaid, and cash assistance."[82]

Following oral argument on the day of filing, the court granted a temporary restraining order directing the city to provide the named plaintiffs with emergency food stamps and cash assistance and also scheduled an evidentiary hearing for later that month.[83] Later, the court provided for an "informal intervention procedure" whereby individuals with "exigent need for expedited food stamps and/or emergency cash assistance" could be assisted.[84] This procedure allowed plaintiffs' attorneys to address individual cases as they arose.

As the hearing date approached, the parties attempted to negotiate a settlement. Judge William H. Pauley III adjusted the discovery schedule to accommodate these efforts, but on January 14, 1999, the day the hearing was scheduled to occur, the parties advised the court that they had not reached a settlement.[85] After expedited discovery and "voluminous pre-hearing submissions,"[86] the court held a three-day evidentiary hearing in which the city conceded that it had improperly denied food stamps and Medicaid benefits.[87] Officials admitted that HRA staff had violated the law by sending applicants to food pantries instead of providing emergency benefits and by turning people away if they did not arrive early in the morning.[88] One HRA official testified that the city had not considered reviewing the application process until *Reynolds* was filed, and that even after the filing, HRA took no action other than sending memoranda to the Job Centers advising them not to engage in such practices.[89] Commissioner Turner stated that HRA's policy was to ensure that "all benefits to which individuals are entitled are freely available to them."[90] But a Job Center caseworker contradicted that statement, testifying that once she had deemed someone ineligible for cash assistance, she would "reject the whole case," including food stamps and Medicaid—a clear violation of the separate eligibility determination requirement.[91]

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[82] *Id.* ¶ 5.
[83] *Reynolds I*, 35 F. Supp. 2d at 337.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Rachel L. Swarns, *New York City Admits Turning Away Poor*, N.Y. TIMES, Jan. 22, 1999, at B3.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*

Having acknowledged that HRA was in violation of the law, the city offered to make changes such as retraining workers and revising application forms.[92] In addition to the *Reynolds* lawsuit, the city was also facing a highly critical report from the USDA, which had investigated the city's practices with regard to food stamps.[93] The city portrayed itself as ready to make changes, and it revised application forms and issued policy directives after the hearing had commenced.[94] Yet when Judge Pauley rendered his first major decision in the case (*Reynolds I*), he found these changes insufficient to justify continuing the Job Center initiative.[95]

2. The Injunction and Call for a Plan of Action

In January 1999, Judge Pauley granted the plaintiffs' motion for preliminary injunctive relief on behalf of the proposed class of New York City residents.[96] The tone and language of the opinion suggests that the judge gave great weight to the plaintiffs' evidence and that he was moved and troubled by the experiences of welfare applicants.

To obtain a preliminary injunction, plaintiffs needed to show both irreparable harm and a likelihood of success on the merits. Judge Pauley easily decided that there was "no question" that irreparable harm would occur without an injunction.[97] The judge noted that, according to the Supreme Court, denial of welfare benefits can deprive a person "of the very means by which to live,"[98] and he noted that Job Center practices were endangering especially needy people, including "children, expectant mothers, and the disabled."[99] He specifically cited the hardships experienced by the pregnant homeless woman noted above, who "went . . . without food on more than one occasion."[100]

Judge Pauley also held that the plaintiffs had established a likelihood of success on the merits.[101] First, he found that the plaintiffs had valid § 1983 claims against the city defendants, giving the plaintiffs private rights of action to enforce provisions of the Food Stamp Act and the Medicaid Act.[102] The court declared that not only did the specific statutes in question create an enforceable federal right, but that under *Goldberg v.*

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[92] *Reynolds I*, 35 F. Supp. 2d at 342.

[93] FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., NEW YORK PROGRAM ACCESS REVIEW NOVEMBER-DECEMBER 1998 (1999), http://www.welfarelaw.org/webbul/nyprog5.pdf.

[94] *Reynolds I*, 35 F. Supp. 2d at 342.

[95] *Id.* at 347–48.

[96] *Id.* at 333. With the consent of the parties, consideration of the request for class certification was postponed to allow the expedited discovery to occur. *Id.* at 333 n.1.

[97] *Id.* at 340.

[98] *Id.* at 339 (citing Goldberg v. Kelly, 397 U.S. 254, 264 (1970)).

[99] *Id.* at 339.

[100] *Id.* at 340.

[101] *Id.* at 341.

[102] *Id.*

Kelly, plaintiffs also had "an overarching property interest in their continued receipt of food stamps, Medicaid, and cash assistance."[103]

The judge then distinguished between the plaintiffs' requests for mere *compliance* with federal law and the request for enjoining the conversion of more Income Support Centers into Job Centers. An injunction ordering mere compliance warranted a less rigorous standard of whether there were "sufficiently serious questions going to the merits."[104] The injunction against continuing conversions, however, required application of the higher "likelihood of success on the merits" standard because it "intrude[d] on the City defendants' ability to exercise their regulatory authority."[105] This was the first instance in which Judge Pauley revealed a concern about federal intrusion into local government matters, and it foreshadowed future federalism concerns. Examining the conversion process and its effects in detail, the judge then found that this higher standard had been met—the plaintiffs' claims merited both kinds of injunctive relief.[106]

The court acknowledged that "reforming welfare in a large city such as New York present[ed] tremendous challenges,"[107] but determined that defendants were not adequately protecting "some of the City's neediest residents [who] continue[d] to fall through the safety net at Job Centers."[108] Judge Pauley noted Commissioner Turner's testimony that with regard to the first conversion, "we acted first and worried about the consequences later."[109] Commissioner Turner claimed that the incremental process of conversion, whereby centers were converted one at a time, was meant to avoid the possibility of "rolling out a major mistake on a city-

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[103] *Id.*

[104] *Id.* at 338.

[105] *Id.*

[106] *Id.* at 343–47. Citing statistics and data offered by the plaintiffs, Judge Pauley noted that after Income Support Centers were converted, fewer applicants were approved for benefits, and fewer received expedited food stamps and emergency cash assistance. Evidence of an overwhelming increase in demand at a food pantry following conversion of the local Income Support Center suggested a practice of using food pantry referrals as a replacement for expedited food stamps. The named plaintiffs demonstrated that applicants with urgent need did not receive emergency benefits within the time limits established by federal and state law. Training manuals provided to "financial planners" did not outline procedures for processing applications for expedited food stamps or emergency cash assistance, nor did they mention the obligation under federal law to inform people that their applications would be processed without an interview as long as it contained their name, address, and signature. The judge also cited the plaintiffs' evidence that people were turned away despite emergency needs for unlawful reasons such as arriving late in the day or being under twenty-one years old, and that eligibility for food stamps and Medicaid was often illegally tied to eligibility for state cash assistance. The opinion also discussed the denial of benefits to applicants who missed appointments "through no fault of their own," for example when financial planners did not mark the "I" interview appointment on calendars given to applicants. *Id.*

[107] *Id.* at 347.

[108] *Id.* at 342.

