

SHUTTING THE SHELTER DOORS: HOMELESS FAMILIES IN THE NATION'S CAPITAL

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INTRODUCTION

In the pre-dawn hours one morning in 1993, four families, including a woman who had given birth only days before to a premature baby, camped on the doorstep of the District of Columbia's emergency shelter office. The office is located within view of the United States Capital and the United States Supreme Court. When the waiting room door opened at 8:00, the four families were first in a line of nine to apply for shelter. At 9:40, the office supervisor announced that there was no space in the District's program, leaving all nine families without shelter.¹ That same month in a lawsuit challenging this policy of turning away homeless families applying for emergency shelter,² a federal court ruled that the District's rejection of federal funding mooted the families' section 1983³ claim for enforcement of federal emergency assistance regulations and declined to order emergency relief for the families.⁴

This Article documents the efforts of homeless families in the

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1. These events were witnessed by an outreach volunteer with the Washington Legal Clinic for the Homeless.

2. *Washington Legal Clinic for the Homeless v. Kelly*, No. 93-0691 (D.D.C. filed Apr. 5, 1993). See *infra* notes 79-89 and accompanying text for a discussion of this lawsuit.

3. 42 U.S.C. § 1983 (1988) states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

4. See *infra* notes 79-89.

nation's capital to obtain emergency shelter through legal action.⁵ Homeless families, along with a growing number of persons dependent on the government for subsistence, now face more difficulty in obtaining public aid. In an era of burgeoning budget deficits, judges are more likely to defer to local and state officials who themselves plead poverty. Moreover, the age-old argument that the public fisc cannot support statutory obligations to the poor now may have new legal authority to bolster cutbacks in poverty programs. The 1992 Supreme Court's decision in *Suter v. Artist M.*,⁶ a decision which some courts have interpreted to limit the enforceability of rights under section 1983, has shaken up the legal underpinnings of entitlement programs that for years had been deemed to confer rights upon beneficiaries and duties upon the executive branches of government. If this trend continues, the term "welfare rights" may become an oxymoron, leaving needy citizens — like homeless families in the District of Columbia — without realistic recourse to justice.

THE 1990s: THE POOR GET POORER

During the 1980s, the number of poor people, as defined by the Census Bureau's poverty index, increased more than twenty percent, with one out of five children living in poverty.⁷ All across the country, soaring housing costs and economic hardship have caused a growing number of families to seek assistance from local and state governments,⁸ which has increased requests for emergency shelter.⁹

5. See *Washington Legal Clinic for the Homeless v. Kelly*, No. 92-1894 (D.D.C. filed Aug. 19, 1992) (*Washington Legal Clinic for the Homeless I*); *Washington Legal Clinic for the Homeless v. Kelly*, No. 93-0691 (D.D.C. filed Apr. 5, 1993) (*Washington Legal Clinic for the Homeless II*). See *infra* notes 59-69, 79-89 and accompanying text for a discussion of these lawsuits.

6. 112 S. Ct. 1360 (1992).

7. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 103d CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS 1312-13 (Comm. Print 1993) [hereinafter *WAYS AND MEANS*]. The number of persons in poverty increased from 29.2 million in 1980 to 35.7 million in 1991; the poverty rate in 1991 for children was 21.8%. *Id.*

8. UNITED STATES CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: 1991, at 71-72 (Dec. 1991).

9. *Id.* In New York City, with the local government unable to respond to the increase in homeless families applying for shelter, children were forced "to sleep on tabletops and dirty floors" in the shelter intake offices. A state judge fined the city and "ordered four city officials to spend a night in the same offices where hundreds of homeless families have had to sleep." Celia W. Dugger, *4 Dinkins Officials Found in Contempt on Housing Delay*, N.Y. TIMES, Nov. 21, 1991, at A1.

In some ways, the District of Columbia represents a microcosm of our country's current failure to provide affordable housing and to meet the growing demand for emergency assistance. Even before the recent recession, affordable housing in the District was a scarce commodity. According to a 1989 government study, one of every five residents, including one in three children, lived in a doubled-up household.¹⁰ In the face of soaring market rents, low-wage earners struggled with rent payments¹¹ while welfare recipients found themselves priced out of the private housing market.¹² Subsidized housing, in reality the only affordable housing for low-income households, remained out of reach. As of June 30, 1991, there were 15,584 applicants on the District's Department of Public and Assisted Housing's (DPAH) waiting list.¹³ The poverty of chil

10. OFFICE OF THE SPECIAL ASSISTANT FOR HUMAN RESOURCE DEV., OFFICE OF THE MAYOR, DOUBLED-UP HOUSEHOLDS IN THE DISTRICT OF COLUMBIA 5 (Feb. 1989). Doubled-up households include three-generation families, married couples or single parents living with other relatives or unrelated persons. *Id.* See also Tracy Thompson, *D.C. Has Scant Help to Offer Families with Nowhere to Go*, WASH. POST, June 27, 1993, at A1 (defining doubled-up households as those consisting of two or more families sharing living quarters).

11. Wages for unskilled workers continue to decline in comparison to the cost of living. "The average hourly wage for private, nonsupervisory workers is now lower, after adjustment for inflation, than in any year since at least 1969." *State of the U.S. Economy, Federal Budget Policy, and the President's Budget Proposals for Fiscal Year 1992 and Beyond, Including Estimated Costs of Operation Desert Storm and Expiring Tax Provisions: Hearings Before the House Comm. on Ways and Means*, 102d Cong., 1st Sess. 357, 364 (1991) (testimony of Robert Greenstein, Director, Center on Budget and Policy Priorities) [hereinafter *Greenstein testimony*].

The federal minimum wage of \$4.25 per hour yields before tax earnings of \$680 per month. A two-bedroom apartment rents for an average of \$854 per month in the District of Columbia. 57 Fed. Reg. 45,468, 45,477 (1992). "About half of the nation's poor renters are now spending at least half of their incomes on rent A single major unexpected expense, such as illness, job loss or legal trouble, can push these poor families into homelessness." Kristen Downey & Paul Taylor, *Poor Renters Attempt to Stave Off Homelessness*, WASH. POST, Nov. 12, 1991, at A12.

12. In the District of Columbia, a family of three on Aid to Families with Dependent Children (AFDC) receives \$409 per month. A two-bedroom apartment in the District rents for an average of \$854 per month. CENTER OF SOCIAL WELFARE POLICY AND LAW, PUB. NO. 210, LIVING AT THE BOTTOM: AN ANALYSIS OF AFDC BENEFIT LEVELS 29 (July 1993).

13. D.C. DEP'T OF HOUS. AND COMMUNITY DEV., COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY OF THE DISTRICT OF COLUMBIA 1992-1996, at 5 (1992) [hereinafter CHAS]. DPAH maintains a list of applicants for three subsidized housing programs: (1) public housing, which is owned and operated by the District government, 42 U.S.C. §§ 1437-1437u (1988 & Supp. 1991); (2) Section 8 housing, which operates through private landlords who receive a fair market rent as determined by the Secretary of Housing and Urban Development, 42 U.S.C. § 1437f (1988); and (3) a District-funded

dren in the nation's capital was particularly appalling, with the District ranking as one of the worst states by a multitude of measures including infant mortality, low birth weight, immunization rates, and percentage of children living below the poverty line.¹⁴ Such at-risk children are the intended beneficiaries of assistance provided through federal-state programs such as Aid to Families with Dependent Children (AFDC) and Emergency Assistance under the Social Security Act.¹⁵

The 1990s ushered in an era of severe state and local cutbacks to social welfare programs,¹⁶ including those funded through the Social Security Act. In 1991, the District reduced benefits by more than four percent to recipients of AFDC¹⁷ and suspended Cost of Living Adjustments.¹⁸ With rising unemployment¹⁹ and reduced levels

Tenant Assistance Program, modeled on the federal Section 8 program, D.C. CODE ANN. §§ 45-2531 to -2538 (Michie 1988). CHAS at 5.

The District's public housing program is in virtual disarray: Of the 11,790 public housing units available, more than 2,200 are vacant. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF HOUS. AND URB. DEV., AUDIT REPORT 1 (Sept. 1992) (stating that the D.C. Department of Public and Assisted Housing "administers 11,790 low-rent public housing units"); D.C. DEP'T OF PUBLIC AND ASSISTED HOUSING, VACANT UNIT TRACKING REPORT 7 (1992) (reporting that the number of vacant units is 2,211 as of January 13, 1992). This vacancy rate of nearly 20% is far in excess of the three percent federal standard set by the Department of Housing and Urban Development. 24 C.F.R. § 990.118(b) (1993).

14. CHILDRENS' DEFENSE FUND, BRIGHT FUTURE OR BROKEN DREAMS? (1992).

15. WAYS AND MEANS, *supra* note 7, at 615, 650. AFDC, established by the Social Security Act of 1935, provides cash welfare payments to needy children who have been deprived of parental support or care. *Id.* at 615. Emergency Assistance provides assistance "to avoid the destitution of [children]." *Id.* at 650.

