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CIVIL DISTURBANCES: BATTLES FOR JUSTICE IN NEW YORK CITY

REPOHISTORY

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CIVIL DISTURBANCES: BATTLES FOR JUSTICE IN NEW YORK CITY

REPOHISTORY

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SEPARATE BUT NOT EQUAL

The Fourteenth Amendment to the Constitution guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws." But even after the abolition of slavery, government-sanctioned segregation was the law of the land.

The NAACP Legal Defense and Educational Fund (LDF) was founded in 1940 to fight racial injustice through the courts. From its headquarters at 20 West 40th Street in midtown Manhattan, LDF led a nationwide legal attack on Jim Crow laws.

Central to LDF's mission was its litigation campaign to desegregate public schools. This struggle culminated on May 17, 1954, when the U.S. Supreme Court, in *Brown v. Board of Education*, struck down the "separate but equal" doctrine and declared segregated public schools to be unconstitutional. This ruling led to the eventual banning of segregation in all areas of public life, and laid the foundation for the modern Civil Rights movement.

The success of LDF's litigation strategy also redefined the role of the courts in bringing about social justice in America, and has served as a model for generations of public interest lawyers.

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CIVIL DISTURBANCES: JUSTICE UNDER SIEGE

Budget cuts and political attacks threaten the practice of public interest law as never before. What will happen if the disadvantaged can no longer gain access to justice?

CIVIL DISTURBANCES is a REPOhistory project. Sponsored by New York Lawyers for the Public Interest. For a map and project guide, call (212) 727-2270, or visit our web site at http://repo.history.xs2.net.

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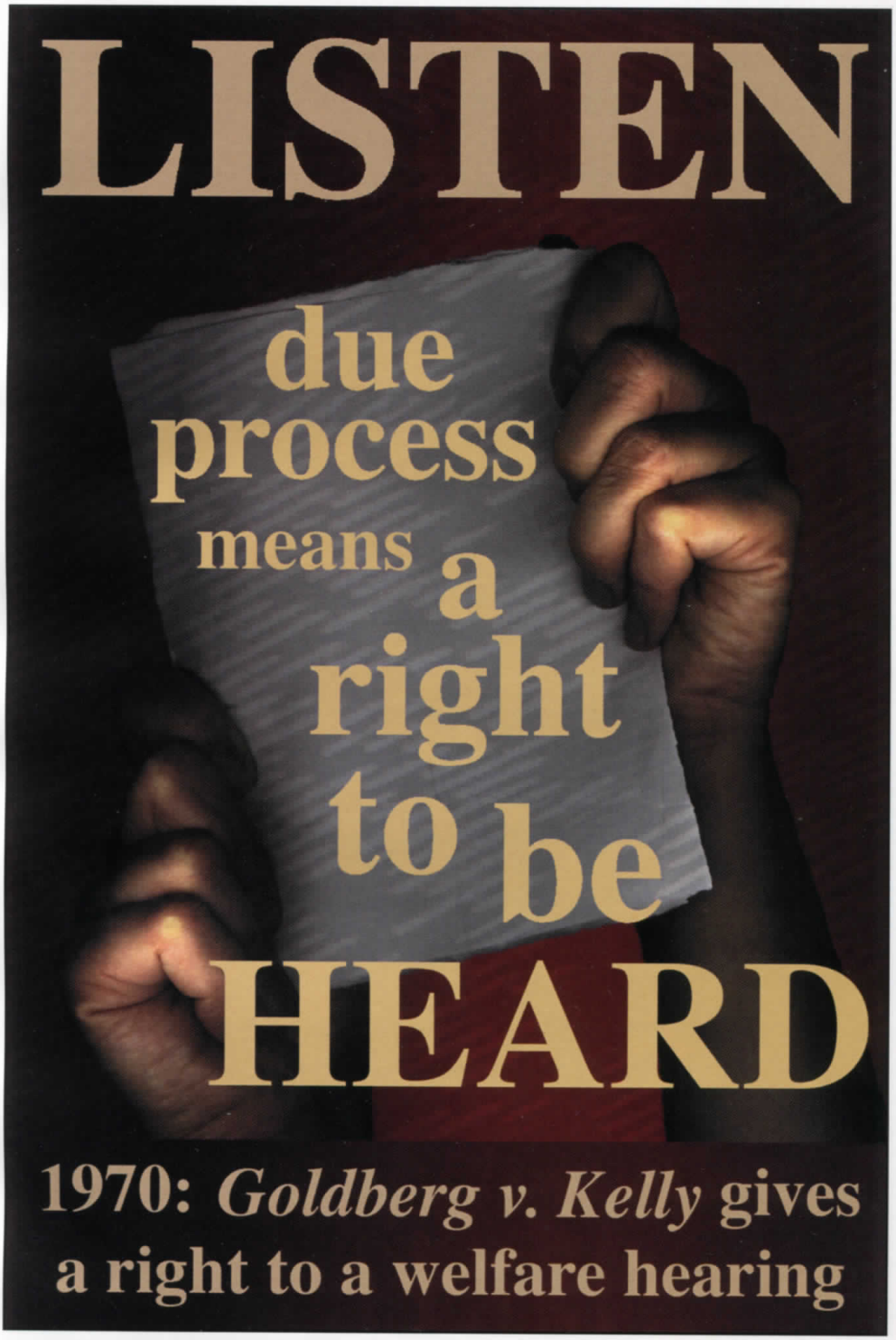

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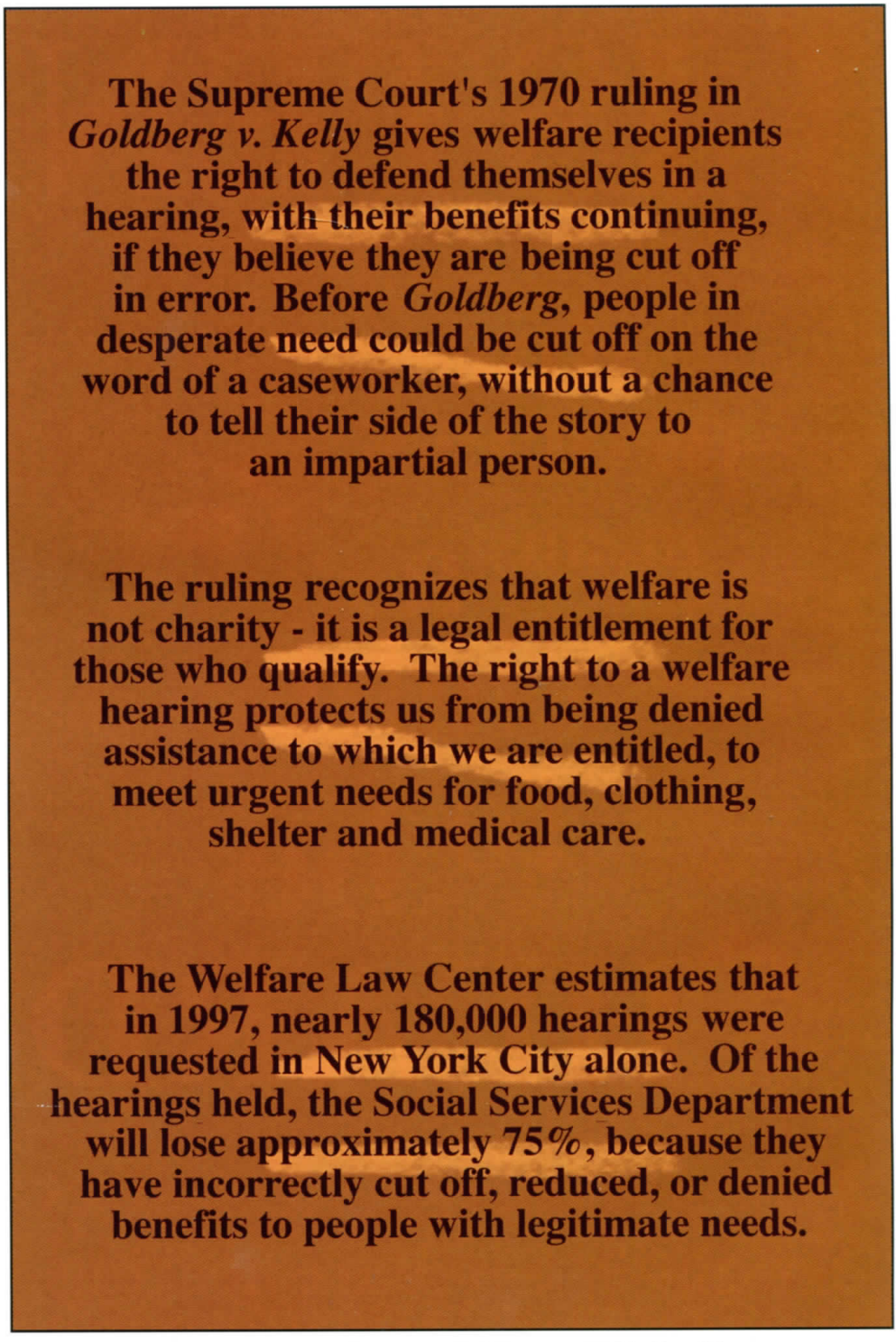

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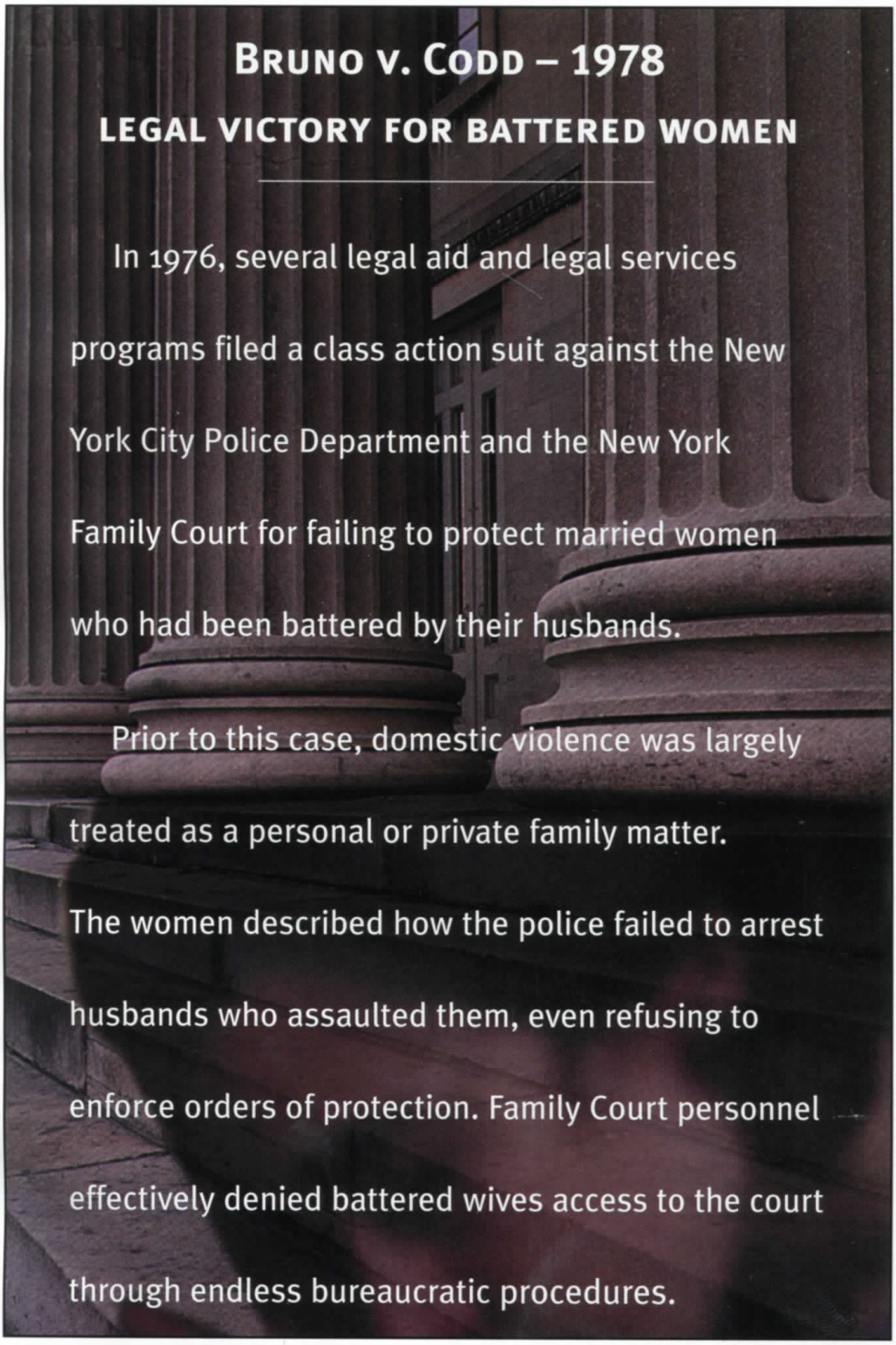

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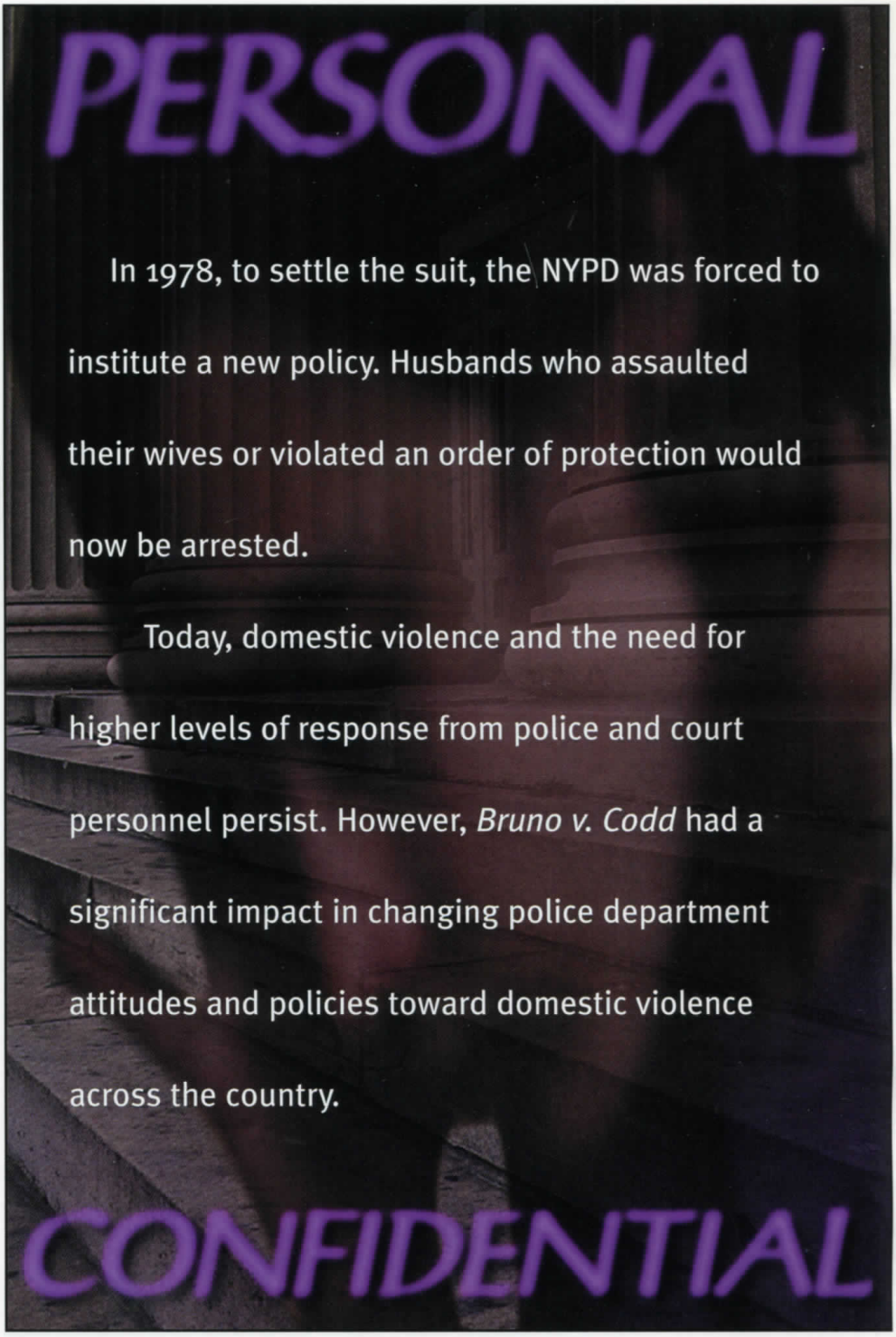

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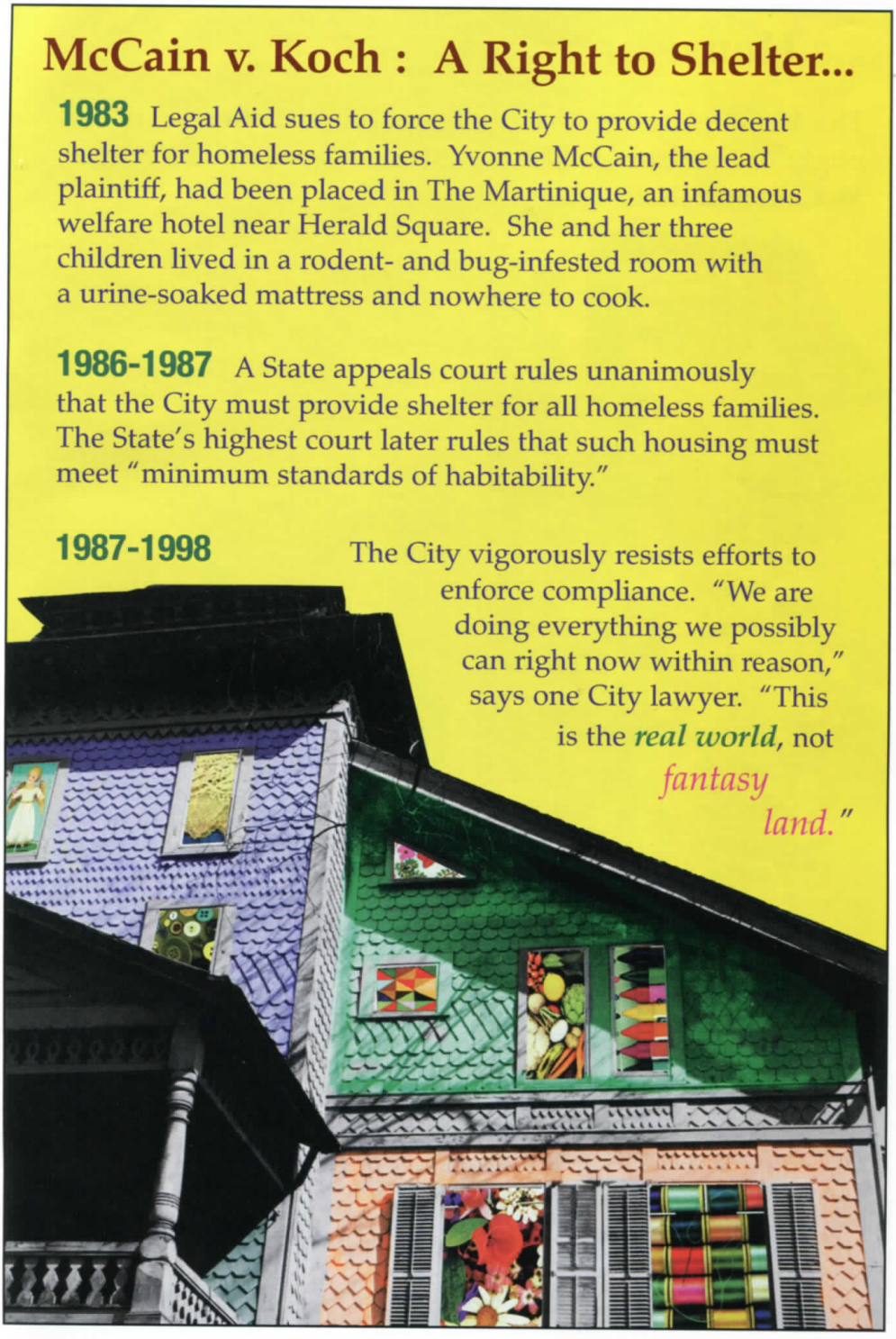