[109] *Id.* at 341.

wide basis."[110] But Judge Pauley felt that the city was correcting problems on an "ad hoc" basis.[111] He pointed out that it was only after the evidentiary hearing began that the city put forth revised procedures and application forms, and that "the majority of those revised documents were created just days before the hearing."[112] Acknowledging that promoting work and self-reliance through welfare policy is a valid goal, the judge wrote that the city nevertheless "cannot lose sight of the requirements imposed by federal statutes and regulations."[113] Refusing to accept defendants' assertion that the problems were "isolated incidents," the court granted preliminary injunctive relief pending a later hearing.[114]

The injunction ordered compliance with applicable law, but, significantly, it did not direct the city to refrain from engaging in problematic discretionary practices (discouraging, pressuring, misleading), as plaintiffs had requested in the complaint.[115] Furthermore, the judge offered no explanation for his denial of such relief. Earlier in the opinion, he stated that he was "impressed by the conscientiousness of Commissioner Turner" in his efforts to modify procedures at the Job Centers;[116] Judge Pauley felt "optimistic" about the continuing conversion project "given that staff there seem to be open to reform and are particularly enthusiastic about helping applicants find jobs."[117] This optimism, combined with concerns about federal intrusion into local government affairs, may have led Judge Pauley to focus on rules instead of the Job Center culture. His order simply required the city to abide by federal law governing food stamps and Medicaid: Job Center employees would have to accept applications on the first visit, provide grants in the time frame required by law, determine eligibility for food stamps and Medicaid separately from eligibility for cash assistance, and provide timely and adequate written notice of eligibility determination.[118] The court also preliminarily enjoined the city from converting any more Income Support Centers into Job Centers pending a hearing on the adequacy of a "corrective [action] plan of training and procedures."[119] Despite using the word "training" in describing the plan generally, the judge omitted training altogether when giving the defendants specific direction. Instead, he enumerated six *procedural* areas the corrective action plan ("CAP") should address.[120]

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[110] *Id.*
[111] *Id.* at 342.
[112] *Id.*
[113] *Id.*
[114] *Id.* at 347.
[115] *Id.* at 347–48.
[116] *Id.* at 342.
[117] *Id.*
[118] *Id.* at 347–48.
[119] *Id.* at 348.
[120] *Id.* at 347–48. For example, the judge recommended "procedures" to allow applicants to file applications "on the first day that they visit a Job Center." *Id.*

At this point, attorneys for the plaintiffs had achieved their first major goal: they could now use the possibility that the injunction would be vacated to induce the city to institute reform.[121] The city was making at least some effort to change the application process at Job Centers. The injunction also ensured that some welfare offices would remain Income Support Centers, which did not have comparable problems of applicants being discouraged or deterred from receiving benefits.[122] The issue now was what the city would do to improve the Job Centers.

B. Reynolds II*: From Plan of Action to Measuring Results*

The defendants submitted their CAP in early February 1999.[123] HRA structured the CAP to respond directly to the six areas Judge Pauley identified in *Reynolds I*.[124] The CAP enumerated changes to the application form, including placing a question about emergency assistance and immediate needs on the front page in bold print.[125] In addition, HRA moved the place for applicants to indicate withdrawal of the application to a less confusing place on the form and gave applicants a way to request consideration for food stamps and Medicaid even if they withdrew their request for cash assistance.[126] HRA also stated that it had developed a poster for the Job Centers entitled, "What You Should Know If You Have an Emergency," which gave examples of emergencies (e.g., no food, no shelter, utilities disconnected) and indicated that interviews about those situations must be granted the same day.[127] The CAP concluded by providing a brief description of staff training efforts.[128] It listed the subject matters covered in the immediate intervention after the city acknowledged it had violated the law and stated that "[n]ew and updated procedures [were] being developed based on this Action Plan."[129] HRA

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[121] Telephone Interview with Rebecca Scharf, *supra* note 41.

[122] *New York City Admits Monitoring Insufficient to Establish Proper Processing of Applications for Food Stamps, Medicaid, and Cash Assistance: Court Bars Opening of New Job Centers*, WELFARE NEWS, Sept. 1999, http://www.welfarelaw.org/monitoring.htm [hereinafter *City Admits Monitoring Insufficient*].

[123] *See* Job Center Corrective Action Plan, *Reynolds III* (No. 98 Civ. 8877 (WHP)) [hereinafter CAP].

[124] For example, the document described how HRA had issued policy bulletins and directives instructing staff to permit applications on the first day of contact, make separate determinations of eligibility for each program, and investigate claims of emergency needs immediately. *Id.* at 7–15.

[125] *Id.* at 13. Previously, the first question about financial need did not appear until question seventeen. *New York City Implements Major Changes in Manner in Which Applications for Food Stamps, Medicaid, and Cash Assistance Are Processed*, Welfare Law Center, *at* http://www.welfarelaw.org/nycimp.htm (last modified Feb. 12, 2001).

[126] *See* Comm. on Soc. Welfare Law, *supra* note 11, at 489–90.

[127] CAP at 15, *Reynolds III* (No. 98 Civ. 8877 (WHP)).

[128] *Id.* at 19–20.

[129] *Id.* at 20.

said that the new training modules would "review" applicable law, HRA policies, and forms to be given to applicants.[130]

After the city's CAP submission, the parties engaged in back-and-forth filing. Plaintiffs filed comments on the CAP, alleging that it failed to address many problems and criticizing its lack of detail about how HRA was retraining its staff.[131] Defendants responded to those comments, and plaintiffs replied again. What emerged from the process in March 1999 was a revised CAP, incorporating some of the plaintiffs' suggestions, but retaining the same basic format.[132] HRA agreed, for example, to instruct its staff to provide expedited food stamps to applicants who met the necessary criteria even if friends and neighbors might be able to provide food, and to determine eligibility for expedited food stamps before ascertaining whether applicants warranted immediate needs cash assistance grants.[133] Despite these changes, attorneys for the plaintiffs still feared that an applicant who did not provide his or her zip code would be turned away before being screened for emergency needs, that HRA would continue to deny benefits to a person who failed to appear at the "I" interview, and that the training procedures described in the CAP were too vague to ensure that personnel would understand the new procedures.[134]

Notwithstanding the plaintiffs' continuing objections to the CAP, Judge Pauley issued an opinion in May 1999 (*Reynolds II*) approving the CAP and modifying the preliminary injunction by allowing the city to proceed with three more Job Center conversions.[135] At this stage of the litigation, the judge was unwilling to delve deeper into the thicket of institutional reform.[136] He stated that many of the plaintiffs' doubts about the CAP turned on "potential discrepancies and inconsistencies" that were "remote and conjectural."[137] He added that "[t]he Court declines to tinker with the nuts and bolts of the comprehensive approach that the City defendants have formulated and begun to implement."[138] As for the training procedures, despite the plaintiffs' urgings, the judge would not require that HRA maintain attendance lists and establish protocols for occasions when staff members missed sessions. He felt that the city's existing quality control efforts—relying on case reviews, spot checks,

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[130] *Id.*

[131] *See* Plaintiffs' Comments on the City Defendants' Corrective Action Plan, *Reynolds III* (No. 98 Civ. 8877 (WHP)) [hereinafter Plaintiffs' Comments].

[132] E-mail from Sr. Mary Ellen Burns, Attorney, Northern Manhattan Improvement Corporation, to author (Feb. 21, 2001, 19:06 EST) (on file with author).

[133] *Reynolds II*, 43 F. Supp. 2d at 495.

[134] *Id.* at 496–97.

[135] *Id.* at 498.

[136] *Cf.* Colegrove v. Green, 328 U.S. 549, 555 (1946), *reh'g denied*, 329 U.S. 825 (1946) ("Courts ought not to enter this political thicket.").

[137] *Reynolds II*, 43 F. Supp. 2d at 496.

