JIGGETTS v. GRINKER: DOES IT ESTABLISH A RIGHT TO "ADEQUATE SHELTER ALLOWANCE" IN NEW YORK STATE?

INTRODUCTION

Poverty and homelessness in New York state are not new problems nor ones that are likely to diminish in the near future. In fact, during the 1980's and 1990's, the number of homeless individuals and families increased dramatically, particularly in New York City.[1] As the problem has grown, numerous cases involving the homeless and indigent have come before New York courts.[2] One case which has the potential to create important policy guidelines concerning housing assistance is *Jiggetts v. Grinker*.[3]

In *Grinker*, the New York Court of Appeals held that the State Commissioner of Social Services has a statutory duty to establish adequate shelter allowances for recipients of Aid to Families with Dependant Children ("AFDC"). The *Grinker* court also held that such aid must bear a reasonable relation to the cost of housing in New York City.[4]

However, the court did not determine whether the existing limits on shelter allowance payments were adequate, and remanded to the New York State Supreme Court for a trial on this issue.[5] The trial on the "adequacy" issue ended in the spring of 1991. To date, State Supreme Court Judge Karla Moskowitz has not issued a decision on the case.

The decision in this case is pivotal in shaping the state of New York's policy and social programs regarding the homeless and the indigent. This Note argues that the shelter allowance is woefully inadequate to provide assistance to the needy, and thus the case[6] should be decided in favor of the plaintiffs. Furthermore, the Commissioner of Social Services should be obligated to raise the allowance. This Note also argues that *Jiggetts* establishes the neces-

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1 *See* RALPH DACOSTA NUNEZ, HOPES, DREAMS & PROMISE: THE FUTURE OF HOMELESS CHILDREN 29 (1994). It is estimated that there was close to a 500 percent increase in the number of homeless families in New York City between 1982 and 1992. *Id.*

2 For a discussion of recent litigation regarding the homeless and indigent, *see infra* notes 33 through 63 and 86 through 132, and accompanying text.

3 553 N.E.2d 570 (1990).

4 *Id.* at 573-75.

5 *Id.* at 571-72.

6 Note that at different times this case has been called *Jiggetts v. Grinker*, *Jiggetts v. Perales*, *Jiggetts v. Bane*, and *Jiggetts v. Dowling* depending on who the commissioner of the New York State Department of Social Services was at the time. This Note will refer to these cases, collectively, as *Jiggetts*.

sary precedent to guarantee a right to adequate shelter allowance for recipients of other public assistance grants, namely Home Relief.[7]

Part I of this Note briefly describes the current problem of homelessness and the impact of state-funded shelter allowances on the homeless population. Part II critically examines the facts of the *Jiggetts* case, analyzes relevant case law pertaining to the constitutional duty to provide adequate aid to the needy, and suggests the outcome of *Jiggetts*. Finally, Part III analyzes the *Jiggetts* rationale and proposes that its reasoning should be extended to apply to recipients of Home Relief.

I THE PROBLEM OF HOMELESSNESS AND HOW NEW YORK IS DEALING WITH IT

Although a thorough examination of the problem of homelessness is beyond the scope of this Note,[8] a brief sketch of the problem will help enlighten the discussion. While no one knows exactly how many men, women and children are homeless, it is well established that the homeless population has grown rapidly in recent years.[9]

There are various reasons for the rapid growth of the homeless population. However, one of the more significant factors involves the massive federal budget cuts of programs aiding the needy by the Reagan and Bush administrations.[10] After these cuts, two main programs survived: AFDC,[11] a joint federal-state program designed to provide support to needy families with children, and Home Relief,[12] a State sponsored program designed to support needy adult single individuals.

Under AFDC, the State determines the appropriation of benefits and the Federal Government then reimburses the state for fifty percent of the costs.[13] This assistance consists of two main components: basic grants for food and other necessities, and shelter

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7 The two main programs that the legislature of the state of New York has set forth in the Social Services Law to assist the needy are AFDC and Home Relief. Though *Jiggetts* deals strictly with AFDC, this Note will argue that the decision should apply equally to Home Relief.

8 *See* DACOSTA NUNEZ, *supra* note 1. *See also* THE WAY HOME: A NEW DIRECTION IN SOCIAL POLICY. REPORT OF THE NEW YORK CITY COMMISSION ON THE HOMELESS, (1992) [hereinafter THE WAY HOME] for a more detailed look at the problem of homelessness in New York.

