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IN THE INTEREST OF JUSTICE: THE IMPACT OF COURT-ORDERED REFORM ON THE CITY OF NEW YORK

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I. INTRODUCTION

The latter half of this century has seen the emergence and expansion of a unique breed of lawsuits which have resulted in state and federal judges becoming increasingly involved in the implementation of public policy.[1] These lawsuits, commonly referred to as institutional reform litigation, have typically been initiated by advocates on behalf of various groups, not for the purpose of monetary compensation, but to remedy constitutional violations and effectuate long-term reform of policies and conditions in public institutions.[2] Generally, disputes have centered on alleged pervasive deficiencies within certain government-operated institutions and programs, and the standards that government officials should apply to remedy those conditions.[3]

A significant amount of institutional reform litigation has been instituted against the City of New York.[4] Court decrees now govern a wide array of City programs and policies. Federal and state judges have used their decree power to achieve sweeping fundamental reform for groups such as New York City's homeless,[5] prisoners,[6] disabled children,[7] residents of public housing,[8] and welfare recipients.[9]

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1. Beginning in 1954 with *Brown v. Board of Education*, 347 U.S. 483 (1954), courts nationwide began to see the rise of this new type of lawsuit. *See* Karen Keeble, *Judicial Modification of Consent Judgments in Institutional Reform Litigation*, 50 BROOK. L. REV. 657, 684 n.1 (1984).

2. *See id.* at 657; *see also* Stacey L. Murphy, Note, *Modification of Consent Decrees in Institutional Reform Litigation: A Return to the Swift Standard*, 8 REV. LITIG. 203, 203 (1989).

3. *See* Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 50 (1979).

4. *See infra* notes 5-10. Today court decrees govern numerous City programs and policies, including education, housing, welfare, and the homeless. *See* Diver, *supra* note 3, at 44.

5. *See* Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 26, 1981).

6. *See* Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980).

7. *See* Jose P. v. Ambach, 669 F.2d 865 (2d Cir. 1982).

8. *See* Escalera v. New York City Hous. Auth., 425 F.2d 853 (2d Cir. 1970).

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

Despite the benefits that accrue from institutional reform litigation, the use of court decrees to resolve complex disputes between private citizens and government institutions has presented numerous problems. Through the use of court decrees, the courts have become entangled in the internal workings of a number of City-run institutions. Many orders have resulted in years, and in some cases decades, of ongoing litigation over the proper enforcement of those orders.[10] As this Note will discuss, courts have engaged in tasks that are somewhat unfamiliar to them—for example, the establishment of detailed performance standards for administrators, the reordering of budgetary expenses, and the displacement of administrative authority.[11]

This Note will explore and evaluate the impact that court-ordered changes have had on New York City local government. Part II[12] will briefly discuss how a consent decree is formed. Part III[13] will discuss the impact that court orders have on the ability of the City to function effectively and efficiently. Part IV[14] concludes that although in many instances institutional reform litigation leads to the establishment of new rights for those challenging the City's practices, decrees often have an adverse impact on the City's ability to operate effectively. In many instances, elected officials are constrained by the demands of the decree and are often precluded from carrying out their responsibilities in a manner they see fit.

II. FORMATION OF CONSENT DECREES

Typically, an institutional reform suit arises when a lawyer or advocacy group brings an action against the City on behalf of an individual or class of persons[15] alleging that rights have been violated in some way, seeking to establish new rights, or seeking to stop the implementation of programs thought to be inappropriate.[16] Plaintiffs typically name a variety of public officials, ranging from junior-level administrators to the mayor,

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10. *See* Susan V. Demers, *The Failures of Litigation as a Tool for the Development of Social Welfare Policy*, 22 FORDHAM URB. L. J. 1009, 1015 (1995).

11. *See* Diver, *supra* note 3, at 44.

12. *See infra* notes 15-32 and accompanying text.

13. *See infra* notes 33-137 and accompanying text.

14. *See infra* notes 138-45 and accompanying text.

15. *See* Ross Sandler & David Schoenbrod, *Government by Decree: The High Cost of Letting Judges Make Policy*, 1994 CITY J. 54, 54-55 (1994). Many cases are brought under the class action device because the interests of large numbers of people are often at stake. *See* Diver, *supra* note 3, at 67.