[138] *Id.*

and audits—were sufficient, and he refused to "micro-manage that process."[139] Judge Pauley wrote that "[c]onsiderations of federalism preclude unnecessary intrusions on managerial prerogatives of local governments. The question of whether judicial retooling of the Plan's training component is necessary should only be addressed retrospectively through the prism of experience."[140]

Although Judge Pauley granted HRA leeway in devising the CAP, he was inclined to "proceed cautiously" when it came to ascertaining whether HRA actually implemented it.[141] The judge acknowledged that "[i]n such a complex system, the translation of theory into practice presents unique challenges," and he refused to accept preliminary audit results from HRA at face value.[142] The city's data purported to evaluate the "accuracy and timeliness of immediate needs assistance and expedited food stamp issuance, the separability of food stamp and Medicaid eligibility determinations, and the adequacy of notices of denial" for February and March of 1999.[143] Defendants maintained that these results demonstrated a drop in incorrect denials of emergency benefits, but plaintiffs argued that the sample sets used for the audit were "fundamentally flawed" because of the small sample size and lack of statistical weighting to account for the variance of caseloads at different centers.[144] Judge Pauley thought it essential to have "reliable, uniform audit procedures and statistically valid monitoring protocols" and he was alarmed by the parties' inability to "agree on the validity of the data set."[145] Balancing the "feasible" CAP against the questionable audit results, the ultimate holding forged a compromise: the court allowed three more conversions, but did not entirely vacate the preliminary injunction.[146] Instead, Judge Pauley called for a hearing on the "adequacy of the City defendants' auditing procedures . . . and an analysis of the data collected pursuant to those procedures."[147] In the months that followed, the city had enormous difficulties devising valid monitoring procedures that it could defend in court. The struggle over statistics was just beginning.

C. Reynolds III*: A Problematic Audit*

During the summer of 1999 a battle of experts commenced. The city hired Dr. June O'Neill, a professor of economics at Baruch College and

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[139] *Id.* at 497.
[140] *Id.* (citing Missouri v. Jenkins, 495 U.S. 33, 51 (1990)).
[141] *Id.*
[142] *Id.*
[143] *Id.* at 498.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*

former director of the Congressional Budget Office.[148] Plaintiffs' attorneys hired Richard Faust, a statistician and independent consultant who had helped develop monitoring tools in prior welfare class actions.[149] The city fired the first shot with an expert report submitted in June 1999. Dr. O'Neill supported the contention defendants had made at the previous hearing: the data showed improved performance at the Job Centers with regard to erroneous denials of emergency assistance and failures to make separate determinations of eligibility for food stamps and Medicaid.[150] Plaintiffs then deposed Dr. O'Neill and found that she had focused on the statistical validity of the city's auditing but not on the data collection methodology. Plaintiffs exposed three major flaws in the auditing procedures: (1) the sample size was too small;[151] (2) the case selection methodology was biased;[152] and (3) the auditors did not even follow their own flawed procedures.[153] Mr. Faust contended that this generated a biased sample in which accepted cases were overrepresented.[154]

In late July 1999, on the Friday before the scheduled hearing on the adequacy of the city's monitoring procedures, after "voluminous submissions" had been filed with the court, the defendants acknowledged the inadequacy of their procedures.[155] Attorneys for the city stated that HRA could not defend its monitoring as it currently existed, and the city would need more time to conduct another audit.[156] Apparently, after being deposed by plaintiffs, Dr. O'Neill decided that the data presented was "not a reliable basis upon which to form an opinion" about the Job Centers' performance, and she encouraged the city to conduct a new audit with different data collection methodology.[157] It was around this time that the city took the fairly unusual step of retaining private counsel.[158]

Attorneys for the plaintiffs suggested a collaborative effort to design a new audit instrument, but the city declined to work with the plaintiffs'

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[148] Report of City Defendants' Expert Dr. June E. O'Neill (June 1999) at 1, *Reynolds III* (No. 98 Civ. 8877 (WHP)).

[149] *City Admits Monitoring Insufficient*, *supra* note 122; E-mail from Sr. Mary Ellen Burns, *supra* note 132.

[150] Report of City Defendants' Expert Dr. June E. O'Neill (June 1999) at 4, *Reynolds III* (No. 98 Civ. 8877 (WHP)).

[151] The sample included only 25 cases per Job Center and 350 cases per month across all Job Centers. *City Admits Monitoring Insufficient*, *supra* note 122.

[152] The city attempted to audit two cases per caseworker. This did not account for caseworkers who failed to take time to process applications correctly and thus saw many more clients, and did not reflect the fact that some Job Centers served many more people than others. *Id.*

[153] Plaintiffs' counsel found that cases had been double-counted or skipped. *Id.*

[154] *Reynolds III*, 118 F. Supp. 2d at 359–60.

[155] *Id.* at 359.

[156] *Id.*

[157] *See* Report of City Defendants' Expert Dr. June E. O'Neill (Oct. 1999) at 3, *Reynolds III* (No. 98 Civ. 8877 (WHP)).

[158] The city hired the Washington, D.C., firm of Covington & Burling. Nina Bernstein, *Judge Rules Against City on Welfare*, N.Y. TIMES, July 25, 2000, at B1.

expert.[159] HRA proceeded with its own audit of the Job Centers ("Reynolds Audit"), using data covering the months of May, June, and July of 1999.[160] Finally, in December 1999, one year after the filing of the case, the court held a hearing on the adequacy of the new audit.[161] That same month, Mayor Giuliani, who at the time was presumed to be the next Republican candidate for U.S. Senator from the state of New York, held a press conference claiming success in ending welfare as New York City knew it.[162] He said that "all" able-bodied welfare recipients without infants were either working or in the process of obtaining work.[163] Critics claimed the Mayor had stretched the definition of "working"[164] and placed great pressure on HRA to reclassify people into categories where they would not be counted as nonworking adults.[165]

Meanwhile, at the December 1999 hearing, the city argued that the portion of the preliminary injunction barring further conversions was no longer justified because plaintiffs had failed to prove that Job Centers were continuing to deter applicants. Defendants tried to prove that the CAP had translated into practice by pointing to figures from the Reynolds Audit, and they offered a new report from Dr. O'Neill and testimony from various HRA officials.[166] The city also contended that HRA had improved its self-monitoring activities through the use of formal quality control efforts and "spot-checkers" who posed as applicants to determine whether applications were taken on the first day of contact with Job Centers.[167] Moreover, defendants pointed to results of fair hearing appeals of adverse HRA decisions. Comparing the outcomes of appeals against the Job Centers to those against Income Support Centers, defendants pointed to the higher success rate of appeals against Income Support Centers as evidence that Job Centers made fewer erroneous eligibility determinations.[168] Finally, the city contended that the court should vacate the portion of the injunction ordering compliance with fed-

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[159] *Reynolds III*, 118 F. Supp. 2d at 360.

[160] *Id.*

[161] *Id.*

[162] Bernstein, *supra* note 3.

[163] *Id.*

[164] *Id.* The director of one community group was quoted as saying that an HRA staff member had joked, "If we tell you to ride the subways for 35 hours a week and look at the posters, we call them engaged, so the mayor can have his state of the city address and say, 'Eureka, I did it.'" *Id.*

[165] For example, the city omitted from the "available to work" category those who had been sanctioned for missing appointments or other violations. In the last four months of 1999, this group had grown by thirty-two percent. HRA also stopped counting thousands of people who had supposedly failed to follow welfare rules but had not yet been officially sanctioned. *Id.*

[166] After receiving initial comments from plaintiffs' expert, Dr. O'Neill submitted a lengthy supplemental declaration in January 2000, with new tables and revised calculations. *Reynolds III*, 118 F. Supp. 2d at 360.

[167] *Id.* at 361.