9 *See* DACOSTA NUNEZ, *supra* note 1, at 29.

10 For a thorough discussion of the depth and breadth of the budget cuts of this era and their effects on the homeless, *see* DACOSTA NUNEZ, *supra* note 1, at 17-34.

11 *See* N.Y. SOC. SERV. LAW §§ 343-362 (Consol. 1993).

12 *See* N.Y. SOC. SERV. LAW §§ 157-164 (Consol. 1993).

13 *See* 42 U.S.C. § 602 (1982 & Supp. I 1983).

grants. The Legislature has specified the amount of monthly assistance payable to recipients for basic grants. The amount of shelter allowance, however, is set administratively to reflect local rent levels in the various areas of the State.[14] For implementation purposes, the New York State Department of Social Services (the "DSS") has enacted regulations that entitle recipients to shelter allowances equal to their actual rent, yet are subject to a fixed ceiling which varies from district to district and is adjusted for the number of persons in the family unit.[15]

Home Relief is set up much the same as AFDC except the State is not reimbursed by the federal government for the costs of the program. Instead, fifty percent of the program's cost is paid by the state, and fifty percent by the local government.[16] The paying local government is usually the County, except in New York City, where the municipality pays for its share of the program.[17] In all other respects, the shelter allowance is set up the same way. It is established administratively by the DSS to reflect local rent levels in the various areas of the state.[18]

The shelter allowances for both programs are paid in the actual amount of the family or individual's rent each month up to a maximum amount.[19] The shelter allowance maximums are set so low, however, that most families and individuals qualify for the maximum allowance.[20] The maximum monthly shelter allowances for households of different sizes in New York City are as follows:[21]

Household size:	1	2	3	4	5
Shelter allowance:	$215	$250	$286	$312	$337
Household size:	6	7	8+		
Shelter allowance:	$349	$403	$421		

A comparison of the AFDC shelter allowance with the actual cost of decent low-income housing in New York City demonstrates just how inadequate the shelter allowance is. The Department of Housing and Urban Development ("HUD") sets a schedule of rents for rent subsidies under Section 8 of the Housing Assistance

14 *See* N.Y. SOC. SERV. LAW § 131-a(1) (Consol. 1993).

15 *Id.*

16 *See* N.Y. SOC. SERV. LAW §§ 131-a, 352 (Consol. 1993).

17 *Id.*

18 *Id.*

19 *Id.*

20 *See* Celia W. Dugger, *A New Effort Aims to Raise Housing Aid*, N.Y. TIMES, May 30, 1993, at A29.

21 *See* JIGGETTS PRELIMINARY RELIEF HANDBOOK (1994) [Hereinafter JIGGETTS HANDBOOK].

Payment Program.[22] HUD's schedule of rents is supposed to represent the cost of available adequate low-income housing.[23] These schedules are generally recognized as conservative estimates of the cost of renting an apartment in New York City.[24] The Section 8 HUD schedule is as follows:

Household size:	1-2	3-4	5-6	7+
Avg. Sec. 8 rent:	$327	$423	$539	$604

Compared to the HUD estimates, the current AFDC shelter allowance represents only about sixty percent of the amount required to procure decent housing in New York City. Moreover, since 1987, the vacancy rate in New York City for apartments that rent for $400 or less has stayed constant, at around one or two percent.[25] Thus, for families and individuals receiving assistance, finding affordable housing is an exceptionally onerous task.[26] Even the most liberal estimates suggest that no more than sixty-five percent of the approximately 300,000 families who receive aid in New York City[27] receive allowances that cover reasonable rent.[28] Other estimates put the figure much lower.[29]

Most families "make it" by doubling up with friends and family or by taking money originally provided for food and using it to pay rent.[30] Thousands of families, however, are unable to pay their rent and often wind up in housing court on the verge of eviction and homelessness.[31]

II. *JIGGETTS* AND HOW IT SHOULD BE DECIDED

A. *The Opinion In* Jiggetts v. Grinker

One such unfortunate person was Barbara Jiggetts, a mother of three receiving assistance under AFDC.[32] In 1987, she,[33] along with other AFDC recipients, filed suit against the city and state

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22 *See* Affidavit of Michael A. Stegman in Support of Plaintiffs at 9-10. Jiggetts v. Grinker, 139 Misc.2d 476 (Sup. Ct. N.Y. County 1989) (No. 40582-87).

23 *Id.*

24 *Id.*

25 *See* Dugger, *supra* note 20.