16. "From 1970 to 1990, AFDC benefits for a family of three . . . fell 39% . . . after adjusting for inflation." *Greenstein testimony, supra* note 11, at 366. Many states continued AFDC cutbacks in 1991 and 1992. CENTER ON SOCIAL WELFARE POLICY AND LAW, PUB. NO. 167 (REVISED), NO RELIEF FOR THE POOR: 1992 STATES CUTBACKS IN AFDC, GA AND EAF, PART 1, at 2 (Sept. 1992). In 1992, 15 of the 37 states in the report cut their AFDC, General Assistance (GA), and/or Emergency Assistance to Families (EAF) programs. *Id.*

17. Under the AFDC program, states furnish financial assistance and rehabilitation and other services to needy, dependent children and the parents or relatives with whom they are living. 42 U.S.C. §§ 601-617 (1988). States determine payment levels within certain federally-prescribed guidelines. 45 C.F.R. § 233.20 (1992).

18. *Quattlebaum v. Dixon*, No. 8207-91, slip op. at 11 n.7, 18 (D.C. Super. Ct. Apr. 15, 1992) (noting reduction in benefits for a family of three from \$428 per month to \$409 per month and suspension of an "automatic cost-of-living increase" until 1993), *appeal filed*, No. 92-CV-504 (D.C. Ct. App. May 1, 1992).

19. In the District, the number of persons receiving unemployment compensation increased from 16,746 in 1989 to 31,443 in 1991. D.C. DEPT. OF EMPLOYMENT SERV., INDICES: A STATISTICAL INDEX TO DISTRICT OF COLUMBIA SERVICES 164 (1992).

of public assistance, it is not surprising that more and more families found themselves with no choice but to seek government shelter. From 1986 to 1990, the number of homeless families entering the District's family shelter system increased by approximately 400%.²⁰ Rather than expand the number of shelter spaces as the need increased in the early 1990s, the District made deep cuts in its shelter budget.²¹

A legacy of mismanagement in the District's subsidized housing program²² compounded the problems facing shelter administrators. The District's response to homelessness among families had long been plagued by its failure to move families from its shelter program into permanent housing. In fiscal year 1990, for example, 1,204 families entered the shelter program but only 708 families moved out of the shelter program into permanent housing — a net increase of 496 homeless families.²³ Thus, a program designed to move homeless

20. CHAS, *supra* note 13, at 9.

21. Affidavit of Stacie Balderston, Budget Officer for the Commission on Social Services of the Department of Human Services, at 1-3, *Washington Legal Clinic for the Homeless II* (No. 93-0691) (describing District's decision to reduce number of shelter spaces provided to families because of shelter program's \$7.5 million deficit).

22. MAYOR BARRY'S BLUE RIBBON COMM'N ON PUBLIC HOUS., FINAL REPORT ON PUBLIC HOUSING IN THE DISTRICT OF COLUMBIA 3 (Oct. 1987). The report noted that "five separate audit reports" failed to address program deficiencies, and concluded:

Most of the problems identified have not been resolved. To the contrary, the properties continue to decay and modernization plans languish. The backlog of repair requests and the number of vacant units increase, and the rent delinquencies grow. As this disheartening process continues, the magnitude of the effort necessary to reverse it increases further and the problems they generate are compounded.

Id.

Soon after her election to succeed Marion Barry, Sharon Pratt Kelly's own transition team described the District's housing agency as "beset by serious systemic management problems, of long standing, that has caused HUD to designate [it] as a Troubled Housing Authority." TRANSITION TEAM REPORT, EXECUTIVE SUMMARY: D.C. DEPARTMENT OF PUBLIC AND ASSISTED HOUSING.

Despite Mayor Kelly's campaign pledges to turn the agency around, two and one-half years after she entered office a D.C. Superior Court Judge determined that the District's mismanagement of its public housing program warranted the appointment of a special master. *Pearson v. Kelly*, No. 92-CA-14030 (D.C. Super. Ct. May 26, 1993).

The special master's recommendations included exempting the agency from all District regulations and procedures. INITIAL REPORT AND RECOMMENDATIONS TO JUDGE STEFFAN W. GRAAE FROM JAMES G. STOCKARD, JR. 11 (Jan. 1994).

23. Of the 708 families placed in permanent housing, 245 moved into public housing, 185 moved into federal Section 8 housing, and 278 moved into private apartments. OFFICE OF EMERGENCY SHELTER & SUPPORT SERVICES, D.C. DEPT OF HUMAN SERVICES, TWO YEAR PROGRAM REPORT: FISCAL YEARS 1990 & 1991, at 3.

families into permanent housing within ninety days could only serve as a holding pen as families waited an average of ten months for placement into housing.²⁴

Families applying for shelter were the first to feel the effects of these cutbacks. Previously subjected to an arduous and demeaning eligibility screening,²⁵ dozens of families now were simply handed mass produced notices listing lack of space as the sole reason for denial and were told that they did not have a right to appeal.²⁶ This clash between compelling need and dwindling government resources inexorably led to a legal showdown in *Washington Legal Clinic for the Homeless v. Kelly*,²⁷ a still-unfolding confrontation with serious implications for homeless families, legal service providers, lawmakers, and government.

THE DISTRICT OF COLUMBIA'S EMERGENCY SHELTER FOR FAMILIES PROGRAM

In attempting to provide emergency shelter to a growing number of homeless families in the 1980s, the District used a combination of federal and local funding sources. Because of the two different funding streams, both federal and local laws governed the family shelter program.²⁸ Until its dramatic decision to withdraw from the program on the eve of a court hearing in the *Washington Legal Clinic for the Homeless II* case, the District of Columbia for nine years had participated in the federal Emergency Assistance (EA) program.²⁹ Participation in the federal AFDC-EA program is not

24. Joan Alker & Frank R. Trinity, *D.C. Needs to Get Its Housing In Order*, WASH. POST, August 22, 1993, at C8.

25. Dick Mendel, *City Said Not to Heed its Own Rule on Temporary Shelter*, WASH. TIMES, May 26, 1992, at B2 (describing emergency shelter eligibility screening process as a "two-week scramble" for applicants to provide requested documentation of identification, income, custody, and need for emergency shelter).

26. Ruben Castaneda, *Rise in D.C. Homeless Families Causes Shelters to Reject Some*, WASH. POST, Jan. 9, 1993, at B4.

27. See *Washington Legal Clinic for the Homeless I*; *Washington Legal Clinic for the Homeless II*. See *infra* notes 59-69, 79-89 and accompanying text for a discussion of these lawsuits.

28. Federal law governing the AFDC-EAF program is codified at 42 U.S.C. §§ 603(a)(5), 606(e) (1988); 45 C.F.R. § 233.120 (1992). District law governing the family shelter program is codified at D.C. CODE ANN. §§ 3-601 to -622 (Michie Supp. 1993), 3-206.3 to -206.9 (Michie 1988 & Supp. 1993); 39 D.C. Reg. 470-491 (1992).

29. The federal AFDC-EAF program is an optional federal-state partnership that was established in 1967. *Quern v. Mandley*, 436 U.S. 725, 728 (1978). Participating

mandatory. Under the EA program, states can obtain up to fifty percent reimbursement from the federal government for EA costs.³⁰ The District, as did approximately thirty other states, committed to provide emergency assistance by submitting a "State Plan" which lists the nature and scope of its program and gives assurances that the District will comply with applicable federal rules.³¹ Federal rules require, for example, that EA applicants be given the opportunity to apply for assistance, be assisted by advocates of their own choosing, and appeal adverse decisions on their applications.³² In addition to extending procedural protections to applicants, EA federal rules also require that emergency assistance be given "forthwith" to eligible applicants.³³

While mandating procedural protections and prompt provision of assistance to eligible applicants, federal laws governing EA-funded emergency shelter for families leave states considerable leeway in shaping their programs. Under the EA program, states specify what type of assistance they will provide to eligible applicants and devise their own eligibility criteria.³⁴ The District committed to providing "emergency shelter and meals" to families who cannot make even temporary sleeping arrangements and who have less than \$100 in resources.³⁵ District laws also detail the program's daily operations.³⁶ The local regulations require families to provide documenta-

states are entitled to reimbursement from the federal government of 50% of their expenditures if they submit a state plan which complies with federal requirements. 42 U.S.C. § 603(a)(5) (1988) (authorizing 50% funding rate); 42 U.S.C. § 602 (1988) and 45 C.F.R. § 206.10 (1992) (outlining federal requirements for state plan). The program is designed "to avoid the destitution" of children. WAYS AND MEANS, *supra* note 7, at 650.

30. 45 C.F.R. § 233.120(b)(2) (1992).

31. *Washington Legal Clinic for the Homeless II* (No. 93-0691), slip op. at 2.

32. 45 C.F.R. §§ 206.10(a)(1) (1992) (right to apply for assistance); 206.10(a)(1)(iii) (1992) (right to be assisted by advocate); 205.10(a)(1)(ii),(5) (1992) (right to appeal).