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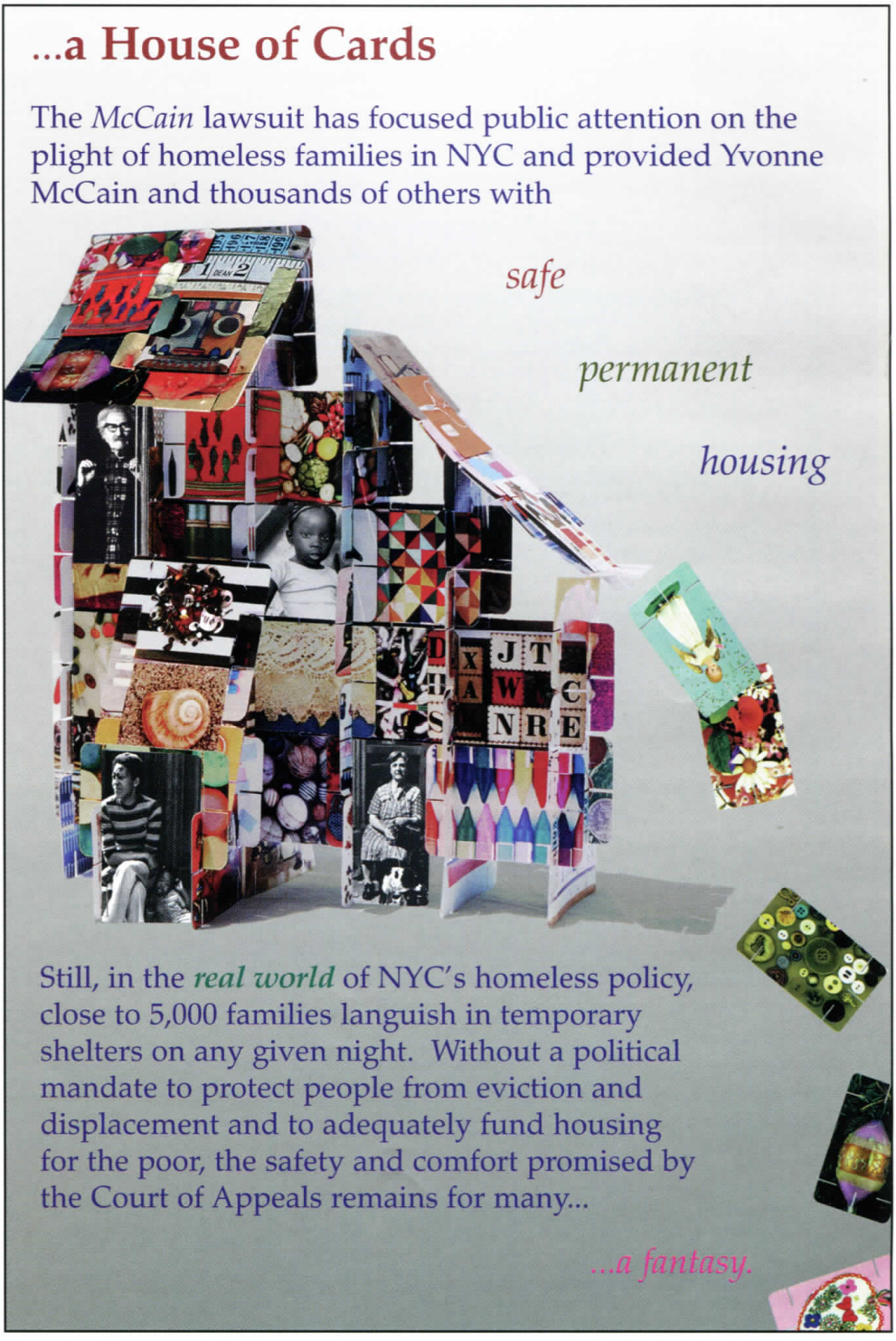

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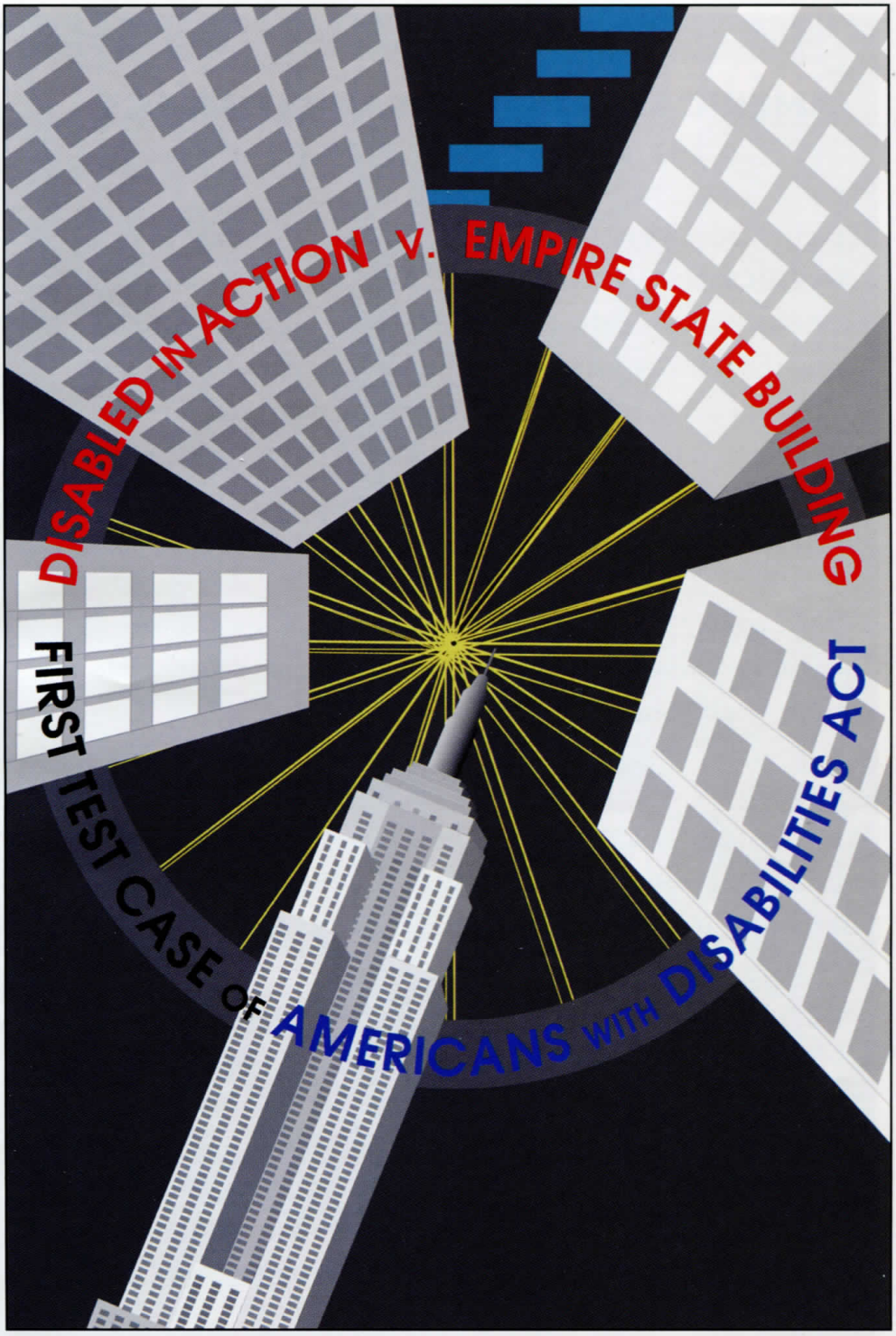

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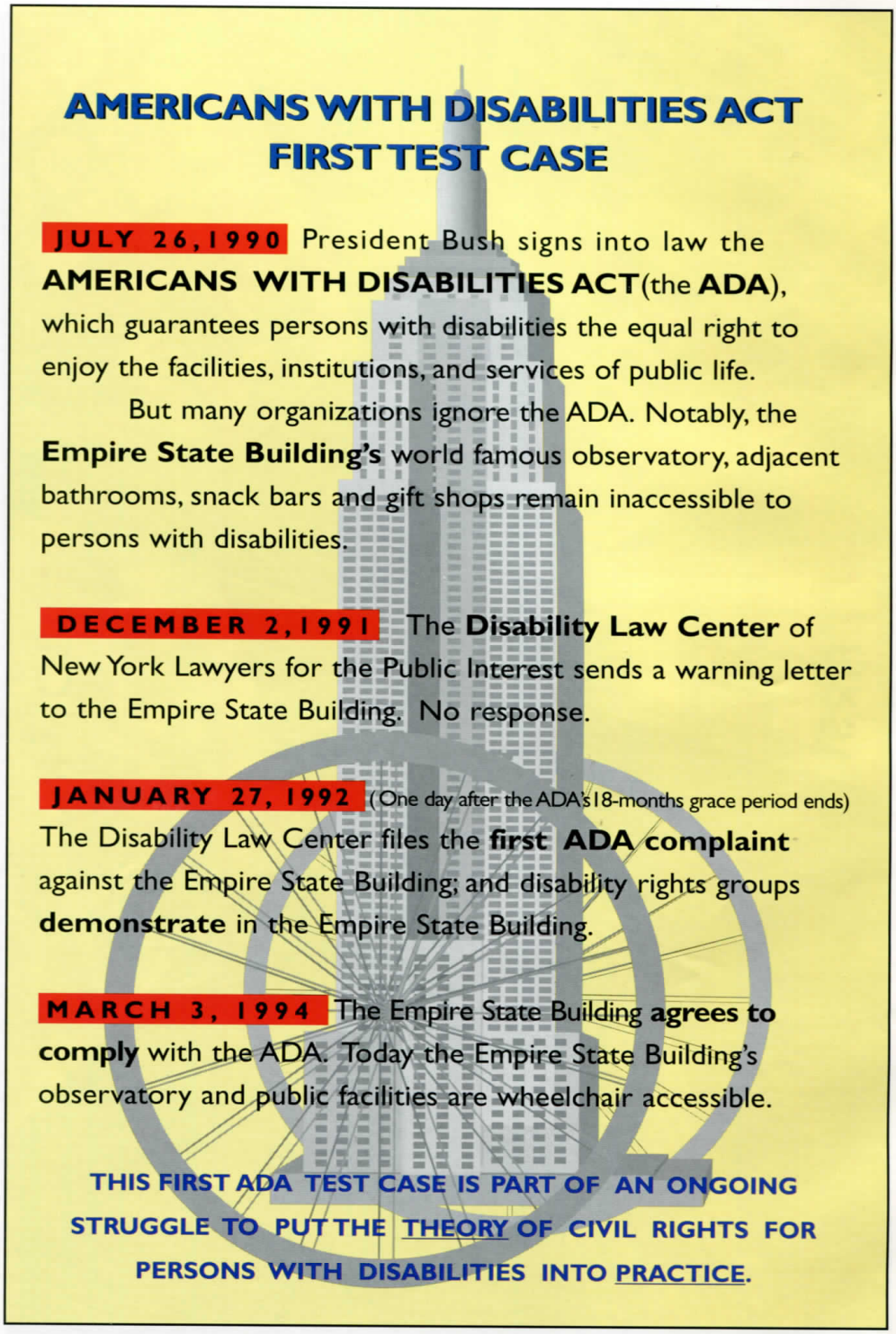

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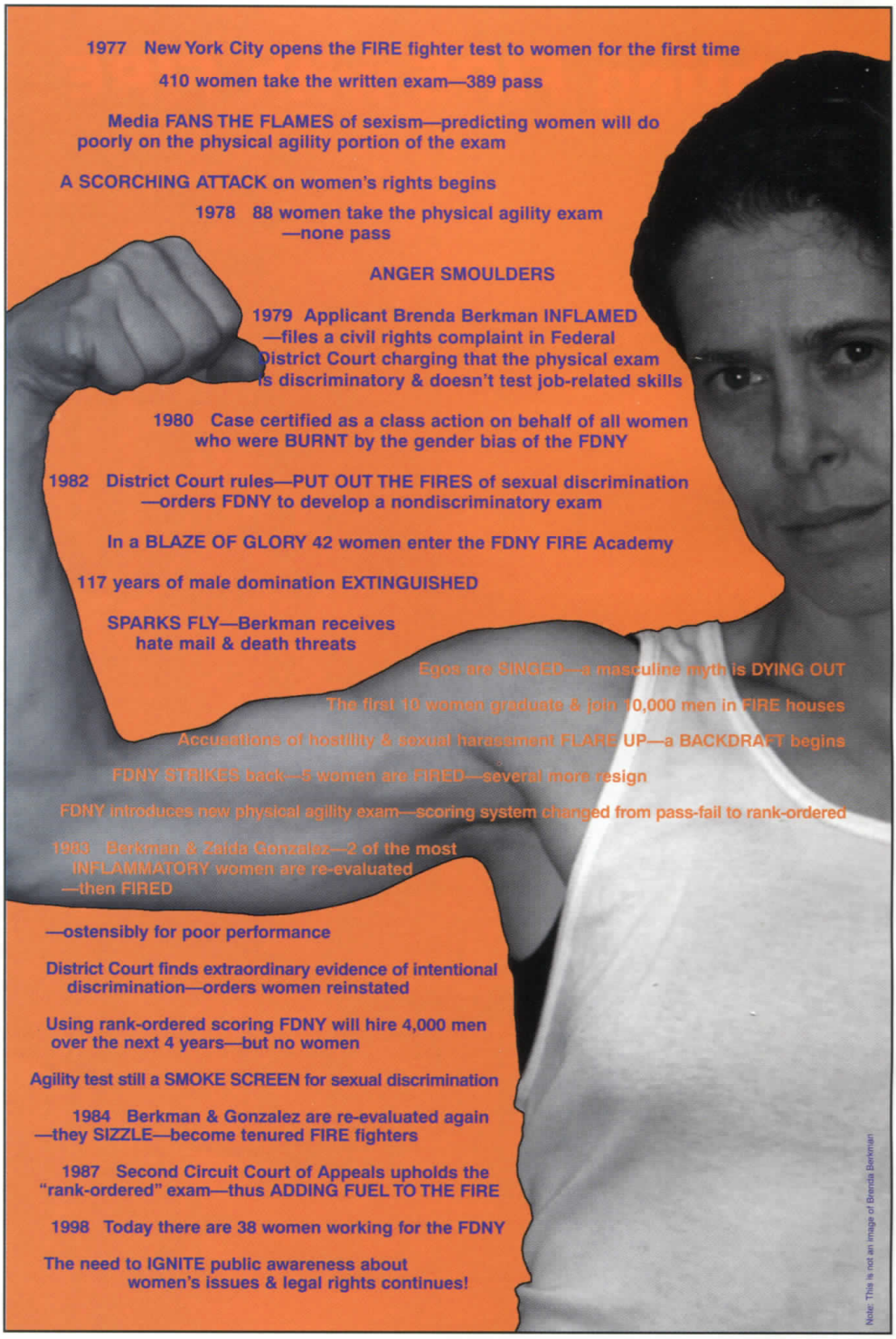

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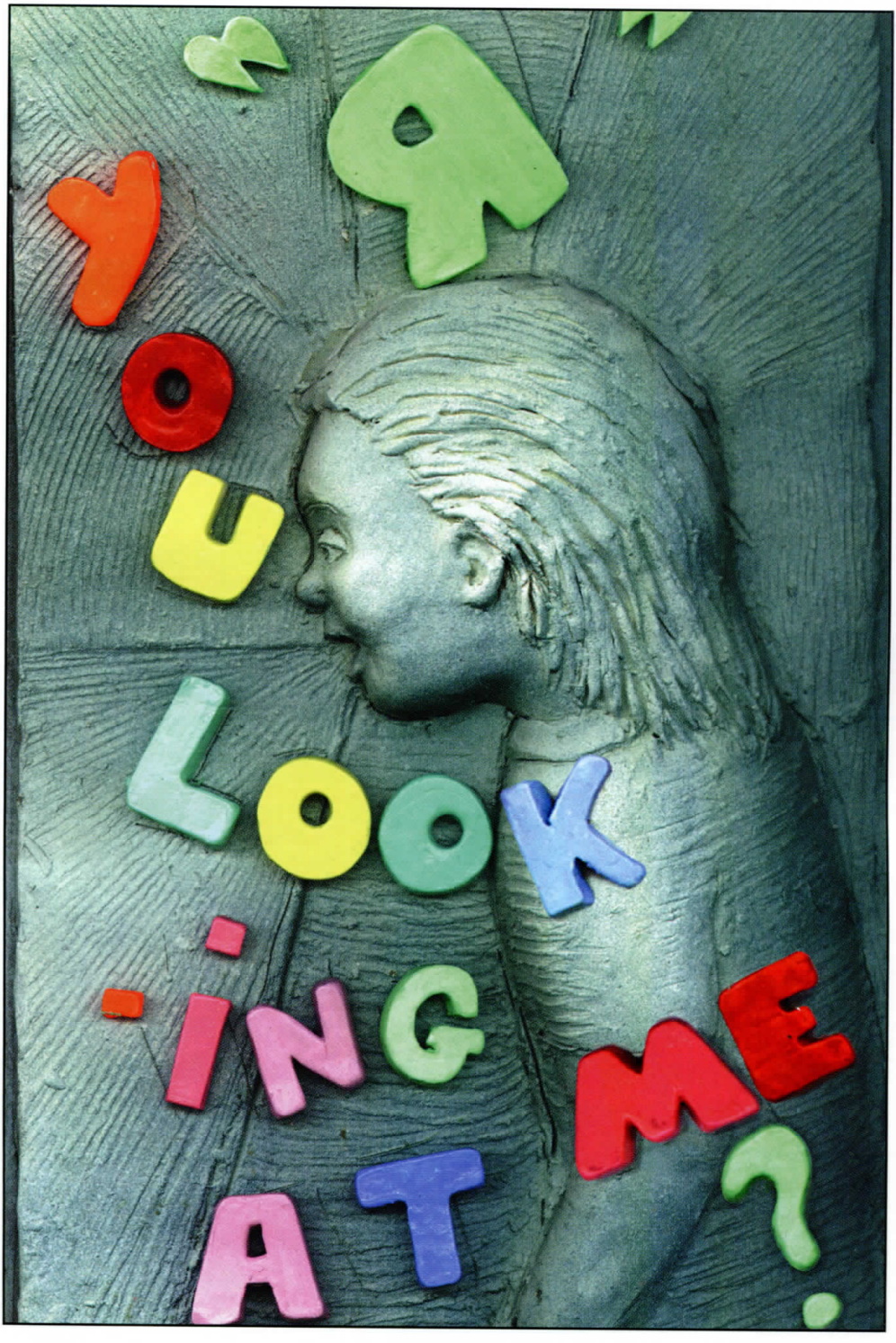