26 *Id.*

27 In May of 1993, First Deputy Mayor Norman Steisel estimated that the figure was 290,000. Dugger, *supra* note 20. The number increases slightly each year. *Id.*

28 *See* Gary Spencer, *Suit Restored Seeking Higher Rent Grants: Social Services Department Must Set Rates reflecting Real Costs, Court of Appeals Rules*, N.Y.L.J., April 4, 1990, at 7.

29 *Id.*

30 *See* Dugger, *supra* note 20.

31 *Id.*

32 *See* Jiggetts v. Grinker, 148 A.D.2d 1, 4 (1st Dep't 1989).

33 Ms. Jiggetts would later withdraw as a party. *Id.*

commissioners of the DSS, and the landlords of the plaintiffs' respective buildings. These tenants claimed that the practice of denying rent arrears grants to AFDC recipients whose rent exceeded the shelter allowance ran counter to the mandatory obligation under the Social Services Law to provide adequate aid to the needy.[34]

At the trial court level, the case was decided in favor of the plaintiffs.[35] At the Appellate Division, the decision in favor of the plaintiffs was reversed.[36] The case was subsequently appealed to the highest court in New York.[37] The New York State Court of Appeals held, in *Jiggetts v. Grinker*,[38] that Social Services Law § 350(1)(a),[39] imposes a statutory duty on the State Commissioner to establish an "adequate" shelter allowance for AFDC recipients that bears a reasonable relation to housing costs in New York City.[40]

The court further held that sections 344(2), 350 and 350-j(3) of the Social Services Law, manifest "the Legislature's determination that family units be kept together in a home-type setting and, [also] imposes a duty on the Department of Social Services to establish assistance levels adequate for that purpose."[41] Any schedule that sets the shelter allowance so low that it thrusts "large numbers of families with dependant children into homelessness" did not comply with the criterion of the statute.[42]

The court made it clear that its decision was not meant to bind the Legislature to appropriate funds, but was rather a finding that the Legislature had imposed a statutory duty on the Social Services commissioner to establish an "adequate" allowance.[43]

However, the court did not determine the key issue of whether the existing limits on shelter allowance set by the DSS were inadequate. Instead, it remanded to the New York State Supreme Court for a trial on this issue.[44]

In the spring of 1991, a three-month trial on the "adequacy" issue was held in New York County Supreme Court.[45] Both sides

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34 *Id.*
35 *See* Jiggetts v. Grinker, 139 Misc.2d 476 (Sup. Ct. N.Y. County 1989).
36 *See* Jiggetts v. Grinker, 148 A.D.2d 1 (1st Dep't 1989).
37 553 N.E.2d 570.
38 *Id.*
39 N.Y. Soc. Serv. Law § 350(1)(a) (Consol. 1993).
40 *See Grinker*, 553 N.E.2d at 573-75.
41 *Id.*
42 *Id.* at 573.
43 *Id.* at 575.
44 *Id.* at 571-72.
45 *See* Dugger, *supra* note 20.

completed their post-trial submissions in January of 1992.[46] However, to date, Judge Karla Moskowitz has not issued her decision in this case.

In the interim, Judge Moskowitz has ordered the state to pay any rent in arrears plus higher monthly rents to AFDC recipients who are legally threatened with eviction because their current shelter allowance is inadequate.[47] The state is currently making "Jiggetts relief" payments to an estimated 17,000 families in New York City.[48] In 1994, the cost to the state of these payments was estimated at $25 million and that figure may rise to $50 million by the end of 1995.[49] Thus, Judge Moskowitz's decision is eagerly awaited, and her decision will have serious ramifications on the state's policy regarding the homeless and indigent.

B. How Jiggetts v. Dowling *Should Be Decided*

1. The Statutory Obligation to "Adequately" Aid the Needy

In *Tucker v. Toia*,[50] the New York State Court of Appeals held that Article XVII, section 1 of the State Constitution[51] imposes an obligation on the state to aid the needy. The court unanimously struck down a statute denying aid to concededly needy persons under the age of 21 who did not live with a parent unless this individual obtained an order of disposition in a support proceeding.[52] In analyzing the legislative history of Article XVII, section 1, the court remarked that "[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by [Article XVII, Section 1 of] our Constitution."[53] The court believed that the legislative history of the constitutional convention evidenced a "clear intent that State aid to the needy was deemed to be a fundamental part of the social contract."[54] In conclusion, the court held that the legislative history established "an affirmative duty to aid the needy."[55]

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46 *See* JIGGETTS HANDBOOK, *supra* note 21, at 1.