[168] *Id.*

eral and state law because the plaintiffs had failed to show that their § 1983 claims arose from a governmental "policy or custom," as required by *Monell v. Department of Social Services*.[169]

In late July 2000, Judge Pauley issued *Reynolds III*.[170] First, he examined the threshold issue of whether *Monell*'s policy or custom requirement applied. Judge Pauley found conflicting precedent on the question of whether the requirement applied to cases in which the plaintiffs requested only prospective injunctive relief.[171] The judge was willing to consider imposing the policy or custom requirement in institutional reform cases not because he was convinced by the city's "expansive reading of *Monell*, but [because of] well-established limitations on a federal court's authority to decree structural relief."[172] Quoting the Supreme Court's mandate that "[o]nly if there has been a systemwide impact may there be a systemwide remedy,"[173] the judge again demonstrated his concern regarding federal intrusion into local government institutions. He ultimately concluded, however, that it was not necessary to resolve the specific question of whether a policy or custom was required for prospective relief because plaintiffs' evidence in *Reynolds I* was "indicative of a widespread pattern of violations that would be actionable under *Monell*."[174]

Judge Pauley then emphasized that since *Reynolds I* and *Reynolds II*, the burden had shifted to the city to prove that it had remedied conditions at the Job Centers to the extent that the preliminary injunction was no longer justified. To do so, HRA had to show that the Reynolds Audit complied with "generally recognized statistical standards."[175] The court explained that while the audit did not need to be flawless, shortcomings would undermine its probative value.[176]

Attorneys for the plaintiffs disputed the validity of the city's data so effectively that the court decided to maintain the injunction. Plaintiffs attacked the Reynolds Audit on four grounds: (1) the data sources omitted cases that had been withdrawn or rejected on the same day they were filed; (2) the case files studied were not representative of the databases from which they were drawn; (3) a large number of case files could not be located at the Job Centers, and others were erroneously excluded from the audit; and (4) the audit instrument was flawed and failed to ask criti-

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[169] *Id.* at 362 (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1977) (holding, inter alia, that local governments can be held liable under § 1983 only when the constitutional deprivation arises from a governmental custom)).

[170] *Id.* at 352.

[171] *Id.* at 362–63.

[172] *Id.* at 363 n.6.

[173] *Id.* (quoting Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977)).

[174] *Id.* at 364.

[175] *Id.* at 366 (quoting MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.493 (1995)).

[176] *Id.* at 367.

cal questions.[177] After thoroughly examining the auditing procedures and criticizing the city many times in passing, Judge Pauley agreed with the plaintiffs on all four counts[178] and found that the audit was entitled to only minimal evidentiary weight.[179] According to the judge, the city's "hastily-conceived sampling protocol [had] spawned an array of complex statistical issues that might have been avoided," and the purported reasons for using the questionable databases had "the earmarks of post hoc rationalization."[180] Judge Pauley declined to take the "leap of faith" of assuming the sample's flaws did not bias the audit's results.[181] Finally, the court concurred with the plaintiffs' criticism of the audit instrument itself, citing their expert's view that the Reynolds Audit was "one of the most poorly designed instruments I have ever seen out of a professional organization which has research and auditing personnel on staff."[182]

Having decided that the sampling for the audit "was stacked in favor of job centers,"[183] Judge Pauley turned to the city's other evidence, such as spot-checking and fair hearing results.[184] Here too, the judge examined the data thoroughly, interspersing the opinion with tables from each side's reports and memoranda.[185] He agreed with the plaintiffs that the evidence offered "shed little light on whether the centers are complying with federal requirements."[186] The judge barely disguised his irritation with the city for proffering such bad data, especially after the first aborted attempt several months before. "[G]iven the array of unanswered

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[177] *Id.*

[178] Plaintiffs' first charge against the audit was critical; withdrawn cases were at the crux of the litigation, yet the sample of 1863 cases contained only 12 that were withdrawn. *Id.* Judge Pauley found that this "significantly undermine[d] the reliability of the audit results" by overrepresenting accepted cases. *Id.* at 372.

[179] *Id.* The Reynolds Audit illustrates the difficulties of obtaining good data from large, complex bureaucracies. The audit started by drawing its sample from one of the city's computerized databases, but that database was focused on active cases—people who had made it over the application hurdles. Also, old information about an applicant was irretrievably overwritten by any new information about that applicant, making it impossible, for example, to determine what had happened with a first application if a second application was later submitted. To compensate for these problems, a second sample was drawn from a different computerized database. The two samples were combined, and the case files selected were then taken from the Job Centers and physically delivered to auditors, who reviewed them for proper determination of eligibility for emergency benefits. *See id.* at 365–66. But files for one-third of the cases drawn could not be found at the Job Centers. *See infra* note 181.

[180] *Reynolds III*, 118 F. Supp. 2d at 368–69.

[181] *Id.* Judge Pauley agreed with plaintiffs' expert that the cases eventually drawn failed the chi-square test of representativeness. He also gave weight to the fact that fully thirty-three percent of the case files the city sought to examine were never actually retrieved. *Id.* at 375. The judge accepted plaintiffs' contention that there was a correlation between missing cases and poorly performing centers, adding another source of error to the audit. *Id.* at 376.

[182] *Id.* at 376.

[183] *Id.* at 377.

[184] *Id.*

[185] *Id.* at 378–79.

[186] *Id.* at 380.

questions left in the wake of the Reynolds Audit," he wrote, "it is difficult to trust any of the extrapolations made by the City defendants."[187]

Ultimately, the city had resorted to arguing that although the plaintiffs had shown that the study was flawed, they had not proven an actual bias in favor of the Job Centers. The judge rejected this argument, stating in response that once the plaintiffs had "thoroughly undermined the structural underpinnings of the Reynolds Audit, they were not required to identify the direction in which it would topple."[188] Judge Pauley went on to certify the proposed plaintiff class,[189] and he refused to dismiss claims against the city defendants.[190] *Reynolds III* was a complete legal victory for the plaintiffs.

III. ANALYSIS

Despite the legal victories in *Reynolds* and some important changes in the Job Centers' application procedures, by the time the court issued its third opinion there seemed to have been little progress in changing the "culture of improper deterrence" that Judge Pauley had highlighted.[191] One attorney for the plaintiffs described the situation in the Job Centers as "still egregious" and stated that "there are in some centers absolutely no efforts at all to improve."[192] Although HRA had gone so far as to suspend six workers for improperly turning away applicants, plaintiffs' attorneys still encountered applicants who were turned away because, supposedly, "too many people applied today," or because it was too late in the day to apply.[193] A study of one Job Center by a coalition of social services groups found that the vast majority of families who reported trouble with their public assistance had been improperly denied benefits upon application or were wrongfully cut off later.[194]

Moreover, Mayor Giuliani's reaction to the ruling demonstrated his strategy of strongly ensconcing reforms before opposition could mount. He claimed a political victory despite the court's rulings.[195] Although the Mayor disparaged Judge Pauley's opinion in *Reynolds III* as "irrational"

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[187] *Id.* at 377.

[188] *Id.*

[189] *See id.* at 387–92.

[190] *See id.* at 380–87. The state defendants had claimed Eleventh Amendment immunity. *Id.* at 381.

[191] *Id.* at 357.

[192] Greg B. Smith, *Judge Puts Break on Workfare*, N.Y. DAILY NEWS, July 25, 2000, at 10.

[193] Rachel L. Swarns, *Judge Finds Improvements in Procedures for Welfare*, N.Y. TIMES, May 25, 1999, at B5; Telephone Interview with Sr. Mary Ellen Burns, Attorney, Northern Manhattan Improvement Corporation (Feb. 2, 2000).

[194] *See* Somini Sengupta, *At One Center, a Study in Welfare Cuts*, N.Y. TIMES, June 27, 2000, at B3.

[195] *See* DeParle, *supra* note 1; *supra* note 1 and accompanying text.

and "rambling," he asserted that the decision would have little effect because the Job Centers had already "transformed" the city's welfare system.[196] Standing before a chart illustrating a steep drop in welfare cases since 1995, the Mayor proclaimed:

> Now, when you come in [to a Job Center] and you want welfare, the first thing we try to do is try to find you a job, because we really care about you, we really love you and we really understand the human personality a lot better than the people who brought us dependency.[197]

Although the lawsuit had achieved some changes in how applications were processed, it had thus far failed to undo the culture of deterrence at the Job Centers and prevent people from being wrongfully turned away. This Recent Development contends that Judge Pauley's actions fell victim to the masking effects of the new discretionary system of welfare administration. While Judge Pauley appeared to have struck a fair balance between attending to the rights of the city's neediest residents and showing restraint in exercising the court's equitable powers, PRWORA's mandate for local experimentation and innovation provided a cover for illegal or bad-faith discretionary tactics. Under the new welfare regime, otherwise prudent reform tactics such as plan submission and focusing on outcomes rather than inputs can allow the persistence of an adverse institutional culture. In *Reynolds*, the judicial tactics chosen also gave Mayor Giuliani an opportunity to engage in symbolic politics at the expense of the city's neediest residents. *Reynolds* thus demonstrates the need for heightened judicial alertness to, and control over, discretionary tactics that are susceptible to use contrary to public benefits law.

