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## The Second Circuit and Social Justice

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# THE SECOND CIRCUIT AND SOCIAL JUSTICE

*Matthew Diller\* & Alexander A. Reinert\*\**

## INTRODUCTION

The Second Circuit is renowned for its landmark rulings in fields such as white collar crime and securities law—bread and butter issues growing out of Wall Street’s preeminence in the financial landscape of the nation. At the same time, the Second Circuit has a long tradition of breaking new ground on issues of social justice. Unlike some circuit courts which have reputations in the area of social justice built around one or two fields, such as the Fifth Circuit’s pioneering role in civil rights litigation<sup>1</sup> or the Ninth Circuit’s focus on immigration,<sup>2</sup> there is no one area of social justice litigation that could be considered the Second Circuit’s signature issue. Instead, it has issued key decisions and established important lines of cases in a wide range of subjects.

Moreover the Second Circuit has developed these bodies of law, for the most part, in its own distinctive incremental manner. The circuit has long operated through consensus, with little of the *Sturm und Drang* that have accompanied en banc reviews and fiery dissents that are common in some other courts of appeals.<sup>3</sup> Indeed, the Second Circuit’s tradition and practice of disfavoring en banc review in favor of awaiting guidance from the U.S.

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\* Dean and Paul Fuller Professor of Law, Fordham University School of Law. Dean Diller is grateful for the assistance of Brianna Gallo, Miranda Lievsay, Brandon Ruben, and Emily Vance in the research and preparation of this Article. He wishes to acknowledge the great debt he owes to the late Honorable Walter R. Mansfield for whom he clerked in the 1985–86 term of the Second Circuit and whose mentorship has played a critical role in his career.

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1. “The Fifth Circuit’s Four” were comprised of four legendary judges in the 1950s and 1960s who played a major role in ending Jim Crow in the South. *See generally* JACK BASS, UNLIKELY HEROES (1981).

2. *See* ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 144–87 (2010) (studying the Ninth Circuit’s role in the immigration system).

3. *See* Mario Lucero, Note, *The Second Circuit’s En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 36–42, [http://www.cardozolawreview.com/content/denovo/LUCERO\\_2013\\_32.pdf](http://www.cardozolawreview.com/content/denovo/LUCERO_2013_32.pdf) (noting that between 2000 and 2010, the Second Circuit heard eight cases en banc, about half the number heard by the next highest circuit) [<https://perma.cc/VV7E-UYZ9>].

Supreme Court has long been a matter of interest to commentators and courts alike.<sup>4</sup>

The Second Circuit's strong tradition in social justice litigation is, in part, a reflection of the richness of the legal community in the New York City metropolitan area and the vibrancy of urban life in the geographic boundaries of the circuit.<sup>5</sup> New York City is the home of many major national public interest organizations, including the American Civil Liberties Union (ACLU), the NAACP Legal Defense Fund, Legal Momentum (formerly NOW Legal Defense and Education Fund), vibrant local organizations focused on civil rights and legal services for low-income clients, and small public interest law firms focused on civil rights and allied litigation. These public interest organizations draw on the rich community of the nineteen law schools within the circuit and are supplemented by the robust pro bono traditions of the major law firms. In addition, federal, state, and local government law offices in the circuit have a well-established tradition of affirmative litigation.

This Article highlights just a few areas of law as illustrations of the Second Circuit's jurisprudence in dealing with claims of marginalized and subordinated individuals and groups. In the area of civil rights, this Article focuses on sexual harassment law and prisoners' rights. In the area of public benefits, this Article focuses on public assistance and the disability benefit programs of the Social Security Act. The discussion of public assistance will focus on one blockbuster case, *Goldberg v. Kelly*.<sup>6</sup> These are just some examples of the circuit's social justice jurisprudence that has developed over several decades.

Any attempt to account for the Second Circuit's jurisprudence in social justice in just a short essay will, of necessity, be vastly incomplete. For instance, while this Article focuses on more recent opinions, there are some earlier Second Circuit opinions in the areas of immigration,<sup>7</sup> due process,<sup>8</sup>

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4. See *id.*; see also Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 311–12 (1986); James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 STAN. L. REV. 387, 392–93 (1995). Compare *Ricci v. DeStefano*, 530 F.3d 88, 92–93 (2d Cir. 2008) (Jacobs, C.J., dissenting) (dissenting from the denial of rehearing en banc and criticizing reliance on the court's "tradition" of denying en banc review), with *id.* at 89–90 (Katzmann, J., concurring) ("Throughout our history, we have proceeded to a full hearing en banc only in rare and exceptional circumstances.").

5. This observation is not intended to denigrate the outstanding social justice oriented law practices in Connecticut and Vermont, as well as elsewhere in New York State.

6. 397 U.S. 254 (1970).

7. See *Soo Hoo Yee v. United States*, 3 F.2d 592, 597 (2d Cir. 1924) (recognizing that a Chinese person born in the United States "well understood the difficulty he would encounter in establishing his right to enter the country" and therefore excusing his entry to the United States in a manner indicating a "desire to escape the observation of the inspection officers with whom he thought he might have trouble"); *United States ex rel. Haum Pon v. Sisson*, 230 F. 974, 976 (2d Cir. 1916) (rejecting the claim that an individual should be deported to China simply because of his appearance, and noting that "[i]n the present age . . . it is impossible to tell by the mere inspection of a man where he was born or from whence he came").

and civil rights<sup>9</sup> that undoubtedly made their mark at the time. And even though this Article concentrates on cases from the mid- to late twentieth century to the present, we lack both the space and the time to expound on significant recent decisions in the areas of national security,<sup>10</sup> disability rights,<sup>11</sup> children's rights,<sup>12</sup> and discrimination on the basis of race<sup>13</sup> or sexuality,<sup>14</sup> among others. Additionally, outside of its decisions, the court has taken other significant steps in areas such as immigration.<sup>15</sup> We lack

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8. See *United States ex rel. Jelic v. Dist. Dir. of Immigration & Naturalization*, 106 F.2d 14, 19 (2d Cir. 1939) (finding that the examining inspector at an immigration hearing failed to provide a fair hearing to a noncitizen seeking admission to the United States); *Angelus v. Sullivan*, 246 F. 54, 62–64 (2d Cir. 1917) (holding that habeas corpus may issue to a local conscription board where an individual claiming exemption from military service has been denied a full and fair hearing).

9. See *Fitzgerald v. Pan Am. World Airways*, 229 F.2d 499, 501–02 (2d Cir. 1956) (finding that section 484(b) of the Civil Aeronautics Act of 1938 implicitly created a cause of action for racial discrimination against passengers by airlines); *United States ex rel. Lynn v. Downer*, 140 F.2d 397, 401–03 (2d Cir. 1944) (Clark, J., dissenting) (arguing that separate selective service quotas for African American and white men were inconsistent with statutory law and equal protection doctrine).

10. See, e.g., *Turkmen v. Hasty*, 789 F.3d 218, 237 (2d Cir. 2015) (en banc) (recognizing the availability of a *Bivens* action for post-September 11 detainees); *ACLU v. Clapper*, 785 F.3d 787, 821 (2d Cir. 2015) (holding that the National Security Agency's collection of telephone metadata exceeded authority granted by the Federal Intelligence Surveillance Act); *John Doe, Inc. v. Mukasey*, 549 F.3d 861, 882–83 (2d Cir. 2009) (holding that provisions regarding National Security Letters violated the First Amendment).

11. See, e.g., *Disabled in Action v. Bd. of Elections of N.Y.*, 752 F.3d 189, 199–200 (2d Cir. 2014) (holding that the Board of Elections denied meaningful access to its voting program to people with vision and mobility disabilities); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 290 (2d Cir. 2003) (upholding injunctive relief against New York City for residents with acquired immune deficiency syndrome (AIDS) or HIV-related illnesses); *Soc'y for Good Will to Retarded Children, Inc. v. Cuomo*, 737 F.2d 1239, 1250 (2d Cir. 1984) (finding that an individual with mental retardation has due process right to "training sufficient to prevent basic self-care skills from deteriorating" in order to maintain liberty interest in a decent and humane existence).

12. See, e.g., *Doe v. N.Y.C. Dep't of Soc. Servs.*, 709 F.2d 782, 790 (2d Cir. 1983) (establishing substantive due process duty of care for children in foster care); *Rivera v. Marcus*, 696 F.2d 1016, 1024–25 (2d Cir. 1982) (holding that a relative licensed as a foster parent has protected liberty interest in the integrity of her family).

13. The circuit's housing discrimination jurisprudence, for example, looms large. See, e.g., *Ragin v. N.Y. Times*, 923 F.2d 995, 1000 (2d Cir. 1991) (stating that the exclusive use of white models in real estate advertisements can violate the Fair Housing Act); *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 933 (2d Cir.) (holding that litigation under the Fair Housing Act is subject to disparate impact analysis), *aff'd*, 488 U.S. 15 (1988); *United States v. Starrett City Assocs.*, 840 F.2d 1096, 1103 (2d Cir. 1988) (rejecting the use of racial quotas in housing as a means of maintaining racial balance); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1184 (2d Cir. 1987) (affirming a finding of intentional discrimination in housing and education); see also Glenn W. Falk, *Housing Discrimination Law*, 14 QUINNIPIAC L. REV. 593, 593 (1994) (outlining "the list of powerful Second Circuit opinions analyzing far-reaching claims of racial segregation in housing").

14. *Windsor v. United States*, 699 F.3d 169, 184–85 (2d Cir. 2012) (applying heightened scrutiny to classifications based on sexuality), *aff'd on other grounds*, 133 S. Ct. 2675 (2013).

15. For instance, with Chief Judge Robert Katzmann's encouragement and assistance, law firms, nonprofit organizations, immigration groups, bar associations, law schools, and federal, state, and local governments have focused attention on access to counsel for immigrants in the service of fair and effective administration of justice in immigration proceedings. See generally Robert A. Katzmann, *Innovative Approaches to Immigrant*

the space to address here the depth of the Second Circuit's impact in these and many other areas of importance to social justice movements. The areas we highlight, however, reflect the Second Circuit's considered and nuanced approach to the difficult questions that courts encounter every day in these areas. We hope that in so doing, we have given a picture, albeit incomplete, that does justice to the Second Circuit's tradition and history.

#### I. THE SECOND CIRCUIT'S LEADING ROLE IN ANTIDISCRIMINATION LAW

New York City has long been home to some of the leading nonprofit organizations active in antidiscrimination challenges, including the NAACP Legal Defense Fund, the Puerto Rican Legal Defense and Education Fund, Lambda Legal, Legal Momentum, and the ACLU, not to mention small public interest law firms that regularly litigate employment discrimination and civil rights claims. Although many of these groups litigate across the country, they also have brought challenges to policies and practices of local public and private institutions.<sup>16</sup> Thus, it should be no surprise that significant opinions in the area of antidiscrimination law emerged from the Second Circuit.

This part focuses on the Second Circuit's sexual harassment jurisprudence. As a general matter, discrimination is a function of power dynamics that are pervasive throughout social institutions, including courts.<sup>17</sup> The problem of sexual harassment in the workplace is just one

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*Representation: Exploring New Partnerships*, 33 CARDOZO L. REV. 331 (2011); Robert A. Katzmann, *Deepening the Legal Profession's Pro Bono Commitment to the Immigrant Poor*, 78 FORDHAM L. REV. 453 (2009); Kirk Semple, *Seeking Better Legal Help for Immigrants*, N.Y. TIMES (Jan. 28, 2014), [http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?\\_r=0](http://www.nytimes.com/2014/01/29/nyregion/service-program-will-recruit-law-school-graduates-to-help-represent-immigrants.html?_r=0) [<https://perma.cc/ZPP4-BYVD>].

16. *See, e.g.*, *United States v. City of New York*, 359 F.3d 83, 97 (2d Cir. 2004) (holding that public welfare recipients obliged to participate in New York City's Work Experience Program are employees within the meaning of Title VII and are entitled to Title VII's protections against sexual and racial harassment); *Comer v. Cisneros*, 37 F.3d 775, 784–85 (2d Cir. 1994) (discussing plaintiffs' class action alleging racial discrimination and segregation in public housing and assistance programs in Erie County, New York); *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 902–03 (2d Cir. 1993) (discussing plaintiffs' complaint alleging discriminatory advertising in violation of the Fair Housing Act); *Waisome v. Port Auth.*, 999 F.2d 711, 712 (2d Cir. 1993) (discussing the claim in a consolidated class action that the Port Authority of New York and New Jersey's promotional examinations had disparate impacts on black officers in violation of Title VII); *Wilder v. Bernstein*, 848 F.2d 1338, 1341 (2d Cir. 1988) (addressing the claim that New York City's statutory scheme for provision of child care services violated the Equal Protection Clause of the Constitution); *Hispanic Soc'y of N.Y.C. Police Dep't Inc. v. N.Y.C. Police Dep't*, 806 F.2d 1147, 1150–51 (2d Cir. 1986) (involving a challenge to the sergeants' examination administered by the New York City Police Department), *aff'd sub nom. Marino v. Ortiz*, 484 U.S. 301 (1988); *Arthur v. Nyquist*, 573 F.2d 134, 136 (2d Cir. 1978) (addressing an allegation of intentional segregation by the Buffalo school system); *Vulcan Soc'y of N.Y.C. Fire Dep't, Inc. v. Civil Serv. Comm'n of N.Y.*, 490 F.2d 387, 390 (2d Cir. 1973) (involving a challenge to the employment practices of the New York City Fire Department).

17. *See* Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1240–41 (2016) (presenting the theory that racial discrimination is a complex, adaptive system that persists through “ostensibly race-neutral institutional rules, laws, and behaviors”); Susan K.

example.<sup>18</sup> As Joanna Grossman has suggested, sexual harassment law has developed over three eras: (1) the emergence of consciousness in the 1970s; (2) the development of a theoretical and doctrinal understanding of harassment as discrimination in the 1980s and 1990s; and (3) the more recent critiques from those who claim that the law now regulates too much interpersonal conduct, as well as those who claim that the law insufficiently deters or compensates for the harms of harassment.<sup>19</sup> As this Article discusses, the Second Circuit played a significant role in this evolution, and, although this Article highlights only a few of the most important cases, the Second Circuit overall has embraced a nuanced understanding of discrimination in the workplace that goes above and beyond sexual harassment.