16. *See* Demers, *supra* note 10, at 1009.

as defendants.[17] While some suits have focused upon upholding federal or state constitutional rights,[18] the majority seek to enforce rights guaranteed to citizens under federal, state, or local statutes or regulations.[19] If the plaintiffs succeed in establishing that the City has violated their rights, the court imposes a remedy.[20] Such relief can be issued in the form of a preliminary injunction;[21] more typically, however, the remedy takes the form of a consent decree or settlement agreement.[22] Courts in New York State will issue a preliminary injunction if it is shown (1) that the plaintiff will suffer irreparable harm unless the policy or practice sought to be enjoined is immediately terminated, and (2) that the balance of equities lies in the plaintiff's favor.[23] The purpose of such a remedy is to "maintain the status quo . . . until a full development of the facts and the law can be undertaken, usually through a trial."[24]

A consent decree is formed when the court approves an agreement negotiated by the parties,[25] or when an order is issued by the court with the consent of the parties.[26] Most decrees aimed at changing public policy involve some negotiation between the parties who have a more intimate knowledge of the institution or program than the judge, who has limited

17. *See* Diver, *supra* note 3, at 70.

18. *See, e.g.*, Marisol A. v. Giuliani, 929 F. Supp. 662, 669 (S.D.N.Y. 1996) (Plaintiffs were neglected and abused children who brought suit against officials responsible for New York City's Administration for Children's Services, alleging that due to the mishandling of their cases they were deprived of their rights under the U.S. Constitution, the New York State Constitution, and various federal and state statutes.).

19. *See* Sandler & Schoenbrod, *Government by Decree, supra* note 15, at 54-55.

20. *See id.* at 55. In some cases the court has imposed a remedy without a finding of wrongdoing by the City. *See id.*

21. *See, e.g.*, McCain v. Koch, 511 N.E.2d 62 (N.Y. 1987) (challenging the City's policy of providing emergency housing for homeless families, the court issued a preliminary injunction against the City, requiring City officials to provide safe and adequate emergency housing assistance.).

22. See Lloyd C. Anderson, *Implementation of Consent Decrees in Structural Reform Litigation*, 1986 U. ILL. L. REV. 725, 726 (1986).

23. *See* Demers, *supra* note 10, at 1016.

24. *Id.*

25. *See* Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL. F. 43, 45 (1987) (noting that the judge typically writes "so ordered" on the decree and signs his or her name); Anderson, *supra* note 22, at 725-26 (stating that "the court either signs the agreement or enters a separate order that requires the parties to comply with the settlement agreement").

26. *See* Demers, *supra* note 10, at 1016.

knowledge about the functioning of public institutions.[27] Often, there are no findings that constitutional rights have been violated, nor is there an admission of wrongdoing by the City.[28] This is primarily because the City, in an effort to avoid protracted legal proceedings, usually chooses not to challenge the relief sought by the plaintiff, and instead negotiates a settlement that is in the best interest of both parties.[29]

Although the parties typically play a significant role in negotiating a settlement, the task confronting a judge who is presiding over an institutional reform case is not necessarily an easy one. Before approving a settlement, or alternately, issuing its own remedy, the court has the heavy burden of balancing the rights and interests of an aggrieved plaintiff against "institutional requirements and limited [city] resources to reach a compromise that provides adequate constitutional protection within functional institutional frameworks."[30]

The use of consent decrees as a mechanism to resolve disputes does have benefits over customary forms of relief. In numerous ways, the use of consent decrees "offer[s] genuine promise for a higher quality of justice at less cost than the parties could achieve through traditional adjudication."[31] In particular, through the use of negotitaion, the parties are able to save time and costs, and can avoid some of the risks normally associated with a full trial on the merits.[32]

III. IMPACT OF DECREES ON CITY OPERATIONS

A. *Separation of Powers—Implementation of Decree Leads to Excessive Judicial Involvement*

In New York City, the outcome in a suit seeking institutional reform has typically been a comprehensive decree that covers practically every aspect of the conditions that shape the particular institutional life.[33] The mandates imposed by the decree usually entail very detailed enumerations

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27. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1299 (1976); *see, e.g.*, Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County 1979) (decree states that there had been no "final adjudication of any issue of fact or law . . . .").

28. *See* Demers, *supra* note 10, at 1016.

29. *See* Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 55, 58 (discussing reasons why the City agrees to consent decrees).

30. Keeble, *supra* note 1, at 683.

31. Anderson, *supra* note 22, at 727.

32. *See* Resnik, *supra* note 25, at 43.