A. Reforms Aimed at Rules, Not Culture

Judge Pauley took notice of a "culture of improper deterrence" at the Job Centers, but his demands on the city focused on rules and regulations and gave HRA considerable leeway in working out compliance with the law. In *Reynolds I*, Judge Pauley acknowledged many manifestations of the culture of deterrence claimed by the plaintiffs: staff spending hours convincing applicants to withdraw their applications, workers stating that diversion was the top priority of Job Centers, and training manuals that failed even to mention the title of the form for expedited food stamps.[198] But when he called for a corrective action plan of "training and procedures," the judge enumerated six items that started with the word "proce-

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[196] Bernstein, *supra* note 158.
[197] *Id.*
[198] *Reynolds I*, 35 F. Supp. 2d at 343–44.

dures" and were based on complying with rules.[199] One of the plaintiffs' chief objections to the CAP was that the retraining process was vague and did not do enough to ensure that workers would understand and implement the new procedures.[200] But Judge Pauley wrote that "over 3,000 personnel had received training," and he refused to "micro-manage that process."[201] He commended the city for devising the CAP in a short amount of time and stated that "HRA cannot be required to formulate a training program that incorporates all conceivable teaching aids."[202] In *Reynolds II*, he also shifted the focus of the case to monitoring outcomes rather than scrutinizing the changes the city claimed it would make.

In other circumstances, these actions might have been entirely appropriate to the task of achieving institutional reform. Yet under the new welfare regime, where institutional culture is paramount, this strategy of targeting rules and regulations did not reach the discretionary tactics of diversion, discouragement, and deterrence. Plaintiffs' attorneys captured this idea well when, commenting on the CAP, they wrote:

> [A]t the heart of the City defendants' Plan is an overarching belief that the core mission of the Job Center is not only to assist needy persons in securing work, but also to reduce, by almost any means, the total number of persons accepted for public assistance, food stamps, and Medicaid. Hence, while some steps have been made to insure that Job Center staff comply with all applicable federal and state statutes and regulations concerning the delivery of public benefits, the staff are still being provided with a confusing message which places more emphasis on deterrence than on providing assistance. Inasmuch as those goals are inherently contradictory, that contradiction appears throughout the City defendants' Plan.[203]

B. An Apparently Prudent Approach

It can be argued that Judge Pauley's actions in *Reynolds* constituted a sensible approach to institutional reform litigation. He was attuned to the needs of poor New Yorkers while remaining mindful of judicial competency and legitimacy concerns, federal intrusion into local government affairs, and the controversial history of court-ordered reform in New York City. Against this background, his actions could be viewed as co-

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[199] *Id.* at 348.

[200] *Reynolds II*, 43 F. Supp. 2d at 497; *see also* Plaintiffs' Comments at 25–27, *Reynolds III* (No. 98 Civ. 8877 (WHP)).

[201] *Reynolds II*, 43 F. Supp. 2d at 497.

[202] *Id.*

[203] Plaintiffs' Comments at 2, *Reynolds III* (No. 98 Civ. 8877 (WHP)).

herent and prudent. Balancing the city's entitlement to pursue "a policy that promotes work and self-reliance" against "requirements imposed by federal statutes and regulations,"[204] the judge's approach had the advantage of communicating to the defendants the importance of following applicable law while allowing them to retain possible benefits of the Job Center initiative.

1. Judicial Legitimacy and Competence

Critics of judicial action in institutional reform litigation have charged that courts have too often moved outside their area of expertise and into the policymaking arena, thereby endangering the legitimacy of courts as independent arbiters insulated from the political realm.[205] To avoid these problems, legal scholars have suggested that courts move gradually and cautiously in fashioning remedies. Professor Peter Schuck, for example, has suggested a method for courts to strike a delicate balance between their "constitutional obligation to do justice" and a "recognition that the remedy may be beyond [their] powers or prudence to implement."[206] Examining the need for courts to act in the face of official wrongdoing while maintaining judicial legitimacy, he posits that structural relief should take the form of the "'least restrictive remedy' consistent with the level of judicial intrusiveness needed to actualize the right."[207] This allows decisionmakers to "enjoy the maximum freedom of action consistent with other, overriding values."[208] He concludes that "[o]ther things being equal, a court should select that remedy that (1) minimizes and internalizes the total costs of misconduct and of implementing the remedy, and (2) maximizes defendants' freedom to decide precisely how to comply."[209] This "graduated and diversified response" allows courts to preserve their functional integrity and legitimacy while exerting pressure on institutions to conform to legal norms.[210]

Judge Pauley's actions in *Reynolds* were in line with this notion of the least restrictive remedy. Rather than mandating exactly how the Job Centers should attain compliance with applicable law, he allowed HRA to submit its own corrective action plan. His emphasis on measuring outcomes, as opposed to mandating certain inputs, also allowed the city defendants to preserve their "decisional initiative."[211] Another advantage of

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[204] *Reynolds I*, 35 F. Supp. 2d at 348.

[205] *E.g.*, GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

[206] PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 169 (1983).

[207] *Id.* at 189.

[208] *Id.*

[209] *Id.* at 190–91.

[210] *Id.* at 191.

[211] *Id.* at 193.

this approach was that it would have allowed the court to take more intrusive action, legitimately, if defendants did not remedy the situation themselves.

2. *Federalism and Separation of Powers Concerns*

Whenever a federal court issues orders that control the actions of a local executive branch, considerations of federalism and separation of powers come into play. In the last decade, the Supreme Court has strongly emphasized that federalism and comity concerns mandate deference to local government defendants in institutional reform litigation.[212] In *Lewis v. Casey*,[213] for example, a federal district court had issued a detailed injunction mandating conditions of a prison library to guarantee inmates' access to the courts.[214] Upon review, the Court found that the lower court "failed to give adequate consideration to the views of state prison authorities" in devising the injunction, which was sufficient grounds for remand.[215] Additionally, in two school desegregation cases the Supreme Court also highlighted restoring local control as one of the aims of institutional reform litigation.[216]

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[212] *See, e.g.*, Janice Griffith, *Judicial Funding and Taxation Mandates: Will* Missouri v. Jenkins *Survive Under the New Federalism Restraints?*, 61 OHIO ST. L.J. 483 (2000); Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475 (1999).

[213] 518 U.S. 343 (1996).

[214] *Id.* at 347.

[215] *Id.* at 362; *see also* Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) (establishing a standard for modifying public law remedy and emphasizing the deference due to defendants in determining whether the proposed modification is suitably tailored to the changed circumstance); Parker, *supra* note 212, at 535–38 (arguing that in *Casey* and *Rufo*, the deference due to defendants seemed to be based on federalism and comity rather than on a notion of defendants' responsibility for enduring an effective remedy).

[216] Freeman v. Pitts, 503 U.S. 467, 489 (1992) ("[T]he court's end purpose must be to remedy the violation and, in addition, to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution."); Bd. of Educ. v. Dowell, 498 U.S. 237 (1991). The Dowell Court found:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

Id. at 248 (citations omitted).