While abuse and harassment of a sexual nature has existed for centuries, the recognition that such harassment could be actionable at law did not emerge until after 1964 with the passage of Title VII.<sup>20</sup> Initially, courts did not appreciate that workplace sexual harassment could constitute discrimination in employment on the basis of sex. For example, according to one judge in the District of Arizona, pervasive harassment was simply “a personal proclivity, peculiarity or mannerism” in which the supervisor “was satisfying a personal urge.”<sup>21</sup> A judge in the District of New Jersey adopted this same logic in the 1976 case of *Tomkins v. Public Service Electric & Gas Co.*,<sup>22</sup> in which an employee alleged that her supervisor had invited her to lunch, made “sexual advances,” and ultimately demoted and fired her after she had complained about the incident.<sup>23</sup> For judges like these,

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Hippensteele, *Revisiting the Promise of Mediation for Employment Discrimination Claims*, 9 PEPP. DISP. RESOL. L.J. 211, 221–23 (2009) (describing the inability of traditional dispute resolution mechanisms to adequately redress employment discrimination); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460 (2001) (characterizing “second generation” discrimination as involving “social practices,” “patterns of interaction,” and “[s]tructures of decisionmaking, opportunity, and power”).

18. See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 93 (2003) (“[W]e can have little hope of transforming existing power differentials without an adequate conceptualization of the modern forms of discrimination that is independent from, though naturally coexistent with, prevailing conceptions of workplace discrimination.”); Linda S. Greene, *Sexual Harassment Law and the First Amendment*, 71 CHI.-KENT L. REV. 729, 740 (1995) (discussing the presence of group power dynamics in sexual harassment); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2172 (2003) (contextualizing sexual harassment in “larger structures of gender inequality in which genuine sex harassment flourishes”).

19. Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U.L. REV. 1029, 1030–31 (2015).

20. Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 253 (codified in scattered sections of 42 U.S.C.).

21. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977). On July 19, 2016, Professor Reinert, a coauthor of this Article, had a conversation with Heather Sigworth, the plaintiff’s attorney in *Corne*, in which he learned that the case was settled after remand.

22. 422 F. Supp. 553 (D.N.J. 1976), *rev’d*, 568 F.2d 1044 (3d Cir. 1977).

23. *Id.* at 557.

applying Title VII to such conduct was “ludicrous” and would force employers to only hire people “who were asexual.”<sup>24</sup>

Judicial reluctance to apply Title VII to sexual harassment in the workplace operated on four levels. On one level, resistance was based on a narrative about the fundamental urges of sex. As the judge from the District of New Jersey put it in *Tomkins*, Title VII was not meant to “provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor and which happened to occur in a corporate corridor rather than a back alley.”<sup>25</sup> In other words, courts reasoned that because the law could not be shoehorned to intervene in “natural” social relations, the fact that the behavior occurs in an employment context should not place it under the umbrella of Title VII. On another level, resistance flowed from a misreading of what constituted discrimination on the basis of sex. Early on, courts reasoned that because the gender of each person is “incidental to the claim of abuse,” it cannot be discrimination on account of sex, but simply an encounter in which “sexual desire animated the parties, or at least one of them.”<sup>26</sup> Third, reluctance rested on various concerns about a flood of new claims that could be raised under Title VII: (1) that coworkers who claim that they were disfavored as a result of a woman “accepting” sexual advances by a supervisor might bring suit alleging discrimination and (2) that sexual harassment itself is so common that too many claims would be filed if Title VII was viewed as covering harassment.<sup>27</sup> Finally, resistance also stemmed from a desire to avoid disrupting social conventions:

“The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions.” This natural sexual attraction can be subtle. If the plaintiff’s view were to prevail, no superior could, prudently, attempt to open a social dialogue with any subordinate of either sex. An invitation to dinner could become an invitation to a federal lawsuit if a once harmonious relationship turned sour at some later time.<sup>28</sup>

Courts within the Second Circuit were not immune to this kind of thinking. A District of Connecticut judge cited *Tomkins* for the proposition that a female employee could not establish a Title VII violation where she

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24. *Corne*, 390 F. Supp. at 163–64.

25. *Tomkins*, 422 F. Supp. at 556.

26. *Id.* Even in reversing the district court’s decision in *Tomkins*, the Third Circuit crafted a dividing line between “complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances, finding Title VII violations in the latter category.” *Tomkins*, 568 F.2d at 1048.

27. *See Tomkins*, 422 F. Supp. at 556–57 (“The abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience. . . . And if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or a raise is later denied to the subordinate, we would need 4,000 federal trial judges instead of some 400.”).

28. *Id.* at 557 (quoting *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976)).

complained that a male employee had “once pinched her breast and on another occasion invited her to bed.”<sup>29</sup>

The Second Circuit, however, soon demonstrated an appropriate level of sensitivity to similar allegations. For example, in the 1989 case *Carrero v. New York City Housing Authority*,<sup>30</sup> the defendants argued that “trivial behavior,” including kisses, arm strokes, “degrading epithets” and “other objectionable” conduct, was insufficiently pervasive to constitute a hostile work environment.<sup>31</sup> Judge Richard Cardamone, writing for the court, “emphatically reject[ed] this argument” because an employee “need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII.”<sup>32</sup>

In deciding *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*<sup>33</sup> in 1992, the Second Circuit extended protection against retaliation to an employee who was subjected to an adverse employment decision for making an internal complaint protesting against sexual harassment.<sup>34</sup> The court recognized that Title VII should protect employees who express opposition to sexual harassment, even if they had not filed a formal Title VII or Equal Employment Opportunity Commission (EEOC) complaint.<sup>35</sup> The court also recognized that employers should not be able to avoid Title VII liability where they promptly respond to a complaint of sexual harassment, but the response has all indications of a “sham.”<sup>36</sup>

The Second Circuit continued its trajectory in a significant sexual harassment case decided in 1994. In *Karibian v. Columbia University*,<sup>37</sup> the plaintiff alleged that her supervisor forced her into a violent sexual relationship, in return for which she received promotions and pay increases.<sup>38</sup> The significance of *Karibian*, and what distinguished it from most “quid pro quo harassment cases”<sup>39</sup> that had come before it, was that, at least for a period of time, the plaintiff experienced promotions and pay increases as a result of her sexual relations with her supervisor rather than

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29. *Pantchenko v. C.B. Dolge Co.*, No. B-74-251, 1976 WL 22169, at \*4 (D. Conn. June 11, 1976).

30. 890 F.2d 569 (2d Cir. 1989).

31. *Id.* at 578.

32. *Id.*

33. 957 F.2d 59 (2d Cir. 1992).

34. *See id.* at 65.

35. *Id.*

36. *Id.* at 64. In *Kotcher*, there was evidence of a sham because the defendant’s only “punishment” of the alleged harasser was transfer to a different store where he soon was promoted to his previous position. *See id.* This reaction to the complaint tended to indicate that the defendant “at least tolerated [the employee’s] unlawful harassing conduct.” *Id.*

37. 14 F.3d 773 (2d Cir. 1994).

38. *See id.* at 775–76.

39. The phrase “quid pro quo harassment case(s)” is used throughout this Article to refer to cases in which a supervisor suggests that he or she will provide a benefit to an employee in exchange for that employee’s satisfaction of a sexual demand.



being subjected to detrimental conditions because of a refusal to engage in sexual relations.<sup>40</sup>

Judge Joseph McLaughlin's opinion summarized the plaintiff's account as follows:

In 1987, while a student in Columbia University's General Studies Program, Sharon Karibian worked in Columbia's fundraising "Telefund" office. . . . In September 1987, Columbia appointed defendant Mark Urban as Development Officer for Annual Giving at [University Development and Alumni Relations]. In that capacity, Urban had supervisory authority over Telefund, and, consequently, over Karibian. . . . [According to Karibian,] Urban "pursued" Karibian by repeatedly inviting her out to bars, ostensibly to discuss work-related matters. On those occasions, Urban often asked Karibian back to his apartment. Initially, Karibian rebuffed Urban's advances; ultimately, however, she yielded to pressure from Urban. Specifically, Karibian claimed that Urban coerced her into a violent sexual relationship by telling her that she "owed him" for all he was doing for her as her supervisor. Karibian also claimed that the conditions of her employment—including her raises, hours, autonomy and flexibility—varied from time to time, depending on her responsiveness to Urban. Karibian stated that she believed she would be fired if she did not give in to Urban's demands.<sup>41</sup>

The plaintiff at first did not tell anyone about the nature of her relationship with Urban, but in September 1988 she contacted Columbia's Panel on Sexual Harassment and also met with Columbia's Equal Opportunity Coordinator.<sup>42</sup> According to Karibian, individuals from each office "discouraged her from actively pursuing a complaint against Urban" and Karibian requested that the meetings be kept confidential.<sup>43</sup> Approximately one and a half years later, Karibian again met with Columbia's Equal Opportunity Coordinator; this time, however, she did not insist on confidentiality.<sup>44</sup> Columbia University ultimately forced Urban to resign "for reasons that remain somewhat vague" and laid off Karibian after the office where she worked was closed.<sup>45</sup>

Although the parties sharply disputed the facts (Urban maintained that the sexual relations were consensual), the legal issue was significant: whether a plaintiff can bring a Title VII claim for sexual harassment when she suffered no economic harm as a result of the harassment.<sup>46</sup> Columbia University successfully argued before the district court that, because the plaintiff had suffered no economic harm, she could not bring a claim

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40. See *Karibian*, 14 F.3d at 775–76. The plaintiff also alleged, however, that she suffered retaliation after she terminated the relationship. See *Karibian v. Columbia Univ.*, 930 F. Supp. 134, 140–41 (S.D.N.Y. 1996).

41. *Karibian*, 14 F.3d at 775–76.

42. See *id.* at 776.

43. *Id.*

44. See *id.*

45. *Id.*

46. See *id.* at 775.

regarding the sexual harassment she claimed to experience.<sup>47</sup> The district court also held that the plaintiff could not establish a hostile work environment claim against Columbia University because it did not have sufficient notice of Urban's conduct and took reasonable steps in response to Karibian's harassment complaints.<sup>48</sup>

The Second Circuit reversed the district court on both grounds, using reasoning that was noteworthy at the time.<sup>49</sup> First, the court addressed Karibian's quid pro quo claim, holding that neither the language of Title VII nor relevant EEOC regulations required plaintiffs to provide evidence of economic harm to prevail.<sup>50</sup> Instead, to establish a quid pro quo claim, the plaintiff was required to show (1) that she was subject to unwelcome sexual conduct and (2) "that her reaction to that conduct was then used as the basis for decisions affecting the compensation, terms, conditions or privileges of her employment."<sup>51</sup> Although the Second Circuit cited authority from other courts for its general statement of the law, the law was quite uncertain at the time.<sup>52</sup> The three cases relied upon by the circuit, for instance, all involved instances of "classic" quid pro quo harassment in which the plaintiff suffered tangible harm to the terms and conditions of her

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47. *See id.* at 776.

48. *See id.* at 777. At the time, the difference under the law between quid pro quo harassment claims and hostile work environment claims was significant because an employer was strictly liable for quid pro quo harassment but not for hostile work environment claims. *See Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992) ("The supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee."); *Carrero v. N.Y.C. Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) ("[T]he harassing employee acts as and for the company, holding out the employer's benefits as an inducement to the employee for sexual favors."). In 1982, the Eleventh Circuit discussed the distinction between the two claims, explaining that a hostile work environment could be created by any employee, whether or not that employee had been given authority by the employer; a quid pro quo harassment claim, on the other hand, is founded on a supervisory employee being delegated the power by his employer to alter the terms and conditions of employment to coerce unwanted sexual conduct. *See Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982). Ultimately, the Supreme Court would obviate the distinction between these two types of claims, at least to the extent that the claims relate to vicarious liability. *See infra* notes 74–77 and accompanying text.

49. *See Karibian*, 14 F.3d at 781.

50. *See id.* at 778.

51. *Id.* at 777.

52. While the Supreme Court had recognized that quid pro quo harassment claims could be potentially actionable under Title VII, it did not resolve the issue of whether economic harm had to be proved. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64–66 (1986) (noting that no economic harm need be proved for hostile work environment claims, but distinguishing quid pro quo claims). In *Vinson*, the district court had concluded that the employee could not claim harassment, but it was unclear on what basis the lower court had relied to come to this conclusion. *See id.* at 67–68. The Supreme Court held that the district court might have erred because, even if it were correct to conclude that there was no sexual harassment claim because of a lack of economic harm, the district court failed to consider whether the plaintiff had stated a hostile work environment claim. *See id.* at 68. The Court also held that, if the district court's conclusion was based on its finding that the sexual relations were "voluntary," in the sense that they were not against the plaintiff's will, that did not necessarily exclude Title VII liability because the relevant question is whether the attempts to engage in sex were "unwelcome." *Id.*

employment because she refused to engage in sexual conduct with her supervisor.<sup>53</sup>

The *Karibian* Court acknowledged that the “typical” quid pro quo case involves a circumstance in which the employee suffers retaliation because of her refusal to submit to a supervisor’s coercion, but the court concluded that it does not follow that tangible economic harm is “always essential to the claim.”<sup>54</sup> At this point, the court turned to policy rather than precedent, observing that if Title VII barred “the victims of sexual harassment who surrender to unwelcome encounters[,] . . . [s]uch a rule would only encourage harassers to increase their persistence”—truly a perverse outcome.<sup>55</sup>

Instead, the *Karibian* Court focused on two issues. First, the court focused on whether the supervisor “linked tangible job benefits to the acceptance or rejection of sexual advances.”<sup>56</sup> On this theory, the tangible benefit provided to the employee who submits to unwelcome advances is the retention of her employment. Second, from the Second Circuit’s perspective, harassment law should focus on the supervisor’s prohibited conduct, not on the plaintiff’s reaction.<sup>57</sup> Whether the plaintiff submitted to advances might help determine whether the sexual advances were unwelcome but “not whether unwelcome sexual advances were unlawful.”<sup>58</sup>

The *Karibian* Court’s treatment of the plaintiff’s hostile work environment claim also broke new ground, for it helped determine when an employer would be strictly liable for tolerating a hostile work environment.<sup>59</sup> At the time, the plaintiff in hostile work environment cases, unlike in quid pro quo harassment cases, had to show why the employer should be liable for the environment fostered by its employees.<sup>60</sup> The Supreme Court had left this issue open in *Meritor Savings Bank, FSB v. Vinson*,<sup>61</sup> which directed lower courts to draw from traditional agency principles to decide such liability.<sup>62</sup> In 1992, in the *Kotcher* case discussed above,<sup>63</sup> the circuit had found that there was enough evidence of the “sham” nature of the response to complaints of harassment to justify attributing

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53. See *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 906 (1st Cir. 1988) (describing a case in which plaintiff experienced tangible harms as a result of refusal as the “very essence of quid pro quo harassment”); *Highlander v. K.F.C. Nat’l Mgmt. Co.*, 805 F.2d 644, 649 (6th Cir. 1986) (finding that a harassment claim was not stated because “the record was totally devoid of any evidence tending to demonstrate that plaintiff was denied a job benefit or suffered a job detriment as a result of her failure to engage in the activity”); *Henson*, 682 F.2d at 910 (discussing sexual harassment “resulting in tangible job detriment”).