33. 45 C.F.R. § 233.120(a) (1992). "A State plan . . . providing for emergency assistance to needy families with children must: . . . (5) [p]rovide that emergency assistance will be given forthwith." *Id.*

34. *Id.* § 233.120(a)(1)-(5) (1992). Types of assistance include, but are not limited to "mass feeding or clothing distribution . . . , [i]nformation, referral, counseling, securing family shelter, child care, [and] legal services." *Id.* § 233.120(a)(3)-(4).

35. DISTRICT OF COLUMBIA STATE PLAN FOR TITLE IV-A OF THE SOCIAL SECURITY ACT: FINANCIAL ASSISTANCE AID TO FAMILIES WITH DEPENDENT CHILDREN, attachment 3-A, at 1 (1982); 39 D.C. Reg. 473-474 (1992) (financial resources include credit cards, cash on hand, bank accounts, and bank cards).

36. 39 D.C. Reg. 470-491 (1992) (codified at D.C. Mun. Regs. tit. 29, §§ 2500-2599.1 (1992)).

tion of their eligibility by presenting an eviction notice or other written statements describing their need for shelter.³⁷ In apparent recognition that homeless families may not be able to provide complete documentation immediately, the regulations direct the District to provide temporary placement to families whose eligibility has not yet been verified.³⁸ Thus, families fleeing domestic violence or stunned by an unexpected eviction are eligible for temporary shelter pending subsequent verification.³⁹ However, the District's practice of requiring exhaustive documentation prior to approval eviscerated this presumption in favor of placement. In defending its screening process, the District relied on the D.C. Emergency Overnight Shelter Amendment Act of 1990,⁴⁰ which provided: "Nothing in this chap-

37. 39 D.C. Reg. 474-475 (1992) (codified at D.C. Mun. Regs. tit. 29, § 2503.10 (1992)) provides:

The Department may require the applicant to provide any of the following information to verify eligibility: (a) Eviction notice; (b) Writ of Restitution; (c) Social Security Number; (d) Marriage Certificate; (e) Income and source of income, including employment and public benefits from any jurisdiction; (f) Foreclosure notice; (g) Statements describing the reasons for the applicant's need for shelter, including information on the following matters: (1) Eviction; (2) Delinquent rent; (3) Natural disaster; (4) Domestic Violence or abuse; (5) Release from jail; (6) Release from another institutional setting; (7) Previous addresses; (8) Case numbers associated with the receipt of employment and public rights; (9) District of Columbia Identification (DCID) Number; (10) Name and address of spouse; (11) Date of birth; (12) Information regarding other persons with whom the applicant seeks to be temporarily housed or sheltered; (13) Source of referral; (14) Employment history and identification; (15) Verification of termination of benefits from other jurisdiction; (16) Name(s) and address(es) of nearest relative(s), and of any relative(s) residing in the District of Columbia metropolitan area; (17) Education; and (18) Other information deemed necessary to establish eligibility.

Id. §§ 475-476.

38. 39 D.C. Reg. 474 (1992) (codified at D.C. Mun. Regs. tit. 29, § 2503.2 (1992)). "Lack of available documentation shall not be a ground for denial of services on the night of application." *Id.* "If the Department cannot verify the applicant's eligibility . . . on the day requested, the Department shall temporarily place the applicant or make a referral to available shelter for that night." *Id.* (codified at D.C. Mun. Regs. tit. 29, § 2503.6 (1992)).

39. The Mayor's own Advisory Task Force on Homelessness called upon the District to "[e]nforce existing City regulations which call for presumptive eligibility for homeless families seeking shelter to prevent the continued homelessness of a family without required documentation, such as birth certificates, an eviction notice, or other proof." MAYOR'S ADVISORY TASK FORCE ON HOMELESSNESS, 1992 REPORT 20 (Oct. 1992). In a note that presaged the District's ultimate decision to forego federal funding rather than provide shelter to all eligible families, the report indicated that the budget implications of the recommendation would be substantial. *Id.*

40. D.C. CODE ANN. §§ 3-601 to -622 (Michie Supp. 1993). The 1990 Act repealed §

ter shall be construed to create an entitlement of any homeless person or family to emergency overnight shelter or support services.”⁴¹

In removing an entitlement to shelter from the local shelter law, the District codified its long-standing practice of turning away eligible families. Even before the 1990 change in local law, the family shelter intake office frequently turned away eligible families.⁴² Intake workers frequently discouraged families from applying by requiring notarized letters, birth certificates, and other documents prior to a decision on eligibility.⁴³ In many cases, workers attempted to convince applicants to return to their previous accommodations, even if overcrowded or otherwise inadequate.⁴⁴ Intake workers often called relatives or friends of applicants in an effort to obtain permission for the applicant to return, even if this would subject the family

3-602 (Michie 1988) which guaranteed “adequate overnight shelter to all homeless persons in the District of Columbia requesting such shelter” The Act also rewrote § 3-601 (Michie 1988) which entitled “[a]ll persons in the District of Columbia . . . [to] the right to adequate overnight shelter.” Other significant changes occurred as well. The 1990 Act set forth eligibility criteria in § 3-605(b) (Michie Supp. 1993), mandated case management services for shelter residents in § 3-602.1(c)(2) (Michie Supp. 1993), imposed length of stay limits in § 3-610(a) (Michie Supp. 1993), and provided for an administrative appeal process as the exclusive remedy to challenge the District’s actions in § 3-606(a)-(d) (Michie Supp. 1993).

This Act was passed following several years of litigation over the provision of emergency shelter to single persons, *Atchison v. Barry*, 585 A.2d 150 (D.C. App. 1991), *aff’g* No. CA-11976 (D.C. Super. Ct. 1989) and families, *Fountain v. Kelly*, 630 A.2d 684 (D.C. Cir. 1993), *aff’g sub nom.* *Fountain v. Barry*, No. 90-1503 (D.C. Super. Ct. Feb. 12, 1990). For an account of this litigation, see Lois G. Williams et al., *The District of Columbia’s Response to Homelessness: Depending on the Kindness of Strangers*, DISTRICT OF COLUM. L. REV. 47 (Spring 1993).

41. D.C. CODE ANN. § 3-609(a) (Michie Supp. 1993).

42. Affidavit of Frank R. Trinity at 1-4, *Fountain v. Barry*, No. 90-1503 (D.C. Super. Ct. Feb. 12, 1990), *aff’d sub nom.* *Fountain v. Kelly*, 630 A.2d 684 (D.C. Cir. 1993). The affidavit reports instances in 1990 of wrongful denials of shelter to homeless families by Department of Human Services intake officials. *Id.* at 1. Instances include denials not accompanied by written notices, denial based on family size larger than three, denials based on the relocation of the shelter intake office, denials based on lack of available units, and the refusal to permit a family to apply for shelter because they were referred from another shelter. *Id.* at 1-4. After attorney intervention, the Department approved shelter for most of these families. *Id.* at 2, 4.

43. Declaration of Frank R. Trinity at 3-4, *Washington Legal Clinic for the Homeless I* (No. 92-1894) (describing one family’s inability to apply for shelter because the applicant did not have her baby’s birth certificate with her). See *supra* note 37 for examples of other required information.

44. D.C. BAR PUBLIC SERVICE ACTIVITIES CORP. PRO BONO PROGRAM, ADMINISTRATIVE ADVOCACY TRAINING MANUAL 358 (Feb. 1992).

to possible eviction for violating lease provisions.⁴⁵ Many families were not provided written denial notices and thus were not informed of their right to appeal.⁴⁶

*OUTREACH TO FAMILIES APPLYING
FOR EMERGENCY SHELTER*

Concerned about the treatment of families in the shelter program, a group of advocates initiated talks with the D.C. Department of Human Services (DHS) in the fall of 1991.⁴⁷ The advocates included attorneys, law students, social workers, and other volunteers associated with local churches and service organizations. The District's representatives included the DHS Chief of Staff, General Counsel, and administrators of the shelter program. To address the fact that most families did not know about their rights with respect to the shelter program, the volunteers visited the shelter intake waiting room several times a week, distributing leaflets describing the rights of applicants and providing advice. The volunteers also facilitated the families' access to legal counsel. Several volunteers arranged for alternative emergency accommodations when the District's program turned away families who appeared to be eligible.⁴⁸

At first, District officials did not object to the outreach program. As the winter progressed, volunteers accumulated a long list of concerns about the shelter intake process: The waiting room was hot and overcrowded; families were not permitted to have food in the waiting room; families were forced to wait hours, day after day, without being informed of the status of their applications for shelter; and workers frequently made snide or inappropriate remarks to

45. *Id.* See generally Michele L. Norris & Paul Duggan, *A Cold Weather Friend*, WASH. POST, Feb. 3, 1993, at D1. In the middle of winter, the District evicted a grandmother who violated her lease by allowing her grandchildren to stay with her in her subsidized apartment. *Id.*

46. These written notices, required by law to be provided upon denial of shelter, contain information about the right to appeal and the procedure to follow. D.C. CODE ANN. § 3-606(b) (Michie Supp. 1993).