33. *See* Eric A. Rosand, *Consent Decrees in Welfare Litigation: The Obstacles to Compliance*, 28 COLUM. J.L.. & SOC. PROBS. 83, 84 (1994).

of the City's obligations and the manner in which they must be performed.[34] The decrees are extensive in nature and often encompass not a few acts, but rather a complete range of conduct.[35] The City's obligations under the decrees are complex and can usually only be performed over a long period of time.[36] Therefore, judicial involvement does not cease when a judgment is entered.[37] Rather, the detailed nature of the decree and implementation requirements often produce a system whereby the particular City agency is subject to continuous judicial oversight.[38] The court thus becomes an active participant in the City's affairs, largely because supervising the decree's implementation is essential to ensure compliance.[39] In some instances, in its efforts to implement and enforce the decree, the court essentially supplants the City as manager of public institutions.[40] In this capacity, "a judge moves far beyond the normal competence and authority of a judicial officer, into an arena where legal aspirations, bureaucratic possibilities, and political constraints converge, and where ordinary legal rules frequently are inapplicable."[41] For the City, this need for ongoing supervision has often meant the loss of administrative control and the loss of the ability to supervise its agencies and programs.[42]

Numerous commentators have attacked institutional reform litigation as damaging to the democratic process.[43] Judges are viewed as intruders in performing such functions as allocating social resources, a role traditionally viewed as primarily legislative.[44] It has been said that decrees

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34. *See* Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1267 (1983).

35. *See id.*

36. *See* Sandler & Schoenbrod, *Government by Decree, supra* note 15, at 55. Typically, the decrees do not specify an expiration date; however, they may contain milestone dates against which to measure the rate at which the City is complying. *See id.*

37. *See* Diver, *supra* note 3, at 51-52 ("Promulgation of the decree [does] not terminate the litigation, but instead . . . initiate[s] a process of enforcement extending into the indefinite future.").

38. *See Special Project: The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 788, 815 (1978) [hereinafter *Special Project*].

39. *See* Michael S. Lottman, *Enforcement of Judicial Decrees: Now Comes the Hard Part*, 1 MENTAL DISABILITY L. REP. 69, 69 (1976).

40. *See* Horowitz, *supra* note 34, at 1267.

41. William A. Fletcher, *The Discretionary Constitution: Institutional Remedies & Judicial Legitimacy*, 91 YALE L.J. 635, 641 (1982).

42. *See* Sandler & Schoenbrod, *Government By Decree*, *supra* note 15, at 55 (noting that the court "continues to manage the City's shelter system in exquisite detail").

43. *See* Ross Sandler & David Schoenbrod, *Statute Promises Local Relief from Overbearing Judges*, TAMPA TRIB., Dec. 8, 1996, at 6.

44. *See* Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 506 (1980).

that control areas of municipal policy "undercut democracy and allocate huge chunks [of the City] budget[s] for policies that elected officials haven't chosen."[45] Under the federal and state constitutions, elected officials are accountable to the public and responsible for policy changes.[46] This accountability is undermined by a court that "goes beyond its responsibility to protect rights and needlessly constrains political officials in matters of policy."[47]

A compelling example of excessive judicial involvement is evident in *Benjamin v. Jacobson*.[48] In *Benjamin*, the Prisoners' Rights Project of the Legal Aid Society, on behalf of prisoners, brought suit against the City of New York and its Board of Corrections, seeking improvement of substandard conditions in City jails.[49] The case ultimately produced a 1978 consent decree that encompassed virtually every aspect of prison life in New York City.[50] The consent decree, a fifty-two page document that has produced more than ninety related court orders and details more than thirty distinct areas of prison management "reads like a manual" for jail administration.[51] The decree focuses on such areas as the maintenance of the physical plant, food service procedures, and the proper method for handling inmate mail.[52] The prison decree is typical of others entered into by the City in that it contains detailed and complex standards to be adhered to by City administrators.[53]

B. *Enforcement Efforts*

Once the parties have negotiated and signed off on the consent decree, the courts have wide latitude to ensure the provisions of the decree are

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45. Sandler & Schoenbrod, *Statute Promises Local Relief from Overbearing Judges*, *supra* note 43, at 6.

46. *See id.*

47. *Id.*

48. 124 F.3d 162, 165 (2d Cir. 1997). This case also falls under the caption of *Benjamin v. Malcolm*.

49. *See* Ross Sandler, *The City Seeks to Regain Control over Its Jails, and Receives Help from the Federal Court and Congress*, 2 CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), June/July 1996, at 49; *see also* Benjamin v. Malcolm, 75 Civ. 3073, Stipulation for Entry of Parties Final Judgment (S.D.N.Y Nov. 29, 1978).

50. *See* Sandler, *supra* note 49, at 49.

51. *See id.*

52. *See id.* at 51.