54. *Karibian*, 14 F.3d at 778.

55. *Id.*

56. *Id.*

57. See *id.* at 779.

58. *Id.*

59. See *id.* at 777–78.

60. See *id.* at 778; see also *supra* note 52.

61. 477 U.S. 57 (1986).

62. See *id.* at 72.

63. See *supra* notes 33–36 and accompanying text.

liability to the employer for its employee's harassment.<sup>64</sup> But *Karibian* presented a different set of facts, and the court turned back to traditional agency principles to determine the scope of an employer's liability.<sup>65</sup> First, however, the court rejected the bright-line rule advanced by Columbia University and apparently accepted by the district court, namely that in every case the plaintiff must prove that the employer either provided no "reasonable avenue" for complaints or knew of the harassment but took no action.<sup>66</sup>

The circuit identified several factors that would influence whether an employer should be held liable for a hostile work environment claim under Title VII. Most critical in *Karibian* was that the alleged harasser was a supervisor who used his delegated authority to create an abusive environment based on sex.<sup>67</sup> Therefore, the circuit stated that the employer could be held liable because the supervisor was acting at least within the scope of his apparent authority.<sup>68</sup> The court also held that an employer could be held liable where a supervisor is "aided in accomplishing the harassment by the existence of the agency relationship."<sup>69</sup> The court contrasted this situation with a situation in which a "low-level supervisor" does not perpetrate the harassment in reliance on his supervisory authority.<sup>70</sup> There, the employer is not liable unless it failed to provide a reasonable avenue for complaints or did not take any action in the face of known harassment.<sup>71</sup> In the *Karibian* case, the court found that there was enough evidence to go to the jury on the issue of whether Columbia University was responsible for the allegedly hostile work environment, stating "[i]t would be a jarring anomaly to hold that conduct which always renders an employer liable under a quid pro quo theory does not result in liability to the employer when that same conduct becomes so severe and pervasive as to create a discriminatorily abusive work environment."<sup>72</sup>

The *Karibian* case received attention immediately after it was announced. The *New York Times* described it as setting a precedent in the quid pro quo context, while also increasing the burden on defendants in hostile work environment cases.<sup>73</sup> Although the contours of sexual harassment litigation have changed over the years, *Karibian* has withstood the test of time. Most notably, four years after *Karibian* was announced, the Supreme Court issued two decisions, *Faragher v. City of Boca Raton*<sup>74</sup> and *Burlington*

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64. See *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 64 (2d Cir. 1992).

65. See *Karibian*, 14 F.3d at 780.

66. See *id.* at 779.

67. See *id.* at 779–80.

68. See *id.* at 780.

69. *Id.*

70. See *id.*

71. See *id.*

72. *Id.* at 781.

73. Jan Hoffman, *Columbia University May Be Sued in Sex Case*, N.Y. TIMES (Jan. 29, 1994), <http://www.nytimes.com/1994/01/29/nyregion/columbia-u-may-be-sued-in-sex-case.html> [<https://perma.cc/GQS2-XHN3>].

74. 524 U.S. 775 (1998).

*Industries, Inc. v. Ellerth*,<sup>75</sup> both of which collapsed the distinction between quid pro quo harassment claims and hostile work environment claims.<sup>76</sup> Rather than hinging vicarious liability on the characterization of the claim, the Supreme Court held in both cases that the proper focus was on whether the “supervisor’s harassment culminates in a tangible employment action.”<sup>77</sup>

Even though the hard-line context in which *Karibian* operated had changed, the key insights from the decision survived. A 2002 Second Circuit decision preserved *Karibian*’s reasoning even though the Supreme Court’s analyses in *Faragher* and *Ellerth* reframed sexual harassment law.<sup>78</sup> Like *Karibian*, *Jin v. Metropolitan Life Insurance*<sup>79</sup> was a case in which the plaintiff was coerced to have sex with her supervisor because he “explicitly threatened to fire her if she did not submit, and then allowed her to keep her job after she submitted.”<sup>80</sup> Judge Wilfred Feinberg’s opinion for the court distinguished *Ellerth* (in which the supervisor’s threats were never carried out) because, unlike the plaintiff in *Ellerth*, the plaintiff in *Jin* was required to submit to sex in order to grant a tangible benefit (continued employment).<sup>81</sup> The court concluded:

[W]hen a victim is coerced into submitting to a supervisor’s sexual mistreatment, the threatened detrimental economic tangible employment action may not take place. But that does not mean that the use of the submission as the basis for other job decisions does not also constitute tangible employment action. Because *Faragher* and *Ellerth* support our earlier holding in *Karibian* that economic harm is not required to hold an employer liable in a submission case, we see no persuasive reason to abandon our prior judgment on that issue.<sup>82</sup>

The Ninth Circuit followed the Second Circuit’s approach. In *Holly D. v. California Institute of Technology*,<sup>83</sup> the plaintiff claimed that her supervisor implicitly threatened to fire her if she did not submit to his sexual demands.<sup>84</sup> The court held that when, “in order to avoid the threatened action, the employee complies with the supervisor’s demands,” a

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75. 524 U.S. 742 (1998).

76. Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 534–36 (2006).

77. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

78. *Jin v. Metro. Life Ins.*, 310 F.3d 84, 95–96 (2d Cir. 2002).

79. 310 F.3d 84 (2d Cir. 2002).

80. *Id.* at 94.

81. *See id.* at 94, 97 (“It is hardly surprising that this type of conduct—a classic quid pro quo for which courts have traditionally held employers liable—fits squarely within the definition of ‘tangible employment action’ that the Supreme Court announced in *Faragher* and *Ellerth*.”). The Court in *Ellerth* affirmed the Seventh Circuit’s decision in *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997). *See Ellerth*, 524 U.S. at 750, 765–66. Indeed, the Seventh Circuit’s decision in *Jansen* relied explicitly on *Karibian*. *See Jansen*, 123 F.3d at 499–500.

82. *Jin*, 310 F.3d at 98.

83. 339 F.3d 1158 (9th Cir. 2003).

84. *See id.* at 1163–64.

tangible employment action occurs.<sup>85</sup> The court stated that “when the supervisor actually coerces sex by abusing the employer’s authority, and thus makes concrete the condition of employment he has imposed,” his harassment “culminates in a ‘tangible employment action.’”<sup>86</sup>

When then-Judge Ruth Bader Ginsburg reflected on the 1970s cases in which she and her colleagues at the ACLU crafted a path toward heightened scrutiny of classifications based on gender, she highlighted principles that would come to characterize the Second Circuit’s nuanced approach to sexual harassment challenges: interrogating the rationalization used by some courts to justify differential treatment of men and women based on “natural” differences and the link between subordination and sex-specific roles and relationships.<sup>87</sup> *Karibian* and the other Second Circuit cases surrounding sexual harassment exemplify the same principles in a different context: the need to challenge ideas about “natural” sexual relations and to see the link between subordination in the workplace and traditional ideas about how men and women relate to each other. The Second Circuit’s approach continued the trajectory that Justice Ginsburg and other advocates had so successfully negotiated in the 1970s. In so doing, the court left an important mark in the area.

## II. THE SECOND CIRCUIT’S LEADING ROLE IN PRISONERS’ RIGHTS JURISPRUDENCE

The Second Circuit is home to one of the largest prison systems in the country: the New York State Department of Corrections and Community Supervision.<sup>88</sup> Moreover, New York City’s jails house more people than do many state correctional systems.<sup>89</sup> Combine these variables with an active and well-established prisoners’ rights lawyering community, represented in small firms as well as large nonprofit organizations like the Legal Aid Society’s Prisoners’ Rights Project, and it is no surprise that the Second Circuit has been the focus of many significant prisoners’ rights cases.

Most prisoners’ rights cases revolve around the meaning of the Eighth Amendment, which prohibits “cruel and unusual punishments.”<sup>90</sup> For a number of reasons that have been explored and discussed elsewhere, federal

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85. *Id.* at 1167.

86. *Id.* at 1170.

87. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 11.

88. As of 2014, New York State had approximately 77,500 adults in prison or jail, exceeded only by Texas (219,100 adults), California (207,100 adults), Florida (153,600 adults), Georgia (91,000 adults), and Pennsylvania (85,200 adults). *See* DANIELLE KAEBLE ET AL., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2014, at 17–18 (2016).

89. At the end of 2014, almost 10,000 people were held in New York City jails. *See* COMM’N OF CORRECTION, INMATE POPULATION STATISTICS, <http://www.scoc.ny.gov/pop.htm> (last visited Sept. 6, 2016) [<https://perma.cc/6X5W-R8Q8>]. This figure is larger than the number of people held in prisons and jails in the District of Columbia and the following states: Alaska, Delaware, Hawaii, Maine, Montana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. *See* DANIELLE KAEBLE ET AL., *supra* note 88, at 17–18.

90. U.S. CONST. amend. VIII.

courts did not begin to develop robust Eighth Amendment jurisprudence until the 1970s.<sup>91</sup> While some state courts were called upon to interpret their own state constitutions' punishment provisions in the 1800s, it is fair to say that the constitutionality of particular punishments, including the conditions of confinement experienced by people held in jails and prisons, was woefully underexamined for most of the nineteenth and twentieth centuries.<sup>92</sup> To the extent that courts did examine the question, they deferred greatly to the judgment of legislators and prison administrators, prompting many to refer to the time period between the founding and the late twentieth century as a "hands-off" period.<sup>93</sup>

Other than *Weems v. United States*,<sup>94</sup> which was an unusual decision from 1910 in which the Supreme Court struck down a sentence imposed by a court in the Philippines, finding it to be cruel and unusual punishment,<sup>95</sup> the Court had given little hint that it questioned the orthodox view that courts had little to nothing to say about the daily living experience of people held in prisons or jails. The first sign of any real change came almost fifty years later, in 1958, in *Trop v. Dulles*,<sup>96</sup> in which the Supreme Court again struck down a punishment as being cruel and unusual.<sup>97</sup> The question in *Trop* involved whether a sentence of denationalization as a punishment for military desertion was consistent with the Eighth Amendment.<sup>98</sup> A plurality of the Court found that the sentence violated both the Eighth Amendment and international law principles because it was contrary to "evolving standards of decency."<sup>99</sup> This framework would become a central tenet of Eighth Amendment jurisprudence as *Trop* was extended in 1976 by *Estelle v. Gamble*,<sup>100</sup> the first modern case to challenge prison conditions alone, separate and apart from a criminal sentence. The *Estelle* Court looked to both *Weems* and *Trop* to establish that the Eighth Amendment applied to more than "physically barbarous punishments,"<sup>101</sup> but also to punishments incompatible with "evolving standards of decency"<sup>102</sup> or involving the "unnecessary and wanton infliction of

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91. See generally Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory?*, 36 FORDHAM URB. L.J. 53 (2009).

92. See *id.* at 60–65.

93. See Ira P. Robbins, *The Cry of Wolfish in the Federal Courts: The Future of Federal Judicial Intervention in Prison Administration*, 71 J. CRIM. L. & CRIMINOLOGY 211, 212–13 (1980) (summarizing the hands-off doctrine and erosion of the approach in the lower courts); see also *Procunier v. Martinez*, 416 U.S. 396, 404–05 (1974) (discussing the traditional hands-off policy of federal courts with respect to problems of prison administration), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989).

94. 217 U.S. 349 (1910).

95. See *id.* at 382.

96. 356 U.S. 86 (1958) (plurality opinion).

97. See *id.* at 99–101.

98. See *id.* at 87.

99. *Id.* at 101.

100. 429 U.S. 97 (1976).

101. *Id.* at 102 (citing *Trop*, 356 U.S. at 100–01; *Weems v. United States*, 217 U.S. 349 (1910)).

102. *Id.* (quoting *Trop*, 356 U.S. at 101).

pain.”<sup>103</sup> With these standards in mind, the Court held that the government had some obligation to provide medical care to prisoners, because the absence of such care could “result in pain and suffering which no one suggests would serve any penological purpose.”<sup>104</sup> Deprivations of medical care that amounted to “deliberate indifference to serious medical needs” were equivalent, in the Court’s view, to unnecessary infliction of pain.<sup>105</sup>

From *Estelle*, much significant prisoners’ rights litigation was born, including cases involving mental health treatment, protection from harm from other prisoners, challenges to material conditions of confinement such as cell size, food, and sanitary conditions, and use of force by correctional staff.<sup>106</sup> From *Trop* on, however, the Second Circuit has played a significant role in the development of constitutional protections for people held in our nation’s prisons and jails.

*Trop* originated in the Eastern District of New York. The plaintiff had served in the U.S. Army in 1944 in French Morocco, but he was convicted by court-martial of desertion in the time of war.<sup>107</sup> Under the governing statute at the time, his conviction of desertion resulted in his expatriation.<sup>108</sup> He filed a complaint in the Eastern District seeking a declaration that he was a “national of the United States.”<sup>109</sup> The district court summarily dismissed his complaint, and the Second Circuit upheld the dismissal.<sup>110</sup> The majority opinion, however, specifically declined to address the question of whether the punishment was consistent with the Eighth Amendment, finding that the plaintiff had not raised that issue.<sup>111</sup> Chief Judge Charles Clark wrote an extremely brief dissent, incorporating fully the arguments made in a comment that appeared in the *Yale Law Journal*.<sup>112</sup> Although Chief Judge Clark’s dissent was only two paragraphs long, he was prescient in recognizing the critical role of “dignity” in Eighth Amendment review, a word that the Court ultimately has adopted as a touchstone for Eighth Amendment jurisprudence.<sup>113</sup>

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103. *Id.* at 103 (quoting *Gregg v. Georgia*, 28 U.S. 153, 178 (1976)).

104. *Id.*

105. *Id.* at 104.

106. *See* *Farmer v. Brennan*, 511 U.S. 825, 835–36 (1994) (applying *Estelle* in failure to protect context); *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (discussing *Estelle*’s deliberate indifference standard’s application in prison conditions cases); *Hudson v. McMillian*, 503 U.S. 1, 5–6 (1992) (contextualizing *Estelle* in an excessive force claim); *Rhodes v. Chapman*, 452 U.S. 337, 347–48 (1981) (applying *Estelle* in a challenge to double-celling).