47 *Id.* These rent supplement payments by the state are commonly referred to as "Jiggetts relief." *Id.*

48 *See* Nicholas Goldberg and Somini Sengupta, *Rent Aid Faces Ax; Pataki Wants to End Shelter Supplements*, NEWSDAY, Feb. 3, 1995, at A7.

49 *Id.*

50 371 N.E.2d 449 (1977).

51 Article XVII, § 1 provides: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. Const. art. XVII, § 1.

52 *See Tucker*, 371 N.E.2d at 450-51.

53 *Id.* at 451.

54 *Id.* at 451.

55 *Id.* at 452.

In *Jiggetts v. Grinker*,[56] as discussed in Part II.(A) *supra*, the New York State Court of Appeals took the "affirmative duty to aid the needy," one step further in holding that Sections 350(1)(a),[57] 344(2),[58] and 350-j,[59] of the New York Social Services Law imposed a duty on the DSS to establish shelter allowances adequate for the purpose of keeping family units together in a home-type setting.[60] The court further held that a schedule which establishes "assistance levels so low that it forces large numbers of families into homelessness does not meet the statutory standard."[61]

Thus, in order for the DSS commissioner to discharge his statutory and constitutional duties, he must establish a schedule of shelter allowances which is "reasonably calculated" to provide adequate funds to meet AFDC recipients' needs and to keep families with dependent children from becoming homeless.[62] In order to determine whether the commissioner has discharged this duty, a look at the current shelter allowance is in order.

2. The Current Shelter Allowance is Statistically Inadequate

The shelter allowances were first promulgated by the DSS in 1975.[63] They were originally calculated to cover the actual rent of 95% of the families receiving aid in the form of AFDC.[64] The present schedule was set in January of 1988 and it represented a 13% raise over the 1975 schedule.[65] At the time it was only intended to cover the rents of 65% of all welfare recipients.[66] As noted earlier, the current schedules may not even cover the full rent of one-half of the families receiving AFDC.[67]

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56 553 N.E.2d 570 (1990).

57 Allowances *shall be adequate* to enable the father, mother or other relative to bring up the child properly, having regard for the physical, mental and moral well-being of such child, in accordance with the provisions of section one hundred thirty-one-a of this chapter and other applicable provisions of law. Allowances shall provide for the support, maintenance and needs of one or both parents if in need, and in the home. N.Y. SOC. SERV. LAW § 350(1)(a) (Consol. 1994)(emphasis added).

58 "Aid *shall be construed* to include services, particularly those services which may be necessary for each child in the light of the particular home conditions and his other needs." N.Y. SOC. SERV. LAW § 344(2) (Consol. 1993)(emphasis added).

59 "Emergency assistance to needy families with children *shall be provided* . . . when such assistance is necessary to avoid destitution or to provide them with living arrangements in a home." N.Y. SOC. SERV. LAW § 350(j)(3) (Consol. 1994)(emphasis added).

60 *See* Jiggetts v. Grinker, 553 N.E.2d 570, 573 (1990).

61 *Id.*

62 *Id.* at 575.

63 *See* Daniel Wise, *Legal Aid Takes on State Over Rent Grants*, N.Y.L.J., Mar. 5, 1991, at 3.

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id. See also supra* notes 24-29 and accompanying text.

It is estimated that rents in New York City have risen by 150% since 1975, whereas the shelter allowance schedule for the same time period has been enlarged by only 40%.[68] Similarly, under current state rent stabilization laws, an apartment renting for $194 per month in 1975 can now be offered at $385 per month.[69] Thus, the statistics suggest that the current shelter allowances are considerably short of being adequate.[70]

The state, however, advanced two main arguments at trial in order to show that the commissioner had discharged his duty. First, the state argued that there is no correlation between the AFDC shelter allowance and homelessness. The state cited the fact that the overall level of homelessness in New York City is approximately the same as it was in 1988, the last time the shelter allowance was adjusted.[71] Second, the state argued that the basic allowance as a whole, most of which is apportioned for food, gives a buffer from which AFDC recipients can draw in order to pay any rent which is above the allowance.[72]

3. Increasing the Shelter Allowance is the Correct Decision

There is no question that there is a significant nexus between the inadequate shelter allowance, eviction and homelessness. In a study conducted by the City of New York Human Resources Administration, the average homeless family is characteristically headed by a single, unemployed female in her late twenties who is a high school dropout with two or three children.[73] Virtually all of the families in the study were on public assistance (e.g., AFDC) before they became homeless.[74] Of the families cited in the study, over 20% were evicted because of a failure to pay rent or overcrowding.[75] Other studies have found that nearly one third of the City's shelter population cite eviction as the cause of their home-

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68 *See* Wise, *supra* note 63.