53. *See, e.g.*, Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 8, 1981) (the decree includes requirements for bedding, storage, supervision, laundry, group recreation, ease of entry, reception of mail, and departure and return from the shelter, as well as stipulations for intake centers, community participation, provision of information regarding other assistance programs, and compliance monitoring).

being implemented.[54] To ensure compliance, state and federal judges have employed various mechanisms to monitor the conduct of the City and to ensure that the court's mandates are being carried out.[55] Some forms of enforcement are much less restrictive and intrusive than others, but they all compel some degree of judicial entanglement in legislative and executive areas.[56]

A common supervisory attempt has been the court's retention of jurisdiction over a case when parties enter into a consent decree.[57] This procedural device allows the court to retain authority over the matter, to supervise implementation of the order, and to issue directives that may be necessary for construction, modification, termination, and enforcement of decree provisions.[58]

Another enforcement mechanism is the issuance of reporting requirements, to help the court evaluate the extent to which the City is performing its obligations under the decree.[59] Reporting requirements have been imposed in several institutional cases in which New York City is the defendant.[60] Under some of these consent decrees, the City is required to submit periodic reports and other documentation of its activities to a committee, individual, plaintiff's counsel, or to the court.[61]

The appointment of a special master has been referred to as "[p]erhaps the most drastic weapon in a court's compliance arsenal[,]"[62] as it probably more substantially impairs the City's autonomy than do other enforcement mechanisms.[63] A special master is an agent of the court who is often given

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54. *See Special Project, supra* note 38, at 815.

55. *See* Lottman, *supra* note 39, at 69. (The court's mandates "are not self-executing, and without adequate provisions for monitoring and insuring compliance, they will never be fully executed.").

56. *See* Diver, *supra* note 3, at 44-45 (noting that courts typically take an "interventionist approach").

57. *See, e.g.*, Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 26, 1981) (The decree contains a provision granting the court continuing jurisdiction over the case.).

58. *See* Lloyd C. Anderson, *Release and Resumption of Jurisdiction over Consent Decrees in Structural Reform Litigation*, 42 U. MIAMI L. REV. 365, 402 (1987).

59. *See* Lottman, *supra* note 39, at 69.

60. *See, e.g.*, Benjamin v. Jacobson, 124 F.3d 162 (2d Cir. 1997); *Callahan,* Index No. 42582/79.

61. *See, e.g., Callahan,* Index No. 42582/79 (final judgment contains a provision requiring the City to submit periodic written reports detailing its compliance or noncompliance with the decree provisions); Benjamin v. Jacobson, 124 F.3d at 165 (the Office of Compliance Consultants, the special master in this case, must produce quarterly reports on all obligations under the consent decree).

62. Lottman, *supra* note 39, at 74.

63. *See id.*

a broad range of powers, such as evaluating and supervising the City's compliance efforts, or even assuming responsibility for implementing the decree.[64] One of the primary functions of a special master is to gather information to determine the extent of the City's compliance and to recommend corrective measures where necessary.[65] As an agent of the court, the use of a special master "contemplates a greater intrusion [than other enforcement mechanisms] by the court into the [daily] operation[s] of the . . . institution."[66]

In 1982, the federal court in *Benjamin* established a court monitoring agency called the Office of Compliance Consultants ("OCC") to monitor the defendant's compliance with the 1978 consent decree governing the City's prison system.[67] Referring to it as the "special master," the court ordered the OCC to "advise and assist the [City] in achieving compliance with the Consent Judgments and to informally assist the parties in resolving disputes as to compliance with the Consent Judgments."[68]

The enforcement mechanism that has been the most powerful is the court's issuance of civil contempt findings to redress the City's violations of a decree. In some cases, contempt findings have been issued several times in the same case, amounting to massive fines against the City. *McCain v. Koch* provides an illustrative example.[69] Numerous contempt citations have been issued in this protracted litigation attacking the City's policies on providing emergency shelter to homeless families.[70] *McCain* commenced in 1983 when homeless families, relying upon various state and federal statutory and constitutional provisions, alleged that City and state officials failed to provide adequate emergency shelter to homeless families.[71] In 1986, the Appellate Division enjoined the City from sheltering homeless families with children overnight in welfare offices.[72] Since then, court orders issued by the New York State Supreme Court have forbidden the City from keeping homeless families in its welfare offices for more than twenty-four hours while those families' eligibility for emergency temporary shelter is being determined.[73] On several occasions, the City and various City officials have been found guilty of violating these orders

64. *See id.*

65. *See* Anderson, *supra* note 22, at 747.