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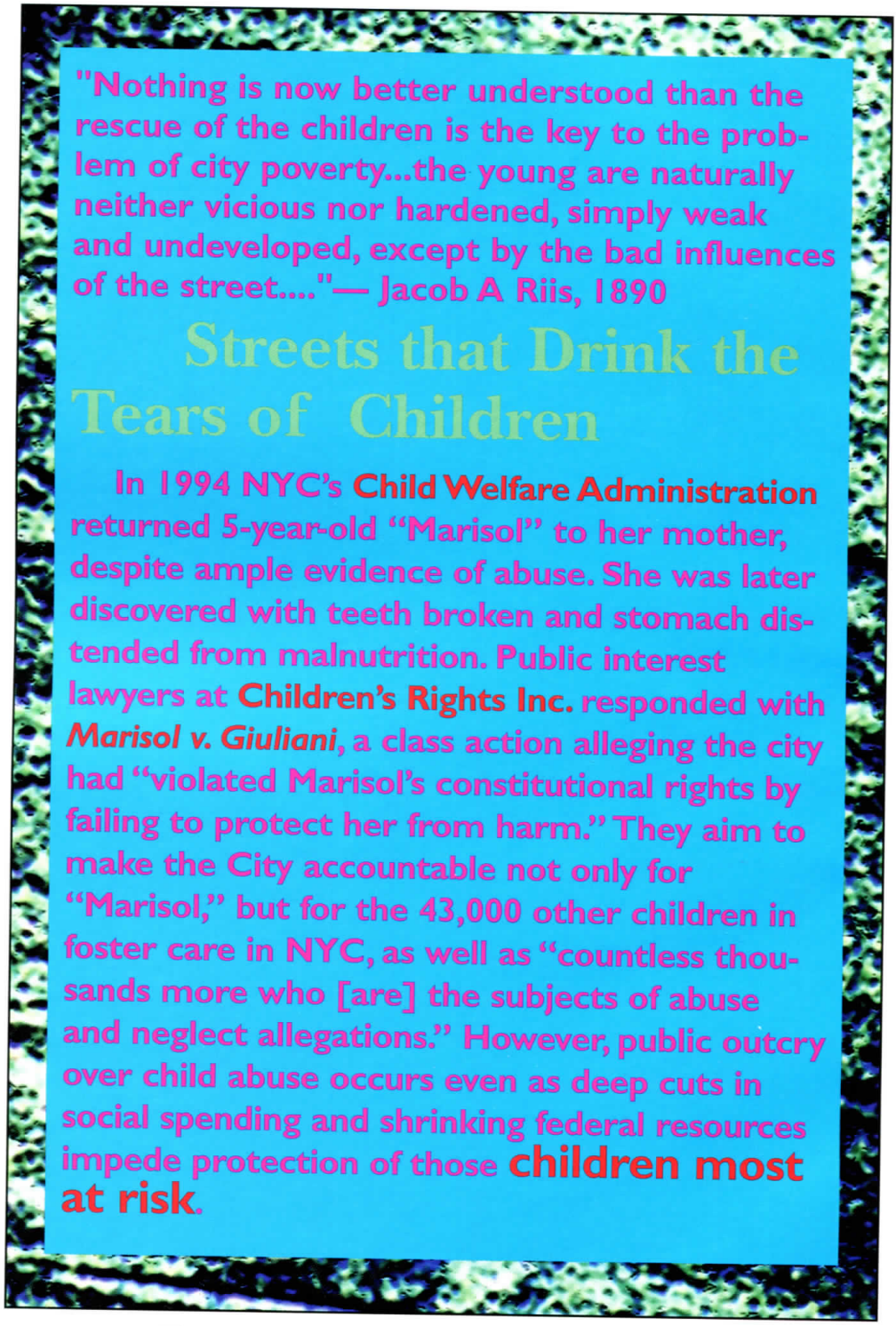

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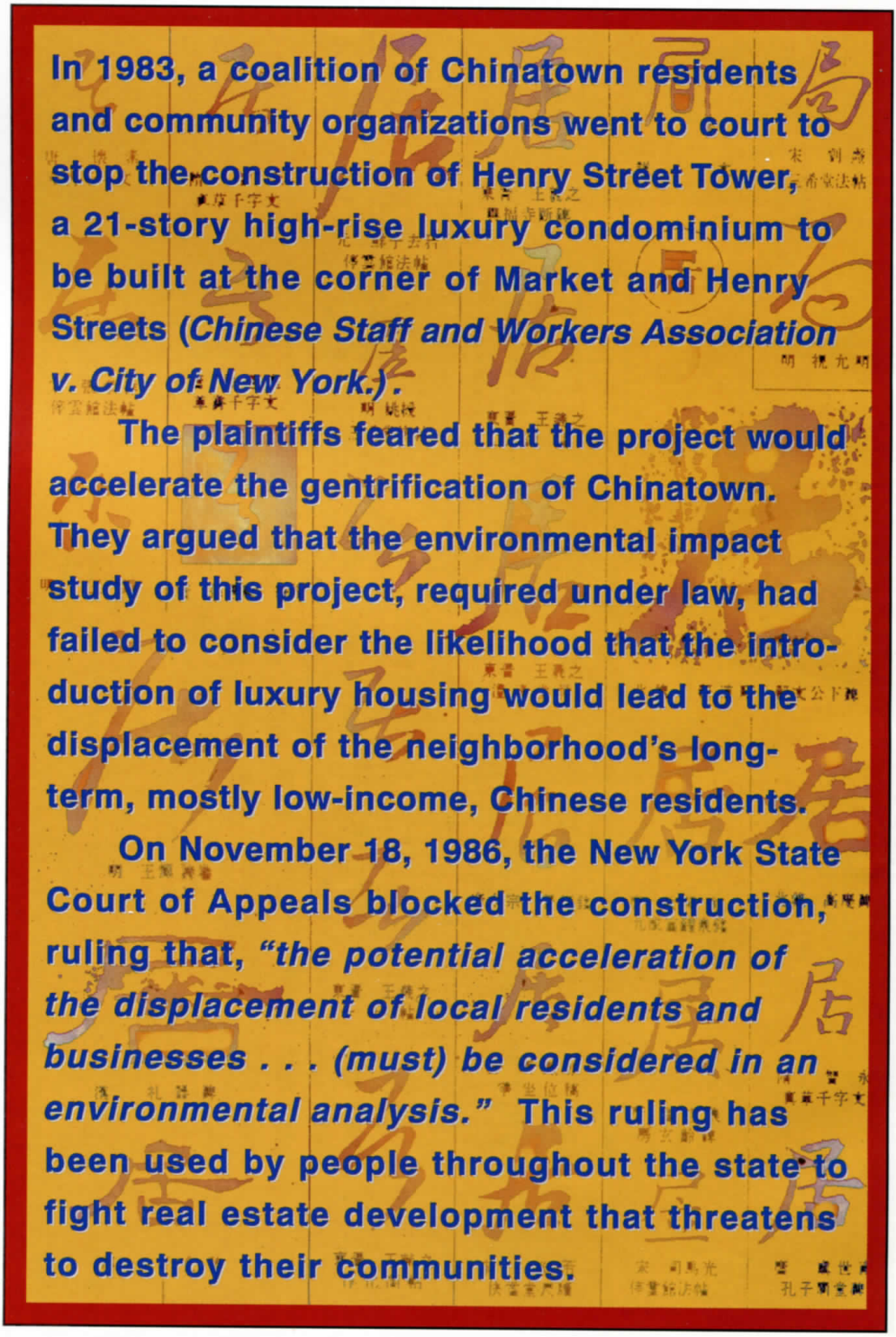

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INTRODUCTION: CIVIL DISTURBANCES — BATTLES FOR JUSTICE IN NEW YORK CITY

*Matthew Diller**

The *Fordham Urban Law Journal* has performed a true service in making selections from *Civil Disturbances: Battles for Justice in New York City* accessible to a wide audience. *Civil Disturbances* is a collaborative project between artists and lawyers that commemorates both the achievements and unfinished work in the battle for social justice in the City of New York. The project consists of twenty signs containing images and text that have been posted at pertinent sites around the City of New York.[1] The signs commemorate landmark public interest law suits and a number of legal struggles still under way. On one level, the signs are cleverly designed vehicles for conveying information. On a deeper level, they present powerful images that provoke strong and disturbing visceral reactions. Ultimately, they are works of beauty. Adding to the original project, the *Urban Law Journal* has also included a number of essays discussing a number of the cases represented by the signs from the perspective of both artists and lawyers. The editors also have given us excerpts from a forum held in connection with the project at New York Law School on November 17, 1998.

Civil Disturbances is the work of REPOhistory, a collective of artists that concentrates on site-specific public art works designed to "repossess" history by evoking remembrance of events and people that are often omitted or excluded from mainstream historical accounts.[2] The group's declared purpose is to "create works that intervene in an anonymous city-scape by drawing attention to the

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1. A complete set of signs can be viewed in its entirety in and around Foley Square, near the largest courthouses in Manhattan. Members of the public called for jury duty in Supreme Court, New York County, receive brochures explaining the project, so that they can view the signs during lunch breaks. The signs will be posted from August 4, 1998 through July 23, 1999.

2. Artists participating in *Civil Disturbances* include Mark O'Brien (Project Director), Stephanie Basch, Neil Bogan, Jim Costanzo, Marina Gutierrez, Mona Jimenez, Lisa Maya Knauer, Janet Koenig, Irene Ledwith, Cynthia Liesenfeld, Bill Menking, Ming Mur-Ray, Laurie Ourlicht, Jayne Pagnucco, Jenny Polak, Susan Schuppli, Cynthia Seymour, Greg Sholette, George Spencer, David Thorne and Kit Warren.

forgotten or suppressed narratives while revealing the spatial relationships inherent in power, usage and memory."[3] The concepts of community inclusion and collaboration have been central to the vision of REPOhistory.[4]

REPOhistory got its start in 1992 with the *Lower Manhattan Sign Project*, which presented an alternative account of the history of New York's financial district. Subsequent projects have included *Queer Spaces*, a project honoring the 25th anniversary of the Stonewall riots in New York City, *Entering Buttermilk Bottom*, an examination of an African American community in Atlanta destroyed by urban renewal, and *Out From Under King George Hotel*, a historical study of a specific site in downtown Houston that sheds light on the process of growth and displacement in an urban environment.

Civil Disturbances represents REPOhistory's attempt to come to terms with the impact of law and legal institutions on urban society. The project was proposed by Joan Vermeulen, executive director of New York Lawyers for the Public Interest ("NYLPI"), one of the premier public interest law offices in New York City. In supporting *Civil Disturbances*, NYLPI sought to raise awareness about the impact of public interest law on our society. Mark O'Brien directed the project. A long time member of REPOhistory and the coordinator of pro bono work for a major law firm. Mr. O'Brien has a thorough understanding of the perspectives of both artists and lawyers. His leadership was essential in making the collaboration between the two disciplines productive and creative.

To lawyers accustomed to dealing with text, rather than images, the idea of artistic representations of lawsuits and legal issues may appear to be a mere curiosity. However, visual images have long played an important role in legal proceedings. The physical arrangement of the traditional courtroom, the judge's robes, the scales of justice, and the image of justice as a blindfolded figure all convey and reinforce attitudes toward the justice system. These traditional images have focused on the authority and neutrality of the judiciary as a means of fostering respect for the law. The idea of strength has been central to this message, thereby aligning the legal system with the centers of power in society.

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3. *See* REPOhistory, *Civil Disturbances* (visited June 10, 1999) <http://repo.history.xs2.net> (providing a fuller description of REPOhistory and additional selections of its work).

4. *See id.*

Moreover, apart from these institutional images, imagery plays a central role in the lawyer's craft. Every skilled courtroom lawyer uses as many means of communication as possible to convey his or her message to a jury. In addition to the increasing use of demonstrative evidence, visual aspects of presentation such as clothing, facial expressions and body language are frequently exploited in order to evoke emotional responses from the judge or jury.[5] Opening and closing arguments are often used to "paint" images to bring the events in question to life for the jury.[6] The courtroom has always had an element of theater, and visual images have always been of central importance on the stage.

Seen in this light, artists and lawyers are a natural pairing. The signs created by REPOhistory convey powerful emotional messages about the lawsuits that they represent, in much the same way that lawyers draw on emotions in presenting their cases. The images in *Civil Disturbances*, however, are dramatically different from the traditional iconography of law — while the symbols of law strive to be dispassionate and detached, the images of *Civil Disturbances* are vivid and intense, calling for engagement with, rather than distance from the issues.

In proposing the project, NYLPI's initial goal was celebratory — to commemorate the successes that have been achieved in the struggle for social justice through law and efforts that are still continuing. The celebration, however, was not simply an end in itself. The project was intended to draw attention to the accomplishments of public interest law at a time when funding for legal services is under attack.[7] After a process of collaboration between artists,

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5. Texts on trial technique offer advice on how lawyers should position themselves and how to use body language and gestures for effect. A leading text advises that lawyers addressing the jury should:

> Keep your hands out of your pants or coat pockets, avoid playing with coins, pencils or papers and restrict constant or aimless wandering about the courtroom. Use upper body gestures, those involving your hands, arms, shoulders, head and face, since these usually strengthen your speech. Remember that your physical and verbal mannerisms should always reinforce your speech.

THOMAS MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 49 (3d ed. 1992).

6. Mauet counsels that effective opening statements are based on good story telling. *See id.* at 43. Where appropriate, he advises that the story should be "emotional and dramatic" in order to create empathy for the litigant. *See id.*

7. As posted, each sign contains the following text at the bottom:

> **CIVIL DISTURBANCES: JUSTICE UNDER SEIGE**
>
> Budget cuts and political attacks threaten the practice of public interest law as never before. What will happen if the disadvantaged can no longer gain access to justice?

lawyers and some of the litigants involved in the cases, the final product is more ambivalent and nuanced than might be expected in a celebration. Many of the signs focus attention on the underlying injustices that the lawsuits sought or seek to address. Many of them deal with issues that remain unresolved. Nonetheless, the signs serve as a reminder that law can be an agent for freedom and equality that can help us to reach for the highest aspirations that we hold for society. The signs point out the rich and long history in which lawyers, courageous individuals and communities have worked to use law as an instrument for achieving social justice. The medium of the project — public signs posted at critical locations — reinforces the point that the struggle for social justice through law has had an immediate impact on the lives of New Yorkers and the City's communities. In this sense, *Civil Disturbances* grounds the fight for social justice in the physical terrain of the City. The signs remind us that lawsuits brought on behalf of disempowered individuals and communities have shaped the fabric of life in New York City as much as the streets on which New Yorkers walk and the buildings in which we live and work.

Before turning to the specific signs included in this selection, it is important to note that *Civil Disturbances* came perilously close to becoming a battle for social justice in its own right. Hours before the signs were due to be posted, the City of New York announced that it was denying the necessary permits on the basis of a policy prohibiting the posting of any signs on New York street lamps other than those relating to traffic.[8] To New Yorkers accustomed to seeing all kinds of postings on lampposts, including holiday decorations, parade banners and community notices, the existence of such a policy must surely come as a surprise. After threatened litigation, the City relented and allowed the project to go forward three months later. The dispute over *Civil Disturbances* is a reminder of the fact that free expression in New York's public places continues to be a contested issue.[9]

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8. *See* David Gonzalez, *Lampposts as a Forum For Opinion*, N.Y. TIMES, May 20, 1998; Stuart Elliot, *Some Legal History Still Being Overturned*, N.Y. TIMES, Nov. 15, 1998.

9. *See* Benjamin Weiser, *City Pays $59,000 to Settle Times Sq. Preaching Group Suit*, N.Y. TIMES, June 16, 1999, at B6; Bruce Lambert, *The Giuliani Way: Sue and be Sued*, N.Y. TIMES, May 23, 1999; Benjamin Weiser, *Ban on Big Gatherings at City Hall Is Ruled Unconstitutional*, N.Y. TIMES, July 21, 1998; Susan Sachs, *Giuliani's Goal of Civilized City Runs into First Amendment*, N.Y. TIMES, July 8, 1998.

The sign for *McCain v. Koch*,[10] the lawsuit which established the right of homeless families to decent emergency shelter, is posted outside of the old Martinique Hotel, where hundreds of homeless children were sheltered in filthy inhuman conditions during the 1980s. The design, by artists Mark O'Brien and Kit Warren, evokes a child's fantasy of home, while at the same time revealing the illusory nature of promises of safe housing. It draws on traditional images of a home as a source of warmth and spiritual repose, completely at odds with the reality of the nightmarish conditions of the Martinique Hotel. Also included remarks by Steven Banks, the lead attorney for the plaintiffs in *McCain*.[11]

Goldberg v. Kelly[12] was initiated by John Kelly, a resident of the Lower East Side, with the assistance of MFY Legal Services, the first store front legal services office in the nation. The Supreme Court's decision in *Goldberg* established that welfare recipients are entitled to a hearing prior to termination of benefits. The pair of hands holding up a piece of paper suggests both an emphatic assertion of rights and a desperate plea. The growing size of the text suggests that due process demands not simply an opportunity to speak, but a right to be listened to. The editors of the *Urban Law Journal* have also given us the remarks of Henry Freedman,[13] one of the attorneys for the plaintiffs in *Goldberg* and Mona Jimenez[14] the artist who designed the sign relating to the case. The sign is posted outside the welfare office responsible for assigning recipients to workfare positions.