47. Declaration of Frank R. Trinity at 6-7, *Washington Legal Clinic for the Homeless I* (No. 92-1894) (focusing on the effectiveness of the District's family shelter program and the indignities suffered by family applicants).

48. Declaration of Lisa Goode, Director of the Father McKenna Center of St. Aloysius Church, at 3, *Washington Legal Clinic for the Homeless I* (No. 92-1894) (noting that the church provided overflow shelter accommodations during the winter of 1991).

applicants.⁴⁹ One law student's account captures some of this treatment:

When I asked [the DHS intake worker] about the progress of my client's application, he treated me with total disdain. He was reading a newspaper when I came to his office, and he did not look away from it when I spoke to him. After I asked my question, [he] walked out of his office, ignoring me, and proceeded to the waiting room. He approached my client in the waiting room and called her into his office where he shouted at her, accusing her of lying to him about her paperwork. Eventually, [he] stopped yelling at my client. He told us to go back to the waiting room and he . . . returned to his office to make some telephone calls. Ultimately, he told my client and me that no shelter was available. My client and I left the OESSS⁵⁰ soon afterwards.⁵¹

During the period of this outreach, a multi-part series on families applying for shelter aired on a popular public radio program.⁵² The program included tape-recorded interviews of families conducted by the reporter while in the waiting room. The families angrily complained about the way they were being treated by intake personnel. Several weeks after the radio show aired, several advocates conducted a protest at the shelter intake office to dramatize the situation there.⁵³

The situation soon deteriorated between shelter staff and advocates seeking to assist applicants in the waiting room. In early March 1992, an intake worker warned families not to speak to the volunteers, telling the applicants "not to bite the hand that feeds" them.⁵⁴ The shelter administrator directed two law students to leave because she did not consider the premises to be an "advocacy set-

49. Declaration of Alec Deull at 2-4, *Washington Legal Clinic for the Homeless I* (No. 92-1894) (describing waiting room of shelter intake office and demeanor of intake workers).

50. The Office of Emergency Shelter and Support Services operates the family shelter program within the DHS.

51. Declaration of Diann Hammer at 2-3, *Washington Legal Clinic for the Homeless I* (No. 92-1894).

52. *All Things Considered* (NPR radio broadcast, Mar. 4, 11, 18, 1992).

53. Margaret Rankin, *District Opens Up Shelter to Families*, WASH. TIMES, Mar. 10, 1992, at B4.

54. Declaration of Diann Hammer, *supra* note 51, at 6.

ting."⁵⁵ A social worker was threatened with arrest by shelter personnel and directed to leave the waiting room because she did not have a pre-existing relationship with an applicant.⁵⁶ An attorney speaking to families in the waiting room was summoned to the administrator's office where he was surrounded by two security guards and two uniformed District police officers and handcuffed.⁵⁷ The District held firm to its position that advocates were excluded from the waiting room unless they were accompanying a client with whom they had already established a professional relationship.⁵⁸

WASHINGTON LEGAL CLINIC FOR THE HOMELESS I

In an effort to break the impasse at the family shelter intake office, in August 1992 homeless families and advocates filed a class action lawsuit in federal district court.⁵⁹ The complaint described the grim and intimidating conditions in the intake waiting room, the discouragement of applicants by intake workers, and the failure to provide written determinations of eligibility and information about the right to appeal adverse decisions.⁶⁰ Allegations also focused on the harassment and expulsion of advocates who wished to assist applicants in the intake office.⁶¹ The complaint alleged violations of a host of rights set forth in federal and local statutes, as well as rights protected by the United States Constitution.⁶² The plaintiffs

55. *Id.* at 7.

56. Declaration of Lisa Goode, *supra* note 48, at 5, 7.

57. Affidavit of Frank R. Trinity, *supra* note 42, at 13.

58. Affidavit of Frank R. Trinity, *supra* note 42, at 13-14.

59. *Washington Legal Clinic for the Homeless I* (No. 92-1894); Christine Spolar, *Homeless Accuse City of Intimidation*, WASH. POST, Aug. 20, 1992, at D3.

60. Spolar, *supra* note 59, at D3.

61. Spolar, *supra* note 59, at D3.

62. The federal regulations applicable to the EA program include the following: A State plan under title . . . IV-A . . . of [the] Social Security Act shall provide that: (1) Each individual wishing to do so shall have the opportunity to apply for assistance under the plan without delay. Under this requirement . . . [a]n applicant may be assisted, if he so desires, by an individual(s) of his choice (who need not be a lawyer) in the various aspects of the application process and the redetermination of eligibility and may be accompanied by such individual(s) in contacts with the agency and when so accompanied may also be represented by them.

45 C.F.R. § 206.10(a)(1)(iii) (1992).

Provisions of District law included the following rights of applicants: the right to seek assistance from advocates in the shelter application process, 39 D.C. Reg. 470, 487-488 (1992) (codified at D.C. Mun. Regs. tit. 29, §§ 2511.10, 2512.3 (1992)); the right to

sought immediate access to the intake waiting room based on the First Amendment rights of the advocates and families to communicate with each other.⁶³ The plaintiffs alleged that the restriction on advocates was a content-based ban created specifically to suppress speech which government workers found objectionable and which left open no alternate channels of communication.⁶⁴ The District contended that the shelter office waiting room was not a public forum and that its restrictions were reasonable and therefore lawful, citing the United States Supreme Court's decision in *International Society for Krishna Consciousness v. Lee*.⁶⁵

receive written and oral notice of denials of shelter, *id.* 474, 487 (codified at D.C. Mun. Regs. tit. 29, §§ 2502.4, 2511.4 (1992)); the right to appeal an adverse determination through an administrative appeal, *id.* 486-488 (codified at D.C. Mun. Regs. tit. 29, §§ 2511.1, 2511.4, 2512.1 (1992)); the right to receive notice of the availability of those reviews and the right to be represented by a person of their choosing, *id.* 486-488 (codified at D.C. Mun. Regs. tit. 29, §§ 2511.1, 2511.4, 2512.3 (1992)); and the right to receive overnight shelter on the night of application regardless of any alleged defect in their documentation, *id.* 474 (codified at D.C. Mun. Regs. tit. 29, § 2503.2 (1992)).

In addition, the complaint alleged that the blocking of contacts between applicant families and advocates in the shelter waiting room violated the First Amendment and the Due Process Clause of the Fifth Amendment.

63. Plaintiffs' Motion for Preliminary Injunction at 1, *Washington Legal Clinic for the Homeless I* (No. 92-1894). Plaintiffs also sought immediate relief on their claims based on (1) the families' due process and First Amendment rights of access to the courts; (2) the families' rights of due process and of equitable relief to challenge violations of local statutes and regulations; (3) the families' right to challenge violations of federal regulations under the Supremacy Clause and 42 U.S.C. § 1983. Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction at 10, 12-41, *Washington Legal Clinic for the Homeless I* (No. 92-1894).

64. Memorandum in Support of Plaintiffs' Motion for a Preliminary Injunction at 40-41.

65. 112 S. Ct. 2701 (1992). In the *International Society for Krishna Consciousness* decision, the Court determined that an airport terminal is not a public forum and therefore upheld a ban on solicitation of funds but disallowed a ban on leafletting. The public forum analysis divides various government property into three categories. *Id.* at 2705-06. In traditional public fora such as streets and parks, regulation of speech is subject to highest scrutiny, permitted only if narrowly drawn to achieve a compelling state interest. *Id.* at 2705. The second category of public property is the designated public forum which the state itself has opened for expressive activity; regulation of such property is subjected to the same scrutiny as traditional public fora. *Id.* Regulation of all other public property need only be reasonable as long as the regulation does not suppress the speaker's activity due to disagreement with the speaker's view. *Id.* at 2705-06. The District argued that the shelter intake waiting room fit within the third category.

As to the other claims put forth by the plaintiffs, the District claimed that it was in compliance with the laws and regulations governing the emergency shelter programs, and that even if plaintiffs could show some violations, the improper behavior of individual employees did not establish state action under 42 U.S.C. § 1983. Memorandum in

At the suggestion of the federal court, the parties agreed to a ninety-day trial program, under which the District allowed volunteers to offer assistance to applicants in the waiting room.⁶⁶ Under the agreement, one volunteer advocate was permitted in the waiting room three times per week for half a day.⁶⁷ The parties agreed to a bi-weekly consultation process to address informally any problems or disagreements.⁶⁸ The agreement also authorized the distribution of leaflets in a designated space in the waiting room and permitted the advocates to install a telephone for use by applicants.⁶⁹

During the ninety-day trial period, volunteers, including lawyers, law students, and social workers, met with approximately 200 families. The advocates provided information to most families about their rights, such as the right to a written decision and the right to appeal an adverse decision, and provided follow-up representation to many families. As a result, previous erroneous denials of shelter were reversed through administrative appeals, while other mishandlings of applications were corrected through informal advocacy.⁷⁰ For the most part, however, the advocates simply witnessed first-hand a dehumanized process that left families exhausted and in despair.⁷¹

Under the glare of litigation, the agency improved its written denial notices. For the first time it acknowledged in writing that families were being turned away not because of ineligibility but because of lack of space.⁷² Under this regime, however, families were not even screened for eligibility.⁷³ Instead, an announcement was

Support of Defendants' Motion to Dismiss the Complaint at 4-5, *Washington Legal Clinic for the Homeless I* (No. 92-1894).