107. *Trop*, 356 U.S. at 87.

108. *See id.* at 88 n.1 (describing the statutory framework).

109. *Trop v. Dulles*, 239 F.2d 527, 528 (2d Cir. 1956), *rev’d*, 356 U.S. 86.

110. *Id.* at 528–30.

111. *See id.* at 529–30.

112. *See id.* at 530 (Clark, C.J., dissenting) (citing Comment, *The Expatriation Act of 1954*, 64 *YALE L.J.* 1164, 1189–99 (1955)).

113. *See* *Brown v. Plata*, 563 U.S. 493, 510 (2011) (stating that “[p]risoners retain the essence of human dignity inherent in all persons”); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 *U. PA. L. REV.* 169, 223–28 (2011) (discussing the role of dignity in Eighth Amendment jurisprudence).



The Supreme Court seemed moved by Chief Judge Clark's dissent, because the Court granted certiorari and reversed, marking a significant turn in Eighth Amendment jurisprudence.<sup>114</sup> Moreover, the plurality opinion specifically indicated its agreement with Chief Judge Clark's dissent and quoted the first paragraph in full.<sup>115</sup> Although *Trop's* "evolving standards of decency" framework<sup>116</sup> would ultimately play a central role in Eighth Amendment jurisprudence, the case did not initially have a wide impact. It was not until 1976 that the Supreme Court expanded *Trop's* analysis to conditions of confinement in *Estelle*.<sup>117</sup>

Between 1958 and 1976, however, the Second Circuit established itself as a court with admirable foresight about how judicial regulation of prison conditions could be accomplished through the Eighth Amendment. The first example of such a case began in the early 1960s in *Wright v. McMann*.<sup>118</sup> Lawrence Wright was serving a life sentence in Clinton Correctional Facility after being convicted, by a jury in state court, of sodomy, assault, and carnal abuse of an eleven-year-old boy.<sup>119</sup> In February 1965, he was placed in solitary confinement for what was only described as "a violation of a prison regulation."<sup>120</sup>

According to Wright's complaint, which he filed pro se:

[T]he . . . solitary confinement cell . . . was dirty, filthy and unsanitary, without adequate heat and virtually barren; the toilet and sink were encrusted with slime, dirt and human excremental residue superimposed thereon[.] [Wright] was without clothing and entirely nude for several days . . . until he was given a thin pair of underwear to put on[.] [Wright] was unable to keep himself clean or perform normal hygienic functions as he was denied the use of soap, towel, toilet paper, tooth brush, comb, and other hygienic implements and utensils therefore[.] [Wright] was compelled under threat of violence, assault or other increased punishments to remain standing at military attention in front of his cell door each time an officer appeared from 7:30 A.M. to 10:00 P.M. every day, and he was not permitted to sleep during the said hours under the pain and threat of being beaten or otherwise disciplined therefore[.] [T]he windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing [him] to be exposed to the cold air and winter weather without clothing or other means of protecting himself or to escape the detrimental effects thereof . . .<sup>121</sup>

According to his complaint, he was forced to sleep on the cold, rough, concrete floor, as the cell had no furniture apart from a sink and toilet.<sup>122</sup> He was kept continuously in that cell for a total of thirty-three days and, a

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114. See *Trop*, 356 U.S. at 104.

115. See *id.* at 101 & n.33.

116. *Id.* at 101.

117. See *Estelle v. Gamble*, 429 U.S. 97 (1976).

118. 257 F. Supp. 739 (N.D.N.Y. 1966), *rev'd*, 387 F.2d 519 (2d Cir. 1967).

119. See *id.* at 741.

120. *Id.*

121. *Wright*, 387 F.2d at 521 (first alteration in original).

122. See *id.*

year later, was again placed in a “strip cell” for twenty-one consecutive days for violating another prison rule.<sup>123</sup> Wright requested injunctive relief and monetary damages.

The district court denied Wright’s claim on the ground that (1) “[t]he complaint makes no sufficient showing of the denial of plaintiff’s constitutional rights” and, in the alternative, (2) “[p]laintiff’s remedy, if any, lies in the state courts.”<sup>124</sup> As to the former, the district court found that the complaint failed to demonstrate “exceptional circumstances” of confinement to rise to the level of an Eighth Amendment violation.<sup>125</sup> In the absence of controlling authority governing the specific conditions of Wright’s confinement, the court was “content to hold that the complaint, which lack[ed] allegations of physical injury,” failed to show a departure from accepted methods of prison punishment.<sup>126</sup> The court reasoned that “[e]very punishment in a sense involves cruelty since it imposes by force conditions at odds with the concept of the freedom of the person from all forms of trespass, and freedom of action.”<sup>127</sup> With respect to the alternative ground for the court’s holding, its reasoning rested on “[t]he general rule that the internal administration of state prisons is the state’s primary responsibility and not a matter of federal intervention.”<sup>128</sup> In other words, the district court’s opinion was consistent with the “hands-off” doctrine that had characterized federal jurisprudence at that time.

More than a decade before the Supreme Court would address (albeit in a sideways fashion) solitary confinement conditions in a case out of Arkansas,<sup>129</sup> the Second Circuit reversed the district court’s decision in *Wright*. In an opinion authored by Judge Irving Kaufman, the Second Circuit embraced a far more muscular role for the federal judiciary in policing the living experience of people in prison.<sup>130</sup> The court rejected the State’s attempt to justify the confinement as “necessary” for prison regulation and admitted that Wright’s treatment was “strictly routine” for a violation of prison discipline.<sup>131</sup> Finding that the conditions “offend[ed] more than ‘some fastidious squeamishness or private sentimentalism,’” the court held that, if proven, they would “constitute cruel and unusual punishment.”<sup>132</sup> Rejecting the “hands-off” policy of deference to prison officials in the State’s punishment practices, the court held that “civilized standards of humane decency simply do not permit a man for a substantial period of time to be denuded and exposed to the bitter cold of winter in

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123. *See id.* at 522. The content of these rules was not contained within the record. *See id.* at 522 n.4.

124. *Wright*, 257 F. Supp. at 745.

125. *Id.* at 747.

126. *Id.* at 745.

127. *Id.*

128. *Id.*

129. *See Hutto v. Finney*, 437 U.S. 678, 687–88, 700 (1978) (upholding an order to remedy extreme overcrowding, pervasive violence, insufficient food, and unsanitary conditions).

130. *See Wright v. McMann*, 387 F.2d 519, 527 (2d Cir. 1967).

131. *Id.* at 526 n.15.

132. *Id.* at 525 (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)).

northern New York State and to be deprived of the basic elements of hygiene such as soap and toilet paper.”<sup>133</sup> Echoing Chief Judge Clark’s call to consider the dignity of the plaintiff in *Trop*, the *Wright* Court observed that “[t]he subhuman conditions alleged by Wright to exist in the ‘strip cell’ at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner.”<sup>134</sup> The court therefore remanded to the district court to allow Wright to proceed on his claims.<sup>135</sup>

On remand, Wright’s case was consolidated with that of another prisoner, Robert Mosher.<sup>136</sup> In a long and eloquent opinion, the district judge, newly assigned to the case (because the judge to whom the case was first assigned had died), wrote that horrid prison conditions were a systemic problem and renounced the rationale that “if unpleasant problems arise in the prisons, the prisoners brought it on themselves and the less public notice the better.”<sup>137</sup> Taking a cue from the Second Circuit, the lower court stated that “[n]o longer can prisons and their inmates be considered a closed society with every internal disciplinary judgment to be blissfully regarded as immune from the limelight that all public agencies ordinarily are subject to.”<sup>138</sup>

Though the court acknowledged that security in maximum-security prisons is an important state objective, it asserted that this interest can “never” justify treatment and prison procedures that violate human decency and constitutional rights.<sup>139</sup> While the court posited that segregation under proper conditions in a state prison is not unconstitutional per se, it credited testimony from a psychiatrist who testified to “the care to be taken concerning its conditions and the length of its use due to the serious impact it may have upon certain prisoners [because of] their individual mental and physical attitudes and capacities.”<sup>140</sup> The court ultimately rested its finding of unconstitutional punishment on the physical conditions of the cell (e.g., filthy, barren, etc.), and the abuse to which Wright was subjected (e.g., being forced to sleep nude on a rough concrete floor with no windows in the winter).<sup>141</sup> Wright was ultimately granted \$1,500 in compensatory damages and no punitive damages.<sup>142</sup>

The court similarly found aspects of Mosher’s punishment to be unconstitutional. Mosher had been placed in solitary confinement for five months for failing to sign a “safety sheet,” which he genuinely believed would constitute waiver to sue the State for personal injuries suffered due to negligence.<sup>143</sup> The district court held that, with respect to the alleged

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133. *Id.* at 526.

134. *Id.*

135. *Id.* at 527.

136. *See Wright v. McMann*, 321 F. Supp. 127, 131 (N.D.N.Y. 1970).

137. *Id.* at 132.

138. *Id.*

139. *Id.* (“The judicial complacency of the past in regard to these problems and cautions for courts to refrain whenever possible . . . has been discarded.”).

140. *Id.* at 138.

141. *See id.* at 138–39.

142. *See id.* at 144.

143. *Id.* at 134–35, 145.

Eighth Amendment violations, Mosher's initial segregation and prolongation of that segregation was a "grossly disproportionate punishment" for the offense he committed.<sup>144</sup> The court thus granted positive injunctive relief, requiring the prisons to promulgate (1) rules ensuring that segregation cell facilities were adequate to safeguard the health of occupants and (2) rules governing (a) procedures of prison disciplinary hearings, (b) the conditions of psychiatric observation, and (c) procedures to determine whether an inmate should be confined to such a cell.<sup>145</sup> The State appealed.<sup>146</sup>

On this second appeal, the Second Circuit relied on an intervening en banc decision in order to reverse the district court's imposition that the State promulgate rules and regulations governing disciplinary hearings and procedures used in determining whether an inmate should be confined to a psychiatric observation cell.<sup>147</sup> Still careful to voice its admonition of "inhumane, degrading treatment," the court, in an opinion by Judge J. Edward Lumbard, deferred to the New York legislature, which had recently enacted and amended laws to respond to these conditions.<sup>148</sup> But while the court absolved the State from having to make new prison rules, it affirmed the district court's findings of unconstitutional conditions for each plaintiff.<sup>149</sup>

With respect to Wright, the court held that the Warden of Clinton could be personally liable because he knew of the inhumane conditions in the strip cells.<sup>150</sup> The court sympathized that "Wright should be properly compensated for the suffering he endured, and recovery should not be defeated by an attempt by the warden to shift responsibility to inferiors . . . when responsibility for permitting such conditions to exist was ultimately, in any event, squarely his."<sup>151</sup>

As for Mosher, while the court noted that an "inmate alleging disproportionate punishment will ordinarily have a heavy burden," it found that he successfully met that burden.<sup>152</sup> Specifically, the court found that placing Mosher in solitary confinement for five months for failing to sign a "safety sheet," out of the belief that doing so would constitute a waiver of his right to sue, constituted disproportionate punishment.<sup>153</sup> The purpose of the sheet was simply to assure that inmates were familiar with safety

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144. *See id.*

145. *See id.* at 141–42.

146. *See* Wright v. McMann, 460 F.2d 126 (2d Cir. 1972).

147. *See id.* at 130–31 (citing Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) (en banc)).

148. *Id.* at 131.

149. *See id.* at 129.

150. *See id.* at 135. The court was not concerned that imposing personal liability on the Warden would dissuade qualified candidates from seeking the position. *See id.* ("In the unlikely event that a prospective superintendent in fact turns down an offer for fear of personal liability, we think that the position is probably better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit.")

151. *Id.*

152. *Id.* at 132–33.

153. *Id.* at 133–34, 145.

regulations, and even the Warden testified that “segregation as punishment for refusal to sign the sheet was inappropriate.”<sup>154</sup>

*Wright* laid the groundwork for many subsequent prison conditions cases, which became particularly important in the wake of the Attica riots in September of 1971.<sup>155</sup> One commentator has described *Wright* as one of the first cases to reflect increasing skepticism “about the benevolence of government and the capacity of the experts to ‘rehabilitate,’ and . . . sensitiv[ity] to claims of fairness, equal treatment, and due process.”<sup>156</sup> Around the time that the Second Circuit handed down the decision, Judge Kaufman described it as part of a trend in judges “abandon[ing] the traditional judicial resistance to correcting any but the most egregious injustice in the prison system.”<sup>157</sup> With its emphasis on dignity and “civilized standards of humane decency,” the decision foresaw many of the themes and standards that the Supreme Court ultimately would adopt in its Eighth Amendment jurisprudence.<sup>158</sup> Even now, with its recognition that proportionality principles should apply to punishment meted out within prison, and not just punishment handed down by the sentencing judge, *Wright’s* principles play a significant role in ongoing challenges to the use of solitary confinement throughout the country.<sup>159</sup>

*Wright* is just one of many cases in which the Second Circuit has helped to develop prisoners’ rights jurisprudence. In 1970, the Second Circuit found that a prisoner stated a claim under the Eighth Amendment where he

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154. *Id.* at 133.

155. See Andrew B. Mamo, “*The Dignity and Justice That Is Due to Us by Right of Our Birth*”: *Violence and Rights in the 1971 Attica Riot*, 49 HARV. C.R.-C.L. L. REV. 531, 542 & n.57 (2014) (identifying *Wright* as one of the cases that reflected an increasingly popular view of seeing the Eighth Amendment to protect “against both direct abuse by prison officials and unconstitutionally punitive conditions of incarceration”).

156. JEFFREY B. MORRIS, FEDERAL JUSTICE IN THE SECOND CIRCUIT: A HISTORY OF THE UNITED STATES COURTS IN NEW YORK, CONNECTICUT & VERMONT, 1787 TO 1987, at 186 (1987). The Second Circuit relied on *Wright* in *LaReau v. MacDougall*, 473 F.2d 974 (2d Cir. 1972), a case decided shortly thereafter that was one of the first to examine the effects that solitary confinement may have on a person in prison. See *id.* In *LaReau*, the court held that the conditions constituted an Eighth Amendment violation because the isolation cell “seriously threatened the physical and mental soundness of its unfortunate occupant.” *Id.* at 978.

157. Irving R. Kaufman, Book Review, 86 HARV. L. REV. 637, 639 (1973).

158. *Wright*, 460 F.2d at 131 (quoting *Wright v. McMann*, 387 F.2d 519, 526 (2d Cir. 1967)).