66. Lottman, *supra* note 39, at 74.

67. *See* Benjamin v. Jacobson, 124 F.3d 162, 162 (1997).

68. *Id.*

69. 502 N.Y.S.2d 720 (App. Div. 1986), *rev'd in part,* 511 N.E.2d 62 (1987), *on remand,* 523 N.Y.S.2d 112 (App. Div. 1988).

70. *See id.*

71. *See id.* at 207-10.

72. *See id.* at 211-16.

73. *See id.*

by continuing to shelter homeless families in welfare offices for more than twenty-four hours.[74] Contempt findings issued to redress these violations have amounted to substantial fines for the City.[75] Initial contempt fines were set by court orders in 1992 when the City and four senior officials were held in contempt after the City admitted several homeless families were required to stay overnight in welfare offices during the summer and fall of 1992.[76] The fines against the City were set at a rate of $50 per family for the first night and $100 for each additional night thereafter.[77]

Under the 1992 orders, in addition to imposing fines, the court ordered the offending officials to stay overnight in the welfare offices.[78] The appellate division upheld the contempt findings and the fines against the City but remanded the unorthodox portion of the decision directing the officials to stay overnight in welfare offices, ordering the lower court to impose an appropriate sanction.[79] As a result of the 1992 contempt findings, the City was required to pay more than $5 million for violations that occurred between September 1991 and December 1994.[80] In a subsequent order in May 1996, the City was held in civil contempt again, and the court imposed a fine of $150 per day payable directly to homeless families for each day after June 16, 1995 in which they were kept in offices for more than a 24-hour wait period.[81] These fines amounted to approximately $1 million.[82] Thus, the City's contempt bill in this one case totaled in excess of $6 million.

The foregoing example illustrates that despite the detailed nature of consent decrees, noncompliance has remained a problem for the City. Often, it is the magnitude of the tasks demanded which makes compliance

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74. *See* McCain v. Dinkins, 601 N.Y.S.2d 271, 273 (App. Div. 1993), *aff'd as modified*, 639 N.E.2d 1132 (1994).

75. *See* discussion *supra* notes 80-86.

76. *See id.*

77. *See* McCain v. Dinkins, 639 N.E.2d 1132, 1139 (N.Y. 1994) (noting that the orders cover violations from September 1991 through December 1993).

78. *See id.* at 1135.

79. *See* McCain v. Dinkins, 601 N.Y.S.2d 271, 273 (App. Div. 1993), *aff'd*, 639 N.E.2d 1132 (1994). On appeal, the Court of Appeals affirmed the lower court's findings, and further held that it was not necessary to remit the proceedings to the trial court for the imposition of replacement sanctions against the officials. In the court's view, the imposition of civil fines against the City was a sufficient remedy to address the conduct of the officials. *See McCain*, 639 N.E.2d at 1139.

80. *See* Matthew Goldstein, *City Held in Contempt Again for Keeping Homeless in Office*, 215 N.Y. L.J., May 15, 1996, at 1.

81. *See Court Orders Against the City*, 2 CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), June/July 1996, at 61.

82. *See id.*

so difficult to achieve.[83] Ongoing judicial oversight has served useful purposes: remedies have been revised where necessary, and the court has been allowed to consider the sufficiency of plans and reports required of the defendants and has issued supplemental orders when necessary.[84]

However, despite these various accomplishments, continued intrusive judicial supervision needlessly undermines local governmental institutions that have been established to oversee government agencies. For example, in *Benjamin v. Malcolm*,[85] local agencies instituted to oversee and govern conditions in various institutions have at times relinquished their functions to state and federal courts.[86] The New York City Charter provides for the establishment of a Board of Corrections and grants it the authority to "establish minimum standards for care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the corrections department."[87] Yet due to the existence of the prison consent decree, the board has postponed action on disputed issues in some cases, waiting until the court has taken action, rather than making decisions based on its own experience and authority.[88]

C. *Ability of Elected Officials to Change and Develop Policy*

When the court becomes intimately involved in reforming social institutions, it assumes responsibilities that are delegated to other branches of government.[89] The separation-of-powers doctrine mandates that sensitivity be employed when a court seeks to implement, modify, or enforce the decrees for which they assume responsibility. While a court clearly has the authority to strike down policies that contravene constitutional or statutory norms, such a right does not extend to the ability of courts to "fashion wide-ranging relief that substitutes the [court's] views of policy, or those of a litigant, for those of the [legislative] and the executive branch officials."[90] The New York State Constitution and the

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83. *See* Sandler & Schoenbrod, *Government by Decree, supra* note 15, at 55.