66. Memorandum of Understanding at 1-2, *Washington Legal Clinic for the Homeless I* (No. 92-1894).

67. *Id.* at 3.

68. *Id.* at 4.

69. *Id.* at 5-6. The advocates also agreed to a dismissal without prejudice of the complaint, reserving the option to refile a new lawsuit if necessary to guarantee their rights. *Id.* at 6-7.

70. First Amended Complaint ¶¶ 79-148, *Washington Legal Clinic for the Homeless I* (No. 92-1894).

71. *Id.* ¶¶ 104 and 108.

72. Notice of Eligibility Determination for Emergency Overnight Shelter and Support Services 1 (Mar. 5, 8, 1993) (on file with the *Stetson Law Review*) (stating "[d]enial is based on the lack of available appropriate temporary housing").

73. Declaration of Lisa A. Brown at 2-7 (Mar. 8, 1993) (on file with *Stetson Law Review*).

made daily that the system was full and that families could return the following day to re-apply.⁷⁴ Not surprisingly, this policy exacted extreme hardship on the families. One applicant, who was eventually placed into shelter, described her experiences:

My dealings with [the Office of Emergency Shelter and Support Services] followed essentially the same routine for almost two weeks. Almost every business day I filled out an application, heard an announcement that there was no space, and received a written denial. The written denials are all the same. The applications are “denied” and the reason given is “Other”. Right after “Other” there is a handwritten explanation that “Denial is in accordance with 2511.2 of the Emergency Shelter Regulations.” This last statement appears to be in the exact same handwriting on at least four of the notices I have received, making it appear that part of the notice has been standardized When I asked an OESSS worker what “2511.2” means, he said he didn't know. When I inquired further, he said that it means there are no more spaces available in the system and that OESSS is not required to give anyone shelter. When I asked what exactly “2511.2” said, he said he didn't know and that he had never seen what it says. No one at OESSS had given me a copy of the shelter regulations.⁷⁵

By failing to screen applicants for eligibility for shelter, the agency denied applicants access to benefits — such as free on-site medical services and highest priority on the subsidized housing waiting list — reserved for families approved for shelter.⁷⁶ Forcing families to return to the waiting room day after day also adversely affected their ability to ensure uninterrupted schooling for their children.⁷⁷

A front-page article in the *Washington Post* opened with a first-hand description of the hopelessness experienced by families in the

74. *Id.* at 3-4.

75. *Id.* at 4.

76. “Applicants [for subsidized housing] who reside in a shelter operated by the D.C. Government receive priority placement.” Letter from Ray Price, Director of the D.C. Department of Public and Assisted Housing, to Frank R. Trinity (Apr. 24, 1992) (on file with Washington Legal Clinic for the Homeless). Health Services are provided at the shelter intake office to “homeless families found eligible for emergency shelter.” Letter from Mohammad N. Akhter, M.D., M.P.H., Commissioner of Public Health, to Frank R. Trinity (Mar. 1993) (on file with Washington Legal Clinic for the Homeless).

77. Affidavit of Frank R. Trinity, *supra* note 42, at 3. Although not required by regulation, “the OESSS staff requires that minor children accompany the head of the family . . . even if the children have to be absent from school for this purpose.” *Id.*

shelter waiting room:

At 10:40 A.M., social worker Pam Shaw walked into the waiting room, where about 20 adults and children applying for emergency shelter sprawled in a collection of dirty orange plastic chairs. Outside, the morning was unusually cool, and the sky was emptying torrents of rain onto gray city streets.

"Ladies and gentlemen, I have an announcement," she said. The people waited, their faces like granite, their eyes hard. "We had one shelter vacancy today, and it has been filled. The rest of you are free to come back tomorrow and reapply." One woman let out a long explosion of air — a sigh between clenched teeth — that eloquently expressed exasperation; then she and the others drifted out the door.⁷⁸

WASHINGTON LEGAL CLINIC FOR THE HOMELESS II

Having documented this unacceptable treatment of children, advocates could not accept the District's claims of municipal penury. A second lawsuit was filed, insisting on the families' rights to eligibility determinations and to prompt placement if eligible.⁷⁹ The plaintiffs moved for a preliminary injunction solely on their section 1983 claim that federal law mandated placement of eligible families "forthwith."⁸⁰ In support of the motion, plaintiffs submitted declarations from five families who had been turned away at the shelter office, as well as a pediatrician's conclusion that "[e]ven brief periods of malnutrition, exposure, or illness without medical care can result

78. Tracy Thompson, *D.C. Has Scant Help to Offer Families with Nowhere to Go*, WASH. POST, June 27, 1993, at A1.

79. *Washington Legal Clinic for the Homeless II* (No. 93-0691). At the end of the 90 days, the District "unilaterally" announced its intention to permit volunteers in the shelter waiting room in limited numbers and during limited hours. Letter from Jesse P. Goode, Senior Attorney, Department of Human Services, to Katherine D. McManus, Howrey & Simon (Mar. 18, 1993) ("In an attempt to settle the question of your clients' continued access to the Intake Office at 25 M St., S.W. and in order to avoid litigation, the Department is going to unilaterally allow your clients access to the Intake Office.").

80. *Washington Legal Clinic for the Homeless II* (No. 93-0691) (citing 45 C.F.R. § 233.120(a)(5) (1992) ("A State plan . . . providing for emergency assistance to needy families with children must . . . (5) [p]rovide that emergency assistance will be given forthwith.")). Cf. 42 U.S.C. § 1983 (1988) which allows persons to sue officials acting under color of state law for alleged deprivations of "rights, privileges, or immunities secured by the Constitution and laws" of the United States.

in long term physical injury or psychological impairment for homeless children.”⁸¹ The District opposed the lawsuit, repeating its First Amendment arguments and contending that applicant families had no enforceable rights under section 1983 in light of the Supreme Court's decision in *Suter v. Artist M.*⁸² Despite this vigorous attack on the merits of the plaintiffs' section 1983 claim, on the eve of oral argument the District informed the court that it had removed the provision of emergency shelter from its EA state plan and would thereafter finance its emergency family shelter program solely through local funds.⁸³ At oral argument, counsel for the District told the court that the pending lawsuit had been a “catalyst” for this decision,⁸⁴ explaining that

It's admittedly very difficult. You have to determine either to shut down at the front end or shut down at the back door — the front door or the back door. In this case, by withdrawing from the E.A. State Plan, admittedly, the District government has decided to shut down at the front door.⁸⁵

The District argued that its withdrawal from the EA program rendered the plaintiffs' motion for preliminary relief moot.⁸⁶ In a decision filed ten days later, the court agreed, ruling that federal regulations no longer applied to the District's shelter program.⁸⁷ The court gave assurances that if the District returned to the EA program and again violated plaintiffs' rights as alleged, it would pro-

81. Declaration of Dr. Ann Barnett at 9, *Washington Legal Clinic for the Homeless II* (No. 93-0691) (on file with *Stetson Law Review*).

82. 112 S. Ct. 1360, 1370 (1992) (noting that a provision of the federal Adoption Assistance and Child Welfare Act of 1980 could not be enforced under § 1983; the provision mandates that states use “reasonable efforts” to prevent the need for removing children from their homes and to make it possible for children to return to their homes). See *infra* notes 126-35 and accompanying text.

83. Transcript of Hearing on Motion for Preliminary Injunction at 21, *Washington Legal Clinic for the Homeless II* (No. 93-0691) (D.D.C. filed Apr. 5, 1993); Tracy Thompson, *D.C. Turns Down U.S. Aid for Emergency Shelters*, WASH. POST, July 20, 1993, at B1.

84. Transcript of Hearing on Motion for Preliminary Injunction at 3, *Washington Legal Clinic for the Homeless II* (No. 93-0691).

85. *Id.* at 21.

86. *Id.*

87. *Washington Legal Clinic for the Homeless II* (No. 93-0691) (order denying preliminary injunction as moot). The judge stated that “the Court cannot order the District of Columbia to follow the mandates of a federal law no longer applicable.” *Id.* at 5.

vide prompt judicial review.⁸⁸ The District has since indicated in various statements that it will re-enter the EA emergency shelter program.⁸⁹

The District's precipitous withdrawal from federal funding forestalled an immediate resolution in *Washington Legal Clinic for the Homeless II* of whether homeless families have section 1983 causes of action under the Emergency Assistance program.⁹⁰ Still, the case illustrates how murky the rules governing section 1983 claims have become after the Supreme Court's decision in *Suter*. The lower federal courts are now split on the teaching of *Suter*, with some courts holding that state compliance with federal statutory directives can be enforced only by federal agencies,⁹¹ and other courts permitting private enforcement through the courts.⁹² These divergent and irreconcilable streams of precedent among the circuit courts illustrate the pressing need for clarification, or correction, by the Court or Congress.