159. Perhaps closest to home, Professor Reinert has been involved in litigation that resulted in widespread reforms to New York State’s use of solitary confinement and that was premised on the claim that disproportionate sentences to solitary confinement violate the Eighth Amendment. See *Peoples v. Annucci*, No. 11-CV-2694 (SAS), 2016 WL 1464613, at \*11 (S.D.N.Y. Apr. 14, 2016) (approving class action settlement implementing “a significant step toward improving the conditions of solitary confinement throughout New York State”); *Peoples v. Fischer*, 898 F. Supp. 2d 618, 621 (S.D.N.Y. 2012) (finding that the plaintiff stated a viable Eighth Amendment claim because his solitary sentence was “grossly disproportionate to the non-violent violation that he was found to have committed”); *Richardson v. Dep’t of Corr.*, No. 10 Civ. 6137 (SAS), 2011 WL 4091491, at \*7 (S.D.N.Y. Sept. 13, 2011) (finding an Eighth Amendment claim to be viable based on the “atypical and extreme sentence” to solitary).

was treated with “deliberate indifference,”<sup>160</sup> and six years later the Supreme Court adopted that standard when it held that prisoners have a constitutional right to minimally adequate health care.<sup>161</sup> The Second Circuit was one of the first courts of appeals to apply the “deliberate indifference” framework to claims that prison officials failed to protect prisoners from assault at the hands of other prisoners<sup>162</sup>—almost a decade before the Supreme Court did the same.<sup>163</sup> Although the Second Circuit was sometimes so far ahead of the curve that the Supreme Court expressed profound disagreement with the appellate court’s intervention in the workings of prisons and jails,<sup>164</sup> the following excerpt from one of the circuit’s many cases involving prison and jail conditions testifies to its leading role in protecting prisoners’ rights:

The conditions in our prisons are inextricably related to our system of criminal justice and what might otherwise be lawful detention becomes an unconstitutional restriction when those conditions become so dehumanizing as to constitute an additional hardship beyond the need for custody in violation of the detainees’ due process and equal protection rights. The failure in the past of legislators to take the proper correctional action to remedy these inhuman conditions for both detainees and convicted prisoners has eroded the historical reluctance of federal courts to interfere with the administration of penal institutions. Indeed this failure has required the courts to take action in the interests of fundamental decency and the protection of the constitutional rights of the inmates.<sup>165</sup>

In the Supreme Court’s recent reminder that prisoners “retain the essence of human dignity inherent in all persons,”<sup>166</sup> one can hear the echoes of the Second Circuit’s longstanding prisoners’ rights jurisprudence. The Second Circuit is one of the courts that has led the way in recognizing that a prison system that deprives people of that dignity “has no place in a civilized society,” prompting the judicial responsibility to provide a remedy, even if it requires intruding on the decision making of prison officials.<sup>167</sup>

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160. *Martinez v. Mancusi*, 443 F.2d 921, 924 (2d Cir. 1970).

161. *See Estelle v. Gamble*, 429 U.S. 97, 104 n.10 (1976) (citing *Martinez*, 443 F.2d at 921). The *Estelle* Court also quoted and relied upon a 1974 case from the Second Circuit that used and applied the “deliberate indifference” formulation. *Id.* at 104 n.10, 106 n.14 (citing *Williams v. Vincent*, 508 F.2d 541, 544 (2d Cir. 1974)).

162. *See Villante v. Dep’t of Corr.*, 786 F.2d 516, 523 (2d Cir. 1986).

163. *See Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

164. *See Bell v. Wolfish*, 441 U.S. 520, 562–63 (1979) (reversing and remanding a Second Circuit decision upholding pretrial detainees’ challenges to conditions in federal pretrial detention facility).

165. *Detainees of Brooklyn House of Det. for Men v. Malcolm*, 520 F.2d 392, 397 (2d Cir. 1975) (citations omitted).

166. *Brown v. Plata*, 563 U.S. 493, 510–11 (2011).

167. *See id.*

### III. THE SECOND CIRCUIT'S LEADING ROLE PROTECTING ACCESS TO PUBLIC BENEFITS

The Second Circuit has developed substantial jurisprudence around issues concerning public benefits, including public assistance, Social Security, and Supplemental Security Income (SSI). In particular, the court has emphasized the importance of fair process in determinations of eligibility. Fair process is essential to the administration of benefit programs for a number of reasons. First, it is a necessary means of ensuring that benefits reach those for whom such programs were intended. Erroneous denials of benefits have plagued the administration of these programs for decades, leading them to fall short of the protection and support they were created to provide.<sup>168</sup> Second, judicial review of agency procedure in determining eligibility is critical to treatment of benefits as legal entitlements, rather than simple gratuities provided by the state.<sup>169</sup> The proposition that applicants can sue to establish fair procedures is vital in bringing the rule of law to the administration of public benefits, ensuring that officials are required to adhere to articulated standards and processes. This also signals to beneficiaries that they are rights holders—rather than supplicants—who can thus hold their government accountable as to those rights.<sup>170</sup> Taken together, procedural rights have a major impact on the power relationship and dynamics between clients and street-level administrators. By stressing the importance of fair process, the Second Circuit has played a key role in shaping how we think about public benefit programs and how they operate today.

#### A. Public Assistance

The 1960s brought about a revolution in the way that public benefit programs are conceived and administered. The Second Circuit was at the forefront of this revolution, largely through its involvement in *Goldberg v. Kelly*,<sup>171</sup> one of the foundational cases in the field.<sup>172</sup> While *Goldberg* is often cited as the fount of the “new property” jurisprudence,<sup>173</sup> or the

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168. See *infra* note 218.

169. See *infra* note 173 and accompanying text.

170. See MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 90–97 (1993).

171. 397 U.S. 254 (1970), *aff'g* Kelly v. Wyman, 294 F. Supp. 893 (S.D.N.Y. 1968). The action in *Goldberg* was initiated in the Southern District of New York under the case name *Kelly v. Wyman*, and was decided by a three-judge panel that included Circuit Judge Wilfred Feinberg. See *Goldberg*, 397 U.S. at 255–56, 261. Although state officials were party defendants in the action filed in the Southern District of New York, only the Commissioner of Social Services of the City of New York appealed. See *id.* Therefore, when the case was appealed to the Supreme Court, the name changed to *Goldberg v. Kelly*. See *id.* As discussed in this Article, the Supreme Court's decision in *Goldberg* drew in significant part on the lower court's opinion in *Wyman*.

172. For a discussion of the history of *Goldberg*, see generally DAVIS, *supra* note 170. See also Symposium, *The Legacy of Goldberg v. Kelly: A Twenty Year Perspective*, 56 BROOK. L. REV. 729 (1990).

173. In establishing this proposition, the Court cited two seminal articles by Charles A. Reich that contend that benefits are more properly conceived of as property than as a

source of the elements of due process, the discussion here focuses on *Goldberg's* grounding in the conditions and strategies that surrounded public assistance administration in New York City in the late 1960s. *Goldberg* began with the filing of *Kelly v. Wyman*<sup>174</sup> in 1968 by attorneys at MFY Legal Services, the first law office established with the mission of fighting poverty, rather than the more general aim of simply providing representation to indigent clients.<sup>175</sup> From the start, *Goldberg* was intended to break new ground. On one level, the action involved a narrow issue concerning an individual's right to a hearing prior to the termination of public assistance benefits. On a much higher level, however, the case presented the sweeping legal questions of whether individuals could assert rights afforded under property law in the context of public assistance and what legal rights they had against state agencies.<sup>176</sup>

The objective of *Goldberg* was to replace a system of discretionary administration, where welfare caseworkers exercised extraordinary authority over clients, with a legal regime bounded by rules to limit and check caseworkers.<sup>177</sup> Prior to *Goldberg*, a caseworker could threaten a client with immediate termination of benefits for failure to comply with a directive, throwing the client's life into immediate turmoil.<sup>178</sup> While an appeal could lead to the restoration of benefits at some later date, the damage to the client already would have occurred.<sup>179</sup> Clients pushed back against caseworkers' decisions at their peril. But, after *Goldberg*, the client could appeal, thereby staying the termination until the decision received independent review.<sup>180</sup> If the termination lacked a sound basis, it would never go into effect.

*Goldberg* plaintiff John Kelly's situation illustrates the impact of this change in procedure.<sup>181</sup> Kelly's caseworker had directed him to move out of one single-room-occupancy (SRO) hotel and into another.<sup>182</sup> Given the caseworker's control over his benefits, Kelly complied with this request despite finding the second hotel to be filled with addicts and alcoholics.<sup>183</sup> Kelly, finding his living situation to be untenable, eventually moved out of the second hotel.<sup>184</sup> When the clerk at the second SRO reported to the

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gratuity. See *Goldberg*, 397 U.S. at 262 n.8 (citing Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965); Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

174. 294 F. Supp. 893 (S.D.N.Y. 1968).

175. See *id.* at 895; see also DAVIS, *supra* note 170, at 30–35 (discussing MFY Legal Services).

176. See DAVIS, *supra* note 170, at 90–97.

177. See *id.* As Professor Sylvia A. Law, one of the original lawyers in *Goldberg*, put it, “[n]ot only did poor people have no process in the 1960s, but, in a fundamental sense, they had no law.” Sylvia A. Law, *Some Reflections on Goldberg v. Kelly at Twenty Years*, 56 BROOK. L. REV. 805, 806 (1990).

178. See *Wyman*, 294 F. Supp. at 904–05.

179. See *Goldberg v. Kelly*, 397 U.S. 254, 263–64 (1970).

180. See *id.*

181. See Brief for Appellees app. at 76–77, *Goldberg*, 397 U.S. 254 (No. 62).

182. *Id.*

183. *Id.*

184. *Id.*



caseworker that Kelly had moved out, the caseworker terminated Kelly's benefits and then refused to meet with him.<sup>185</sup> As a result, Kelly was forced to live on the streets.<sup>186</sup>

Advocates for assistance recipients viewed the right to a pretermination hearing as key to their efforts to mobilize a grassroots movement of recipients.<sup>187</sup> At the time, the National Welfare Rights Organization was actively seeking to build a campaign through protests, sit-ins, and demonstrations, including sit-ins held at the office of Jack Goldberg, the Commissioner of Social Services for the City of New York.<sup>188</sup> Organizers focused on urging recipients to claim grants for which they were eligible and to seek hearings if denied.<sup>189</sup> Absent a right to a pretermination hearing, the potential for retaliation against a recipient was a major impediment.

While much attention has been paid to Justice William Brennan's landmark Supreme Court opinion in *Goldberg*, there has been less focus on the critical role played by Second Circuit Judge Wilfred Feinberg's district court opinion. To clarify, *Goldberg* was assigned to a three-judge district court panel,<sup>190</sup> presided over by Judge Feinberg, who had been elevated to the circuit court only a few years before. The State of New York responded to the lawsuit by issuing regulations requiring notice and some form of pretermination process.<sup>191</sup> The state regulations offered localities two options. Option (a) offered recipients the opportunity to appear before an official, superior to the one who made the decision, and present oral or written evidence with the aid of an attorney or other representative.<sup>192</sup> Option (b) provided recipients only the opportunity to submit written statements demonstrating continued eligibility.<sup>193</sup> New York City was the only locality in the state to elect option (b).<sup>194</sup> Thus, the thrust of the three-judge panel's analysis—and of the Supreme Court's analysis—focused on the adequacy of the process provided, rather than on the right to process as a threshold matter.<sup>195</sup>

Judge Feinberg's opinion set forth a framework that has become famous in the form of Justice Brennan's opinion in *Goldberg*. Judge Feinberg's opinion detailed the impact of the destitution that the plaintiffs faced, to which Justice Brennan only alluded.<sup>196</sup> For example, Judge Feinberg's

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185. *Id.*

186. *Id.*

187. See DAVIS, *supra* note 170, at 43.

188. See *id.* at 52.

189. See *id.* at 49–50.

190. See 28 U.S.C. § 2281 (2012); *Kelly v. Wyman*, 294 F. Supp. 893, 895 (S.D.N.Y. 1968).

191. See *Wyman*, 294 F. Supp. at 896 & n.6.

192. *Id.* at 896–97; see also N.Y. COMP. CODES R. & REGS. tit. 18, § 351.26(a) (2011).

193. See *Wyman*, 294 F. Supp. at 898; see also N.Y. COMP. CODES R. & REGS. tit. 18, § 351.26(b).

194. See *Wyman*, 294 F. Supp. at 897–98.

195. See *id.* at 901; see also *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970).

196. Compare *Wyman*, 294 F. Supp. at 899, with *Goldberg*, 397 U.S. at 264 (noting, on a general level, that “the crucial factor in this context . . . is that termination of aid pending

opinion discussed the allegations of proposed intervenor Angela Velez, whose benefits were terminated because her husband allegedly visited her home every night.<sup>197</sup> By the time of the ruling, the State had provided Velez with a posttermination hearing concluding that the allegations were not valid.<sup>198</sup> In the opinion, Judge Feinberg stressed that during the four months between the termination of benefits and the hearing decision, Ms. Velez and her three children had been evicted and forced to live in a single room in her sister's apartment—who herself had nine children.<sup>199</sup> Judge Feinberg's opinion also described plaintiff Esther Lett's plight, whose benefits were terminated on the ground that she had concealed employment.<sup>200</sup> Lett and her three children were forced to survive on handouts from neighbors and became ill after eating spoiled food.<sup>201</sup> Lett fainted from hunger while seeking emergency aid at a welfare center.<sup>202</sup>

These facts set a persuasive backdrop for Judge Feinberg's strong opinion, which stressed that "to cut off a welfare recipient in the face of this kind of 'brutal need' without a prior hearing of some sort is unconscionable."<sup>203</sup> Judge Feinberg wrote, "there is one overpowering fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets."<sup>204</sup> Against this strong imperative, Judge Feinberg weighed the costs of providing pretermination procedures and of paying out benefits in the interim before a hearing.<sup>205</sup> However, he noted, these costs were substantially within the control of the city and state, since they controlled the timing of the hearings.<sup>206</sup>

Judge Feinberg also found that the pretermination process provided by the City of New York (i.e., option (b)) did not provide an effective opportunity to be heard.<sup>207</sup> Rejecting the sufficiency of a hearing through written submissions, he wrote that "[n]ot only is the right to a personal appearance ordinarily implicit in the constitutional concept of a fair hearing, but the reality of the status of many welfare recipients makes the invitation to submit their cases in writing cruelly ironic."<sup>208</sup> He cited the vagueness of the charges, the lack of education of many welfare recipients, and the fact that eligibility can often be determined by a simple interchange of questions

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resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits").