69 *Id.*

70 Since the New York Court of Appeals decision in *Jiggetts v. Grinker*, both current Governor George Pataki and former Governor Mario Cuomo have attempted, by legislation, to declare the existing shelter to allowance ratio to be legally "adequate." To date neither has been successful. *See* Goldberg and Sengupta, *supra* note 48.

71 *Id.*

72 *Id.*

73 *See* THE CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION, PROJECT BULLETIN: LONGITUDINAL STUDY OF HOMELESS FAMILIES: PRELIMINARY FINDINGS (1985).

74 *Id.*

75 *Id.*

lessness.[76] Thus, to suggest that there is no causal nexus between the low shelter allowance and homelessness is simply incorrect.

As stated earlier, the current public-assistance shelter allowance is estimated at a little over half of the amount that the U.S. Department of Housing and Urban Development considers necessary for families to obtain decent low-cost housing in New York city.[77] Most of the *Jiggetts* plaintiffs are families on the verge of eviction and homelessness, in part, because the shelter allowance is $60 to $100 short per month of enabling them to meet their rent.[78]

Rather than increase the housing subsidies, the state would prefer that families use money, allocated to them for buying food, to pay their rent.[79] To the contrary, it makes more economic sense for the state to raise the shelter allowance. A comparison of the costs of sheltering families that become homeless due to inadequate shelter allowances with the cost of increasing the allowances, demonstrates that raising shelter allowances is more reasonable. Sheltering costs for evicted AFDC families vary from $75 per night in "welfare hotels" to $145 per night in Tier I (semi-private) shelters.[80] The majority of evicted AFDC families are housed in Tier II (private room) shelters which cost $100 per night, or approximately $3,000 per month.[81]

Compare these figures with the 17,000 families whose evictions have been stopped and their back rent paid by way of "Jiggetts relief."[82] The average Jiggetts relief payment for each family has been approximately between $200 and $250 per month.[83] Assuming, hypothetically, that the average total shelter allowance would be $500 per month for each AFDC family, net savings for the state on AFDC families receiving such an increased shelter allowance could be up to $2,500 per month per family.[84]

City officials have estimated that a higher AFDC shelter allowance could cost $3,000 per family per year.[85] This is relatively inexpensive when compared with the estimated $36,000 it costs to

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76 *See* Study by the city Human Resources Administration cited in 144 Woodruff v. Lucrete, 154 Misc.2d 301 (1992) and Edward Frost, *Landlords, Tenants Attack Housing Judges*, MANHATTAN LAWYER, December 22, 1987 - January 4, 1988, at 3.

77 *See supra* notes 22-29 and accompanying text.

78 *See* Spencer, *supra* note 28.

79 *See* Wise, *supra* note 63.

80 *See* Jonathan Lang, *Pay More to Save More*, NEWSDAY, February 5, 1993, at 46 (citing THE WAY HOME, *supra* note 8).

81 *Id.*

82 *See* Goldberg and Sengupta, *supra* note 48.

83 *Id.*

84 *See* Lang, *supra* note 80. This is presuming that the AFDC families would have been thrust into the shelter and welfare hotel system upon eviction. *Id.*

85 *See* Dugger, *supra* note 20.

maintain a homeless family in an apartment-style shelter for one year.[86] It is estimated that if even one half of the approximately 25,000 evictions per year in New York City were prevented through an increase in the AFDC shelter allowance, the state could save over $60 million in housing costs.[87]

Critics of an increase in the AFDC shelter allowance argue that an across the board increase would make welfare more appealing than working in a low-paying job.[88] Andrew Cuomo, former Governor Cuomo's son and a former chairman of a mayoral commission on homelessness, asserts that the heads of homeless families frequently have problems that a mere shelter allowance increase would not address.[89] These problems include drug abuse, lack of education and job skills, as well as depression.[90] Cuomo's thoughts are echoed by others who believe that homelessness is not merely a problem of shelter, and should not be treated as such.[91]

However, with a reallocation of money saved from not housing the homeless in costly shelters and "welfare hotels," programs could be implemented as part of an aid package which would address such problems as drug abuse, lack of job skills, and depression. Another important point is that an adequate shelter allowance would go a long way toward providing permanent housing, which in turn could allow the heads of welfare families to escape from "daily chores such as waiting in line at government agencies, looking for a place to live, and other 'administrivia' associated with homelessness."[92] This, in turn, could allow the family head to search for gainful employment, or to finish his or her education.[93]

Thus, the state's contentions that the allowance is adequate, and alternatively that the allowance has no causal nexus with homelessness find little empirical support and, accordingly, the court should absolutely find that the allowance is inadequate.