THE UNSUITABILITY OF SUTER v. ARTIST M.

To understand the confusion engendered by the *Suter* decision, one must first consider that the task of interpreting congressional

88. *Id.* at 6. The court also permitted plaintiffs to amend their complaint to add a count seeking enforcement of a local statutory provision. *Id.* at 9. Section 3-206.3(a) of the D.C. Code Annotated states as follows: "The Mayor is authorized to operate an Emergency Shelter Family Program, which shall claim federal financial participation to the extent allowable by law for housing assistance and services to homeless families with minor children." D.C. CODE ANN. § 3-206.3(a) (1988).

89. July 30, 1993 Opinion in *Washington Legal Clinic for the Homeless II*, at 7 n.7 (No. 93-0691) (referring to statement attributed to District family shelter administrator that the District planned to reenter the EA program within three to six months); U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, THE D.C. INITIATIVE IMPLEMENTATION PLAN, WORKING TOGETHER TO SOLVE HOMELESSNESS 44 (1993) ("In the development of the short term emergency shelter system, the District will access greater financial resources. As part of this effort, the District already is exploring options for re-entering the homeless support component of the Federal Emergency Assistance program.").

90. While the court denied Plaintiffs' Motion for Preliminary Relief as moot, the plaintiffs amended their complaint to add a mandamus claim, and the case is still pending on all counts, including several constitutional claims. *Washington Legal Clinic for the Homeless II* (No. 93-0691).

91. *See, e.g.*, *Thomas v. New York City*, 814 F. Supp. 1139 (E.D.N.Y. 1993) (holding that municipalities and agencies are liable under § 1983 for constitutional violations).

92. *See, e.g.*, *Kam Shing Chan v. City of New York*, 803 F. Supp. 710, 725 (S.D.N.Y. 1992) (holding that under *Suter* the right to prevailing wages under 42 U.S.C. § 5310 conferred a specific substantive right on the plaintiff).

intent based on statutory language is not an easy one. This inquiry is made more difficult by the complexity of joint federal-state programs governed by overlapping statutes and regulations. Except when Congress has clearly indicated that implementation of federally-funded programs is not to be second-guessed by the judiciary,⁹³ courts have applied accepted guidelines to settle questions of enforceability. Prior to the *Suter* decision, the Supreme Court had developed and refined a three-part set of guidelines, which some have called the *Wilder* test.⁹⁴ While falling short of bringing complete illumination to this difficult area of judicial inquiry, the *Wilder* test gave all parties the same questions to answer. *Suter* ignored the accepted guidelines, articulated none of its own, and left future courts to struggle on their own.

Before *Suter*, it was clear that beneficiaries of Social Security Act public assistance programs⁹⁵ could seek federal relief to redress violations of the rights conferred upon them by those programs.⁹⁶ Several courts ruled in the 1980s that homeless families could assert section 1983 claims when alleging violations of their rights to shelter under the Emergency Assistance program.⁹⁷ In *Koster v. Webb*,⁹⁸ a federal district court in New York observed that it was “clear” that homeless families could use section 1983 to assert a right to emergency shelter under the Social Security Act.⁹⁹ In denying the govern-

93. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 31-32 (1981) (holding that developmentally Disabled Assistance and Bill of Rights Act does not create enforceable rights to certain kinds of treatment).

94. See *infra* notes 106-21 and accompanying text for a discussion of the *Wilder* case.

95. Characteristics of State Plans for Aid to Families with Dependent Children under Title IV-A of the Social Security Act, at XX (1990-91 ed.) (outlining various public assistance programs funded through the Social Security Act).

96. See *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (holding that individual recipients of public aid funded in part under the Social Security Act may sue for injunctive relief under § 1983 to enforce compliance with application processing standards set forth in federal regulations); see also *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (holding that AFDC recipients challenging state interpretations of federal statutory provisions on benefit levels as violative of Social Security Act may sue under § 1983).

97. *Koster v. Webb*, 598 F. Supp. 1134, 1136 (E.D.N.Y. 1983) (holding that homeless families may sue under § 1983 to enforce “right to emergency shelter under the Social Security Act”); *McCain v. Koch*, 502 N.Y.S.2d 720, 728 (App. Div. 1986) (finding that homeless families may use § 1983 to enforce emergency shelter provisions of state plan submitted under the Social Security Act).

98. 598 F. Supp. 1134 (E.D.N.Y. 1983).

99. *Id.* at 1136.

ment's motion to dismiss in *Koster*, the court observed that while neither the federal statute nor the implementing federal regulations explicitly require participating states to supply shelter to eligible applicants, the states are required to specify the nature of the services to be provided.¹⁰⁰ Because New York's EA state plan (along with state regulations) included "securing family shelter"¹⁰¹ as one of the program's services, and because emergency shelter was one of the types of assistance contemplated in the federal Act (as shown by legislative history), the court ruled that New York was "bound to fulfill its promise."¹⁰²

Similarly, in *McCain v. Koch*,¹⁰³ a New York state court ruled that homeless families alleging arbitrary denials of emergency shelter could sue under section 1983 to obtain mandatory enforcement of the state plan submitted pursuant to the Social Security Act.¹⁰⁴ In reaching the conclusion that the Social Security Act creates federally enforceable rights, the courts in both *Koster* and *McCain* determined that the government had clearly stated a promise to needy families with dependent children in unambiguous terms.¹⁰⁵

The concept of binding obligations was central to the section 1983 analysis adopted in 1987 by the Supreme Court in *Wilder v. Virginia Hospital Ass'n*.¹⁰⁶ In deciding whether a federal statute creates an enforceable federal right under the *Wilder* test, the court must first determine whether "the provision in question was intend[ed] to benefit the putative plaintiff."¹⁰⁷ "If so, the provision creates an enforceable right unless it reflects merely a 'congressional preference' for a certain kind of conduct rather than a binding obligation on the governmental unit"¹⁰⁸ or "unless the interest the plaintiff asserts is 'too vague and amorphous' such that it is beyond the competence of the judiciary to enforce."¹⁰⁹

Under the *Wilder* test, homeless families seeking enforcement of

100. *Id.* at 1137.

101. *Id.*

102. *Id.*

103. 502 N.Y.S.2d 720 (App. Div. 1986).

104. *Id.* at 728.

105. *Koster*, 598 F. Supp. at 1137; *McCain*, 502 N.Y.S.2d at 729.

106. 496 U.S. 498 (1987).

107. *Id.* at 509 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)).

108. *Id.* (quoting *Pennhurst State Sch. & Hosp.*, 451 U.S. at 19).

109. *Id.* (quoting *Golden State Transit Corp.*, 493 U.S. at 106).

federal Emergency Assistance laws appear to pass the first test easily: It is virtually indisputable that such families are the intended beneficiaries of the federal law.¹¹⁰ As to whether the law incorporates a preference or a binding obligation on the part of the government, the homeless families can rely on a multitude of mandatory language including a federal regulation providing that EA state plans “must” provide that assistance “will be given forthwith” to those who are eligible.¹¹¹ Moreover, the binding nature of a state's obligation can also be determined when there are sanctions other than section 1983 litigation to enforce compliance.¹¹² Homeless families applying for EA emergency shelter also pass this test, as compliance with the provision of a Title IV-A state AFDC plan, including its EA components, is a prerequisite for receipt of federal financial reimbursement.¹¹³

110. The Social Security Act states that the purpose of the AFDC program is to: [F]urnish financial assistance and rehabilitation and other services . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

42 U.S.C. § 601 (1988).

111. 45 C.F.R. § 233.120(a)(5) (1992). Federal regulations describe Social Security Act state plans in specific detail as follows:

The State plan is a comprehensive statement submitted by the State agency describing the nature and scope of its program and giving assurance that it will be administered in conformity with the specific requirements stipulated in the pertinent title of the Act, the regulations in Subtitle A and this chapter of this title, and other applicable official issuances of the Department [of Health and Human Services].

45 C.F.R. § 201.2 (1992).

112. *Wilder*, 496 U.S. at 511 (noting that among the factors supporting the Court's conclusion that § 1983 relief is available is that the federal funding provision is expressly conditioned on compliance with the federal law at issue and the federal government is authorized to withhold funds for non-compliance).

113. 42 U.S.C. § 604(a)(2) (1988) states as follows:

In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds . . . that in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) of this title to be included in the plan . . . the Secretary shall notify such State agency that further payments will not be made to the State [until the State is in compliance].