84. *See Special Project, supra* note 38, at 816.

85. 495 F. Supp 1357 (S.D.N.Y. 1980).

86. *See Implementation of the Prison Litigation Reform Act of 1995: Hearings Before the U.S. Senate Judicary Comm.*, 102d Cong., (1996) (statement of Laura A. Chamberlain, Assistant Corporation Counsel, on behalf of the City of New York) [hereinafter *Hearings on the Implementation of the Prison Litigation Reform Act*].

87. N.Y. CITY CHARTER ch. 25 § 626(e) (1989).

88. *See Hearings on the Implementation of the Prison Litigation Reform Act, supra* note 86 (statement of Laura A. Chamberlain).

89. *See* Demers, *supra* note 10, at 1012.

90. *Id.*

New York City Charter clearly reserves such policy-making authority for the executive and legislative branches of government.[91]

The broad nature of consent decrees and court orders, however, often perpetuate the preferences and priorities of former elected officials and counsels that decision-making in the future be exercised in a particular fashion.[92] The ability of elected officials to implement changes is often restricted by consent decree obligations that may have been entered into years before the official took office.[93] Specifically, the demands imposed often limit the discretion of elected officials who have been entrusted with the responsibility for creating laws and instituting policies to manage the City as they see fit.[94]

An administration's inability to change City policy often stems from the problems entailed in modifying or vacating a consent decree, which is frequently a "labor-intensive, document intensive, costly and often frustrating process."[95] In some instances, City agencies have had to engage in long, drawn out procedural motion practices with plaintiffs, instead of managing the institutions they were established to govern.[96] Although decrees are supposed to be terminated when the City achieves compliance, some decrees have spanned decades.[97] This has made it extremely difficult for City government to develop innovative solutions to both old and new problems.[98]

Problems of this nature were encountered in *Callahan v. Carey*,[99] a case that produced a decree requiring the City to provide free shelter for

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91. See N.Y. CONST. art. III, § 1; *see also* N.Y. CONST. art. IV, § 1.

92. *See* Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 56-58 (discussing the manner in which decrees bind future administrations).

93. *See id.* at 54.

94. *See* John B. Weiner, *Institutional Reform Consent Decrees as Conservers of Social Progress*, 27 COLUM. HUM. RTS. L. REV. 355, 363 (1996).

95. *Hearings on the Implementation of the Prison Litigation Reform Act*, *supra* note 86 (statement of Laura A. Chamberlain).

96. *See id.*

97. *See, e.g.*, Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County, Aug. 8, 1981) (this decree has been in effect since 1978). Compliance has been difficult to achieve primarily because courts often "underestimate the sheer magnitude of the tasks demanded[,]" and because the level of political support may be insufficient to ensure that the decree is followed. Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 55.

98. *See* Sandler & Schoenbrod, *Statute Promises Local Relief from Overbearing Judges*, *supra* note 43, at 6.

99. *See generally Callahan*, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 8, 1981).

the homeless.[100] Today, the City's ability to improve its policy towards the homeless "in a deliberative and rational manner [has] been impeded by the need to respond to frequent motions for enforcement of [c]onsent [d]ecree provisions."[101] In essence, the homeless have suffered as a result of the decree formulated to help them, because "[d]etermining what types of facilities and programs would truly meet the needs of residents of adult shelters [have] become a lower priority than ensuring that, for example, there were forty toilets working in the Fort Washington Armory."[102]

Despite the difficulties of breaking free from decades-old consent decrees, recently the City has been working diligently to free itself from these "costly, outdated commitments."[103] The City conducted a review of all current consent decrees, with the aim of attempting to establish that, in some instances, modification of existing decrees is warranted in light of a significant change in circumstances since the decrees were established.[104]

In 1992, the U.S. Supreme Court ruled that modification of a decree would only be granted if the City could establish that a "significant change in the circumstances warrants revision of the decree" and that the "proposed modification is suitably tailored to the changed circumstances."[105] However, compliance has remained an "elusive goal" and many orders, some of which date back to the 1970s, have proven difficult if not impossible to comply with or to terminate.[106]

Some recent efforts to modify consent decrees, however, have resulted in noteworthy changes for the City. In 1996, because the court found a sufficient change in circumstances to allow summary eviction proceedings under the City's "Bawdy House Law," the City was granted its request to modify a then twenty-five-year-old consent decree governing eviction procedures in public housing.[107] This ruling allows for a quicker removal of tenants who use their apartments to engage in drug trafficking.[108] Under a 1971 consent decree, the Housing Authority had been required to engage in a two-step eviction proceeding that typically lasted between eight months

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100. *See id.* Using an equal protection analysis, the consent decree was later made applicable to homeless women in 1983. *See* Eldredge v. Koch, 469 N.Y.S.2d 744 (App. Div. 1983).