197. *See Wyman*, 294 F. Supp. at 899.

198. *See id.*

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.* at 900. Her request for emergency aid was denied. *See id.*

203. *Id.* (quoting Christopher May, Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 YALE L.J. 1234, 1244 (1967) (arguing the case for pretermination hearings in the welfare context)).

204. *Id.* at 899.

205. *See id.* at 900–01.

206. *Id.* at 900.

207. *See id.* at 901.

208. *Id.* at 903.

and answers as necessitating an opportunity for an in-person oral hearing.<sup>209</sup>

Justice Brennan's opinion for the Supreme Court provides a significantly broader and more sweeping discussion of the basics of a fair hearing under the Due Process Clause than did Judge Feinberg's opinion.<sup>210</sup> Judge Henry J. Friendly, for example, critiqued the Court for the breadth of its ruling.<sup>211</sup> Nonetheless, Judge Feinberg's decision contains the essence of what was so powerful about *Goldberg*—its recognition that the realities of destitution are not only relevant but are of paramount importance in determining the scope of the process that is due.<sup>212</sup> In this sense, *Goldberg* bursts through the bounds of formalism by looking to the situation on the ground and to people's lives as they live them. The vast potential of this approach was sharply curtailed in later cases such as *Mathews v. Eldridge*,<sup>213</sup> which went to the opposite extreme of looking to legal rules and categories to determine the extent of due process.<sup>214</sup> Years later, Justice Brennan reflected back on *Goldberg*, seeing it as a crucial statement about the importance of passion and empathy in the law.<sup>215</sup>

One of the key ways in which *Goldberg* recognizes the importance of human interaction to fair adjudication is through its emphasis on giving recipients the opportunity to appear in person before the decision maker and to engage in direct, oral exchange.<sup>216</sup> This emphasis on the oral hearing reflects a longstanding Second Circuit value: while many courts of appeals have greatly curtailed the practice of oral argument, in the Second Circuit oral argument is the norm rather than the exception.<sup>217</sup>

Although the efforts to organize welfare recipients into a social movement did not have long-term success, the pretermination hearing mandated by *Goldberg* has proven to be an important safeguard for recipients. Nevertheless, the accuracy of terminations of benefits remains a major issue in public assistance.<sup>218</sup> The form that the pretermination

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209. *See id.* at 903–04.

210. *See generally* *Goldberg v. Kelly*, 397 U.S. 254 (1970).

211. *See* Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1299–304 (1975) (discussing the various issues posed by the wide reach of Justice Brennan's opinion in *Goldberg*).

212. *See Wyman*, 294 F. Supp. at 899.

213. 424 U.S. 319 (1976).

214. *See id.* at 348–49. *Mathews* looked to whether disability benefit recipients were required to be poor rather than whether they were actually poor, either as a group or individually. *See id.* at 336–39.

215. *See* William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 10 CARDOZO L. REV. 3, 19–23 (1988).

216. *See* *Goldberg v. Kelly*, 397 U.S. 254, 267–69 (1970).

217. *See* JENNIFER BARNES BOWIE ET AL., THE VIEW FROM THE BENCH AND CHAMBERS: EXAMINING JUDICIAL PROCESS AND DECISION MAKING ON THE U.S. COURTS OF APPEALS 35–37 (2014) (reviewing the frequency with which oral argument is denied in the courts of appeals and stating that judges on the Second Circuit have asserted strong preferences for oral argument).

218. *See* Stephen Loffredo & Dan Friedman, *Gideon Meets Goldberg: The Case for a Qualified Right to Counsel in Welfare Hearings*, 25 Touro L. REV. 276, 277 (2009) (noting that, in New York State alone, tens of thousands of poor families challenge terminations on

hearing takes often leaves much to be desired because the vast majority of claimants appear pro se,<sup>219</sup> are left to fight terminations in a hearing that often spans just seven minutes, and usually do not have the chance to review a copy of the agency's evidence beforehand.<sup>220</sup>

The emphasis on work requirements in welfare reform also has made the sanctioning of recipients a major feature of public assistance administration, placing recipients at greater risk of erroneous determinations in their cases.<sup>221</sup> Additionally, welfare recipients are vulnerable to the phenomenon of churning, which is the process of cycling eligible welfare recipients on and off benefits within a short period of time in an effort to reduce welfare rolls through burdensome or heightened eligibility requirements.<sup>222</sup> Against this backdrop, *Goldberg* is more critical than ever and looms larger than ever as a truly remarkable jurisprudential achievement.

### B. Disability Benefits

While *Goldberg* is a case in which the Second Circuit made a key contribution to the realm of fair process in public assistance programs in a single decision, the court has had a sustained impact on the system for the administration of disability benefits through the Social Security Act (“the

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an annual basis). In 2007, claimants prevailed in 70 percent of the issues actually adjudicated at welfare hearings in New York City. *Id.* at 317 n.146; *see also* LORI MCNEIL, URBAN JUSTICE CTR., CASE CLOSED: AN EXAMINATION OF EXCLUSION IN NEW YORK CITY'S PUBLIC ASSISTANCE PROGRAMS 13 (2011) (finding that “[p]ublic assistance in NYC suffers from faulty practices and ineffective procedures, severely affecting the lives of applicants and recipients”).

219. *See* Loffredo & Friedman, *supra* note 218, at 284–85. In New York State, only 1 to 2 percent of claimants are represented by trained advocates while the opposing party, the welfare department, continues to refine its experience in this setting as a repeat player. *See id.* at 278; *see also* Vicki Lens, *In the Fair Hearing Room: Resistance and Confrontation in the Welfare Bureaucracy*, 32 L. & SOC. INQUIRY 309, 329 (2007) (concluding that “the procedures spawned by *Kelly* are often an ill-fitting vessel for many welfare recipients”).

220. *See* Loffredo & Friedman, *supra* note 218, at 287–88.

221. *See* Vicki Lens, *Examining the Administration of Work Sanctions on the Frontlines of the Welfare System*, 87 SOC. SCI. Q. 573, 573 (2006) (finding that “[t]ransactions between clients and workers were often routinized and mechanical, resulting in improper and arbitrary sanctions that were reversed by the hearing officers nearly 50 percent of the time”). In addition, the Commissioner of New York City's Human Resources Administration has reported that approximately one-third of adult public assistance recipients subject to work requirements are under sanction at any given time and that there is a connection between sanctions and applications for emergency shelter in New York City's homeless shelter system. *See* Steven Banks, Comm'r of the N.Y.C. Human Res. Admin./Dep't Soc. Servs., Testimony at the 2015 Executive Budget Hearing: Joint Hearing of the New York City Council Finance and General Welfare Committees (May 19, 2014).

222. *See* Susan D. Bennett, “No Relief but upon the Terms of Coming into the House”—Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System, 104 YALE L.J. 2157, 2180–81 (1995) (defining churning as “the rapid administrative closure of welfare cases, usually as a result of the recipient's inability to comply with a request for verification of eligibility or failure to arrive at a scheduled appointment with the intake caseworker or to meet some other deadline”); *see also* Anna Lou Dehavenon, *Charles Dickens Meets Franz Kafka: The Maladministration of New York City's Public Assistance Programs*, 17 N.Y.U. REV. L. & SOC. CHANGE 231 (1990) (discussing churning and the negative effects it imposes on welfare recipients); David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 241–50 (1998) (same).

Act”) by issuing dozens of decisions over the years.<sup>223</sup> In *Kerner v. Flemming*,<sup>224</sup> the Second Circuit established a framework for reviewing denials of benefits that has set the tone for judicial review and has developed into a national norm. Twenty years later, the court built on this framework to play a key role in what amounted to a judicial rebellion against President Ronald Reagan’s rollback of disability benefit programs.<sup>225</sup> This confrontation between the executive and judicial branches is notable because it took place on a national scale—involving thousands of cases—and was largely shaped by the courts of appeals rather than the Supreme Court.<sup>226</sup> And no court of appeals was more vigorous in upholding the rights of claimants than the Second Circuit.

The disability benefit programs of the Act were added in the 1950s, decades after its initial passage during the New Deal era in 1935.<sup>227</sup> The Disability Insurance Benefit Program<sup>228</sup> was added in 1956 and the SSI program<sup>229</sup> was added approximately twenty years later. *Kerner*, decided in 1960, was one of the first circuit decisions on an appeal from a denial of benefits claim under the Act. Judge Henry Friendly’s opinion was widely influential in setting a tone for how courts would scrutinize agency action under the new program.

In *Kerner*, the Secretary of Health, Education and Welfare had concluded that the plaintiff, Philip Kerner, could not return to his previous work as a furniture upholsterer due to a heart condition but, nevertheless, had denied him benefits on the ground that the record did not establish that Kerner was precluded from performing light-duty or sedentary work.<sup>230</sup> Judge Friendly quickly established that, although the court’s scope of review is limited under the Act, judicial review could be, and would be, quite rigorous.<sup>231</sup> He opened the analysis by referring to the Secretary’s regulations as written in “characteristic Janus-faced fashion” and went on to describe the Secretary’s treatment of the evidence as “exceedingly unsatisfactory.”<sup>232</sup>

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223. See, e.g., *Hidalgo v. Bowen*, 822 F.2d 294 (2d Cir. 1987); *De Leon v. Sec’y of Health & Human Servs.*, 734 F.2d 930 (2d Cir. 1984); *Carroll v. Sec’y of Health & Human Servs.*, 705 F.2d 638 (2d Cir. 1983); *Bastien v. Califano*, 572 F.2d 908 (2d Cir. 1978); *Gold v. Sec’y of Health, Educ. & Welfare*, 463 F.2d 38 (2d Cir. 1972).

224. 283 F.2d 916 (2d Cir. 1960).

225. See *infra* note 258.

226. The Supreme Court did weigh in on a number of occasions, but often sided with the Social Security Administration (SSA) rather than with the claimants. For example, while *Sullivan v. Zebley*, 493 U.S. 521 (1990), and *Bowen v. City of New York*, 476 U.S. 467 (1986), were major victories for claimants at the Supreme Court, *Bowen v. Yuckert*, 482 U.S. 137 (1987), *Heckler v. Day*, 467 U.S. 104 (1984), and *Heckler v. Campbell*, 461 U.S. 458 (1983), were decided in favor of the government.

227. See Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 386 (1996).

228. 42 U.S.C. § 423 (2012).

229. *Id.* § 1381.

230. See *Kerner v. Flemming*, 283 F.2d 916, 918 (2d Cir. 1960).

231. See *id.* at 922.

232. *Id.* at 919. Judge Friendly was referring to the fact that the regulations provided an example of a disabling impairment while at the same time saying that the existence of such an impairment or an impairment of great severity “will not in and of itself always permit a finding that an individual is under a disability as defined in the law.” *Id.* (quoting 20 C.F.R.

Judge Friendly critiqued the manner in which the Secretary had assessed Kerner's limitations, ignoring Kerner's own testimony and the reports of numerous physicians.<sup>233</sup> Judge Friendly also focused on the Secretary's treatment of the question of whether, given his limitations, Kerner could actually work: "[m]ere theoretical ability to engage in substantial gainful activity is not enough if no reasonable opportunity for this is available."<sup>234</sup>

The Secretary had contended that it was Kerner's burden to establish that he was incapable of substantial gainful activity.<sup>235</sup> The court's response to the government's argument has shaped Social Security law ever since: where a claimant has "raised a serious question and the evidence affords no sufficient basis for the Secretary's negative answer," the court should remand to the agency for additional evidence so that it can make specific findings on what the claimant can and cannot do and whether, in light of these limitations, work exists that the claimant can perform.<sup>236</sup> Thus, the opinion makes clear that given Kerner's initial showing, the Secretary could not rest simply on a generic argument about the burden of proof and, in particular, that the Secretary has the expertise to "furnish information as to the employment opportunities . . . or the lack of them, for persons of plaintiff's skills and limitations."<sup>237</sup> Contrasting Social Security disability benefits with Veterans Administration benefits, the court emphasized that the fact that Congress had accorded judicial review to Social Security disability claimants means that the court had an obligation to ensure that the Secretary has reached a rational determination.<sup>238</sup>

*Kerner* had a number of major impacts. First, the decision laid the groundwork for the now well-accepted doctrine that when a claimant establishes an inability to return to past work due to a medical impairment, the agency bears the burden of demonstrating that there is other work in the economy for which the claimant is capable and qualified to perform.<sup>239</sup> *Kerner* thus relieves plaintiffs of the insurmountable burden of establishing the negative: that there is no work that he or she can perform. If the agency believes that a significantly impaired claimant can work, it must justify the basis for its conclusion. *Kerner* led the Social Security Administration (SSA) to adopt a regular practice in the 1960s of introducing the testimony

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§ 404.1501(d) (1959)). The term "Janus-faced" is one the Second Circuit would reuse when referring to the SSA. See *Hidalgo v. Bowen*, 822 F.2d 294, 299 (2d Cir. 1987). For a discussion of the ambiguities in the SSA's initial implementation of the disability insurance program, see Diller, *supra* note 227.

233. See *Kerner*, 283 F.2d at 921.

234. *Id.* (citing *Aaron v. Fleming*, 168 F. Supp. 291, 295 (M.D. Ala. 1958)).

235. See *id.*

236. *Id.* at 922.

237. *Id.*; see also *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

238. See *Kerner*, 283 F.2d at 922.

239. See *id.* *Kerner* also led to substantial confusion about what vocational and employment factors the SSA should consider in determining disability. See Diller, *supra* note 227. This confusion was resolved by Congress in the 1967 Amendments, which made clear that a claimant's age, education, and work experience would be considered, but the availability of particular job openings would not be considered. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821 (1968).

of a vocational expert in each hearing to meet this burden by addressing the question of whether, given a claimant's limitations and the inability to perform past work, there is other work in the economy available for the plaintiff.<sup>240</sup> In the late 1970s, the SSA replaced this system with a medical-vocational matrix (known as "the grid"), which is treated as a finding of fact in each claim where the terms of the matrix are met.<sup>241</sup>

Second, *Kerner* established that courts would give close consideration to the claimant's testimony about the impact of his or her impairments and the views of medical sources, including those of the claimant's treating physician.<sup>242</sup> The court's consideration of different views of medical evidence blossomed into an entire jurisprudence on the weight to be accorded to different medical sources and has played a major role in transforming judicial review from what could have been a toothless exercise into a potent safeguard for claimants.