See also 45 C.F.R. § 201.6(a), (e) (1992). In fact, the District of Columbia has had millions in claims for federal reimbursement disallowed for various reasons, including non-

Given this mandatory language in the federal law and the fact that the burden rests with the government to show that the federal law is precatory rather than binding, government providers of EA are left with really only one argument: The provisions in question are insufficiently specific for courts to enforce. The central regulation at issue requires that assistance be given "forthwith."¹¹⁴ While it is true that the regulation does not set a fixed deadline in terms of hours or days,¹¹⁵ terms such as "reasonable promptness" and "forthwith" have been interpreted and enforced by the courts.¹¹⁶ Indeed, in a separate lawsuit attacking the District of Columbia's failure to provide Emergency Assistance cash benefits (as distinct from shelter) the court entered a consent judgment requiring that assistance be provided "forthwith."¹¹⁷

Thus, under the *Wilder* test, homeless families can look to the federal courts to seek enforcement of federal EA regulations pertaining to emergency shelter. In fact, in a decision written in 1990 by then Federal Circuit Judge Ruth Bader Ginsburg,¹¹⁸ the court dis-

compliance with federal regulations. U.S. DEP'T OF HEALTH AND HUMAN SERV. REVIEW OF EMERGENCY ASSISTANCE PAYMENTS CLAIMED BY THE DISTRICT OF COLUMBIA DEP'T OF HUMAN SERV. UNDER TITLE IV-A OF THE SOCIAL SECURITY ACT, at ii (describing an audit recommending disallowance of \$2.3 million in federal reimbursements for emergency shelter claims which violate federal and local law).

114. 45 C.F.R. § 233.120(a)(5) (1992).

115. For example, the Federal Food Stamp Act requires that expedited food stamps be provided within five calendar days of application. 7 U.S.C. § 2020(e)(9) (1988) ("The State plan of operation . . . shall provide . . . that the State agency shall . . . provide coupons no later than five days after the date of application to any household which [is destitute or homeless]."). 7 C.F.R. § 273.2(i)(3)(i) (1993) (stating that "for households entitled to expedited service, the State agency shall make available to the recipient [Food Stamps] not later than the fifth calendar day following the date an application was filed").

116. See *Mandley v. Quern*, 635 F.2d 659, 661-62 (7th Cir. 1980) (distinguishing between the "reasonable promptness" and the "forthwith" standard in the EA provision); *Beasley v. Harris*, 671 F. Supp. 911, 915-16 (D. Conn. 1987) (interpreting "reasonable promptness" standard in challenge to timeliness of AFDC child support payments); *Purnell v. Edelman*, 365 F. Supp. 499, 500-01 (N.D. Ill. 1973) (interpreting "forthwith" standard in provision of EA to restore utility service); *Adens v. Sailer*, 312 F. Supp. 923, 926-27 (E.D. Pa. 1970) (interpreting "forthwith" standard for disbursement of EA payments).

117. *Feeling v. Barry*, No. 82-2994, at 2-3 (D.D.C. Mar. 12, 1986) (consent judgment) (setting a standard of eight working days from the completion of application, provided that in the case of an imminent emergency the District would take "all reasonable steps to see that the application is processed in time to resolve the emergency").

118. *Coker v. Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990) (holding that homeless families challenging noncompliance with state EA plans may sue states under § 1983 but

missed a suit filed by homeless families against the Secretary of Health and Human Services seeking federal enforcement of EA regulations governing shelter.¹¹⁹ The court concluded that the suit had been filed against the wrong party, stating that “[i]njured parties may secure state compliance with EA pledges through fair hearing procedures and, if state noncompliance indicates a pattern violative of federal law, through direct suits against the states.”¹²⁰ Under the *Wilder* interpretation of section 1983 as “a remedy, to be broadly construed, against all forms of official violation of federally protected rights,”¹²¹ beneficiaries of Social Security Act programs, including EA emergency shelter, should in most cases have access to section 1983 remedies.

After *Suter*,¹²² however, remedies for such beneficiaries may become elusive because the *Wilder* framework for adjudicating section 1983 claims was not followed by the 1992 *Suter* decision. In *Suter v. Artist M.*,¹²³ children eligible for foster care and adoption services from the State of Illinois sued to enforce a provision of the Federal Adoption Act¹²⁴ under which the federal government reimburses a percentage of state services included in a state plan submitted to the Secretary of Health and Human Services.¹²⁵ The provision of the Act in question stated that in order for a state to be eligible for federal reimbursement, “it shall have a plan approved by the Secretary which . . . provides that, in each case, reasonable efforts will be made” to prevent removal of children from their homes and to return children to their homes.¹²⁶ The reasonable efforts provision was one of sixteen features required to be in a state plan filed under the Act.¹²⁷ The lower courts had read *Wild*

may not sue the federal government under Administrative Procedure Act).

119. *Id.* at 88-90.

120. *Id.* at 88. The court specifically referred to § 1983 as the appropriate basis for a suit against offending states. *Id.* at 89.

121. *Maine v. Thiboutot*, 448 U.S. 1, 5 (1980) (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 700-01 (1978), which held that AFDC recipients may sue under § 1983).

122. *Suter v. Artist M.*, 112 S. Ct. 1360 (1992).

123. *Id.*

124. 42 U.S.C. §§ 620-679a (1988).

125. *Suter*, 112 S. Ct. at 1363.

126. *Id.* at 1364 (citing 42 U.S.C. § 671(a)(3), (15) (1988)).

127. The provisions include, among others, requirements that states monitor and evaluate performance under the program and provide fair hearings for individuals whose claims for assistance are denied or not acted upon with reasonable promptness. 42

er as permitting section 1983 enforcement of this provision.¹²⁸

The Court in *Suter* concluded that the meaning of “reasonable efforts” varies “with the circumstances of each individual case,” and thus allows states broad discretion as to how to comply with this language.¹²⁹ The Court acknowledged that other available means of enforcement, such as federal disallowance of claims for reimbursement, did not constitute a “comprehensive enforcement mechanism”;¹³⁰ still, it was satisfied that the absence of a section 1983 remedy did not make the reasonable efforts clause a “dead letter.”¹³¹ In sum, the State of Illinois had only a “generalized duty,” leaving enforcement of the reasonable efforts clause up to the federal government.¹³²

Although the opinion appeared to limit its breadth by noting that “each statute must be interpreted by its own terms,”¹³³ it included a potentially far-reaching comment on the relative insignificance of the statute's mandatory language: “[T]he Act does place a requirement on the States, but that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the sixteen listed features.”¹³⁴ This one statement, though tangential to the holding in *Suter*, has seriously altered subsequent section 1983 analyses, leading some courts to reject private enforcement actions.¹³⁵

U.S.C. § 671(a) (1988).

128. *Artist M. v. Johnson*, 917 F.2d 980, 987-89 (7th Cir. 1990) (holding that the “reasonable efforts” clause of the Adoption Act could be enforced through a § 1983 action under the *Wilder* analysis); *see also Artist M. v. Johnson*, 726 F. Supp. 690, 696-97 (N.D. Ill. 1989) (holding that the plaintiffs can maintain a § 1983 action to enforce the reasonable efforts clause).

129. *Suter*, 112 S. Ct. at 1368.

130. *Id.*

131. *Id.* at 1369.

132. *Id.* at 1370. Although the Court took great pains to distinguish, rather than reject, its ruling in *Wilder*, it did not apply the test articulated in the earlier decision. *Id.* In a stinging dissent, Justice Blackmun complained that the Court had “inverted the established presumption that a private remedy is available under § 1983 unless Congress has affirmatively withdrawn the remedy.” *Id.* at 1377 (Blackmun, J., dissenting) (quoting *Wilder*, 496 U.S. at 509) (citing *Golden State Transit Corp.*, 493 U.S. at 106-07). Under his own application of the *Wilder* test, Justice Blackmun concluded that the child beneficiaries of the Federal Adoption Act could indeed enforce the reasonable efforts provision. *Id.* at 1372-74 (Blackmun, J., dissenting).

133. *Id.* at 1367 n.8.

134. *Id.* at 1367.

135. *Stowell v. Ives*, 976 F.2d 65, 70 (1st Cir. 1992) (holding that AFDC and Medic-

Subsequent court decisions have split on the application of *Suter* to section 1983 claims brought by recipients of federally funded public assistance. Some courts have ruled that enforcement of social welfare state plans is limited to the federal government, leaving beneficiaries of those plans without a claim under section 1983.¹³⁶ Other courts have not read *Suter* so broadly as to make the filing of a state plan the state's only duty enforceable through section 1983; rather, a state's obligations can extend to other duties that it has clearly undertaken in that plan.¹³⁷ Over time, reading *Suter* broadly — requiring only that states submit, rather than implement, plans of assistance — will undermine the remedial nature of many social welfare programs, leaving needy persons without a realistic means to obtain benefits to which they are entitled.