To support his refusal to micromanage HRA's training process, Judge Pauley cited a passage from *Missouri v. Jenkins* ("Jenkins II") in which the Court held that a federal district court order directly imposing a rate increase in property taxes in order to guarantee sufficient funding for a school desegregation plan violated principles of federal-state comity. *Reynolds II*, 43 F. Supp. 2d at 497 (citing Missouri v. Jenkins, 495 U.S. 33, 51 (1990)). Interestingly, however, that case went on to hold that federal courts *could* require a school district to levy taxes in excess of limits set by state statute, a result that appears to be in conflict with some of the Court's recent and more strict federalism jurisprudence. *See* Griffith, *supra* note 212, at 491–92. Five years after *Jenkins II*, for example, the same liti-

In addition to these general considerations, *Reynolds* is part of a long history of controversial federal court action in New York City. Since the 1970s, civil rights advocates have litigated over the conditions of many of the city's institutions—homeless shelters, the jail at Rikers Island, public housing, the child foster care system, and the welfare system—and many are still governed by consent decrees or injunctions.[217] In some cases, courts have ordered extremely detailed remedies and imposed significant contempt fines on the city for noncompliance.[218] Although civil rights advocates believe court-ordered reform has vindicated important rights for vulnerable New Yorkers, some legal scholars and government officials have strongly criticized it as an illegitimate species of judicial policymaking that has forced enormous municipal expenditures and prevented the city from fashioning coherent social welfare policy.[219] The Giuliani administration indicated a desire to extricate the city from what it viewed as stifling and costly consent decrees.[220]

Given New York City's litigation history and the current strand of Supreme Court jurisprudence emphasizing local control and deference to local governments, it is not surprising that Judge Pauley was reluctant to intrude into the specific workings of New York City government. Throughout the *Reynolds* litigation, the judge mentioned concerns about federal intrusion into local government affairs and showed deference to local government authority. In *Reynolds I*, the judge praised Commissioner Turner's "conscientiousness" in implementing changes in the Centers and was optimistic that further reform would take place.[221] The judge's decision to allow HRA to devise its own action plan, his approval

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gation came before the Court again, and in *Jenkins III*, the Supreme Court held that the district court had gone beyond its remedial authority in ordering a desegregation plan designed to attract nonminority students. Missouri v. Jenkins, 515 U.S. 70 (1995).

[217] Callahan v. Carey, Index No. 42582/79 (N.Y. Sup. Ct. Dec. 5, 1979) (homeless shelters); Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997) (Rikers Island); Escalera v. N.Y. City Hous. Auth., 425 F.2d 853 (2d Cir. 1970) (public housing); Marisol v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) (foster care); Jiggetts v. Grinker, 553 N.E.2d 570 (N.Y. 1990) (welfare benefits, specifically shelter allowances). *See generally* Tamia Perry, Note, *In the Interest of Justice: The Impact of Court-Ordered Reform on the City of New York*, 42 N.Y.L. SCH. L. REV. 1239 (1998).

[218] The consent decree that resulted from *Callahan* contains provisions for the number and conditions of shower and toilet facilities at the city's armory shelters. Callahan v. Carey, Index No. 42582/79 (N.Y. Sup. Ct. Nov. 4, 1982). *McCain v. Koch*, 484 N.Y.S.2d 985 (Sup. Ct. 1984), concerning shelter for homeless families with children, resulted in contempt fines totaling over $4 million. *See generally* Susan V. Demers, *The Failures of Litigation as a Tool for the Development of Social Welfare Policy*, 22 FORDHAM URB. L.J. 1009, 1019, 1029 (1995).

[219] *See* Demers, *supra* note 218, at 1048–49.

[220] *See* Deborah Pines, *City Takes Aim at Long-Standing Consent Decrees*, 215 N.Y.L.J. 1 (1996) (paraphrasing Corporation Counsel Paul Crotty's desire to free New York City from "costly, outdated commitments made by prior administrations in flush times").

[221] *Reynolds I*, 35 F. Supp. 2d at 342.

of that plan in *Reynolds II*, and his reluctance to "micro-manage"[222] the training process all were consistent with themes of deference to and maintenance of local control. Shifting the focus of the litigation to monitoring the actions of Job Centers *after* the plan had been put into practice also showed restraint regarding the federal court's equitable powers.

Judge Pauley's actions demonstrated appreciation of separation of powers concerns as well. By enacting PRWORA, Congress invited states and localities to experiment with welfare administration, allowing them to implement regimes under which staff member discretion could be used to encourage employment and discourage reliance on public benefits.[223] It can be argued that in declining to insert the court into the realm of local government decisionmaking, Judge Pauley was simply deferring to the prerogative of the legislative branch. At the local level, the court owed deference to Mayor Giuliani's executive authority as well, especially considering that Commissioner Turner indicated a willingness to respond to plaintiffs' charges and cooperate with the court. Halting the Job Center conversion process sent a message that the city would have to comply with federal law, but Judge Pauley left it up to the defendants to determine how to achieve compliance.

C. The Need for Courts to Rein in Improper Discretion

A closer examination of the judge's actions, however, reveals that there was a need for the *Reynolds* court to go beyond mandating literal compliance with law, reaching deeper into the workings of the Job Centers to affect the "culture of improper deterrence."[224] In other words, the court had cause to "move up the remedial hierarchy to a more intrusive intervention."[225] The underlying condition demanding increased judicial intervention in *Reynolds* was the discretionary regime of welfare administration under PRWORA, which masked an institutional culture that promoted "diversion first"[226] under the guise of a congressional mandate for experimentation and innovation. This masking effect triggered weaknesses in the strategies Judge Pauley chose to use and allowed the Job Centers to maintain an institutional culture that valued excluding people from the welfare rolls at least as highly as it valued serving people's needs.

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[222] *Reynolds II*, 43 F. Supp. 2d at 497.

[223] *See* 42 U.S.C. § 601(a)(2) (Supp. II 1996) (stating that one of the purposes of the welfare reform statute is to allow states flexibility in operating a program to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").

[224] *Reynolds III*, 118 F. Supp. 2d at 357.

[225] SCHUCK, *supra* note 206, at 193.

[226] *Reynolds I*, 35 F. Supp. 2d at 334.

1. Dangers of the Discretionary Regime

Professor Diller argues that under PRWORA, states and their localities have been able to move away from a legal-bureaucratic model of welfare administration and toward an entrepreneurial model based on discretion.[227] Working from Michael Lipsky's idea of street-level bureaucrats—low-level workers in government institutions who can exercise their discretion either to further or to hinder official policy—Professor Diller argues that PRWORA has greatly magnified the significance of the institutional culture of welfare offices.[228] While the new discretionary regime certainly increases the power of street-level welfare workers, it also, perhaps counterintuitively, increases the power of the central authorities as well. The top level mangers direct the discretion of ground-level bureaucrats to achieve particular outcomes.[229] "By manipulating the institutional culture of welfare offices, higher-level decision makers can steer the direction of the system as a whole, even when they no longer exert direct control."[230]

With PRWORA's encouragement of discretionary welfare administration, the potential for abuse of that discretion is concomitantly higher; this warrants courts scrutinizing the actions of local government institutions more closely to ensure that poor people's rights are not violated. Courts must be more alert to precisely how discretion is employed and rein it in where it is used improperly. This means that courts must not hesitate to prohibit any aspects of the institutional culture that are incompatible with the law—especially where emergency subsistence needs are at issue, as they were in *Reynolds*.

Courts must also be wary of affording undue deference to PRWORA's mandate to encourage self-reliance at the expense of other important statutory rights. In his examination of school desegregation, prison, and mental hospital reform cases, Judge William Fletcher outlined the conditions that make judicial intervention appropriate.[231] When political authorities have been unable or unwilling to enforce rights themselves, when they have shown a clear pattern of noncompliance, he argued, federal courts should be able to use their discretion in granting relief.[232] The resistance tactics in the cases Judge Fletcher examined were readily apparent to the courts and to the general public and operated in clear defiance of the spirit of the law.[233] In contrast, in *Reynolds*, the

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[227] Diller, *supra* note 10, at 1145–63.