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86 *Id.*

87 *See* Lang, *supra* note 80.

88 *See* Dugger, *supra* note 20.

89 *Id.*

90 *Id.*

91 *See, e.g.*, Mark Peters, Note, *Homelessness: A Historical Perspective on Modern Legislation*, 88 MICH. L. REV. 1209 (1990).

92 *Id.* at 1242.

93 *Id.*

III. THE *JIGGETTS* RATIONALE SHOULD BE EXTENDED TO HOUSING FOR SINGLE ADULTS (HOME RELIEF).

In 1992, the First Department of New York Appellate Division, held that the *Jiggetts* rationale, though well intentioned, should not extend to recipients of Home Relief.[94] In *Gautam v. Perales*,[95] the court held that unlike the situation in *Jiggetts*, there was no provision in either the state Constitution or the Social Services Law which required that current shelter allowances be set at a particular level for recipients of Home Relief.[96]

The court relied heavily on cases such as *Bernstein v. Toia*[97] and *RAM v. Blum*[98] to advance the notion that *Jiggetts* did not support the expansion of a judicial power to review the sufficiency of shelter allowances for Home Relief recipients.[99] A review of these two cases and the implications of their holdings on subsequent decisions is crucial to understand how the New York State judiciary has misinterpreted Article XVII, Section 1, and the holdings in *Jiggetts* and *Tucker v. Toia*[100] by reading Article XVII, Section 1 too narrowly, and by not allowing the judiciary to review the adequacy of the welfare allowances made by the legislature.

In *Bernstein*, which was decided shortly after *Tucker*, the Court of Appeals held that the judiciary must defer to the legislature on decisions concerning the method by which shelter benefits are provided. This rationale applies even where those methods fail in "full measure [to meet] all the legitimate needs of each recipient."[101] The court made a distinction between the "impermissible exclusion of the needy from eligibility benefits" and the "absolute sufficiency of the benefits distributed to each eligible recipient."[102]

The court distinguished *Tucker* by stating, "[w]e explicitly recognized in *Tucker* that the Legislature is vested with discretion to determine the amount of aid; what we there held prohibited was the Legislature's 'simply refusing to aid those whom it classified as needy.' "[103] In limiting the obligation to the needy to those whom the legislature defined as such, the court rendered legislative deci-

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94 Gautam v. Perales, 179 A.D.2d 509, 510 (1st Dept. 1992).

95 179 A.D.2d 509 (1st Dept. 1992).

96 *Id.* at 511.

97 373 N.E.2d 238 (1977).

98 103 Misc.2d 237 (Sup. Ct. 1980), *aff'd*, 77 A.D.2d 278, (1st Dep't 1980).

99 *See Perales*, 179 A.D.2d at 510.

100 371 N.E.2d 449 (1977). For a discussion of *Tucker*, *see supra* notes 50 - 54, and the accompanying text.

101 *See Bernstein*, 373 N.E.2d at 244.

102 *Id.* at 244.

103 *Id.* (quoting *Tucker*, 371 N.E.2d at 452.)

sions such as who is needy, and how much support they reasonably require, virtually unreviewable.

RAM v. Blum[104] took this line of reasoning a step further. In that case, individual welfare recipients and RAM, an association of welfare recipients, challenged the constitutional adequacy of public assistance payment levels, asserting that the legislature failed to discharge its duty to aid the needy as stated in Article XVII, section 1.[105] The plaintiffs argued that the assistance levels that the legislature set in 1974 had become inadequate by 1980.[106] At the time the levels were set, they were "found by the legislature to constitute a minimum subsistence standard,"[107] and during the subsequent six years inflation had eroded the value of the dollar.[108]

The trial court found the claims nonjusticiable and granted defendant's motion to dismiss.[109] The court stated, "[w]hile the legislature may not evade its duty in this area of 'public concern,' the manner and means of discharge of that duty lie within the broadest legislative discretion."[110] It concluded by stating that "it is clear that prior judicial construction of the clear meaning of the Constitution now prevents a court from substituting its judgment for that of the Legislature in welfare matters."[111] Thus, *RAM* was decided without even an inquiry into the merits of whether the aid level had fallen substantially below that recognized as "adequate" by the legislature six years earlier.