Disabled in Action v. Empire State Building[15] was the first public access case brought under the Americans with Disabilities Act ("ADA"). It challenged the inaccessibility of the building's observation deck to people with disabilities. Artist Janet Koenig's circular design suggests the mobility of a wheelchair — a reference that is explicit on the back of the sign which depicts the building itself on wheels. The images remind us that community activism and law can work together to move the most rooted of institutions and structures. The sign commemorating the case is posted outside of

10. 511 N.E.2d 62 (N.Y. 1987).

11. *See infra*, *REPOhistory Roundtable Discussion:* McCain v. Koch (remarks of Steven Banks).

12. 397 U.S. 254 (1970).

13. *See infra*, *REPOhistory Roundtable Discussion:* Goldberg v. Kelly (remarks of Henry A. Freedman).

14. *See infra*, *REPOhistory Roundtable Discussion:* Goldberg v. Kelly (remarks of Mona Jiminez).

15. United States Dep't of Justice Complaint No. 202-51-1 (Jan. 27, 1992).

the building. In addition, Cary LaCheen, one the lawyers for the plaintiffs, has given us a fascinating account of how the case was brought and the impact that it has had.[16]

The sign commemorating *Berkman v. City of New York*[17] emphasizes the strength and power of Brenda Berkman, the plaintiff who challenged the New York City Fire Department's refusal to hire women firefighters. The image of a woman's flexed biceps simultaneously points out Ms. Berkman's qualifications as a firefighter and her power as a fighter for justice. It suggests that the Fire Department discovered the hard way that Ms. Berkman has considerable incendiary power of her own — she ignited a fire that the Department simply could not extinguish. The sign is posted on Livingston Street in Brooklyn, at the site of the Fire Department's former headquarters. Included in this collection are remarks by Brenda Berkman,[18] her attorney Laura Sager[19] and artist Susan Schuppli.[20]

Marisol v. Giuliani[21] is a major class action challenging the City of New York's mal-administration of its child welfare system. The case was settled on the eve of trial in 1998. The childlike lettering of the sign contrasts the image of innocence associated with childhood with the grim realities of the City's foster care system. The sign hangs on Chambers Street, just north of City Hall. In accompanying essays, artist Greg Sholette discusses his goals and approach to the sign[22] and Marcia Lowery, attorney for the plaintiff class, has provided discussion of the litigation.[23]

Also included in this selection is artist Ming Mur-Ray's sign for *Chinese Staff & Workers Ass'n v. City of New York*.[24] In *Chinese Staff & Workers*, New York's highest court required that zoning decisions take into consideration the impact of proposed develop-

16. *See infra*, Cary LaCheen, *REPOhistory: "Equal Access is Our Right": Increasing Accessibility at the Empire State Building*.

17. 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd* 705 F.2d 584 (2d Cir. 1983), *later proceeding* 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd in part and rev'd in part* 12 F.2d 52 (2d Cir. 1987), *cert. denied* 484 U.S. 848 (1987).

18. *See infra*, *REPOhistory Roundtable Discussion:* Berkman v. City of New York (remarks of Brenda Berkman).

19. *See infra*, *REPOhistory Roundtable Discussion:* Berkman v. City of New York (remarks of Laura Sager).

20. *See infra*, *REPOhistory Roundtable Discussion:* Berkman v. City of New York (remarks of Susan Schuppli).

21. 929 F. Supp. 662 (S.D.N.Y. 1996), *aff'd* 126 F.3d 372 (2d Cir. 1997).

22. *See infra*, Greg Sholette, *REPOhistory: Я We Not Human?*.

23. *See infra*, Marcia Robinson Lowry, *REPOhistory: Why Settle When You Can Win: Institutional Reform and* Marisol v. Giuliani.

24. 502 N.E.2d 176 (N.Y. 1986).

ments on community residents and businesses, including the displacement of low income residents that can result from the process of "gentrification." The decision recognizes that the character of the neighborhoods is an important component of the urban environment. As is often the case, the judicial decision is the tip of an iceberg. The lawsuit grew out of the efforts of activists and community groups to halt the creation of a high rise luxury apartment building in the heart of Chinatown. The sign is posted at the corner of Henry and Mott streets, in the heart of New York's Chinatown.

Bruno v. Codd[25] challenged the failure of the New York City Police Department and the Family Court to protect wives from violence perpetrated by their husbands. The sign, designed by Stephanie Basch, points out how treatment of spousal abuse as a private matter was used to deny women police protection from violence and access to the justice system. It is posted outside of police headquarters.

Finally, the editors have included the sign for *Brown v. Board of Education*,[26] a decision that needs no introduction. Although the *Brown* decision is more likely to evoke images of Topeka than of Manhattan, the sign honors the NAACP Legal Defense Fund, a New York institution for more than fifty years. It is posted at 20 West 40th Street, the site from which Thurgood Marshall and his colleagues waged their battle against segregation during the years when *Brown* was litigated. As an eight year old child, artist Laurie Ourlicht was a plaintiff in the first suit brought to desegregate Detroit's public schools. That case was filed in 1962.

In sum, the artists of REPOhistory, the lawyers of NYLPI and the editors of the *Urban Law Journal* have joined together to present a truly unique experience for the readers of this journal. Their work, however, is underpinned by the labors of the lawyers, judges, community activists and individual litigants that made possible the accomplishments commemorated in this project.

25. 47 NY.2d 582 (1979).
26. 347 U.S. 483 (1954).

"EQUAL ACCESS IS OUR RIGHT": INCREASING ACCESSIBILITY AT THE EMPIRE STATE BUILDING

*Cary LaCheen**

The Empire State Building is a symbol, indeed it is *the* symbol, of New York City. Over 3.8 million people visit its observatories each year.[1] To date there have been over 120 million visitors.[2] Up until 1994, however, not one of these observatory visitors reached the observatory in a wheelchair. To people with mobility impairments, the Empire State Building was long a symbol of a different kind — a symbol of the exclusion of people with disabilities from mainstream public life.

Much of the discrimination faced by people with disabilities has been "the product, not of invidious animus, but rather of thoughtlessness and indifference — of benign neglect."[3] The longstanding failure to use accessible building design and to make modifications in existing buildings so that services are accessible to people with disabilities, is one of the more tangible results of this neglect. A Lou Harris poll published in 1986 found that the large majority of people with disabilities never went to restaurants, grocery stores, movies, theaters, sporting events, churches, or synagogues.[4] When businesses, public transportation, and sidewalks are not accessible, people with many disabilities stay at home, perpetuating their invisibility. As a result, people with disabilities have routinely been excluded from the mainstream of public life and relegated to second class status.

In 1973, Congress enacted what would later become Section 504 of the Rehabilitation Act,[5] which prohibits discrimination against

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1. Information Desk, Empire State Building (visited Mar. 27, 1999) <http://db.esbnyc.com/body_answers.cfm>.

2. *See id.*

3. *See, e.g.*, Alexander v. Choate, 469 U.S. 287, 295 (1985). *See also* Section 504 of the Rehabilitation Act (legislative history).

4. Louis Harris and Associates, The ICD Survey of Disabled Americans: Bringing People with Disabilities into the Mainstream 32-41, *cited in* H.R. REP. No. 101-485 (1990).

5. 29 U.S.C. § 794 (1994).

people with disabilities in federal agencies and any entity that receives federal financial assistance. Though most state and local governments receive federal assistance for transportation, education, and other services, states and localities largely ignored Section 504, with little or no repercussions. Moreover, Section 504 did not reach one of the most pervasive problems facing people with disabilities, namely, the lack of accessibility of privately owned places of public accommodation. Restaurants, movie theaters, doctors' offices, supermarkets, concert halls and other businesses open to the public were free to do as they chose, unless they received federal funds.

People with disabilities wanted a comprehensive federal law that reached not only the conduct of federal agencies and grantees, but a wide range of services, activities and entities. After a concerted effort which brought together a coalition of disability, civil rights and other groups, the Americans with Disabilities Act ("ADA") was passed and signed into law by President George Bush on July 26, 1990.[6] The ADA is comprehensive in scope, addressing discrimination in employment, all State and local government programs and services, telecommunications, transportation, and the activities of privately owned places of public accommodation.[7] Its purpose is to "provide a clear and comprehensive national mandate for the elimination of discrimination against people with disabilities."[8]

The preamble of the ADA reflects a clear understanding by Congress that discrimination against people with disabilities takes many forms, including "the discriminatory effects of architectural, transportation, and communication barriers."[9] The ADA addresses these barriers in a number of ways. Title III defines "public accommodations" that are subject to the law broadly to include twelve categories of businesses, including retail establishments, schools, hotels and other places of lodging, social service establishments such as doctors' offices, places of recreation, places of display such as museums, and places of public gathering.[10] This definition is far broader than that used in Title II of the Civil Rights Act of 1964,[11] the law on which Title III was modeled in

6. Pub. L. No. 101-336, 104 Stat. 327 (1990).
7. 42 U.S.C. § 12101 et seq. (1994).
8. 42 U.S.C. § 12101(b)(1) (1994).
9. 42 U.S.C. § 12101(a)(5) (1994).
10. 42 U.S.C. §§ 12181(7)(A)-(L) (1994).
11. 42 U.S.C. § 2000a(a) (1994).

part, which prohibits discrimination on the basis of race by restaurants, hotels and places of entertainment. In explaining its reasoning for adopting a broader definition, the legislative history of the ADA states "[i]t is critical to define places of public accommodation to include all places open to the public . . . because discrimination against people with disabilities is not limited to specific categories of public accommodation."[12]

Title III contains different standards for new construction[13] and existing facilities.[14] While new construction must be designed and built so that it is "readily accessible to and usable by individuals with disabilities,"[15] existing facilities must remove architectural and structural communication barriers in existing facilities only where such removal is "readily achievable,"[16] defined as "accomplishable and able to be carried out without much difficulty or expense."[17] In determining whether a modification is readily achievable, the factors to be considered include the nature and the cost of the modification; the overall financial resources of the particular facility involved; the number of employees at the facility; and the impact of the barrier removal on the operation of the facility.[18] In addition, the overall resources of the public accomodation, the number of its employees and the number of its facilities are to be considered where a public accomodation operates at multiple sites.[19] Finally, the nature of the business, and its workforce, and the relationship of the particular facility to the larger public accomodation are to be considered as well.[20] What is "readily achievable" for a small "mom and pop" grocery store will be different than what is required of a large supermarket that is part of a nationwide chain. Nevertheless, the "readily achievable" analysis is not the end of the inquiry. Even when architectural modifications are not "readily achievable," a place of public accommodation must make its services available to people with disabilities through alternative, readily achievable methods.[21] A mom and pop grocery store may not have to ramp its entrance or lower

12. *See* H. REP. NO. 101-485(I), at 36; S. REP. NO. 101-116, at 11.
13. 42 U.S.C. § 12183 (1994).
14. 42 U.S.C. § 12182(2)(b)(2)(a)(iv) (1994).
15. 42 U.S.C. § 12183(a)(1) (1994).
16. 42 U.S.C. § 12182(b)(2)(iv) (1994).
17. 42 U.S.C. § 12181(9) (1994)
18. 42 U.S.C. §§ 12181(9)(A),(B).
19. 42 U.S.C. § 12181(9)(C).
20. 42 U.S.C. § 12181(9)(D).
21. 42 U.S.C. § 12182(2)(A)(v) (1994).

shelves, but it will probably have to provide sidewalk service or home delivery to someone who cannot get in the door or lift merchandise from high shelves.[22] The ADA "strike[s] a balance between guaranteeing access to individuals with disabilities and recognizing legitimate cost concerns of businesses and other private entities."[23] The regulations even contain an order of priorities for barrier removal,[24] reflecting the understanding that places of public accommodation could not do everything at once. As a result, Congress gave public accommodations eighteen months after the ADA passed before requiring compliance.[25] Instead of using this time productively to evaluate the accessibility of its public accommodations, and make needed changes, many public accommodations did nothing.

The owners and operators of the Empire State Building were among this group. Members of Disabled in Action of Metropolitan New York ("DIA"), a local disability rights organization, informed New York Lawyers for the Public Interest, Inc. ("NYLPI") that the Empire State Building observatory was not accessible to wheelchair users and no changes appeared to be underway in anticipation of the ADA's effective date. It was virtually impossible for wheelchair users to purchase a ticket to the observatory because metal poles directing traffic flow made it impossible for wheelchair users to wait in line for tickets, and even if they could somehow make it to the ticket booth, the booth itself was prohibitively high and difficult to reach from a wheelchair. There were no signs indicating alternative wheelchair accessible routes to the observatory. To reach the main observatory on the 86th floor, one needed to transfer elevators on the 80th floor; however, a turnstile in the middle of the hallway on this floor made it impossible for wheelchair users to proceed further. On the 86th floor itself, visitors departing the elevators were confronted with three flights of stairs, which were the only means of getting to the outside observation deck and the souvenir and concession stands. It was not even possible to look out of the window and see the view without using the stairs. None of the stairs were ramped or had wheelchair lifts. When asked how a wheelchair user could see the view, a guard said the person would have to be carried up the stairs, a demeaning and unsafe practice that U.S. Department of Justice has said is unac-

22. 28 C.F.R. 36, app. A § 36.305 (1998).
23. 28 C.F.R. 36, app. A § 36.304 (1998).
24. 28 C.F.R. §§ 36.304(c)(1)-(4) (1998).
25. Pub. L.101-336, § 310, 104 Stat. 365 (1990).

ceptable as a method of achieving program accessibility.[26] Even if a wheelchair user could manage to make it up these stairs, it was necessary to use another set of stairs to reach the observation deck outside. Even if it had been possible to get to the deck, the parapet walls surrounding the deck made it impossible to see the view from a seated position. The women's bathroom was down a steep flight of stairs, and the men's room had a door that was too narrow for a wheelchair user to enter, and visitors were not permitted to use any other bathroom in the building. The public telephones on the 86th floor and the building lobby were too high to be usable by wheelchair users and lacked any assisted listening equipment required by Title III. As for entry into the building itself, the main entrance on Fifth Avenue had a revolving door — a virtual chamber of death to a wheelchair user. In short, the building and observatory were about as accessible as many other places of public accomodation — not accessible at all.[27]

NYLPI asked a designer who worked for Eastern Paralyzed Veterans Association to pay the building a visit. After he did, he informed NYLPI that the outside observation deck could be made accessible by installing wheelchair lifts for $13,000 each. Modifying one of the bathrooms was also possible, and removing the barriers to the ticket booth and on the 80th floor was also possible and almost cost-free. Given that the observatories received over 2.5 million visitors each year[28] and the regular ticket price was $3.50,[29] it seemed safe to assume that these modifications could be accomplished and carried out "without much difficulty or expense."

In early December, 1991, NYLPI wrote a letter to Harry Helmsley, President of Helmsley-Spear, the managing agents for the building, requesting that measures be taken to make the observatory accessible before the approaching effective date of Title III. It was not possible to write to the owners directly, as the building had

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26. *See* 28 C.F.R. 35, app. A § 35.150 (1998); UNITED STATES DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL § II-5.2000 (1993).

27. The Empire State Building also has a smaller observatory on the 102nd floor, from which visitors can enjoy the view from an even higher vantage point. This observatory has no observation deck or souvenir standards. The low ceiling on the 102nd floor made its windows inaccessible to wheelchair users, but no reasonable architectural modifications could have remedied this problem.

28. Mitchell J. Shields, *The Ups and Downs of New York's 60-Year Wonder*, N.Y. TIMES, Nov. 11, 1991, at C1.

29. This information was obtained by the author during visits to the Empire State building in November and December, 1991.

recently been purchased by a holding corporation,[30] and the identities of the owners were secret. The letter received no response.

On January 27, 1992, NYLPI filed a complaint with the U.S. Department of Justice,[31] which has enforcement authority over Title III, concerning lack of accessibility of the Empire State Building observatory. It was the first complaint filed under Title III of the ADA anywhere in the country, on the first business day that the law went into effect.[32] Title III has two private enforcement mechanisms: private lawsuits[33] and administrative complaints filed with the U.S. Department of Justice ("DOJ").[34] DOJ has the duty to investigate these complaints[35] and the authority to bring an action in court to obtain injunctive relief and civil penalties.[36] NYLPI chose to use the administrative complaint process, rather than file a court action, to test the administrative complaint system. NYLPI wanted to gather information about this process so that it could inform people with disabilities about whether and how to use the process, and what to expect.

NYPLI held a press conference at the Empire State Building to announce the filing of the complaint. In conjunction with the press conference, Disabled in Action held a demonstration. Wearing signs that read "Equal Access Is Our Right," "We Demand Equal Access to the Observatory," and "ESB has a Bad Point of View," DIA members, many of whom are wheelchair users, entered the building (through a side entrance) and made their way to the inaccessible ticket counter. At one point, the demonstrators decided to try to go to the observatory itself, and they made their way onto the elevators. Some got stuck on the 80th floor where the turnstile made the transfer from one elevator to the other impossible. A few managed to get to the 86th floor, where they were confronted with the stairs. The press conference and demonstration were well attended by both the television and print media, and they were featured on several news programs that night and in countless newspaper stories in mainstream, business, and legal publications.[37]

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30. Deed from Prudential Insurance Co. of America, to E.G. Holding Co. Inc., dated and recorded Nov. 27, 1991.

31. United States Dep't of Justice Complaint No. 202-51-1 (Jan. 27, 1992).

32. While the actual effective date for Title III was January 26, 1992, the 26th fell on a Sunday.

33. 42 U.S.C. § 12188(a)(1) (1994).

34. 42 U.S.C. § 12188(b)(A)(1) (1994); 28 C.F.R. § 36.502 (1998).

35. 42 U.S.C. § 12188(b)(A)(1)(B) (1994).

36. 42 U.S.C. § 12188(b)(B)(2) (1994).