In *Gold v. Secretary of Health, Education & Welfare*,<sup>243</sup> the court again took the SSA to task in reviewing its determination that claimant Minnie Gold had failed to establish disability by the date on which her Social Security Disability Insurance (SSDI) expired.<sup>244</sup> Judge J. Joseph Smith reviewed the numerous reports of the physicians who had treated Gold that had been discounted by the hearing examiner and concluded that "[t]he expert opinions of plaintiff's treating physicians as to plaintiff's disability . . . are binding upon the referee if not controverted by substantial evidence to the contrary."<sup>245</sup> This is the first full statement of what would later be referred to as the Second Circuit's "treating physician rule." The language was a quote from a district court decision in Indiana (which had cited *Kerner*),<sup>246</sup> and its adoption by the Second Circuit would have major consequences. Judge Smith went on to critique the hearing examiner for his harsh treatment of Gold, noting that she was "handicapped by lack of counsel, ill health, and inability to speak English," which, in the court's view, called for greater care and solicitude.<sup>247</sup> Instead, the court described the examiner as showing "intolerance of her confusion and inability to digest the written exhibits with which she was faced shortly before the hearing began."<sup>248</sup> In view of the strength of the treating physicians'

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240. See *Heckler v. Campbell*, 461 U.S. 458, 461 (1983).

241. See *id.* at 461–62.

242. See *Kerner*, 283 F.2d at 920–21.

243. 463 F.2d 38 (2d Cir. 1972).

244. See *id.* at 40. Under the Act, a claimant must meet the disability standard within a specific time period of ceasing work. 42 U.S.C. § 423 (2012). Gold did not apply for benefits until many years later and was required to establish disability as of the date she was last insured. *Gold*, 463 F.2d at 40–41.

245. *Gold*, 463 F.2d at 42 (quoting *Walker v. Gardner*, 266 F. Supp. 998, 1002 (S.D. Ind. 1967)).

246. See *Walker*, 266 F. Supp. at 1002. The *Walker* Court also cited *Teeter v. Fleming*, 270 F.2d 871 (7th Cir. 1959), a Seventh Circuit decision which stated that treating physician opinions, while admissible, are not binding per se, but because the opinions were not contradicted in that case, they were controlling. See *id.* at 871.

247. *Gold*, 463 F.2d at 43.

248. *Id.*

opinions and what had transpired at the hearing, the court remanded for payment of benefits rather than the adduction of new evidence—an important extension of its analysis in *Kerner* in terms of the weight it placed on the claimant’s treating physician’s opinion.<sup>249</sup>

In the years that followed, the Second Circuit would return to the treating physician rule repeatedly as a central lens through which to analyze disability benefit appeals. It came to the fore most significantly in dealing with the Reagan administration’s major roll back in the disability benefit programs in the early 1980s. In 1981, the new administration targeted both SSDI and SSI as major sources of cost savings and viewed them as the poster children for the expansion of the welfare state that it was determined to halt.<sup>250</sup> This major change in course led to the termination of benefits of hundreds of thousands of recipients and a sharp drop in the allowance rate on new claims.<sup>251</sup> It became a significant political issue, generating editorials around the country, and ultimately congressional action. The administration tackled the disability benefit programs on two fronts. First, it launched a broad program of reviewing the claims of individuals who were already receiving benefits and terminating the benefits of large numbers of recipients.<sup>252</sup> Second, the administration toughened the standards for initial applications, thereby substantially reducing allowance rates.<sup>253</sup> In reviewing the status of ongoing recipients, the administration accorded no initial presumption of disability.<sup>254</sup> This meant that the fact that a recipient had previously been determined to be eligible was given no weight in the review.<sup>255</sup> To the contrary, the new, more stringent standards were applied, resulting in findings that 495,000 recipients were “no longer disabled” despite the fact that there had been no finding of medical improvement.<sup>256</sup>

This retrenchment flooded the courts with appeals from disability benefit denials and terminations.<sup>257</sup> Many judges recoiled at the harsh and

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249. *See id.* at 44.

250. *See generally* MARTHA DERTHICK, *AGENCY UNDER STRESS: THE SOCIAL SECURITY ADMINISTRATION IN AMERICAN GOVERNMENT* (1990); JENNIFER L. ERKULWATER, *DISABILITY RIGHTS AND THE AMERICAN SOCIAL SAFETY NET* (2006); SUSAN GLUCK MEZEY, *NO LONGER DISABLED: THE FEDERAL COURTS AND THE POLITICS OF SOCIAL SECURITY DISABILITY* (1988).

251. The tightening of disability standards began under the Carter administration based on a recognition that the disability benefit programs were growing rapidly. *See* ERKULWATER, *supra* note 250, at 94–105. As Martha Derthick has put it, what was contemplated in 1980 as a process of review of recipients’ eligibility was implemented in 1981 as a purge. *See* DERTHICK, *supra* note 250, at 36–37.

252. *See* Beth S. Glassman, *Terminating Social Security Disability Benefits: Another Burden for the Disabled?*, 12 *FORDHAM URB. L.J.* 195, 195–96 (1983).

253. *See* ERKULWATER, *supra* note 250, at 108–09 (noting a process of gradual tightening of eligibility standards).

254. *See* DERTHICK, *supra* note 250, at 5.

255. *See id.*

256. *See id.*

257. *See* ERKULWATER, *supra* note 250, at 124–26; L. Stuart Ditzen, *Denied Disability Benefits, Many Turn to the Courts*, *PHILA. INQUIRER* (Feb. 1, 1986), [http://articles.philly.com/1986-02-01/news/26089139\\_1\\_disability-benefits-eligibility-reviews-federal-courts](http://articles.philly.com/1986-02-01/news/26089139_1_disability-benefits-eligibility-reviews-federal-courts) [<https://perma.cc/M2BV-A2LV>].



draconian results that flowed from the initiative,<sup>258</sup> particularly from the SSA's announced policy of nonacquiescence—its refusal to adopt rules announced by the courts of appeals at the administrative level—in adjudicating cases other than the specific claim before the court that articulated the rule.<sup>259</sup> The nonacquiescence policy limited the impact of judicial review to the individual claims appealed to the judicial level, denying other claimants the benefit of judicially articulated standards. It was a red flag to the courts as it threatened to overwhelm them with filings.

The Second Circuit responded to this crisis in a number of ways. Like other courts, it confronted the termination issue by concluding that in reviewing eligibility for ongoing benefits, the SSA was required to apply a “medical improvement standard,” meaning that the agency’s prior finding of disability established a presumption of continued eligibility for benefits that could be overcome only by a showing that the recipient had “improved.”<sup>260</sup> In dealing with denials of claims on new applications, the Second Circuit issued dozens of decisions in individual appeals upholding claimants’ rights to fair procedures in the administrative process.<sup>261</sup> These decisions created a substantial jurisprudence that amounted to a common law of substantial evidence review. The principal analytical tool that the circuit relied on was the treating physician rule announced in *Gold* and rooted in the *Kerner* decision.<sup>262</sup> The Second Circuit consistently upheld the rights of claimants to bring class action litigation seeking injunctive relief to halt unlawful agency procedures.<sup>263</sup> The individual cases

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258. For example, District Judge Lee Sarokin referred to the SSA as “a heartless and indifferent bureaucratic monster destroying the lives of disabled citizens.” *Merli v. Heckler*, 600 F. Supp. 249, 250 (D.N.J. 1984); see also *City of New York v. Heckler*, 578 F. Supp. 1109 (E.D.N.Y. 1984); Alfonso A. Narvaez, *Judge Criticizes U.S. Agency on Denial of Benefits*, N.Y. TIMES (June 8, 1984), <http://www.nytimes.com/1984/06/08/nyregion/judge-criticizes-us-agency-on-denial-of-benefits.html> [<https://perma.cc/6V86-XC38>]; Robert Pear, *U.S. Flouts Courts in Determination of Benefit Claims*, N.Y. TIMES (May 13, 1984), <http://www.nytimes.com/1984/05/13/us/us-flouts-courts-in-determination-of-benefit-claims.html> (recounting judicial criticisms of the SSA) [<https://perma.cc/N36L-YHR5>].

259. See William Buzbee, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 582 (1985); Carolyn A. Kubitschek, *Social Security Administration Nonacquiescence: The Need for Legislative Curbs on Agency Discretion*, 50 U. PITT. L. REV. 399 (1989).

260. *De Leon v. Sec’y of Health & Human Servs.*, 734 F.2d 930, 936–37 (2d Cir. 1984). As the court pointed out in *De Leon*, this was in accord with rulings in eight other circuits. See *id.* Congress adopted this standard in the Disability Benefits Reform Act of 1984. See 42 U.S.C. § 423(f) (2012).

261. See *infra* notes 268–70 and accompanying text.

262. See *Gold v. Sec’y of Health, Educ. & Welfare*, 463 F.2d 38, 42 (2d Cir. 1972) (citing *Kerner v. Flemming*, 283 F.2d 916 (2d Cir. 1960)).

263. See *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989), *aff’g* *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988); *Dixon v. Heckler*, 785 F.2d 1102 (2d Cir. 1986), *aff’g* 589 F. Supp. 1494 (S.D.N.Y. 1984), *vacated sub nom.* *Bowen v. Dixon*, 482 U.S. 922 (1987); *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984), *aff’g* 578 F. Supp. 1109 (E.D.N.Y. 1984), *aff’d sub nom.* *Bowen v. City of New York*, 476 U.S. 467 (1986). In *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984), the Second Circuit upheld Judge Jack Weinstein’s decision that the SSA could not rely on the statute of limitations because its policies were clandestine and could not reasonably be discovered by claimants. See *id.* at 738. This opened the door to sweeping class-wide relief that required the SSA to reopen

established standards that could be enforced through class action litigation. Class action litigation, in turn, protected the courts from being overwhelmed with individual cases repetitively raising the same issues. Finally, these two responses came together in two class actions: *Stieberger v. Bowen*,<sup>264</sup> (*Stieberger II*) challenging the agency's policy of nonacquiescence in circuit court law,<sup>265</sup> and *Schisler v. Heckler*<sup>266</sup> (*Schisler I*), challenging the agency's refusal to instruct its adjudicators in the Second Circuit's treating physician rule in particular.<sup>267</sup>

In reviewing individual appeals, the court repeatedly and emphatically stressed the importance of affording deference to claimants' treating physicians and expressed heightened concerns about the agency's apparent disregard for the principle. For example, in *Hidalgo v. Bowen*,<sup>268</sup> Judge Richard Cardamone reviewed the Second Circuit's jurisprudence on the treating physician rule, concluding that, in the fifteen years since *Gold*, the court had seen the rule "consistently misapplied" by the SSA and that the number of published decisions on the subject overturning SSA determinations was "legion."<sup>269</sup> The court identified twenty-three cases and emphasized "how often the rule has been expounded," and the court also indicated "some sense of frustration at how little, if any, impact our decisions have had on the Secretary and his administrative fact-finders."<sup>270</sup> The Second Circuit's jurisprudence in individual cases sent a clear message of skepticism and distrust of the SSA's administrative processes.

Given the SSA's apparent pattern of lack of compliance with the treating physician rule, advocates for claimants turned their attention to seeking class-wide injunctive remedies. In *Schisler I*, a class action on the standard to be applied in continuing disability eligibility reviews, the circuit confronted the SSA's lawyers directly on this subject.<sup>271</sup> At oral argument, the court attempted to extract a direct answer to the question of how the agency dealt with treating physician opinions at the administrative level.<sup>272</sup> Counsel reassured the court that the agency's policy was "the same" as the Second Circuit's rule, even if not articulated clearly.<sup>273</sup> Despite the considerable evidence that, as Judge Ralph Winter put it, the "SSA does not

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thousands of denied claims. The Supreme Court ultimately upheld this ruling in a unanimous decision. *See Bowen*, 476 U.S. at 478.

264. 801 F.2d 29 (2d Cir. 1986).

265. *See id.* at 38.

266. 787 F.2d 76 (2d Cir. 1984) (finding for the plaintiffs, a class of individuals whose benefits were terminated during a four-year period, and directing the SSA to draft a rule codifying the Second Circuit's treating physician rule to be binding on all SSA factfinders); *see also* *Schisler v. Bowen (Schisler II)*, 851 F.2d 43 (2d Cir. 1988) (upholding the court-modified Social Security Ruling policy, which codified the Second Circuit's treating physician rule); *Schisler v. Sullivan (Schisler III)*, 3 F.3d 563 (2d Cir. 1993) (affirming the validity of the SSA's own regulations regarding the treating physician rule).

267. *See Schisler I*, 787 F.2d at 84.

268. 822 F.2d 294 (2d Cir. 1987).

269. *Id.* at 297.

270. *Id.*

271. *See Schisler I*, 787 F.2d at 83–84.

272. *See id.*

273. *Id.*

march to that particular drummer,” the court took the representations of counsel “at face value,” given counsel’s obligation of candor as an officer of the court.<sup>274</sup> However, because of the record of reversals, the court directed that the SSA “state in relevant publications . . . that adjudicators at all levels, state and federal, are to apply the treating physician rule of this circuit.”<sup>275</sup> Recognizing that this directive went far beyond the scope of the *Schisler I* class, the court noted, the “SSA can hardly object to this result in light of its representations to us as to what its policy is.”<sup>276</sup> It continued, “all we order here is that [the] SSA tell its adjudicators what it has told us about the treating physician rule.”<sup>277</sup>

Responding to the Second Circuit’s order directing the SSA to produce a publication for its adjudicators,<sup>278</sup> the SSA submitted a twelve-page draft Social Security Ruling on treating physician evidence that the district court rejected as “fail[ing] to reflect, in significant respects, the treating physician rule recognized and effective here and to be in place nationwide.”<sup>279</sup> The court found the draft to be “rambling and ambiguous” and noted “[t]here lurks in its lengthy and discursive texts bases for not applying the treating physician rule.”<sup>280</sup> District Judge John Elfvin took out his red pen and edited the document himself to track Second Circuit decisions more closely. The Second Circuit affirmed on appeal, explaining that the purpose of the remand was to “mitigat[e] what had become an abuse of judicial processes resulting from [the] SSA’s adjudicators’ ignorance of the treating physician rule.”<sup>281</sup> Accordingly, the court did not rule on the legality of the substance of the Secretary’s proposed instruction but held that the instruction was not the appropriate vehicle for developing or announcing new policy.<sup>282</sup> Judge Winter wrote, “[h]aving taken the position that he has adopted the treating physician rule of this circuit, the Secretary is thereby bound to offer a formulation of that rule based on our caselaw.”<sup>283</sup>

The Second Circuit’s handling of the treating physician issue in *Schisler I* was certainly extraordinary. It hinged system-wide injunctive relief on counsel’s statements about agency policy at oral argument, rather than on analysis of the governing law and regulations, and created obligations for how evidence is to be weighed at the administrative level based on the court’s power of substantial evidence review.<sup>284</sup> Moreover, the relief extended beyond the scope of the class certified in the case. This unusual treatment reflected the fact that the system was in crisis—the agency’s

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274. *Id.*

275. *Id.* at 84.