This interpretation of the scope of legislative discretion seems to be, on its face, inconsistent with the holding in *Tucker* that the state's obligation to aid the needy is not a "matter of legislative grace."[112] The obligation to aid the needy and the amount of aid provided are such interdependent concepts that a determination of whether the obligation has been fulfilled must turn on an examination of how much aid has been provided and to whom. Enforcement by the judiciary of the needy's constitutional right to aid is inconceivable without such analysis.

It must be acknowledged that welfare issues, which involve the allocation of limited resources, raise difficult questions about the proper roles of the judicial and legislative branches. The Court of

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104 103 Misc.2d 237 (Sup. Ct. 1980), *aff'd*, 77 A.D.2d 278 (1st Dep't 1980).
105 *Id.* at 237.
106 *Id.* at 238-39.
107 *Id.* at 239.
108 *Id.*
109 *Id.* at 239-40.
110 *Id.* at 239.
111 *Id.* at 240.
112 *See Tucker*, 371 N.E.2d at 451.

Appeals meticulously analyzed these concerns in *Klosterman v. Cuomo*.[113] The court remarked that it is the legislature's role, not the judiciary's, to establish welfare policies and programs.[114] However, the court held that it is the judiciary's role to determine whether legislative policy choices encroach on constitutional or statutory rights.[115] The court further stated that when individuals seek to enforce such rights, "[t]he appropriate forum to determine the respective rights and obligations of the parties is in the judicial branch."[116] This is equally true where enforcement of those rights requires the expenditure of funds and a particular allocation of resources.[117]

The appropriate standard of review for legislative classifications of the needy and decisions regarding the level of aid was recommended by the Court of Appeals in the *Tucker* opinion, as the court discussed an earlier opinion, *Barie v. Lavine*.[118] In *Barie*, the court held that temporary suspension of aid to persons who unjustifiably refuse employment did not violate article XVII, section 1.[119] The court in *Tucker*, quoting from *Barie*, stated:

> "The Legislature may in its discretion deny aid to employable persons who may *properly* be deemed not to be needy when they have wrongfully refused an opportunity for employment." In that case we were concerned with a *reasonable legislative determination that such individuals were not needy*.[120]

The court's language indicates that the legislature's discretion in classifying who is needy and determining the amount of aid required is limited by the "reasonableness" of the determination.

In *Jiggetts*, an "adequacy" standard was held to have been mandated by the Legislature in the Social Services Law.[121] The case could well have been decided on a standard of "reasonableness" which would have been the more appropriate standard. If the case had been decided in this manner, then *Gautam* might very well have been decided differently.

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113 463 N.E.2d 588 (1984).

114 *Id.* at 593.

115 *Id.* at 593-94.

116 *Id.* at 594.

117 *Id.*

118 *See Tucker*, 371 N.E.2d 449, 452 (1977) (discussing Barie v. Levine, 357 N.E.2d 349 (1976)).

119 357 N.E.2d 349, 352 (1976).

120 *See Tucker*, 371 N.E.2d at 452 (emphasis added) (citation omitted) (quoting *Barie*, 357 N.E.2d at 352).

121 *See supra* notes 55 - 60 and accompanying text.

The narrow interpretation of Article XVII, section 1 and *Tucker* given in *RAM* and *Bernstein* had a profound effect on a parallel line of cases regarding sheltering the homeless. In *Callahan v. Carey*,[122] the New York State Supreme Court issued a preliminary injunction directing city and state officials to furnish food and lodging to homeless men on the Bowery.[123] In support of its holding, the court cited Article XVII, section 1 in addition to state statutory and regulatory provisions, as well as case law.[124]

In *Eldredge v. Koch*,[125] the supreme court extended, on Equal Protection grounds, *Callahan's* consent decree to homeless women in New York City.[126] In *McCain v. Koch*,[127] the issue was raised, also on Equal Protection grounds, of whether families on the Bowery had a right to emergency shelter. The appellate division granted a preliminary injunction barring the denial of emergency shelter.[128] Following *Eldredge*, the court found "no apparent reasonable basis for the City's denial of emergency shelter to [homeless families]" when such shelter was made available to individuals.[129]

The court went further, however, and addressed the constitutional right to shelter under article XVII, section 1, and found that "only providing cash allowances and information concerning housing availability amounts to the denial of aid to homeless families."[130] In regarding the assistance scheme as tantamount to a denial of aid, the court tacitly challenged the unreviewable legislative discretion to determine the amount and form of aid.