37. *See, e.g.*, Edmund L. Andrews, *Advocates of Disabled File Complaint About the Empire State Building*, N.Y. TIMES, Jan. 28, 1992, at B3; *Empire State Building is*

Before the day was over, Helmsley-Spear representatives appeared with a press release from Howard Rubenstein and Associates, the renowned public relations firm. The release, which quoted the general manager of the building, acknowledged that the building was not accessible to wheelchair users but attempted to lay the blame elsewhere. It said, "unfortunately the architects of the 1920s failed to appreciate the needs of the physically challenged in creating rather limited corridors and stairways that ring the observation deck at the Empire State,"[38] as if to suggest that there was nothing the management could have done in the sixty-one years that had followed to rectify this problem. Nevertheless, the press release indicated that an architectural firm had been hired to determine how to remove the physical barriers.[39]

Following the complaint and the demonstration, the slow process of waiting for the Department of Justice to investigate the compliant. The first thing NYLPI learned was that organizations and individuals filing complaints were not officially "parties" to the matter and, under DOJ rules, would be excluded from the complaint settlement process. Nor would complainants have access to information obtained by DOJ in the course of investigating or settling a complaint. Although we were unhappy with this development, we went forward with the complaint. Fortunately, our views and preferences about various access measures were solicited by DOJ throughout the process.

Finally, on March 4, 1994, more than two years after the complaint was filed, DOJ announced a settlement. In an extremely thorough twenty-nine page agreement with a four-page rider, the owners and operators of the building agreed to make modifications to all of the barriers we had identified and even some we had not, such as curb ramps on the sidewalks near the building and the

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Target of Complaint under Disabilities Act, WALL STREET J., Jan. 29, 1992, at 1; Jonathan Mandell, *A Mission of Admission: Using Lawsuits - Demonstrations — Whatever it Takes - Disabled in Action Fights to Make New York Accessible to All,* N.Y. NEWSDAY, Feb. 12, 1992; *Figuring Out the Next Step,* U.S. NEWS & WORLD REP., Feb. 10, 1992; Jay Seeman & Richard Romm, *The Americans with Disabilities Act,* N.Y. L.J., June 10, 1992; Nick Ravo, *New Federal Law for Disabled Slow to Take Hold,* N.Y. TIMES, July 12, 1992; *A Landmark for the Disabled,* CLEVELAND PLAIN DEALER, Jan. 30, 1992; Rick Pezzullo, *Federal Law Aims to Assist Disabled: Government and Businesses Make Changes First,* NORTH COUNTRY NEWS, Feb. 4, 1992, at 21.

38. Howard J. Rubenstein and Associates, Inc., Empire State Building Seeks to Remove Obstacles from Physically Challenged, Jan. 27, 1992 (press release).

39. *See id.*

height of the binoculars on the observation deck.[40] The owners and operators admitted in the settlement agreement that the majority of these changes were readily achievable,[41] and thus that they had been in violation of the law. The settlement was the first of its kind under Title III, and it provided advocates, businesses and public accommodation with the first glimpse of how the DOJ would interpret and enforce Title III. The settlement received extensive coverage in the press,[42] indeed, there was greater coverage of the settlement than of the complaint filing. The DOJ anticipated that interest in the agreement would be high and it held a telephone news conference to discuss the settlement.[43] Following the settlement, there was another round of press stories when construction work began on the building.[44]

After signing the settlement agreement, the Empire State Building management claimed that the changes agreed to in the settlement would cost $1.8 million,[45] a far cry from the $13,000 per wheelchair lift that the designer from Eastern Paralyzed Veterans Administration estimated. However, it was evident from both the settlement agreement and the architectural plans of the proposed modifications that the owners and operators decided to spend far

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40. Settlement agreement under the Americans with Disabilities Act between the United States of America and the owners and operators of the Empire State Building of New York, New York, for United States Dep't of Justice Complaint No. 202-51-1 (Mar. 3, 1994).

41. *See id.*

42. *See, e.g.,* Lindsey Gruson, *Getting to Top of Empire State: Opening the Way for Disabled*, N.Y. TIMES, Mar. 4, 1994 at B3; *Empire State Building Sets Renovations for Disabled*, WALL STREET J., Mar. 4, 1994 at A5; Liz Spayed, *A Landmark Access Overhaul at Empire State*, WASH. POST, March 4, 1994 at 4; *Today's News Update*, N.Y. L.J., Mar. 4, 1994 at 1; *Plus News,* CHICAGO SUN TIMES, Mar. 3, 1994 at 3; *Justice Dept. Hates Barriers*, ENGINEERING NEWS-RECORD, Mar. 14, 1994 ; Andrea Hamilton, *Empire State Bows to Disabled*, NEW ORLEANS TIMES-PICAYUNE, Mar. 6, 1994 at A17; *Empire State to be More Accessible*, ST. LOUIS POST-DISPATCH, Mar. 6, 1994 at 1A; *Empire State Building Bows to Disabilities Act Demands,* ARIZONA REPUBLIC, Mar. 4, 1994 at A8; Andrea Hamilton, *Empire State Building Renovations to Provide Better Access for Disabled,* BUFFALO NEWS, Mar. 4, 1994 at A11; Andrea Hamilton, *Empire State Building Settlement Opens New Vistas to Disabled Visitors*, FORTH WORTH STAR-TELEGRAM, Mar. 4, 1994 at 19; *Empire State Building Makes Way for Disabled,* LAS VEGAS REVIEW-JOURNAL, Mar. 4, 1994 at 9A; *National News*, MINNEAPOLIS ST. PAUL STAR TRIB., Mar. 4, 1994 at 7A; *The Nation*, USA TODAY, Mar. 4, 1994 at 3A.

43. *See* U.S. Dep't of Justice, *Justice Department Officials to Hold Telephone News Conference to Announce ADA Settlement with Empire State Building* (Press Release, Mar. 4, 1994).

44. *See Empire State Building Sets Renovations for Disabled*, WALL ST. J., Mar. 4, 1994 at A5D; Alex Monsky, *Empire State Bldg. Takes a New View of the Disabled*, N.Y. POST, Mar. 4, 1994; *Today's News Update*, N.Y. L.J., Mar. 4, 1994 at 1.

45. *See id.*

more than necessary to make the observatory and ticket area accessible. Striking what would become a common theme of respondents in Title III settlements, management then attempted to use its unnecessary expenditures as evidence that the ADA created an unreasonable burden on businesses. In fact, when management made the access modifications, it did so as part of an extensive capital improvements project costing $40 million.[46] Thus, even the $1.8 million cost of making the observatory accessible was only a fraction of the cost of renovations.

The observatory now has ramps, and the parapet wall around the observation deck has been lowered in a few areas so that visitors can see the view from a seated position. An accessible unisex bathroom and accessible telephones were installed, and access signs were posted in the lobby and telephones in the lobby were made accessible to people with hearing impairments. Some of the modifications were completed behind the schedule agreed to in the settlement, and management chose to ignore one part of the settlement altogether, by installing an automatic door in one of the side entrances, instead of the front entrance. For the most part, however, the necessary modifications were made.

In the weeks, months, and years that followed, the Empire State Building complaint was frequently mentioned in the press whenever there was a story on an ADA administrative complaint or lawsuit,[47] and became a touchstone on the issue of ADA access. On the fourth anniversary of the signing of the ADA, Attorney General Janet Reno mentioned the Empire state Building complaint in

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46. *See* Andrea Hamilton, *Empire State Building Renovations to Provide Better Access for Disabled*, BUFFALO NEWS, Mar. 4, 1994.

47. *See e.g.*, Liz Spayd, *Disabilities Act Sparks Lawsuits*, WASH. POST, Feb. 4, 1992, at A13; Linda Feldmann, *Disability Advisors' Preying on Businesses, Supporters of New Federal Disabilities Law Warn of Fraudulent Certifications*, CHRISTIAN SCIENCE MONITOR, Feb. 11, 1992; Deborah Kendrick, *Being Accessible to all Customers is Just Good business*, CINCINNATI INQUIRER, Feb. 23, 1992 at E12; Cynthia Durcanin, *1990 Disabilities Act Making Life Accessible*, ATLANTA J. & CONST., Mar. 8, 1992, at D1; Randall Samborn, *No Flood of ADA Suits — Yet*, NAT'L L.J., Mar. 16, 1992, at 3; Peter McKenna, *Friend or Foe? Some Think the New Disabilities Act Hurts Restaurants. Others Think it Could Help*, RESTAURANT BUS., Mar. 20, 1992; Charlotte Allen, *Disabling Business*, INSIGHT MAG., Apr. 13, 1992; Mary Lou Song, *Landlords Nail Down Rehab Plans Under ADA Regulations*, CHI. LAW., May 1992; Jay Seeman & Richard Romm, *Real Estate and Title Trends: The Americans with Disabilities Act*, N.Y. L.J., June 10, 1992, at S6; Joe Hall, *Lawyers Expect Lots of Suits with ADA in Effect*, NASHVILLE BUS. J., July 27, 1992; Steve Kerch, *Disability Act Enters 2nd Scene*, BALTIMORE EVENING SUN, July 12, 1992; *Wendy's Will Make Access Easier for the Disabled,* PORTLAND OREGONIAN, Aug. 28, 1998, at BO2; Gary W. Morrison, *Straight Approach*, GRAND RAPIDS PRESS, Aug. 29, 1998, at D5; Liz Spayd, *Disability Rights Group Sues Safeway*, WASH. POST, Mar. 20, 1994, at B3.

public remarks, stating "We have no patience with those who would thumb their noses at this law that has unlocked the door for so many people."[48]

Many people learned about the ADA as a result of the media coverage of the Empire State Building complaint. Shortly after it was filed, NYLPI received telephone calls from people with disabilities all over the country who wanted information about how to enforce their rights under the ADA. The case even made its way into popular culture when the network television program *Saturday Night Live* did a joke about the settlement.[49]

Despite the success and impact of the Empire State Building complaint, New York City still has a long way to go to become accessible to people with disabilities. The City's own 1994 survey found that only one-third of the sidewalks had curb cuts,[50] some of which may not even be compliant with ADA safety and construction standards.[51] Only thirty-five of 469 subway stations were fully accessible to wheelchair users,[52] and under the current timetable, the New York City Transit Authority has until 2020 to make one hundred key subway stations accessible.[53] The ADA requires cities with fixed-route public transit systems, such as New York City, to operate paratransit systems that provide comparable service for individuals that cannot use the fixed route system; however, New York City's paratransit system is so inadequate that the City's office of the Public Advocate filed a formal complaint with the Federal Transportation Administration concerning the problem.[54] A non-exhaustive survey by the One-Step Campaign[55] of businesses

48. *Reach of Disabilities Law Expands*, BALTIMORE EVENING SUN, July 26, 1994, at 6A.

49. Kevin Nealon, the anchor on "Weekend Update", the news segment of "Saturday Night Live," announced: "In the Big Apple, New York's Empire State Building will soon be made accessible for the physically disabled. Spokesmen said, among other things, a wheelchair ramp will be installed. The ramp will begin in Central Park, leading 26 blocks up to the building's observatory."

50. New York City Dep't of Transportation, The Americans with Disabilities Act Pedestrian Ramp Transition Plan (May 13, 1994).

51. *See id.* Interview with James Weissman, Associate Director of Legal Affairs, Eastern Paralyzed Veterans Association (Apr. 26, 1999).

52. Interview with James Weissman, Associate Director of Legal Affairs, Eastern Paralyzed Veterans Association (Apr. 26, 1999).

53. N.Y. TRANSP. LAW § 15-b.3(b)-(c) (McKinney 1999).

54. Complaint filed by the New York City Office of the Public Advocate with the Federal Transportation Administration, Apr. 21, 1998.

55. The One Step Campaign is a coalition comprised of Disabled in Action, the six Centers for Independent Living in New York City, the Eastern Paralyzed Veterans Administration, and other organizations, to identify businesses in New York City that

located in the Business Improvement District near the Empire State Building found that over sixty businesses had one or two steps at their doorway entrances which prevented wheelchair users from entering.[56] Vigorous advocacy is still needed to ensure that New York City becomes truly accessible to everyone.

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could become accessible to wheelchair users with relatively minimal effort and expense.

56. Letter from Robert L. Levine and Frieda James, Co-chairpersons, One Step Campaign, to Daniel A. Biederman, Grand Central Partnership, July 26, 1996 (on file with the author).

WHY SETTLE WHEN YOU CAN WIN: INSTITUTIONAL REFORM AND *MARISOL v. GIULIANI*

*Marcia Robinson Lowry**

Introduction: Marisol's Story

Shortly after Marisol was born, her mother left her with a neighbor, until Marisol's mother would return from jail. When Marisol's mother returned, however, she decided that she did not want Marisol back. Marisol was then formally placed as a foster child with the neighbor. The neighbor turned out to be a good mother to this abandoned child and fell in love with her, telling the city agency that she wanted to adopt the little girl.

When Marisol was three-and-a-half years old, the New York City child welfare agency decided to discharge her from foster care and return Marisol to the home of her birth mother. The agency did this even though Marisol returned from the weekend visits with her birth mother filthy, unfed and describing violence in the home. Indeed, the City agency rejected repeated reports that the child was being abused in her birth mother's home, including one from the child's natural aunt. Fifteen months later, a housing inspector discovered Marisol locked in a closet, starving and bearing the scars of repeated abuse. Most of her hair had been pulled from her head and she had eaten her own feces, garbage bags and cardboard boxes to stay alive. Doctors said she would not have survived much longer.

Marisol re-entered foster care and was placed with the same foster mother who was still committed to raising her, and now to healing her. The City's child welfare agency had different plans for Marisol. The City intended to return Marisol, once again, to her mother, now in jail for child abuse. The City planned to make this feasible by offering Marisol's mother some parenting classes.

Thankfully, the City child welfare agency was not left to follow its usual course. Six months after Marisol reentered City custody, and less than a month after the well-publicized child abuse death of

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Elisa Izquierdo in late in 1995, Marisol became the first named plaintiff in a class action lawsuit, *Marisol v. Giuliani*, filed in the Southern District of New York.

It would be another two years before Marisol was officially adopted by the foster mother who had raised her for most of her life. Even these two years of frightening uncertainty were an unusually rapid time period in a child welfare system where children often linger in uncertainty for years. No doubt, Marisol's case was sped up due to her status in the federal case and constant pressure by her attorneys. Despite the horrible abuse she suffered, Marisol was probably more fortunate than all too many children in the plaintiff class — her scars have had a chance to heal, and now she lives with a safe, nurturing family.

The Suit

There is nothing remote or theoretical about the issues involved in a major child welfare lawsuit or about using such a lawsuit to bring desperately needed, long overdue reforms to a huge, inept government system on which so many children depend for their very lives. *Marisol v. Giuliani*[1] is such a case. Although the case raised and resolved many important legal issues, the political context of the case significantly affected the manner in which it went forward. Moreover, *Marisol* concerned more than the life of a little girl. The case shaped and developed theories about how best to change institutional behavior, by making hard calculations about what was necessary to bring about these institutional changes in the perception-driven and complex environment that is New York City.

The *Marisol* case was ready for trial during the summer of 1998 when settlement talks suddenly began mere weeks before the July trial date. Until that point, the case had been vigorously litigated, both factually and legally, with discovery being hard fought. Plaintiffs were represented by attorneys from two public interest organizations: Children's Rights Inc., a spin-off of the Children's Rights Project of the American Civil Liberties Union, which had brought more child welfare reform lawsuits than any other organization in the country and which, at the time, had seven child welfare systems under some form of court supervision[2], and Lawyers for Children,

1. 929 F. Supp. 660 (S.D.N.Y. 1996).

2. G. L. v. Stangler, 873 F. Supp. 252 (W.D. Mo. 1994) (covering Kansas City); Joseph & Josephine A. v. New Mexico Dep't of Human Services, 575 F. Supp. 346 (N.M. 1983); Juan F. v. William O'Neill, Civ. Action No. H-89-859 (AHN) (Conn.

which represents thousands of children in the New York Family Courts on a daily basis and thus was intimately familiar with how the realities of how the system operated and affected children. These organizations were joined by senior litigation partners from the prestigious Manhattan law firms of Cahill Gordon & Reindel, and from Schulte, Roth and Zabel.

New York City and State primarily defended the case by under staffing it in the early stages. As a result, long delays occurred in responding to discovery, while the governments' attorneys complained they were working as hard as they could. From the start, the defendants challenged every possible legal theory upon which plaintiffs based their claims and attempted to narrow the case as much as possible. For example, early in the case the plaintiffs moved for the certification of a class that included all children affected by the child welfare system.[3] The defendants first challenged the scope of plaintiffs' class, on the ground that a class of more than 100,000 children would be unmanageable.[4] The defendants also challenged whether the Constitution, federal or state laws were enforceable by children at all.

Increasing Public Scrutiny

From the day it was filed, a very strong undercurrent in the case has been the public perceptions concerning the issues it addresses, and the manner in which the political powers have responded to them. Anyone familiar with child welfare in New York City at the time knew the system was in a shambles, long neglected by City government. Then, in November, 1995, the horrible death of little Elisa Izquierdo, after the City ignored clear signs that she was being abused, shocked the public as no other child abuse death had. Because this case remained in the public eye for so long, it made the problems in New York City's child welfare system impossible for the political forces to ignore. A year later in December, Mayor Giuliani and the new Child Welfare Commissioner, Nicholas Scop-

January, 1991); Sheila A. v. Whitman, No. 89-CV-33 (Kan., 1993); LaShawn v. Barry, 762 F. Supp. 958 (D.C. 1991); Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986). A settlement agreement had also been reached in Philadelphia, Baby Neal et al. v. Thomas P. Ridge, Civ. No. 90-2343, 1996 U.S. Dist. LEXIS 14 (January 2, 1996) and was approved by the court in February, 1999.

3. The class consisted of all children subjected to reported abuse and neglect and all children in foster care.

4. They did so, despite the fact that appropriateness of certifying precisely that class had recently been upheld by the Third Circuit. *See* Baby Neal et al. v. Casey, 43 F.3d 48 (3d Cir. 1994).

petta, issued a "reform plan" acknowledging the wisdom of twenty years worth of critical reports, that had been largely ignored. Child welfare — finally — had become an issue that was not going to go away, at least not until some very visible steps were taken.

Three weeks after Elisa's murder, Marisol's lawsuit was filed. In this context, and given the current status of the management of the child welfare system, the plaintiffs' complaint asked that control of the system be handed over to a receiver. This was an unprecedented strategy move; few public systems have been put under receiverships by the federal courts. In fact, not only did it take four years for the only child welfare system in such a status to reach that point,[5] it also required many failed attempts at complying with the post-judgment remedy. Yet, by asking for a receivership, plaintiffs' attorneys sent a strong, clear message that the *Marisol* lawsuit was different. It signaled that plaintiffs were committed to seeking fundamental systemic reform no matter the cost, and that the plaintiffs did not trust the current administration to be responsive. Requesting a receivership put the City and State further on the defensive. Indeed, Mayor Giuliani announced that the newly established Administration for Children's Services ("ACS")[6] was created, in part, as a response to the call for the appointment of a receiver.