Federal agency enforcement of state obligations does not provide Social Security Act beneficiaries with a meaningful remedy at all; a termination in federal funding compounds rather than corrects state non-compliance. Assume a federally funded program properly assists sixty percent of the persons who are eligible for aid but violates the rights of, or wrongfully denies aid to, the remaining forty

aid recipients contesting benefit levels under federal statute do not have § 1983 rights because under *Suter* “the onus of compliance with the statute's substantive provisions [is] on the federal government”); *Clifton v. Schafer*, 969 F.2d 278, 284-85 (7th Cir. 1992) (holding that AFDC recipients denied aid pending an appeal do not have § 1983 right to enforce federal regulations which implement federal AFDC statutes because under *Suter*, individual beneficiaries of the program only have a right to a state plan complying with the regulation and cannot bring federal action to contest an “isolated violation of a conceded legal plan”); *Fountain v. Kelly*, 630 A.2d 684, 689-90 (D.C. 1993) (holding that homeless families do not have § 1983 right to minimum conditions in shelters funded through State Plan submitted under the Social Security Act because under *Suter*, the state is required only to file a plan, leaving enforcement to the federal government); *Lampkin v. District of Columbia*, 1992 WL 151813, at *4 (D.D.C. June 9, 1992) (mem.) (holding that parents of homeless children do not have a § 1983 right to enforce provisions of the Federal McKinney Act to ensure that states adequately provide for the education of homeless children because a state's only duty is to submit a state plan, leaving enforcement to the Secretary of Education).

136. See cases cited *supra* note 135.

137. *Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 269 (1st Cir. 1993) (holding that AFDC recipients implementing regulations and challenging a state's child support collection practices as violative of the Social Security Act do have a § 1983 claim under the *Wilder* test, which interpreted *Suter* to allow such claims when the attached conditions to the disbursement of federal money are unambiguous); *Arkansas Medical Soc'y, Inc. v. Reynolds*, 6 F.3d 519, 525 (8th Cir. 1993) (noting that “although some commentators have found *Suter* and *Wilder* difficult to reconcile, we choose to synthesize the two cases”) (footnote omitted). In *Reynolds*, the court held that the equal access provision of the Medicaid Act may be enforced under § 1983. *Id.* at 525-26.

percent, and that the program is governed by unambiguous federal rules. If those injured by the program's noncompliance with federal law seek vindication of their federal rights, a meaningful remedy can only be a mandatory injunction to comply with the governing laws. A cut-off in funding by a federal agency¹³⁸ would hurt not only those seeking relief, but also those currently assisted by the federal-state program.¹³⁹

Can *Suter* and *Wilder* be reconciled? Some have argued that little weight should be accorded to the statement in *Suter* that states are impervious to suits under section 1983 so long as they have submitted a state plan, because such a holding would be inconsistent with *Wilder*, a case which the Court cited for authority.¹⁴⁰ It is possible, under this reading, to see *Suter's* judgment as consistent with the final part of the *Wilder* test, that is, deeming the "reasonable efforts" provision to be insufficiently specific to permit private enforcement.¹⁴¹ The weakness of this interpretation is that, as Justice Blackmun pointed out in his dissent, the Court itself did not apply the *Wilder* test.¹⁴² The Supreme Court's failure to articulate a cogent analysis leaves courts in a difficult position. Perhaps the best approach is for courts to profess to utilize the teachings of *Suter* while

138. Of course, the state has the option under federal law to withdraw from the program, as the District of Columbia did after its EA emergency shelter program came under fire. See *supra* text accompanying notes 83-88.

139. The Supreme Court in *Pennhurst* appeared to acknowledge this problem of remedy. 451 U.S. at 29-30. The Court noted that it had on occasion departed from the rule that courts could not order states to pay additional sums demanded by compliance with federal standards. In the case cited by the Court, *Carleson v. Remillard*, 406 U.S. 598, 604 (1972), the Court approved an injunction requiring a state participating in the AFDC program to provide monetary benefits to all needy families as defined by the Social Security Act. The Court disapproved requiring states to provide money or to undertake the kind of "open-ended and potentially burdensome obligations" as were required by the federal statute at issue in *Pennhurst*. 451 U.S. at 29.

140. Timothy J. Casey, *The Enforcement of Social Security Act State Plan Requirement After Suter v. Artist M.*, 26 CLEARINGHOUSE REV. 403, 404 (1992). See, e.g., *Suter v. Artist M.*, 112 S. Ct. 1360, 1366-68 (1992) (citing *Wilder*, 496 U.S. at 509).

141. Judge Manion, who dissented in the Seventh Circuit's decision in *Suter*, based his decision on this reasoning. *Artist M. v. Johnson*, 917 F.2d 980, 995 (7th Cir. 1990) (Manion, J., dissenting) (arguing that the "reasonable efforts" provision does not communicate unambiguous notice to a state of conditions required to receive federal funding).

142. *Suter*, 112 S. Ct. at 1375 (Blackmun, J., dissenting). See *Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043, 1051 (5th Cir. 1993) (concluding that *Suter* "calls into question the continued viability of the framework set forth in *Wilder*"); *Fountain v. Kelly*, 630 A.2d 684, 691 (D.C. Cir. 1993) (explaining that *Suter* "might be viewed as contrary, at least in emphasis," from *Wilder*).

applying pre-*Suter* guidelines. A district court recently adopted this approach in allowing Medicaid recipients to sue to recover out-of-pocket expenses for state violations of a federally-mandated reimbursement standard.¹⁴³ There, the court reached its conclusion in favor of enforceability after “[a]pplying the three-part *Wilder* test, and following the guidelines set out in *Suter*.”¹⁴⁴

CONCLUSION

With lower courts splitting on whether the submission of a state plan fully discharges state duties and forecloses section 1983 actions, further clarification is needed by the Court or Congress.¹⁴⁵ In the meantime, putative beneficiaries of the Social Security Act face an increasing number of court decisions rejecting their attempts to seek enforcement under section 1983. If this trend continues, governments will often have free rein to operate social welfare programs. But as Oscar Wilde warned almost 100 years ago: “Charity creates a multitude of sins.”¹⁴⁶ While other avenues of judicial relief may be available under certain circumstances,¹⁴⁷ we now face the

143. *Greenstein v. Bane*, 833 F. Supp. 1054, 1067 (S.D.N.Y. 1993) (holding that plaintiffs have an enforceable right under § 1983 to bring a claim under the Medicaid statute).

144. *Id.*

145. *See, e.g.*, S. 1620, 103d Cong., 1st Sess. (1993) (discussing legislation to clarify Congress' intention to allow § 1983 enforcement of the Social Security Act by individual beneficiaries).

On March 19, 1993, Senator Riegle (D-MI) introduced Senate Bill 620 which would amend the Social Security to read as follows:

In an action brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a state plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability: Provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

S. 1620, 103d Cong., 1st Sess. (1993). Congress has yet to approve this amendment.

146. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 676 (15th ed. 1980) (quoting OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM* (1895)).

147. Where federal and local laws both provide for similar substantive rights, the unavailability of a § 1983 remedy leaves open alternative bases for relief. *See LeShawn A. v. Kelly*, 990 F.2d 1319, 1325 (D.C. Cir. 1993) (holding that children in foster care have a private right of action to enforce government obligations set forth in local laws

prospect that the lexicon of welfare rights, developed over the past twenty-five years, will be replaced by the banner of charity — at best subject to favoritism, at worst plagued by punitive and arbitrary practices.

Returning to the families lined up at daybreak outside the District of Columbia emergency shelter office, their efforts to obtain lodging through legal action have yet to succeed. On January 14, 1994, by 5:30 A.M., three families huddled in the darkness outside 25 M Street SW. The third woman in line, nine months pregnant, sat on a milk crate provided by a security guard who declined to give her a chair. By 7:30 A.M., eight families were in line, waiting for the waiting room to open at 8:00 A.M. The first three families were approved for shelter later that day, with the other families given form denial letters based on lack of space.¹⁴⁸ By first revoking a local entitlement to emergency shelter and then withdrawing from federal EA shelter funds, the District government has evinced a consistent resolve to avoid judicial oversight of its assistance to homeless residents. For the time being, the District has succeeded in avoiding judicial review of its family shelter program, leaving homeless children to face another winter bundled up on the streets of Washington, D.C.

which provide a court a basis independent of federal law for injunctive relief).

Procedural due process claims may fill some of the vacuum created by a broad reading of *Suter*. Challenges to arbitrary application processing of applications for emergency, based on procedural due process, may obtain relief by way of improved procedures. *See, e.g.*, *Haitian Refugee Ctr., Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989) (applicants for temporary immigration status have the constitutionally protected right to apply for residency as well as to substantiate their claims for eligibility); *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265-68 (2d Cir. 1968) (explaining that public housing applicants have standing to raise due process challenges to ensure selection in accordance with “ascertainable standards” or “some reasonable manner”). Until the implementation of such procedures, litigants may be able to obtain equitable relief in the form of emergency shelter — not as an entitlement, but as a means to prevent irreparable injury *pendente lite*.

148. These observations were made by the author on January 14, 1994. *See also* Author's Letter to Judge David A. Clarke, Chairman of the Council of the District of Columbia (Jan. 18, 1994) (on file with *Stetson Law Review*).

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