276. *Id.*

277. *Id.*

278. *See id.*

279. *Schisler v. Bowen*, No. CIV-80-572E, 1987 WL 15330, at \*1 (W.D.N.Y. Aug. 5, 1987), *aff’d in part, rev’d in part*, 851 F.2d 43 (2d Cir. 1988).

280. *Id.* at \*1 n.3.

281. *Schisler II*, 851 F.2d at 45.

282. *See id.*

283. *Id.*

284. *See Schisler v. Heckler (Schisler I)*, 787 F.2d 76, 85 (2d Cir. 1986).

sharp change in course flooded the courts with individual cases, many of which presented compelling cases of hardship and threatened to leave the federal courts, as District Judge Morris E. Lasker put it, like “Cuchulain battling the invulnerable tide,” futilely trying to check the SSA one case at a time.<sup>285</sup>

The Second Circuit’s remarkable response also reflected the difficulty the courts faced in fixing the problem. While there were specific SSA policy statements that could be and were subject to challenge, much of the crisis resulted from a shift in the adjudicative culture at the agency, as its leadership pressured adjudicators to tighten standards.<sup>286</sup> Indeed, the SSA’s own administrative law judges rose up in protest and sued the agency for exerting undue pressure on their decisional processes.<sup>287</sup> The problem is compounded by the SSA’s passive-aggressive approach of refusing to adopt circuit court standards in its administrative adjudications, coupled with its failure to seek review for those standards by the Supreme Court. While the Second Circuit’s approach in the *Schisler* decisions was therefore unorthodox, it represented a creative response to an unfolding disaster by a frustrated court.

Like *Schisler*, *Stieberger v. Heckler*<sup>288</sup> (*Stieberger I*) represented another attempt to close the gap between the Second Circuit’s approach to disability benefit eligibility and the Reagan administration’s practices.<sup>289</sup> This class action challenged the SSA’s practice of nonacquiescence in decisions of the Second Circuit generally and arose, in part, from public assertions by Justice Department and SSA officials that agencies are not bound to follow the holdings of the courts of appeals beyond implementing specific orders.<sup>290</sup> Under this view, when a circuit court reversed the SSA, the individual claimant received the benefit of the ruling, but the court’s reasoning would not be incorporated into the process of deciding similar claims. The fascinating constitutional questions raised by administrative nonacquiescence lie beyond the scope of this Article,<sup>291</sup> but the issue of nonacquiescence is an important part of this story.

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285. *Dixon v. Heckler*, 589 F. Supp. 1494, 1510 (S.D.N.Y. 1984), *aff’d*, 785 F.2d 1102 (2d Cir. 1986), *vacated sub nom.* *Bowen v. Dixon*, 482 U.S. 922 (1987) (referring to the William Butler Yeats poem, “Cuchulain’s Fight with the Sea”).

286. *See Ass’n of Admin. Law Judges v. Heckler*, 594 F. Supp. 1132, 1142 (D.D.C. 1984) (finding that “the evidence as a whole, persuasively demonstrated that defendants retained an unjustifiable preoccupation with allowance rates, to the extent that ALJs could reasonably feel pressure to issue fewer allowance decisions”).

287. *See id.* at 1133.

288. 615 F. Supp. 1315 (S.D.N.Y. 1985). Dean Diller served as the fourth counsel for the plaintiff class in *Stieberger*.

289. *See Stieberger v. Bowen (Stieberger II)*, 801 F.2d 29 (2d Cir. 1986).

290. *See Stieberger I*, 615 F. Supp. at 1343–44, *vacated*, *Stieberger II*, 801 F.2d at 29; *see also Judicial Review of Agency Action: HHS Policy of Nonacquiescence: Oversight Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 99th Cong. (1985).

291. Compare Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 753 (1989) (arguing that intracircuit nonacquiescence can be lawful in certain circumstances), with Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A*

The SSA's statements about nonacquiescence were understood by lower court judges as a statement that the SSA would ignore their decisions and that it did not care whether its determinations accorded with circuit court standards.<sup>292</sup> This remarkable affront to the judiciary put Assistant U.S. Attorneys in an untenable position, and U.S. Attorney Rudolph Giuliani wrote to the judges in the Southern District of New York assuring them that his office would not defend cases that did not meet judicial standards.<sup>293</sup>

The SSA responded to the *Stieberger* class action by arguing, in the alternative, that its policies did not conflict with any Second Circuit decisions on the issue of disability, and thus it had not engaged in nonacquiescence to any decisions of the court.<sup>294</sup> But even if it had, the agency argued, nonacquiescence was a perfectly lawful means of maintaining the national uniformity of the disability benefit programs.<sup>295</sup> In ruling on plaintiffs' motion for a preliminary injunction in the initial suit brought by the class in *Stieberger I*, District Court Judge Leonard Sand rejected both of these contentions, finding that the SSA's lack of compliance with the treating physician rule was evident and that nonacquiescence violates basic principles of judicial review dating back to *Marbury v. Madison*.<sup>296</sup> On appeal from this decision, the Second Circuit vacated the preliminary injunction in light of the relief ordered just a few years earlier in the *Schisler I* decision.<sup>297</sup> While Judge Jon Newman recognized that the district court might ultimately find nonacquiescence in other holdings of the circuit and that injunctive relief may still be appropriate, the *Schisler I* decision spoke to the irreparable harm caused by the agency's failure to follow the treating physician rule.<sup>298</sup>

On remand from the Second Circuit's decision in *Stieberger v. Bowen*<sup>299</sup> (*Stieberger II*), Judge Sand ultimately found that the SSA had engaged in nonacquiescence in at least two areas of Second Circuit law—the treating physician rule and the standards for dealing with “post-hearing evidence.”<sup>300</sup> In reaching these conclusions, Judge Sand rejected the

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*Response to Estreicher and Revesz*, 99 YALE L.J. 801, 825 (1990) (arguing that intracircuit nonacquiescence is fundamentally unconstitutional).

292. See Pear, *supra* note 258 (stating expressions of judicial outrage).

293. See Letter from Rudolph W. Giuliani, U.S. Att'y, S.D.N.Y., to Constance Baker Motley, Chief Judge, S.D.N.Y. (June 25, 1984), in 130 CONG. REC. S10,853, 10,883–84 (Sept. 10, 1984). The letter could be viewed as vouching for the government's position in the cases then pending, as the plaintiffs in those cases would undoubtedly have had a different view as to whether the denial of their claims comported with judicial standards.

294. See *Stieberger I*, 615 F. Supp. at 1344–45.

295. See *id.* at 1352.

296. 5 U.S. 137 (1803); see *Stieberger I*, 615 F. Supp. at 1353 (citing *Marbury*, 5 U.S. 137).

297. See *Stieberger v. Bowen (Stieberger II)*, 801 F.2d 29, 37 (2d Cir. 1986).

298. See *id.* at 37–38.

299. 801 F.2d 29 (2d Cir. 1986).

300. See *Stieberger v. Sullivan (Stieberger III)*, 738 F. Supp. 716, 735–38 (S.D.N.Y. 1990). Plaintiffs argued that there were substantial differences between the Second Circuit and the agency with respect to a number of other issues, but Judge Sand found that these gaps were not demonstrated to have enough of an impact on the adjudication of cases to justify class-wide relief. See *id.* at 743.

argument that the SSA was only required to address circuit court law at the administrative level when the court's holding was squarely inconsistent with agency policy.<sup>301</sup> Instead, Judge Sand recognized that court decisions may add to, or elaborate on, policies and that these holdings are binding on the agency.<sup>302</sup>

By the time of Judge Sand's second ruling in *Stieberger v. Sullivan*<sup>303</sup> (*Stieberger III*), the SSA had been in retreat for a number of years. With the end of the Reagan administration and President Bush's emphasis on a kinder and gentler nation,<sup>304</sup> the SSA was outwardly looking to mend fences with the courts and to put the legacy of the Reagan years behind it.<sup>305</sup> In 1992, the SSA agreed to settle *Stieberger* by issuing a manual of Second Circuit case law on disability to be distributed to all adjudicators responsible for cases within the circuit.<sup>306</sup>

The *Stieberger* settlement marked the close of a decade of remarkable acrimony and conflict between the Second Circuit and the SSA. The cleanup continued for years afterward as injunctions and settlements in class actions required the agency to basically readjudicate a decade's worth of benefit denials.<sup>307</sup> The SSA came to terms with the treating physician rule by issuing a set of comprehensive regulations on the evaluation of medical evidence, thus putting an end to the game of cat and mouse around the issue of what exactly is the agency's policy.<sup>308</sup> The interlude demonstrates the ability of federal courts to act as an effective check on agencies not simply by exercising judicial review of an individual agency action, but by responding to a massive shift in administrative direction

301. *See id.* at 729–30.

302. *See id.* Judge Sand also rejected the process that the agency had developed during the course of the litigation for dealing with acquiescence generally through the issuance of Acquiescence Rulings, finding that in most of the cases that the agency lost at the circuit level, it had determined that the court's holding did not conflict with agency policy, leading to the implausible conclusion that the SSA had simply misapplied its own policies in case after case that it had defended to the appellate level. *See id.* at 751–57.

303. 738 F. Supp. 716 (S.D.N.Y. 1990).

304. *See* President George H.W. Bush, Inaugural Address at the West Front of the United States Capitol (Jan. 20, 1989) (“America is never wholly herself unless she is engaged in high moral principle. We as a people have such a purpose today. It is to make kinder the face of the Nation and gentler the face of the world.”).

305. *See* R. Shep Melnick, *Entrepreneurial Litigation: Advocacy Coalitions and Strategies in the Fragmented American Welfare State*, in *REMAKING AMERICA: DEMOCRACY AND PUBLIC POLICY IN AN AGE OF INEQUALITY* 51, 60–61 (Joe Soss et al. eds., 2007) (noting that the SSA officials conceded that they had created a “nightmare in the courts” and were left “deeply chagrined” (quoting Interview by Larry DeWitt with Rhonda Davis, Soc. Sec. Admin., in Baltimore, Md. (Feb. 5, 1996))).

306. *See Stieberger v. Sullivan (Stieberger IV)*, 792 F. Supp. 1376, 1378–79 (S.D.N.Y. 1992); *see also* ERKULWATER, *supra* note 250, at 147–48. The *Stieberger* settlement also called for the reopening and readjudication of tens of thousands of claims that the agency had denied. *See id.*; *see also* Robert Pear, *U.S. to Reconsider Denial of Benefits to Many Disabled*, N.Y. TIMES (Apr. 19, 1992), <http://www.nytimes.com/1992/04/19/us/us-to-reconsider-denial-of-benefits-to-many-disabled.html?pagewanted=all> [<https://perma.cc/7QZH-VCDT>].

307. *See, e.g.*, *Dixon v. Shalala*, 54 F.3d 1019 (2d Cir. 1995); *New York v. Sullivan*, 906 F.2d 910 (2d Cir. 1990); *City of New York v. Heckler*, 742 F.2d 729 (2d Cir. 1984).

308. *See* 20 C.F.R. § 404.1527(d) (2016).

implemented through both formal and informal means that transformed the administration of an entire program. While courts across the country were involved in producing this result, no circuit was more engaged than the Second Circuit, evidenced by the stream of decisions involving panels consisting of members of the entire court, with key decisions written by many members of the court.<sup>309</sup> This leadership should not be surprising, given the groundbreaking framework established by Second Circuit in *Kerner* at the outset of the disability benefit programs.

Social Security disability cases are justice at the retail level. They are fact intensive and technical, and generally do not raise the kinds of legal issues and analysis that attract most able attorneys to the federal bench.<sup>310</sup> Moreover, the principle of judicial deference to administrative agencies easily could lead courts to apply only a light touch to judicial review. Nonetheless, these cases are critical to people in need. They are important to people's lives. The Second Circuit has long recognized this reality, rolled up its sleeves, and dug into the record in ways that have had a major impact.

#### CONCLUSION

In this Article, we attempted to illustrate a variety of issues through which the Second Circuit has advanced social justice. This diversity, reflective of the rich legal and social communities in which the Second Circuit sits, is in itself a strength. But the deeper significance of the Second Circuit's jurisprudence is its nuance and sensitivity to fundamental power inequality, illustrated by the case law discussed herein. In 1951, Chief Judge Learned Hand captured the Second Circuit's tradition with brevity and eloquence: "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."<sup>311</sup> We look forward to the circuit continuing to break new ground as it dispenses justice in its considered and thoughtful fashion.

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309. See, e.g., *Sullivan*, 906 F.2d 910 (Kaufman, J.); *Schisler v. Bowen* (*Schisler II*), 851 F.2d 43 (2d Cir. 1988) (Winter, J.); *Hidalgo v. Bowen*, 822 F.2d 294 (2d Cir. 1987) (Cardamone, J.); *Stieberger v. Heckler* (*Stieberger II*), 801 F.2d 29 (2d Cir. 1986) (Newman, J.); *Dixon v. Heckler*, 785 F.2d 1102 (2d Cir. 1986) (Kearse, J.), *vacated sub nom.* *Bowen v. Dixon*, 482 U.S. 922 (1987); *Heckler* 742 F.2d 729 (Newman, J.); *De Leon v. Sec'y of Health & Human Servs.*, 734 F.2d 930 (2d Cir. 1984) (Oakes, J.).

310. Through the years there have been proposals to create specialized Social Security courts, thus removing Social Security cases from the jurisdiction of general Article III courts. See Paul R. Verkuil & Jeffrey S. Lubbers, *Alternative Approaches to Judicial Review of Social Security Disability Cases*, 55 ADMIN. L. REV. 731 (2003) (recommending an Article I judicial review process with limited review by the circuit courts of appeals); see also Robert E. Rains, *A Specialized Court for Social Security?: A Critique of Recent Proposals*, 15 FLA. ST. L. REV. 1 (1987).

311. Learned Hand, *Thou Shalt Not Ration Justice*, 9 LEGAL AID BRIEF CASE, Apr. 1951, at 3, 5.