As a significant footnote to these issues, highlighting the degree to which this case was playing out both in a public as well as legal forum, Court TV chose to test the federal court ban on television cameras in the courtroom, by recording the argument on the *Marisol* motions for class certification and for dismissal of certain claims. In February, 1996, Court TV filed a motion seeking permission to film the argument, represented by pre-eminent First Amendment lawyer Floyd Abrams. The application was strenuously opposed by the City defendants, for whom public perception was a critical factor and who argued that the public would get an unfairly negative view of the City's child welfare performance since, in the context of a motion to dismiss, they would not be able to challenge plaintiffs' factual allegations. In a March 1, 1996 decision, the Federal District Court Judge Robert J. Ward, to whom *Marisol* was assigned, granted Court TV's motion. Consequently, Court TV provided "gavel-to-gavel" coverage of the argument, complete with legal commentary.

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5. *See* LaShawn v. Barry, 887 F. Supp. 297 (D.D.C. 1995).

6. This was the City of New York's child welfare agency's fourth name change in the last two decades.

A Very Favorable Legal Context

Four months after the argument, in June 1996, Judge Ward resolved the complicated legal issues raised. Judge Ward certified the class in a fairly straightforward decision, relying heavily on the Third Circuit's definitive, scholarly ruling in the *Baby Neal* case. Moreover, Judge Ward ruled for plaintiffs on virtually all of their legal claims raised in defendants' motion to dismiss:[7] the most expansive children's rights decision in the country thus far. The court held, among other things, that:

1) Children could enforce state child welfare statutes;[8]
2) Children in state foster care custody have a substantive due process right to be free from harm that extends to freedom from "unreasonable and unnecessary intrusions into their emotional well-being";[9]
3) Children in foster care have a substantive due process right to conditions of confinement which bear a reasonable relationship to the purpose of their custody, including conditions and duration of foster care reasonably related to this goal;[10]
4) The substantive due process right to freedom from harm encompasses the right to reasonable services to enable children to be reunited with biological family members;[11]
5) The state laws governing the investigation of child abuse and neglect create constitutionally protected entitlements sufficient to trigger procedural due process rights, a ruling of particular significance;[12]
6) Children have a private right of action to sue for violations of the Adoption Assistance and Child Welfare, and the Child Abuse Prevention and Treatment Acts, the primary federal child welfare funding statutes;[13] and
7) Children in foster care with disabilities have rights under the federal disability statutes, both to non-discriminatory access to government services and to affirmative steps to ensure that the access is meaningful.[14]

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7. Marisol v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996).
8. *Id.* at 686, 687.
9. *Id.* at 675
10. *Id.*
11. *Id.* at 677.
12. *Id.* at 680.
13. *Id.* at 683-84.
14. *Id.* at 685.

The certification of the class was upheld on appeal in the Second Circuit. The Circuit Court, however, instructed the district court to create sub-classes for manageability purposes.[15]

Unassailable Facts and an Attempted Gag Order

The other major development in the case had to do with factual development. In most child welfare systems — and New York is certainly no exception — key information about the children in the system is simply not collected. Computerized information systems in use are often too primitive or too inadequate to collect reliable information. This, of course, assumes that computerized systems are in use at all. Likewise, some child welfare administrators and political authorities simply choose not to record the information that would reveal the system's failures. Unfortunately, information about the system's impact on children was critical to proving that the legal rights of children were violated.

Traditional discovery devices could not provide such data; it simply did not exist. As in many other child welfare lawsuits,[16] this data had to be created during the discovery process, in what amounted to social science research. Normally, data collection is highly contentious; plaintiffs' results are challenged by the defendants' experts, each side parading studies in front of judge. In *Marisol*, however, defendants agreed to a joint, neutral data collection process, in which experts chosen by all the parties would extract information from a random sample of children's case records and produce reports. The parties all agreed that the facts established through this process could not be contested and would not be subject to challenge on methodological grounds.

This arrangement has its pros and cons. The advantages of this process are obvious: it saves time, money and, most importantly, provides key information upon which the court can rely. Consequently, this leaves the parties to argue about the legal import of the findings, rather than conducting diversionary legal battles about whose experts chose the most valid random sample, and other arcane points to which there are probably no objective answers. In addition, the findings, because they are presumed to be neutral, can have a considerable impact on the case. The main disadvantage to this arrangement is that, to the degree that any party might hope to shade an expert's conclusions, such opportunity

15. *Marisol A.*, 126 F.3d 372 (2d Cir. 1997).
16. *See, e.g.*, LaShawn v. Barry, 762 F. Supp. 958, 965 (D.D.C. 1991).

would be lost, as all the parties would be bound by whatever the joint expert group found. For parties who really want to find out what is going on, there are no substantial disadvantages, which was why plaintiffs proposed this approach.

The experts' results in *Marisol* were just as plaintiffs anticipated: the expert group's reports produced evidence of widespread systemic problems and their impact on children. Below are some of the key findings.

- In child abuse and neglect investigations, the City scored only fifty-two percent in an index of the critical components necessary for a completed investigation, and forty-five percent in an index of major decisions and assessments that directly affect the lives of children and families.
- The risk of future abuse or maltreatment to children was adequately assessed in only sixty-six percent of the cases reported for abuse or neglect.
- There were inadequate assessments of safety throughout the investigation period in twenty-four percent of the cases.
- Child protective court proceedings were filed for only seventy percent of the cases that needed them.
- In twenty-one percent of the cases there were "unacceptable" gaps in necessary case activity.
- In forty-three percent of the cases, additional substantiated reports of child abuse or maltreatment were recorded after ACS protective oversight began.
- In thirty percent of the cases that had been closed, case closure was considered inappropriate for reasons that included failure to ensure the safety of the children, and in additional 27% of the cases that were closed, it was impossible to determine whether the cases had been closed appropriately.
- In twenty percent of the cases, there were no face-to-face contacts between children and their caseworkers during the entire six month period for which data was collected.
- In forty percent of the cases where services were identified as necessary to avert foster care placement, the needed services were not provided.
- Assessments of case records during the critical first ninety days after the case was opened found that one-fourth of the cases lacked plans to meet families' service needs and thirty-one percent of the cases contained no discussion of whether the child was safe.
- A large number of findings demonstrated that ACS was failing to take timely, legally required steps to secure permanent living arrangements for children at risk of spending their childhood drifting through the foster care system.

- Although efforts to reunite foster children with their natural parents were purportedly a centerpiece of ACS' foster care program, necessary services and outreach to birth parents were lacking in a large percentage of cases.
- ACS continued to maintain the goal of returning children to parents even in cases where parents' whereabouts were unknown, or where there was evidence of permanent neglect or abandonment.
- In the portion of the cases that ACS handled directly, rather than through contracts with private foster care agencies (about twenty percent of the system), the system's failings were even more pronounced, with ACS' own performance in some areas twice as deficient as that of the contract agencies.[17]

Throughout the case, there had been no limitations on the use of the expert findings that only contained aggregate data, absent all individually identifiable information. When the first of three reports was issued and the press reported on it, the City immediately ran to the District Court for a gag order. After Judge Ward denied that motion, the City took an emergency appeal to the Second Circuit, where their position was ridiculed and quickly rejected by that Court.[18] Ironically, after the City's aggressive attempt to suppress the report, the New York Times released the report, featuring it on the front page.

The expert reports soon became the key evidence in the case. Judge Ward, repeatedly on-the-record, made clear, the likelihood he would consider these reports to constitute prima facie evidence of violations of the legal standards he had established. Indeed, his main concern was to determine the degree to which these violations had been, and were being, addressed by the "reform" administration appointed by Mayor Giuliani.

The Problem to be Solved

A year after it was created, the newly renamed and reorganized child welfare agency, ACS, issued a lengthy "reform plan."[19] This

17. Reports 1 (Aug. 1997), 2 (Sept. 1997) & 3 (Dec. 1997), Marisol v. Giuliani, 929 F. Supp. 662 (S.D.N.Y. 1996) (95 Civ. 10533) (original on file with author).

18. The City argued that news reports about the study's findings were demoralizing to public agency workers. One of the appeals court judges inquired during the argument how many workers had gone into therapy as a result. *See City Halls' Fragile Babies Seem to be Caseworkers*, N.Y. TIMES, Oct. 23, 1997, at B6.

19. Administration for Children's Services, *Protecting the Children of New York: A Plan of Action for the Administration for Children's Services* (Dec. 19, 1996) (on file with the author).

plan reiterated the agency's long history of serious problems[20] and announced a variety of new initiatives that, while lacking in detail, were bounded by deadlines for implementation. On the eve of trial, two-and-a-half years later, few of the plans were implemented, and almost none of the deadlines met. To be fair, some steps were taken, some superficial changes made and a number of energetic, committed people were brought into leadership positions in the agency. Clearly, far more attention had been paid. On the surface, it was not the same agency that had been sued.

Appearances, however, can be deceiving. ACS remained an agency with fundamental problems, many of which were still unaddressed and unacknowledged. Indeed, at the City level, even in those rare instances that problems had been acknowledged, agency administrators appeared genuinely unable to figure out solutions, save for paying lip service to many of the popular ideas in child welfare thought.

At the state level the problem was different. According to state law, the state oversees the New York City child welfare system, although it does not have direct operational responsibility to provide services to children. From time immemorial, however, the state has neglected this responsibility. Moreover, not one of the critical reports that state officials had ever issued about the City's child welfare system resulted in any changes. Amazing, considering the tone of consternation and impotence throughout the State documents produced during discovery.

As trial approached, plaintiffs' attempts to reach agreement on at least some stipulated facts with either the City or state defendants met with complete resistance. The result: with no stipulated facts at all in a complex case, there was sure to be a lengthy trial. Because of the breadth and complexity of the issues, and in response to a suggestion from plaintiffs, the court decided that each side would be limited to a total of 300 trial hours. The court had rejected a request to bifurcate the liability and remedy stages of the trial, or to freeze the evidence at any particular date, even though discovery had been closed six months before the trial date. And once again the court made clear that while no determination of liability had been made in advance of the presentation of evidence,

20. "Through most of the past twenty-five years, the city agency charged with protecting children and other organizations and government entities trying to work to the same end have worked ineffectively, sometimes hindering one another's efforts despite everyone's best intentions." *Id.* at 17.

its primary concern was the degree to which the system had improved, and whether and what kind of remedy might be necessary.

Ever since the results of joint case record review became available, taken together with legal rulings on the motion to dismiss, it seemed extremely likely to plaintiffs' counsel that plaintiffs would succeed in establishing liability. It was also clear that defendants were committed to prolonging the trial for as long as possible. The court's rulings allowing liability and remedy to be tried simultaneously, allowing an extended period for the trial, and allowing current evidence to be admitted[21] meant we were dealing with a moving target. It seemed highly likely that the already protracted trial schedule would extend far into the future. Even after the trial concluded, if it ever did, it was clear that defendants would appeal a finding of liability, and it was possible that any substantial remedies might be stayed on appeal. While plaintiffs' claims remained strong, it seemed likely that a court, faced with energetic, articulate defendants and continuing new developments might, after a finding of liability, grant to defendants more time to implement their plans or to create an expert panel to recommend and probably to monitor additional changes.

It seemed likely that significant relief for the children who were class members was years away. Throughout the course of discovery, plaintiffs' counsel, in consultation with their experts, remained convinced that even the City's "reform" plans would not result in significant benefits for children, and because of the uncertainty of implementation might even create further chaos in an already chaotic system.

Several key markers continued to indicate that things were not getting measurably better. Child fatalities, obviously a particularly important and sensitive indicator and one on which the City administration had been particularly focused, had gone up since the "reform" administration had taken office. The number of child abuse deaths of children in foster care had also risen. Adoptions, which had risen dramatically just *before* the creation of the new child welfare agency, had leveled off and started to drop. A plan to move to a system of "neighborhood-based services" appeared con-

21. In response to plaintiffs' concern that the court's willingness to receive current evidence on which plaintiffs had not conducted discovery would put plaintiffs at a disadvantage through surprise, the court made clear that plaintiffs would have the opportunity to take additional depositions or to receive limited additional discovery as new facts were presented by defendants, but defendants only had to give plaintiffs 24-hours notice of the intent to use new facts.

tradictory and poorly thought out. Not only were children going to be further delayed in getting a better child welfare system, but things might even get worse.

It would, of course, take years to establish these points, defend a judgment on appeal, and then develop meaningful relief and have the court order it. In the process, it was entirely likely that the top management of the child welfare agency would have been paralyzed by the need to respond to the lawsuit. Even the commissioner, notwithstanding his early attractiveness to the media because he had spent several years of his childhood in foster care, was vulnerable to the revelations of a lengthy court process. He could, perhaps, be removed from office, causing further disorganization within a very shaky administrative structure.

Under this shadow, plaintiffs agreed to settlement talks with both the City and the state. These talks proceeded independently and the content of each was withheld from the other defendant until late in the process.[22] From plaintiffs' prospective, as difficult as it was to give up what looked like a certain finding of liability, it was easy to recognize that the settlements moved the process forward by at least two years and offered the best, most immediate prospect of beginning to solve the problems now.[23] These factors informed plaintiffs' perspective in finally reaching the settlements that were submitted to and approved by the court. In their final form, the City and state settlements are both innovative and complementary.

State Settlement

The primary failing of the state was that it did not exercise adequate oversight to ensure that the City was following the law and

22. City and state defendants did not appear to have developed a joint strategy in the case and it appeared from the discovery material that there was a marked lack of cooperation between the city and state child welfare authorities.

23. The content of all settlement discussions are, of course, confidential. However, some background on the City settlement talks are provided by a City document produced during discovery, in which one City expert explains that the city had failed to seek top level independent expert advice to improve the system's operations because it feared that such experts would then become trial witnesses against the City. The report stated: "Because of the *Marisol* lawsuit, a suggestion by the head of the Annie E. Casey Foundation to convene an advisory council of 'super experts' to review, discuss, and advise on the agency's reform process foundered on fears that participants would inevitably become witnesses for the plaintiffs." Administration for Children's Services, *An Assessment* (May 12, 1998) (citing reports by city defendants' expert Lawrence E. Lynn) (on file with the author).

protecting children. Under the agreement, the state is obligated to take a number of concrete steps:

- to increase the staffing of a badly understaffed local oversight office, and to limit the scope of the office's responsibility to New York City (changing a metropolitan regional office to a New York City office);
- to complete the reports on child fatalities on a timely basis (all of which had been long overdue); to use these reports to determine whether there are significant, recurring problems in the City's ability to investigate child abuse complaints, and, if so, to use its authority to require the City to address and correct the failings that have contributed to these child deaths;
- to take reasonable steps to develop a long overdue computerized information system; and
- to conduct case record reviews and interviews with service recipients to document the City's full range of child welfare practices, to determine whether the City's child welfare system is improving and is protecting children and, if it is not, to require the City to address the problem while the state monitors its progress.[24]

The state settlement allows plaintiffs to monitor the state's compliance with its obligations under this agreement, through meetings with the head of the state agency and review of relevant state documents. If plaintiffs determine that the state is failing to comply with its obligations, plaintiffs can return to court for enforcement, seeking in the first instance an order directing compliance and, thereafter, a finding of contempt and any appropriate remedies. The agreement will last for two years, unless it is extended by the court because the state has failed to fulfill its obligations. During this period new class actions by class members are barred, but individual equitable and damage actions are not.

City Settlement

The settlement with the City follows an innovative approach. Instead of the traditional settlement, where the City is obligated to take specific actions while the plaintiffs monitor the City and return to court if the City fails to comply with such an agreement, this settlement builds on ACS' stated commitment to reform. However, it recognizes ACS' need for outside help to understand the problems it faces and how to best address the problems. The settlement provides for independent expert assistance to aid ACS

24. Settlement on file with author.

in those pursuits, and also ensures rigorous monitoring of the implementation of the recommendations, with the opportunity for far more powerful court action if necessary.

A key to the settlement's success thus far is the strength and independence of the expert group. Indeed, both plaintiffs and defendants trust these experts. The members of this four-person expert panel ("Panel") were administrators in public systems. In addition, all of the costs associated with the Panel's work, including the salaries of full-time staff, will be borne by the Annie E. Casey Foundation, a major private fund raiser for national child welfare reform in the country. All of the Panel participants have a major stake in the settlement process working and producing credible results, as does the Casey Foundation, which certainly has a difficult course to negotiate and which, to some degree, is putting its reputation on the line. The Casey Foundation, as an added bonus, has a wide range of national expertise to call upon, and as a present or future grant-maker, is assured of the enthusiastic cooperation of anyone the Panel members call upon for assistance.

The Panel's specific responsibility is to assess the child welfare agency's operations in all key areas and to develop specific recommendations about what ACS needs to do to achieve good child welfare practices. The City is not obligated to implement the Panel's specific recommendations, but will be monitored by the Panel to determine whether it has adequately improved its child welfare practices, either through implementing the Panel's recommendations or by some other equally effective means. If ACS fails to make good faith efforts to achieve reform, as measured by this expert Panel with practical knowledge about what can be done in systems committed to reform, the Panel can find an absence of good faith. In this case, plaintiffs can return to court to impose liability and seek any available remedy, with the Panel as plaintiffs' witnesses and with no limitation on the duration of any relief the court may order.

The Settlement also provides the Panel and its staff with extraordinary and unprecedented access to all aspects of the child welfare agency's operations, staff, meetings and documents, in a manner that far exceeds anything that could ever be obtained through discovery or even through more traditional monitoring efforts. Thus the Panel, all experienced and skilled administrators themselves, will be in a unique position to understand not only what is, or is not, happening, but why and how.

If the Panel sets the standard too high and comes up with truly unachievable recommendations, the City could balk, resume a defensive posture, close off the access to candid discussion of the system's problems and refuse the Panel's help. If this occurs, the City thus forfeits the opportunity to make these reforms voluntarily, in which case the Panel would have the obligation to make the absence-of-good faith findings that will bring the parties back to court, with the Panel members as witnesses against the City. On the other hand, if the Panel sets the standard too low and subjects the City to anything less than tough scrutiny by demanding anything less than concrete results for children, plaintiffs will deem the process a failure and label the Casey Foundation an apologist for an inadequate system. Neither is likely to happen however. One can only assume that the Foundation and the very highly skilled Panel members put themselves in this sensitive position because they expected to demand the best that is achievable, and subject the City to appropriate consequences if it falls short of what could have been done.

This is a highly unusual construct, but one with enormous potential. Should the Panel find an absence of good faith reform, the plaintiffs need only establish legal liability to obtain a judicial remedy for the City's violation of the order. Given the legal standards employed by the district court, the Panel's testimony, which will be based on full access to all personnel and documents, will be deemed prima facie evidence of the City's absence of good faith to reform the child welfare system under the terms of the settlement. At the least, a finding of absence of good faith reform efforts by the experts is likely to be enormously persuasive to a court. At that point, the Panel members may testify about what *should* and *can* be done. This will make the scope of a court order far easier to determine, and, if necessary, the possibility of a receivership far more likely. These recommendations, made by experts that are trusted by the City, will provide the kind of planning, guidance and independence that the City has long been lacking. The Panel will then monitor and report on ACS' progress over the next two years in either implementing the recommendations, or in otherwise accomplishing the goals that have been set out in each of the key child welfare areas. Thus, either the City will have been required to accomplish necessary reforms within two years — in which case the plaintiff children will be the winners — or the City will make clear that even with outside help it is incapable of doing so — in

which case a court takeover, after a finding of liability, would be almost inevitable.