101. Demers, *supra* note 10, at 1021.

102. *Id.*

103. Deborah Pines, *City Takes Aim at Long-Standing Consent Decrees*, 215 N.Y. L.J., Feb. 7, 1996, at 1.

104. *See id.*

105. Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367, 383 (1992).

106. *See* Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 57.

107. *See* Escalera v. New York City Hous. Auth., 924 F. Supp. 1323 (S.D.N.Y. 1996).

108. *See id.*

and two years.[109] In the 1996 decision, U.S. District Court Judge Loretta Preska cited the escalation of violence related to the unanticipated proliferation of crack cocaine use as a reasonable basis for allowing the Housing Authority to expedite evictions of drug-trafficking tenants.[110] The court reasoned that its decision would allow it to satisfy its obligation to provide decent, safe, and sanitary dwellings for low-income families.[111]

The City also won several modifications to the 1978 consent decree in *Benjamin*.[112] In an effort to reduce gang-related violence in prisons, the City sought to prohibit gang-identifying jewelry and was successful in modifying the portion of the decree that permits prisoners to wear jewelry.[113] The consent order was also modified to allow for a revised food preparation protocol that was renegotiated by the City and the Legal Aid Society (on behalf of the prisoners) in March 1996.[114] Under an earlier order entered into in the late 1980s, the City had been required to implement a costly food preparation method.[115] This order was the result of efforts aimed at improving insufficient food services and below quality food standards.[116] The modification benefits the City because the new food preparation requirements are much less expensive than those in existence under the prior order.[117]

Further modification of the prison consent orders was achieved in April 1996 when the City was granted a motion to allow in-cell library privileges for the most violent inmates.[118] The 1978 consent decree had required that prisoners be provided with congregate law library privileges.[119] However, Judge Harold Baer, Jr., the federal judge in charge of supervising the consent decree, found that the levels of violence in prison law libraries had not been anticipated at the time the decree was entered into, and thus suspension of congregate law library privileges was warranted for the most violent inmates.[120]

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109. *See* Bill Alden, *Modification of 1971 Consent Decree Granted*, N.Y. L.J., Apr. 22, 1996, at 1.

110. *See Escalera*, 924 F. Supp at 1340-41.

111. *See id.* at 1345.

112. Benjamin v. Malcolm, 495 F. Supp. 1357 (S.D.N.Y. 1980).

113. *See* Benjamin v. Jacobson, No. 75 CIV. 3073, 1995 WL 378529, Supplemental Order Re: Gang Jewelry (S.D.N.Y. June 26, 1995).

114. *See* Benjamin v. Jacobson, Supplemental Order Re: Food Service (S.D.N.Y. Oct. 2, 1995); *see also* Sandler, *supra* note 49.

115. *See Hearings on the Implementation of the Prison Litigation Reform Act*, *supra* note 86 (statement of Laura A. Chamberlain).

116. *See id.*

117. *See id.*

118. *See* Benjamin v. Jacobson, 923 F. Supp. 517, 518 (S.D.N.Y. 1996).

119. *See id.*

120. *See id.* at 521-22.

The City's most monumental (albeit short-lived) achievement occurred on July 23, 1996, when the City briefly won back the management of its jail system.[121] In 1978, the City had entered into a consent decree which placed most aspects of the City's jail system under federal court supervision.[122] In response to a motion filed by the City, Judge Baer vacated a series of consent decrees stemming from the initial 1978 decree, which had governed the prison system for nearly twenty years.[123] The court found the decision was mandated by the Prison Litigation Reform Act of 1995,[124] which required termination of the decrees unless there were current ongoing constitutional violations.[125] The City's victory in this area did not last long. On August 26, 1997, the U.S. Court of Appeals for the Second Circuit reversed the district court's ruling, and in essence held that New York City jails should continue to be managed by the federal decrees dating back to 1978.[126] The court of appeals held that although the Prison Litigation Reform Act may have terminated the federal court's authority to enforce the consent decrees, the decrees were still binding on the parties,[127] and thus plaintiffs "should be able to get all the relief from state courts . . . that had previously been available to them federally under the [c]onsent [d]ecrees."[128]

D. *Reordering of Budgetary Expenditures & Allocation of Resources*

Implementing the reforms ordered in a consent decree forces the courts to assume a legislative role—the process of resource allocation.[129] Unlike the City Council, the court is unable to engage in a debate about how the City should use its limited funds.[130] Through the issuance of its orders, the court is able to place a particular policy at the top of the budgetary list, so

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121. *See* Benjamin v. Jacobson, 935 F. Supp 332 (S.D.N.Y. 1996), *aff'd in part, rev'd in part*, 124 F.3d 162 (2d Cir. 1997) (reversing portion of the decision requiring that the consent decree be vacated).