The issue of legislative discretion was raised more directly in the portion of the opinion that vacated a preliminary injunction requiring the city to ensure minimum standards in the emergency shelter it does undertake to furnish.[131] Although the appellate court found justiciable the plaintiffs' claim that the abhorrent conditions they were enduring violated their constitutional right to aid,[132] the court was bound by *Tucker* and *Bernstein* to declare that the adequacy of relief provided is consigned to the discretion of

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122 N.Y.L.J., Dec. 11, 1979, at 10 (Sup. Ct. N.Y. County).
123 *Id.*
124 *Id.*
125 118 Misc.2d 163 (Sup. Ct. 1983), *rev'd on other grounds*, 98 A.D.2d 675 (1st Dep't 1983).
126 *Id.* at 164.
127 117 A.D.2d 198 (1st Dep't 1986), *rev'd in part*, 511 N.E.2d 62 (1987), *on remand*, 136 A.D.2d 473 (1st Dep't 1987).
128 *Id.* at 211.
129 *Id.* at 214.
130 *Id.* at 216.
131 *Id.* at 216-18.
132 *Id.* at 216.

the legislature.[133] The court seemingly deplored its inability to set even "minimum standards of decency and habitability," stating that the situation was "discouraging, saddening, and disheartening."[134] The court called upon the Court of Appeals to "reexamine and, hopefully, to change its prior holdings" on this subject.[135]

On appeal, the New York State Court of Appeals decided *McCain* on very narrow grounds, only addressing the issue of whether the supreme court had the power to issue a preliminary injunction requiring the DSS, which had already undertaken the duty to provide emergency housing for homeless families with children, to provide housing which satisfies minimum standards.[136] The court decided that the New York Supreme Court was within its right to issue an injunction requiring minimum standards once the DSS had undertaken the duty to provide the housing.[137] The court did not decide whether families were entitled under Equal Protection doctrine to a right to adequate shelter.[138]

This line of cases (*Eldredge, Callahan,* and *McCain*) seems to distinguish *RAM* and *Bernstein,* giving the judiciary more discretion to determine whether the legislature's efforts were reasonable and the aid provided adequate. This line of cases also establishes that once the state has undertaken the duty to provide aid to the needy, *all* of its recipients are entitled to Equal Protection of law. As noted in *Eldredge,* "[t]he City of New York cannot . . . set standards for shelters for the homeless, that [are] applicable only to shelters housing men, unless a rational basis exists for excluding women from its terms."[139] Further, the court stated, "[c]learly, women have as equal a need as men for adequate sleeping, recreation and toilet facilities."[140] The same reasoning should apply to receiving an "adequate" shelter allowance in New York State. If families receiving AFDC are entitled to have a shelter allowance that is "reasonably calculated" to provide adequate funds to meet the recipients needs and to keep them from becoming homeless,[141] then individuals receiving Home Relief should be entitled to the same type of adequate funding under the Equal Protection Doc-

133 *Id.* at 216-17.

134 *Id.* at 216.

135 *Id.* The court stated that, "[the government's efforts] may be more than token, but they are inadequate." *Id.*

136 McCain v. Koch, 511 N.E.2d at 65-67.

137 *Id.* at 65-66.

138 *Id* at 65.

139 *See Eldredge,* 118 Misc.2d at 163.

140 *Id.* at 163-164.

141 *See Jiggetts,* 553 N.E.2d at 575.

trine. In the words of the *Eldredge* court, "[t]his contention is so obviously meritorious that it scarcely warrants discussion."[142]

CONCLUSION

The current shelter allowance is indisputably inadequate to discharge the DSS commissioner's obligation under Article XVII, section 1 and Social Services Law 350 to adequately aid the needy. Accordingly, Judge Moskowitz should find in favor of the plaintiffs in *Jiggetts v. Dowling*. Further the *Jiggetts* rationale should be applied to the recipients of Home Relief, as well as AFDC. Though there is some case law to the contrary, recipients of Home Relief are entitled to "adequate" shelter allowance, if not under the *Jiggetts* rationale, then under the doctrine of Equal Protection.

Kurt Emhoff

142 *See Eldredge*, 118 Misc.2d at 163.