Because of the extraordinary access the settlement provides to the Panel, and because their findings will be reported in public documents, the settlement prohibits the filing of any new class action lawsuits during the two years the settlement remains in effect, absent further judicial action. Although new class actions are barred during this period, individual actions for either equitable relief or damages are not. Although this provision is controversial, and has drawn fire from some advocates, some respected experts and observers believe that piecemeal class action litigation, which may advance a particular interest at a particular time, can in fact be damaging to the creation of a coherent and well-managed system. Indeed, the New York City child welfare system, long-recognized to be driven by crisis management, has all too often illustrated that point, serving one interest at the expense of others, without every having had the capacity to develop a well-functioning whole.

A final, particularly important part of the City settlement is that it folds into the agreement the requirements of the consent decree in *Wilder v. Bernstein*,[25] a lawsuit that was settled in 1985 and governs many aspects of the City's placement system. Although that lawsuit has had a significant impact on several aspects of the child welfare system[26], it has still not accomplished its goals and the City has never complied with its terms.[27] The reason for this is that the *Wilder* settlement addresses only one aspect of a child welfare system. Of course, the child welfare system is so disorganized and ineffective in so many different ways, that it is impossible to fix only a piece of it. Faced with the overwhelming problems that a dysfunctional placement system represents, the court has not had adequate constructive alternatives.

The *Marisol* settlement incorporates the *Wilder* requirements as enforceable rights. The *Marisol* Panel, however, will make the critical difference in the enforceability of these rights and the degree to which they can be used to ensure reform. The Panel is free to modify the details of some of the *Wilder* requirements and to assess

25. 645 F. Supp 1292 (S.D.N.Y. 1986)

26. As a result of *Wilder*, the federal court enjoined a City plan to go to managed care, changed the City's method of placing foster children with relatives by employing supervisory contract agencies rather than the City's directly operated program and required the City to hire two hundred workers with master's degrees in social work. *See* Wilder v. Bernstein, 49 F.3d 69 (2d Cir. 1995).

27. Wilder v. Bernstein, No. 78 Civ. 957 (RJW), 1998 WL 355413 at *14 (S.D.N.Y. July 1, 1998).

the City's compliance with those requirements in the context of the overall operation of the child welfare system. Non-*Wilder* aspects of the City settlement require plaintiffs to obtain judgments on the underlying legal claims in the face of a lack of good faith finding by the Panel. This step should present only minimal difficulty given the breadth of the court's legal rulings on the motion to dismiss, as discussed above. With regard to the *Wilder* requirements, however, the legal rights have already been established, and if the Panel makes a finding of absence of good faith implementation, plaintiffs will be entitled to move immediately for contempt. At that point, the possibility of intrusive remedies, including receivership, become far more likely than they would have been in the context of the *Wilder* lawsuit.

Both the City and state settlements reflect an approach that differs substantially from the standard proscriptive settlement decree, with specific steps that must be taken within specific time periods. That is the agreements' strength. Particularly in New York, a new approach seemed appropriate, one in which a panel of trusted and skilled experts could prescribe a remedy for what ails a child welfare system in trouble, and then make sure that this remedy is actually put into place.

The Combined Impact of the Settlements

The *Marisol* approach is two-pronged. It requires the state to finally exercise its oversight responsibility toward the City, with the contempt powers of the court available if the state does not. State oversight has always been exercised through a regional office, responsible for several counties in addition to New York. The settlement requires the establishment of a New York City-only office, and an increase in staff necessary to do the work.

The agreement with the City builds on the lessons learned from other reform efforts. Although it is relatively easy to specify what is wrong in these complex child welfare systems, it is far more difficult to determine, beyond the obvious, *why* those wrongs have occurred and how to right them. The discovery process is uniquely suited to identifying the former and not the latter. The wealth of information relevant to understanding the workings of a complex bureaucracy and to shifting it in its course is difficult to obtain through the adversarial process but critical to changing how that bureaucracy functions. Thus, one of the key and early advantages to the *Marisol* City settlement is the immediate access to critical information that the *Marisol* Panel and its staff provide. Of course,

pivotal to the City agreement is the faith of both plaintiffs and defendants in the integrity, independence and skill of the Panel members, a group to which both sides agreed. Whether they can remain strong and tough enough to satisfy plaintiffs that they are making the difficult calls and the necessary determinations, without losing their free access to the internal workings of the child welfare bureaucracy and the ability to guide the City's plans, remains to be seen. It is likely that the City cooperation will disappear if and when the Panel determines that court involvement is necessary. At that point, however, the non-adversarial aspects of this agreement are likely to be over, and the process is likely to move toward legal findings and court orders. But unlike the situation now, a legal judgment and court order at that point will be based on full information from experts given a unique inside view, with a clear understanding of what can but has not been done, and of how to do it. The case will then have reached the contempt hearing stage, but a uniquely well-informed one. Should this process not work, the City will be virtually foreclosed from pleading that it deserves another chance, or the opportunity to do things its own way, since the team that the City invited in has found that the City cannot or will not.

The settlements are thus a no-lose proposition for plaintiffs, moving them to the remedy stage years earlier than after a trial and appeal. In practical terms, this settlement is likely to lead to one of two results: (1) The expertise of this Panel will provide the guidance lacking in City administration and add a behind-the-scenes pressure to address fundamental problems in a historically inadequate system; or (2) if the City resists fundamental reforms, the fact-finding will be up-to-date and based on the best possible information, from the trusted expert Panel members, who will have become intimately familiar with the agency's operations, and who can present to the court a plan to reform the agency that can be implemented under the court's control. Either way, the children are the winners.

The one thing that plaintiffs' counsel gave up in agreeing to settling *Marisol* is the personal pleasure that comes from winning at trial, and from stripping away the overblown claims of achievement that have been the hallmark of government agencies willing to acknowledge the shortcomings of their predecessors but all too committed to minimizing their own. That would have been gratifying. But that would not, in the short term, have improved the lives of our clients, our children. And one way or another, the *Marisol* set-

tlements have moved us two years ahead in the process of doing exactly that, and of getting concrete results and better services and protection for children, the best kind of victory we can achieve for them.

'Я' WE NOT HUMAN?

*Greg Sholette**

Since becoming a father in 1990, I have been intrigued by the way children and childhood are represented within contemporary culture. There is a palpable tension between the highly sentimentalized way children are typically portrayed in art and the media — and the way we, as a society, fail them down the line. "Kids Rights 1, 2, and 3," designed for REPOhistory's, "Civil Disturbances: Battles for Justice in New York City" seeks to evoke this tension.

Before making my images and writing my texts I researched the legal and historical idea of childhood itself. Many scholars insist that childhood, as we understand it, emerged at about the time of the industrial revolution. Prior to that time a child was seen as a smaller version of an adult and was the legal property of its father. Yet two conflicted concepts of childhood continued to exist side by side. On one hand, following the "natural philosophy" of Jean Jacques Rousseau, the children of the bourgeoisie were perceived as belonging to a separate sphere from adult life, one uncorrupted by social customs. On the other hand the children of the working class continued to labor beside adults much as they had since the middle ages, except that factory work began to supersede agriculture. I believe that these separate versions of childhood, which divide along class lines, continue to affect our understanding of childhood today. It is this unease between a Victorian notion of the child as almost pre-human, and the actual, modern "kid" whose small body is a legal, economic, and commercial battlefield that informs the overall structure of my three part sign installation for *Civil Disturbances.*

"Kids Rights 1" deals with issues of contemporary child labor, number "2" with the Miranda Rights of young people, and number "3" with the states legal obligation to protect the welfare of all citizens including children. This last point is addressed through the class action suit *Marisol v. Giuliani.* At a historical and cultural level, *Marisol* raises the question of who is ultimately responsible for a child's well being, by arguing that our national constitution holds the states responsible for this task. In *Marisol*, New York

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failed to provide that constitutional protection to children not only in its foster care system but in general.

However with "Kids Rights 3 - Freedom from Abuse and Neglect: *Marisol v. Giuliani*" I also wanted to raise the problem of economic inequality which I believe can not be separated from the issue of child abuse and neglect. Unquestionably neglect cuts across class boundaries, yet the situation faced by a single mother on work-fare with five kids and no access to child care can not be equated with a middle class family that employs a full-time nanny. My text for *Marisol* tries to bring this social inequity into the picture by concluding with the line ". . . public outcry over child abuse occurs even as deep cuts in social spending and shrinking federal resources impede protection of those children most at risk."

The artistic approach I have taken in *Marisol* also exploits these conflicts and contradictions. Indeed, all three of my "Kids Rights" signs employ imagery that looks like children's book illustrations complete with cookie-dough like typography: Modeled in clay, painted in bright "candy colors," and then scanned into a computer. My custom alphabet poses a series of rhetorical questions about the contemporary status of children: "'Я' You Looking At Me?" and "'Я' We Not Human?" In other words, does the commercial representation of childhood in popular culture present kids as sentimental "objects" for our "adult" gaze, and is our looking at these images of idealized childhood not filled with a mixture of longing and compassion?

In a sense I also hoped to suggest that my own practice as an "artist-reformer," not un-like that of Jacob Riis before me, is inevitably caught-up with being an "artist-voyeur." By engaging in the very act of representing the social wrongs I am inevitably invading and exploiting another's misery, in this case a child known to the courts as Marisol. To the degree that any artist or concerned citizen engages these issues such contradictions must be squarely faced as well.

ROUNDTABLE DISCUSSION*

Berkman v. City of New York[1]

*Plaintiff: Brenda Berkman***

When I first went to Laura Sager in 1978, more than twenty years ago, I could not have imagined how this case would change my life. I have been a firefighter now for the past sixteen years. Life in the firehouse has never been easy. The first seven years were extremely difficult, and I am not sure I would have enough stamina to deal with the level of harassment for twenty years. Fortunately for me, times have changed. Although the Fire Department is by no means perfect, the level of harassment, animosity and even hatred of women firefighters has abated considerably.

While there is still considerable resistance to the integration of women in the fire service, I believe this case had a dramatic impact on the New York City Fire Department. But this case not only forced New York City to finally hire women, it sent out a tremor that affected Fire Department employment practices throughout the United States and abroad.

The case also had a tremendous effect on public attitudes about the role of women in the workplace. Certainly, people still — after eighteen years— say to me "Oh, you are the first woman firefighter that I have ever seen. I did not realize that they even had women firefighters. Do you go on the truck?" Now, however, more and more, young girls come to the firehouse and they draw pictures of *themselves* driving the fire engine and climbing the ladder. To me that is a dramatic change. The idea that public opinion has changed to a degree, that girls *can* try to do anything because they have seen a woman firefighter, that has been the reward for me in terms of my participation in this case.

I am very grateful to my lawyers at the New York University Law School and Debovoise & Plimpton. I am also very grateful to

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* These remarks were originally delivered at New York Law School on Nov. 17, 1998. They have been edited to remove the minor cadences of speech that appear awkward in writing.

1. 536 F. Supp. 177 (E.D.N.Y. 1982), *aff'd*, 705 F.2d 584 (2d Cir. 1983), *later proceeding*, 580 F. Supp. 226 (E.D.N.Y. 1983), *aff'd in part and rev'd in part*, 812 F.2d 52 (2d Cir. 1987), *cert. denied*, 484 U.S. 848 (1987).

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my entire network of supporters. Plaintiffs such as myself cannot survive this kind of case in isolation. There is no way that an individual can endure the stress of a lengthy litigation if he or she tries to go it alone. Plaintiffs need support from many people, and I was lucky to have that.

I was a lawyer before I became a firefighter and I was in law school at the time when women were first allowed to apply to become firefighters. Consequently, because of my legal training, I started the case thinking that the law will provide the solution for past discrimination, that the law would effect social change. In many ways, the law was the answer. The court forced the City to develop a job-related non-discriminatory hiring process and stopped the City from firing me during my probationary period. The court also attempted to ensure that I received the same working conditions as the male firefighters by requiring the Fire Department to adopt anti-harassment training and procedures. Yet, despite these requirements and orders, the law could not protect me from physical and verbal assaults from co-workers and civilians alike. No judge could protect me when my co-workers telephoned death threats to my home or refused to talk to me at work.

Through this experience, I discovered that people fighting discrimination need more than the law and the talents lawyers bring to bear. Ending discrimination requires political activism. Change of this magnitude requires the efforts of the entire community — the efforts of artists, writers and the media.

I feel very good about the REPOhistory sign that memorializes my case. The sign documents something of which I am very proud. Through this sign, other will learn of the importance of the struggle to end discrimination. It reminds people that women trailblazers have worked hard and suffered for many years to make the work place better for everyone. Hopefully, this sign will inspire others to continue their work in the future.

*Attorney: Laura Sager****

In 1978 I was a professor at New York University Law School, where I still teach. In those days I taught a course called the

*** Professor, New York University School of Law. J.D., UCLA School of Law, 1968; B.A., Wellesley College, 1961. First under the auspices of the Women's Rights Clinic, and then through the Civil Rights Clinic at New York University School of Law, Professor Sager has represented plaintiffs in many employment discrimination and other civil rights cases. Her work on behalf of Brenda Berkman lasted for more than ten years.

Womens' Rights Clinic for third-year law students working under supervision on real cases in my area, employment discrimination. When Brenda Berkman came to see me that year, she was a third-year law student. She told me that she had taken the entrance exam to become a New York City firefighter, that she had passed the written part, but failed the physical part. She told me that all the women who took the test had failed the physical part. She said she thought the test discriminated against women.

This was the first time that the firefighter entrance test was open to women; the first time women even had a chance to apply for this job. Although Brenda was in law school, and intending to become a lawyer, she had always wanted to be a firefighter, and so she took the test. She did that not just for a lark, but because she truly hoped to pass the test and to get into the Fire Department. She asked me if the Clinic would take her case, challenging the validity of the physical test. I thought about it for a while and we talked a little bit. I agreed to take the case, but I had no conception of what that would mean for me, for my program or for my life over the next ten years.

Taking on the task of challenging the validity of the physical test was quite demanding, and after a year or two of litigation, the law firm of Debevoise & Plimpton joined as co-counsel in the case, at the suggestion of New York Lawyers for the Public Interest. As you may know, there are two legal theories on which a claim of discrimination can be based. One theory is intentional discrimination — that is, that an employer intentionally discriminates against a group of people, for example by intentionally constructing a physical test for the purpose of making it very difficult, if not impossible, for women to pass. The other theory is what is known as "disparate impact" discrimination. Under this theory, the plaintiff can claim that regardless of their intent, New York City in fact created a test that was much more difficult for women than for men, and that the test is not valid; that is, there is no evidence that people who score higher on the test will perform better on the job than people who score lower on the test.

When Brenda Berkman first came to see me, she explained that about 410 women had applied for the position of firefighter and that all the women had failed the physical test. We agreed that the focus of the litigation would be to show that the physical test was invalid — that passing or failing the test was not a predictor of who could do the job and who could not. Although we had some evidence of intentional discrimination by the City, the essence of the

case was a disparate impact claim. We argued that women who were strong and in very good condition (which Brenda Berkman always was) were capable of performing the physically demanding job of firefighter and could pass a valid physical test.

As an aside, I just want to mention that throughout the litigation the City seemed to think that Brenda was just a "stalking-horse" for other women. City lawyers and officials could not imagine that a woman who had graduated from N.Y.U. Law School and had become a lawyer would leave her job to go to work in a firehouse. Of course, Brenda really meant it and, as you can see, she achieved her childhood dream of becoming a firefighter. Besides winning this case, I was gratified to be able to show the City that this person meant what she said.

The first phase of the litigation consisted of our challenge to the validity of the physical test. Did the test in fact measure whether a person could perform the physical requirements of the job? After a trial that extended over several weeks in the Eastern District of New York, Judge Sifton found conclusively that it did not. He ruled that the test was invalid and he ordered the City to devise a new interim measure to test the fitness of Brenda and the other class members, and to develop a new test for future use. In 1982, the new interim test was given and Brenda and many other women passed. In a very emotionally stirring ceremony, Brenda and the other women were sworn in as the first women firefighters in the history of New York City.

Unfortunately, the case did not end there, because, after the standard one-year probationary period for all Fire Department personnel, the City determined that all of the women except for two should be granted tenure. Those two women were Brenda Berkman and Zaida Gonzales. Brenda Berkman, as you know, was the lead plaintiff in the case, and had been the subject of a lot of publicity. Zaida Gonzales also had been the subject of a lot of publicity because she was featured on the cover of *New York Magazine*. During their probationary year in the firehouses, both Brenda and Zaida Gonzalez had a lot of very bad things happen to them. Both of them were denied training that other probationary firefighters were given. Both of them were subjected to abusive treatment by men in the firehouses. Some of the harassment was sexual in nature, and some was abusive in other ways. For example, both Brenda and Zaida were "put out of the meal." In the firehouse, firefighters eat collectively: they buy the food collectively, they cook and they eat it. But both Brenda and Zaida were

told that they could not eat with the other firemen. That gives you some idea of what life was like for them in the firehouses. And then, at the end of their probationary year, the City announced that these two women, out of all the women who had now joined the Fire Department, would be terminated.

So, a year after we had won what we thought was a victory in the case, we were back in court with a second case claiming that the termination of Brenda and Zaida Gonzales was unjustified and constituted retaliation against them. Once again, Judge Sifton heard the case and he ruled that by denying these two women the training that was given to other probationary firefighters, and by permitting them to be subjected to egregious harassment in the firehouses, the Fire Department had not treated them fairly. The judge ordered the City to give Brenda and Zaida Gonzalez the training they had been denied and then test them on their ability to perform fire-fighting tasks. After several weeks of such training, the women passed their tests with flying colors and became tenured members of the Fire Department.

The lawsuit, however, continued. The City developed another physical test that was so demanding that at least one person died from heart failure while taking it. We challenged that test in another round of litigation, but the courts held that new test was valid. Subsequently, however, the City gave up on that test, and has developed yet another test. Hopefully, women will be able to pass the physical tests that the City gives in the future and there will be more women firefighters.

Before I close, I want to say a few words about Brenda Berkman. Brenda performed the role of named plaintiff in a class action as well as anyone could possibly do. She did not merely lend her name to the case, but provided real leadership and support to the other women who wanted to be firefighters, the class members. This case went on for a long time, and Brenda was subjected to an extraordinary degree of animosity and hatred, even receiving death threats. But she never wavered in her determination to see the case through and to become a firefighter.