[228] *Id.*

[229] *Id.* at 1172–76.

[230] *Id.* at 1127.

[231] William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 694–95 (1982).

[232] *See id.*

[233] A court cannot mistake closing a public school system for five years, for example, for anything other than a method of defying desegregation. This was the case in *Griffin v.*

HRA's resistance to diligent enforcement of federal food stamp and Medicaid law bore the imprimatur of Congressional approval in the form of PRWORA's mandate for experimentation by the states. The atmosphere PRWORA fosters provides a convenient justification for HRA to discourage people from applying for any benefits. The city seems simply to be implementing the will of the American people to encourage self-reliance. Meanwhile, the older and perhaps less glamorous food stamp and Medicaid statutes still exist in full force—with their own important and valid purposes—yet their true spirit remains ignored. Given the potential for the masking effect of PRWORA, the *Reynolds* court should have been wary of discretionary practices that were fundamentally incompatible with the requirements of federal and state public assistance law. The weakness of Judge Pauley's tactics was their failure to target such discretionary practices.

2. Plan Submission

It has been common practice in institutional reform litigation for courts to order government defendants to submit a plan detailing the remedial efforts they will make, and for the reasons noted above, this strategy offers advantages.[234] Yet plan submission also has potential weaknesses which, in *Reynolds*, were exacerbated by the discretionary system of welfare administration. Critics of plan submission observe that it allows defendants to create delays and requests a solution from the party who is arguably least likely to produce one.[235] As Professor Diver explains: "[T]he powerful instinct for institutional survival and self-exoneration constrain the defendants in considering alternatives while fashioning a plan. The defendants will avoid considering any options that severely threaten established institutional routines or arrangements."[236] Perhaps most importantly, plan submission affords defendants an advantage by allowing them to "frame[ ] the issues and set[ ] the agenda for future discussion."[237] Giving defendants control of the first draft of the plan allows them in large part to define the parameters of reform, even if plaintiffs and the court are given opportunities to scrutinize it carefully. Items that the plan fails to address often fall by the wayside.[238]

In *Reynolds*, allowing the city to submit the CAP hindered the process of reform. It seems unlikely that the city and HRA, so invested in achieving particular results with the Job Centers, could have fashioned a

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County School Board, 377 U.S. 218 (1964).

[234] *See supra* notes 198–211 and accompanying text.

[235] *See* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 83 (1979).

[236] *Id.*

[237] *Id.*

[238] *Id.* at 84.

truly responsive plan. To the extent that the city did suggest changes, the proposed steps were not innovative, but fell back on old ways of operating.[239] Although *Reynolds I* held that plaintiffs were likely to succeed on the merits, Judge Pauley placed the burden of original plan submission squarely on defendants, allowing them to define a very narrow framework of reform. Even after the incorporation of several of the plaintiffs' suggestions, the defendants' CAP could serve as a model example of a limited and reactionary response. While Diver writes that plan submission has the potential to be a politically useful tool for galvanizing a defendant's cooperation, a judge must exploit the power structure of the institution for this to occur, for example by making the relevant operating manager in the executive branch personally responsible for devising the plan.[240] Judge Pauley did not take advantage of the power relationships among defendants and took a hands-off approach to the CAP itself, satisfied that dialogue between the parties had produced a workable plan.

3. Monitoring Outcomes

As Michael Lipsky has pointed out, measuring the performance of bureaucracies in general is very difficult, and evaluating the work of street-level bureaucrats is particularly problematic.[241] He cites goal ambiguity, excessive variables, and public deference to the autonomy of bureaucrats as some of the phenomena that contribute to the problem of measuring bureaucratic operations.[242] Moreover, when bureaucracies attempt to measure workers' performance, it is not always clear what the results actually mean.[243] Does a decrease in welfare recipients mean that more people are finding jobs and are thus less reliant on public benefits, or does it mean that workers have been more successful at diverting applicants? As Lipsky explains, "agency-generated statistics are likely to tell us little about the phenomena they purport to reflect, but a great deal about the agency behavior that produced the statistics."[244]

Yet it is precisely "agency-generated statistics" that Judge Pauley requested as a means of determining whether the CAP had been put into practice. Despite early indications that HRA was contriving the audit to protect its diversionary practices, the judge did not order the city to col-

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[239] The revised application form, for example, was essentially the same one used at old Income Support Centers. *See* Comm. on Soc. Welfare Law, *supra* note 11, at 489.

[240] Diver, *supra* note 235, at 84–86.

[241] MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES 48–49 (1980).

[242] *Id.* at 49–50.

[243] *See id.* at 50–51.

[244] *Id.* at 51. Mayor Giuliani exemplified this idea when, criticizing the judge's ruling in *Reynolds III*, he stated, "the statistics he uses are precisely the statistics that are good ones; that fewer people went on welfare, more people got jobs." *Morning Edition* (NPR radio broadcast, July 25, 2000).

laborate with plaintiffs on devising an auditing scheme, though plaintiffs had offered to do so. In effect, Judge Pauley permitted the city to continue to divert and discourage applicants, thus contributing to Giuliani's ostensible victory in ending welfare in New York City before 2000. It should have been apparent that as part of a discretion-based regime headed by an executive who was determined to advance a policy in tension with applicable law, HRA was not an institution capable of monitoring itself accurately or fairly. As a result, the judge had no choice but to afford minimal probative weight to the practically worthless Reynolds Audit.

D. When the Least Restrictive Remedy Requires More

Besides generally being more attuned to the possibility of improper use of discretion in welfare administration, courts must also watch for more specific signs of institutional cultures operating in violation of public benefits law. Advocates for the poor should be sure to bring these signs to the attention of courts. Certain factors in the *Reynolds* litigation highlighted the need for the court to prohibit the use of improper discretionary tactics at the Job Centers. Judge Pauley could have used the preliminary injunction to reach the aspects of institutional culture that were incompatible with federal and state law while adequately minding judicial legitimacy and federalism concerns.

1. Warning Signs in Reynolds

a. Questionable Data

Early in the case it was evident that the city was, at best, having difficulty finding valid methods of offering data about the Job Centers. At worst, it was presenting shoddy, incomplete data in an attempt to conceal real problems within the institutions. In *Reynolds II*, plaintiffs had pointed out weaknesses, which Judge Pauley recognized as valid, in HRA's auditing procedures. But the judge was willing to rely on defendants themselves to "amend or supplement their existing procedures or . . . demonstrate that their existing procedures are reliable and valid."[245] By *Reynolds III*, the case had become bogged down in disagreements over the city's data.

b. Conflict Within the Hierarchy of the Institutions

Dissonance between upper-level management and ground-level workers was apparent at the initial *Reynolds* hearing. Upper-level manag-

[245] *Reynolds II*, 43 F. Supp. 2d at 498.

ers asserted that, although the purpose of the Job Centers was to encourage employment and self-reliance, applicants were also supposed to be screened for any benefits for which they might be eligible. Yet ground-level workers heard a different message: "while the higher-ups said 'Work First,' they meant 'Diversion First.'"[246] This should have signaled the need for careful judicial scrutiny and control, particularly since the "Diversion First" message filtering down was contrary to federal and state law designed to meet emergency needs and to encourage the hungry to apply for assistance.

c. Disincentives for Compliance

Given the political circumstances in New York City, HRA had disincentives to comply diligently with federal and state benefits law. With Mayor Giuliani's ambition to "end welfare" by 2000, HRA was under a great deal of pressure not to cooperate with the court so that the city could claim success in meeting its goal. It is true that Commissioner Turner indicated a willingness to make changes, but his boss, Mayor Giuliani, the impetus behind the Job Center initiative, had hired him as part of a plan to rid the city of welfare. Although consideration of the political environment may be too speculative for courts as a general rule,[247] the lead defendant in this case had a well-publicized goal—reducing the welfare rolls to zero—which was in obvious tension with obedience to applicable law.[248]

Taken together, these factors pointed to an institutional culture that was fundamentally incompatible with assiduous compliance with federal and state statutes governing public benefits. The situation thus merited judicial action directly targeting the discretionary practices of discouraging, deterring, and pressuring potential applicants.