122. *See Benjamin*, 935 F. Supp. at 337.

123. *See id.*

124. *See* Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 802 (to be codified at 18 U.S.C. § 3626 as amended).

125. *See Benjamin*, 935 F. Supp. at 357.

126. *See Benjamin*, 124 F.3d 162, 164-65 (2d Cir. 1997).

127. The court's rationale was that the underlying contract in the consent decree remained intact. *See id.* at 178.

128. *Id.*

129. *See* Jack Weinstein, *The Effect of Austerity on Institutional Litigation*, 6 L. & HUM. BEHAV. 145, 150 (1988).

130. *See* Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 57.

what had once been an option can become a priority.[131] As one commentator has argued, "[t]he courts are, in effect, requiring the appropriation of funds by the legislature, because sufficient funding must be budgeted to respond to court imposed solutions."[132]

The implementation and supervision of consent and court decrees often require considerable expenditures, making institutional reform litigation an increasingly costly process for the City. Some consent decree requirements cost City taxpayers millions of dollars a year.[133] As noted in *Callahan*,[134] for example, the City at one point spent in excess of $170 million a year to comply with the decree requirements that it provide shelter for the homeless.[135] Although the judiciary does not have the authority to require the appropriation of local funds, in essence, its court-ordered mandates indirectly compel some expenditures[136]—at times up to millions of dollars of local tax funds.[137]

IV. CONCLUSION

Consent decrees have become a powerful mechanism for the enforcement of constitutional and statutory norms, through which New York City residents have won judicial protection for many existing rights and privileges.[138] When entering into a consent decree, both sides hope that the parties can come to an agreement in which the goals of the decree have been satisfied.[139] However, this goal has generally eluded the City of New York.[140] The difficulty of enforcing these comprehensive decrees raises serious doubts about the utility and desirability of litigation as a means of reforming government institutions. As long as such cases continue to rise, however, courts must consider how their powers can be employed most effectively to implement institutional change. This is especially the case when one considers that the "involvement of the court and judge in

131. *See id.*

132. Demers, *supra* note 10, at 1048.

133. *See Hearings on the Implementation of the Prison Litigation Reform Act*, *supra* note 86 (statement of Laura A. Chamberlain) (noting that in *Benjamin v. Jacobson*, the City spent over $2 million dollars a year in compliance monitoring alone).

134. Callahan v. Carey, Index No. 42582/79 (Sup. Ct. N.Y. County Aug. 8, 1981).

135. *See* Demers, *supra* note 10, at 1020.

136. *See* Eisenberg & Yeazell, *supra* note 44, at 506.

137. *See* Demers, *supra* note 10, at 1017.

138. *See supra* notes 5-10 and accompanying text.

139. *See* Anderson, *supra* note 58, at 403.

140. *See* Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 56.

[institutional reform litigation] is workable and indeed inevitable if justice is to be done in an increasingly regulated society."[141]

As the above examples illustrate, the courts have become entangled in the policy-making and discretionary functions of the legislative and executive branches of City government. At times there are clearly legitimate reasons for judicial intervention in City policy-making.[142] The protection of constitutional rights is one of the most compelling reasons.[143]

However, despite the necessity of heightened judicial interest in institutional reform, the courts should not completely take control of the reform effort from the parties. Instead, "courts should defer to local institutions to the maximum extent [possible], consistent with [their] primary judicial function of enforcing the Constitution."[144] In addition to the asserted rights of a particular plaintiff, a court faced with an institutional suit should consider the fundamental right of voters to elect officials who will have the ability to deal with important social programs and problems.[145] Taxpayers expect accountable leadership. True leadership means not allowing misguided policies of the past to dictate the future of the City.

Tamia Perry

141. Chayes, *supra* note 27, at 1281.

142. *See* Sandler & Schoenbrod, *Government by Decree*, *supra* note 15, at 56.

143. *See id.*

144. *Special Project*, *supra* note 38, at 815.

145. *See* Sandler & Schoenbrod, *Statute Promises Local Relief from Overbearing Judges*, *supra* note 43, at 6.