Looking back, I believe that this case accomplished a great deal. Brenda Berkman is now a Lieutenant in the Fire Department. Beyond that, however, there are many other women in the New York City Fire Department, including one woman who is about to become a Captain. Who knows, the second Captain may be Brenda Berkman. What these women have demonstrated through their commitment, courage and dedication is that gender is not the bar-

rier that it was once for highly demanding physical work for women. Working on this case was a wonderful experience for me, and I am especially happy that Brenda and I have remained friends through all these years.

Artist: Susan Schuppli[****]

As an artist I think you always work with a specific image, but then translate it, transform it, into something a little more general is capable of reaching a broader audience. My own work has always dealt with the relationship between women and institutional structures — predominantly around issues of violence against women. Brenda's case provided an opportunity for me to continue the work I already do and am committed to as an artist.

In most of my past projects, I have inserted a female protagonist into a type of prototypical masculine narrative. This case was interesting because of the subject, a sort of heroic figure, yet largely masculine figure, the firefighter. Also, the opportunity to work with a very specific case was appealing. This was not fiction. Thus, I created a chronology of this very protracted struggle that Brenda Berkman endured over the course of fifteen or twenty years. And while the battle in the court may be over, the struggle continues in her daily life working in the Fire Department. So, this was a very important opportunity for me to actually work with a very kind of particular case. So there was no longer the kind of fictionalizing element that I often used in my work.

At the same time, the challenge for me, and I suspect for a lot of artists, is to change something that is so complex and enormous as this case into a sign that conveys the importance of the issues behind it. The first trial alone lasted twenty-two days and produced more than 3,500 pages of transcripts debating one particular exam in the court. How do you take all of that information and reduce it to the form of a sign so it relates to the case, provides information, but still captures the struggles of what was a very lengthy battle? As a result, I produced a sign that actually has quite a lot of language that had a relationship to the case, words like inflammatory and ignite.

**** Susan Schuppli is a Canadian visual artist and educator. She has participated in numerous exhibitions in Canada, the United States and Great Britain, and has also produced and curated commissioned public art projects in Seattle, Vancouver and San Diego. She received her MFA from the University of California San Diego and is currently on the art faculty at the University of Lethbridge, Alberta.

What was interesting to me actually about the relationship between art and law is that people who are engaged in those activities are often quite removed from the effects of their work. Artists and lawyers often fail to understand the relationship that their activities have to people's everyday lives. Individuals that are often seen as doing something that isn't always or understood to be useful, quite an interesting kind of parallel.

As it has been a point of contention between Brenda and I, I wanted to conclude by saying that the woman in the sign that I created is not Brenda Berkman. It is a symbol. I always worked with visual images that have a symbolic presence. So, for me the woman in the sign becomes a kind icon, one representing women of strength. It relates back to that point I made at the beginning about transforming very specific ideas into general ones, because, like the final line in the sign says, we need to ignite on-going awareness about all of the issues that impact upon women's everyday lives. For me what was most important, in a sense, was that women could project themselves into that kind of masculine narrative. That is the very heart of the sign.

McCain v. Koch[2]

Attorney: Steven Banks†

In 1982, Yvonne McCain became homeless as a result of domestic violence. She and her three children went to a New York City shelter due to this abusive relationship. Because she was went to the City after leaving her mother's home, where she had been living in a crowded one-bedroom basement apartment, the City denied her and her children shelter. The City officials denied her shelter because she was living with a relative; the City denied Yvonne help on account of her not telling them she was fleeing from domestic violence. Yvonne, like so many women, had not come to grips with the domestic violence issues in her life at the time and yet she was turned away, despite the fact that her mother would not house her anymore.

Yvonne ended up sleeping on the floor with her kids at a City Welfare Office. Ultimately, when she was finally provided with shelter, she was sent to the Martinique hotel, among the most notorious of the welfare hotels. The four of them lived there, sleeping on a urine stained mattress bare on the floor. They had no towels, sheets, or operable plumbing. The room was infested with mice and cockroaches. Yvonne was forced to hang the children's milk out the window, trying to keep it cold in a box hung outside the window, because, of course, there were no refrigerators. There were no window guards either so, it was not very difficult to put the box outside the window. Ironically, it is a Holiday Inn now. She and I were actually there a few months ago for an interview she was doing with a news organization. I think she particularly enjoyed the fact that there is a REPOhistory sign that is going to be posted out in front of the Holiday Inn, right near Macy's.

Yvonne went to a community group called the "Redistribute America Movement," an outgrowth of the Downtown Welfare Advocacy Center. She went looking for help because she could not get help from legal services offices or Legal Aid. Yvonne did not have a housing problem, she had no housing at all; she did not have a benefits problem because shelter was not a benefit. So she went to a community group looking for help. I knew someone at that

2. 511 N.E.2d 62 (N.Y. 1987).

† Deputy Attorney-in-Charge, Civil Division, Legal Aid Society; Coordinating Attorney, Homeless Rights Project, Legal Aid Society. Mr. Banks has been counsel in the *McCain* litigation on behalf of homeless families for sixteen years and now serves as counsel to the Coalition for the Homeless in litigation on behalf of single adults.

community group who called me and let me have it. How could it possibly be that I could not help a person such a Yvonne, one who needed so much help. At that time, I was a staff attorney in our Staten Island office and because Yvonne McCain's last address was in Brooklyn, I couldn't represent her.

Eventually, she ended up being represented initially by a lawyer named Marcella Silverman, who is now a professor at Fordham Law School, a colleague of Matt Diller's. I remember calling Marcella about this case and explaining the problem. Marcella interviewed Yvonne and then Marcella and I spoke about the case. I remember being unsure about whether the law would help her. Some things just cannot be solved through legal means, I thought. Still unsure of what to do, Legal Aid lawyers pressed on working weekends and getting others involved, such as Ann Moynihan and the other neighborhood office of Legal Aid Society lawyers.

That was about fifteen and-a-half years ago and I wish that I could say that the litigation has come to a conclusion. Unfortunately it has not. The *McCain* litigation, however, has been a lightening rod for a lot of changes affecting homeless people. There are some terrific court orders and decisions: orders requiring the City to provide safe, suitable and adequate shelter and there are very significant orders that provide for what those conditions have to be. As a result of that, the Martinique Hotel was closed.

The struggle involving homeless people, however, continues to be a struggle, now though three mayoral administrations. Unfortunately, the court cannot be with every plaintiff twenty-four hours a day, and that is part of the problem of fighting this struggle during so many different mayoral administrations: trying to get compliance with court orders or trying to enforce court orders in litigation. During the Koch years, the administration initially failed to acknowledge the legal rights of the homeless, but once court orders were issued, that administration ultimately complied. During the Dinkins Administration, there was an acknowledgment that this is a terrible problem and that they should comply with the orders. That administration, however, did not comply with the orders. The current administration, however, has no desire to be bound by anything other than what the administration decides. This is a very difficult environment to litigate a case in, but that is what we are currently attempting to do.

Yvonne's problems were resolved during the first phase of litigation, but she has remained involved throughout these fifteen-and-a-half years. She testified before the Congress. She has testified in

a number of other settings about the needs of homeless people and she currently serves on an advisory board in the Legal Aid Society. I think she stays involved because no one has answered her original question yet: Why can the government spend thousands of dollars to put people in shelters and only give them a couple hundred dollars a month as their rent allowance? We may have to litigate this in pieces, but Yvonne continues to press on to have that question answered and continues to hold our feet to the fire.

Currently, Yvonne is doing well with her life. She is working in a community organization. Her batterer died and, predictably, that was a major event in her life. Her kids are doing well also. Thinking about the sign and thinking about what she thought about the case reminds me of when I accompanied her to the Welfare Fair Hearing with her daughter. The State Administrative Law Judge asked, "Excuse me, are you the Yvonne McCain?" Her daughter turned and said proudly, "That's my mom." Yvonne cared a lot about her children and it meant a lot to her that they viewed her as someone that would not quit. The fact that the government said it was tough luck, or that you had to sleep on the floor of an office or the Martinique Hotel. She did not want that for her kids, herself or any one else, and so, she wanted to change the system.

Goldberg v. Kelly[3]

Attorney: Henry A. Freedman††

Almost thirty-one years have passed since *Goldberg v. Kelly* was filed here in New York City. The issues it raised and the problems it addressed then are still with us today. The importance of these issues has only grown since the case was decided.

When the case was first filed, it seemed revolutionary from both a legal and human point of view. The U.S. Supreme Court held that welfare benefits could not be terminated without advance notice of the reason for the proposed termination and an opportunity for a hearing before termination, so that the individual could contest the correctness of the termination. The decision by Justice William Brennan contained powerful language to which all law students and all persons concerned about the fair treatment of the powerless should be exposed. Brennan wrote "there is one overpowering fact which controls here by hypothesis: a welfare recipient is destitute without funds or assets. Suffice to say that the cutoff of welfare recipient in the face of brutal need without a prior hearing of some sort is unconscionable unless overwhelming considerations justify it."

Why was this revolutionary from a legal point of view? Well, for one thing, neither the Supreme Court nor lower courts ever said any thing like this before until this case was filed. Plaintiffs' lawyers relied on the Due Process Clause: "nor shall any state deprive any person of life, liberty or property without due process of law."

Creative law professors, led by Charles Reich at Yale, had written extensively about the reality of the modern welfare state and welfare as a property right. Well-being, indeed even the survival of many individuals, these professors said, depended on benefits con-

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3. Goldberg v. Kelly, 397 U.S. 254 (1970), *aff'g sub nom.* Kelly et al. v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968) ("We hold that a pre-termination hearing for welfare recipients is constitutionally required and that the procedures set forth above for such hearing are the constitutional minimum.").

†† Executive Director, Welfare Law Center (formerly the Center on Social Welfare Policy and Law), 1971-present. While a Reginald Herber Smith Fellow at the Center in 1967, he participated in drafting the papers and filing the complaint in *Goldberg v. Kelly*. Freedman was awarded the 1998 New York State Bar Association Public Interest Law Award and the 1981 National Legal Aid and Defender Association Reginald Herber Smith Award for Dedicated Service. Before becoming Executive Director at the Center, Mr. Freedman had been in private practice in New York City and taught at Catholic University Law School in Washington D.C. Mr. Freedman has also taught at Columbia and New York University Law Schools, and Columbia and Fordham Schools of Social Work. He is a graduate of Yale Law School and Amherst College.

ferred by the state, whether they be driver's licenses, pilot licenses or food stamps. Since there were rules on who was eligible for benefits, Reich argued, these benefits had become a new type of property, property that the government could not take away without due process of law. The Supreme Court accepted this analysis in *Goldberg v. Kelly*.

It was particularly exciting to see these new ideas transformed into the law of the land. To see the courts empathize with the plight of persons who needed public assistance was exciting and moving; it was emotional. Indeed, Justice Brennan understood what it was like to be desperate and without resources and in need of government aid.

I was fortunate to be involved in this case from the very beginning. I was working at the Center on Social Welfare Policy and Law (currently the Welfare Law Center). The Center was established in 1965 by a great man, Edward Sparer. He was trying to duplicate, in the area of poverty, the approaches that had been used in the Civil Rights Movement. I was a new lawyer at the time and I was helping develop the theories and papers for this kind of suit.[4]

As fate would have it, I met up with David Diamond, then at MFY Legal Services on the lower Eastside, at the City Bar Library for a meeting. There I said, "David, you have many people coming into your office at MFY, why don't you see if anybody comes in who presents this problem. We have the papers; we can go into court." He called me two days later, ready with six plaintiffs.

I was surprised; I still did not appreciate how common place it was for eligible recipients — and all six of them were eligible — to get denied benefits without a hearing. We filed the case, and did a lot of the work on it. Eventually the senior, more experienced attorneys took the case over. Needless to say, as a young lad I greatly resented that, but I can tell you there is a reason for having experienced people do things; that is something that one learns over the years.

Goldberg v. Kelly made a profound difference in the way welfare programs are administered in New York City, New York State and around the country. Here in New York State since *Goldberg* was

4. There had actually been one suit filed in the South. Marion Wright Edelman, founder and President Children's Defense Fund, was a lawyer in a case in Mississippi, in the first prior hearing case filed. The State of Mississippi folded and agreed to grant a prior hearing. So, while Mississippi didn't give benefits that were worth anything, the state was willing to continue aid until there was a hearing.

decided, millions of hearings have been provided. As a result, millions of people have obtained the assistance they so desperately need.

The bad news is that Welfare Administration in this City and State continues to be a bastion of arbitrariness. Ten years ago, a New York State Bar Association Task Force concluded that the most serious threat to the fair hearing system in this state is that local agencies "appear to have made a cynical cruel choice. Decisions are allowed to be made wrongfully to deny, reduce or terminate benefits, knowing that many decisions will not be challenged and therefor money will be saved." Currently, our office is engaged in class action litigation against the City and State for not processing appeals in a timely fashion. We are suing the City for repeatedly failing and refusing to implement binding hearing decisions rendered by the State.

There is much to be discouraged about. In today's mail, I got the City Project's Analysis of the Mayor's most recent Management Report showing that, according to the City's own statistics, the percentage of public assistance applications rejected went from 26% in 1993 to 57% in 1998. People have not been losing eligibility over the last few years; the City has just changed the way those applications are processed. Indeed, Fair Hearing requests have increased by 70% because many more wrong decisions are being made. How do we know there are so many wrong decisions? Because when you look at the Fair Hearing results in 1998, the City won only 13% of the hearings. That is appalling. These problems are compounded by the City's explicit policies to make it difficult for persons to collect benefits, regardless of the fact that they meet all legal requirements.

Today, New York City turns away needy people from Welfare Offices without being allowed to file applications. At best, the poor are told to search for a job and come back another day. Every day we hear that people, are told incorrectly, that they are ineligible. If they filed an application, they are told to sign a form withdrawing their application, just in case they have second thoughts about pursuing it. New York City's poor are repeatedly denied due process. This problem is compounded by public and agency officials who thumb their noses at court orders, thus creating more work for the few lawyers available to bring class actions and seek systemic change.

It is frustrating that these battles must be waged constantly. I went to law school to help achieve social and economic justice, or

to at least make a difference in the lives of others those who are weak, powerless and in enormous financial need. I am delighted to have been able to do that and get paid for it.

I am particularly thrilled to see the type of recognition that the REPOhistory Project brings to these issues. It is so important that this information be put out on the streets of our City where people who are affected can see it and can know that these battles are being fought on their behalf. The signs and the stories behind them have inspired me. I hope that it will encourage everyone here to continue in the struggle and to have those struggles recorded in many more beautiful signs posted all over our City.

Artist: Mona Jiminez†††

My personal history, beyond this sign and my artistic life, has afforded me a real connection to welfare rights and welfare issues. I had my first experience with the "system" when I was about nineteen and pregnant, when my partner and I received Medicaid to help pay the medical expenses. Later, while a single parent, I was on assistance for a couple of years, including a job-training program called the WIN Program. In subsequent years, I learned a lot about Welfare and public assistance by living and working.

In 1976, I began to do welfare organizing as a founding member of the Geneva Women's Resource Center in Geneva, New York. Many of the founding members were single mothers who had experience with welfare, so the issues of women with low incomes were important to us and we wanted to help others. In fact, one of the first components of the Center was walk-in counseling and advocacy on issues of housing and welfare rights.

In 1980, I was hired by Legal Services, and worked there until 1986 as a paralegal. I worked in five rural counties in upstate New York doing welfare advocacy (including many fair hearings) and community legal education. Later, I worked as an welfare rights organizer in Wayne County, a rural county located between Syracuse and Rochester, New York. We did a lot of great work there,

††† Mona Jimenez is a visual artist who uses electronic tools to make both time-based work and prints. Her work often involves retelling stories about lost or little known historical, cultural and personal history. Jimenez has been an artist in residence at Yaddo, the Millay Colony, and Light Work, and was the recent recipient of an Artist Fellowship in Computer Arts from the New York Foundation for the Arts. Her work is held in several video and photographic collections, and has been published in *Light Work's Contact Sheet*, *CEPA Quarterly*, and *Felix: A Journal of Media Arts and Communication*. As a media arts consultant, she assists non-profits with their Internet, multimedia and video projects.

using tactics that worked, like organizing a free lunch in the welfare office to get media attention about the welfare department's unconstitutional denials of emergency food stamps.

I remember the day that Mark O'Brien called and asked me to work on the REPOhistory project. Mark described the project - to produce signs about landmark court cases - and asked if I wanted to work on *Goldberg v. Kelly*. I was stunned; I said it would be an honor to work on the case, as *Goldberg v. Kelly* is so fundamental to welfare rights and has had such a profound impact on so many people's lives.

While an organizer, I had always wanted to do a series of posters that spoke about the skills, knowledge and perseverance that welfare recipients must have to get through the system and continue to live and raise children with self-respect. A couple years ago, I had done a piece for *Felix: A Journal of Media Arts and Communication* that dealt with the issue of fingerprinting welfare recipients. This sign project was along that line – a public expression of the welfare rights issue.

As an artist, it was a real challenge for me to do the sign. While in my artwork I often combine text and image, I usually don't use many words, and my work tends to be very personal. I tried very hard to make the language non-technical and to remain, as Henry Freedman suggested, celebratory of the case, rather than to focus on complaining about the system. But the real challenge was figuring out what I wanted to say, because there are so many different aspects to the case.

I first thought about the audience for the sign. I thought that people who would casually walk by the sign may or may not believe some of the myths about welfare and low income people that are so prevalent now. It was important to deal with some of these myths, and to also assume that some of the people may not know basic facts about welfare. I also assumed that part of the audience would be those seeking welfare or those already on welfare that may not know about their right to a fair hearing. So it was important to address both groups.

In creating the sign, I asked myself: what is it that is so essential about this case, in terms of reality of dealing with the system on a day to day basis? The image of the hands holding papers came from the importance paper plays while asserting your rights within the welfare department. You are constantly saving papers, providing documentation, writing things down, and telling the welfare workers to put papers in your case file about your needs or actions

you have taken. All the paper is so important - it is really the only way you can prove your side of the story.

That's essentially what the eligibility process is all about, and what welfare hearings are all about - being able to prove your case. The flip side of the sign describes what welfare hearings are and why we need them - that before Goldberg, you could be cut off arbitrarily, without a chance to tell your side of the story. I also explained that welfare is not a charity, it is an entitlement for those who qualify. I gave facts about hearings in New York City, including estimates by the Welfare Law Center about how often the City loses fair hearings, because so many people are being wrongfully denied welfare benefits. This serves as a sad reminder of how far we have to go before the vision of *Goldberg v. Kelly* is finally realized.