2. Recommended Judicial Action

This Recent Development does not mean to suggest that Judge Pauley should have mandated extremely detailed relief of the kind that has been roundly criticized in other institutional reform cases, at least not at the pretrial stage of the litigation examined herein. But the court could have ordered the defendants to stop using the discretionary tactics that were causing the illegal denial of desperately needed benefits. Indeed,

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[246] *Reynolds I*, 35 F. Supp. 2d at 343.

[247] SCHUCK, *supra* note 206, at 195.

[248] By 1998, Mayor Giuliani was publicizing the fact that New York City had eliminated from the welfare rolls a number of people greater than the entire population of New York's second-largest city, Buffalo. *E.g.*, George F. Will, *Big Apple Vinegar*, WASH. POST, Oct. 1, 1998, at A23.

plaintiffs specifically asked for this form of relief in the complaint.[249] Specifically, Judge Pauley could have used the injunction in *Reynolds I* to order HRA personnel to refrain from using the discretionary practices that were causing the unlawful diversion of applicants, and in *Reynolds II* could have directed the defendants to revise the CAP to enumerate training procedures that would ensure the end of discretionary tactics. In doing so, the court would not have taken over a function of local government. Rather, it would merely have directed the city to take appropriate actions to end the tactics that were diverting so many needy people. It is arguable that plaintiffs' requests for the court to order HRA to keep attendance records of training sessions and establish procedures for staff members who missed sessions tipped too far toward the "micromanaging" that Judge Pauley feared,[250] and would have come too close to usurping regulatory power from the city. But the judge need not have gone so far. He could have required broadly—without specifying exactly how it would be accomplished—that training sessions be designed to stop HRA workers from using their discretion to discourage applicants from applying regardless of actual need.

Enjoining the Job Centers' harmful discretionary tactics without specifying exactly how caseworkers should be trained would take into account the judicial legitimacy concerns noted above. Professor Schuck's notion of the least restrictive remedy is predicated on courts taking the specific circumstances of the case into account and asking when a more intrusive remedy is appropriate. He writes that in evaluating the appropriateness of a particular remedy, courts should consider, inter alia, the substantial adequacy of relief, the responsiveness of the particular institution to centralized controls, and, most significantly for *Reynolds*, the importance of the underlying substantive rights.[251] In this case, the underlying substantive right must weigh heavily in the remedial calculus, for as Judge Pauley recognized, it is the right to "the very means by which to live."[252] The gravity of the right at issue thus warranted at least some amount of judicial intrusion into the institutional culture of the Job Centers. Ordering the cessation of harmful discretionary tactics while stopping short of mandating specific retraining procedures would have been faithful to the ideal of using the least restrictive remedy.

Federalism concerns present a more difficult case. First, it must not be forgotten that federal benefits statutes (the Food Stamp and Medicaid Acts) figure prominently in the *Reynolds* litigation. Although they have separate eligibility criteria, federal food stamp and Medicaid benefits are often combined with state benefits, and states and localities must comply

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[249] Class Action Complaint ¶ 4, *Reynolds I* (No. 98 Civ. 8877 (WHP)).

[250] *Reynolds II*, 43 F. Supp. 2d at 497.

[251] SCHUCK, *supra* note 206, at 193–94.

[252] *Reynolds I*, 35 F. Supp. 2d at 339 (quoting Goldberg v. Kelly, 397 U.S. 254, 264 (1970)).

with federal requirements. Plaintiffs, as individuals and class members, should be able to call on the federal courts to ensure compliance by local government institutions. A certain amount of federal court involvement, therefore, is not only permissible but natural.[253] Yet it is also true that recent Supreme Court jurisprudence mandating deference to local governments and placing a premium on local control does not leave federal courts much leeway in the use of their equitable powers.[254] Federalism thus presents the greatest obstacle to judicial counteraction of the discretionary regime. But it can also be argued that remedial efforts aimed at institutional culture rather than rules and regulations, which might normally be considered excessive federal intrusion, are in fact *demanded* by the discretionary regime established by PRWORA. Since Congress saw fit to allow states and localities to use their discretion, the courts must act as safeguards against abuse of that discretion. When federal courts tailor their remedial efforts to enjoin aspects of institutional culture that are incompatible with the requirements of public benefits law, they should not be viewed as overstepping their bounds.

CONCLUSION

Reynolds v. Giuliani is representative of a new mode of litigation in the age of welfare reform and devolution. As welfare moves away from entitlement and rules, litigation to vindicate rights must attack the ethos of improper deterrence and discouragement that has come to pervade the administration of public benefits. *Reynolds* demonstrates that federal and state statutes can still serve as a brake on unfettered discretion, and advocates can use those laws as a means to challenge the new discretionary regime. But while statutes and rules can provide the hook, courts may still be blinded by the masking effect of the new discretionary system of welfare administration. Judges must be particularly sensitive to institutional cultures that are irreconcilable with statutory requirements. And when they detect such cultures, courts should take swift and even intrusive action to prevent poor people from being deprived of "the very means by which to live."[255]

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[253] It should also be noted that the USDA, as well as federal Medicaid authorities, found it necessary to investigate New York City's welfare pratices. *See* Rachel L. Swarns, *U.S. Audit is Said to Criticize Giuliani's Strict Welfare Plan*, N.Y. TIMES, Jan. 20, 1999, at A1.

[254] Scholars are proposing alternatives to the current jurisprudence, which, if adopted, could afford courts a broader scope of power in cases such as *Reynolds*. Dean Griffith, for example, advocates a balancing test to guide the exercise of federal judicial power that would "weigh[ ] both the need to protect civil rights and to free governments from overly intrusive remedial actions." Griffith, *supra* note 212, at 492.

[255] *Reynolds I*, 35 F. Supp. 2d at 339 (quoting Goldberg v. Kelly, 397 U.S. 254, 264 (1970)).

Advocates and courts attempting to effectuate swift and true reform will also need to search for strategies that reach institutional norms and culture. The conventions of institutional reform litigation that call for cautious and deferential judicial action do not apply. *Reynolds* demands a reconsideration of what constitutes prudent adjudication under the new federal regime. Judges must be allowed to target institutional culture with court-ordered reform. If Judge Pauley had scrutinized more carefully the changes the city promised to make and ordered that the discretionary tactics be stopped, the court could have fostered more reform and prevented the battle over statistics from serving as a delaying tactic that helped hand Mayor Giuliani a political victory.

Reynolds demonstrates that litigation can still achieve important institutional changes, even in a discretionary regime. The case forced the city at least to attempt to bring the Job Centers into compliance with federal and state law, and, insofar as the injunction against further conversions has been in force, prevented the practices of the Job Centers from spreading to the entire city. But *Reynolds* can also serve as a cautionary tale. It shows that injunctive relief focused on literal compliance with applicable law may not reach an institutional culture that forms the true basis of illegality. And while New York City may be an extreme example of discretion run amok, other states are also using diversion and other tactics under the new discretionary regime to deny urgently needed benefits to poor people.[256] As long as courts overlook the realities of the discretion afforded local governments and agencies under recent federal welfare reforms, it is unlikely that the truly needed reform of welfare institutions can occur.

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[256] *See* Diller, *supra* note 10, at 1152–57.