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NO KNIGHTS IN SHINING ARMOR: WHY SEPARATION OF POWERS BENEFITS CHILDREN AND SOCIAL SERVICES SYSTEMS

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ABSTRACT

Using New York Family Courts as a case study, this article examines the larger question of whether judicial intervention on issues of executive discretion is ultimately helpful in reforming social services systems. Judicial intervention arises in these contexts when well-intentioned courts issue orders that require executive agencies to provide goods and services to a specific individual. While advocates and judges may promote the judiciary as an antidote to bureaucratic dysfunction, the article illustrates through the fictional case of "Johnny Doe" that the victories obtained through this type of judicial intervention are often illusory and may even undermine real progress. The central thesis is that an understanding of separation of powers is extremely relevant to reforming social services systems and failing to consider these constitutional principles can inadvertently result in judges doing more harm than good. Adopting a counter-intuitive "conservative" view of judicial authority, the article comes to the conclusion that judicial restraint is necessary in order to provide advocates and the public with complete transparency into the extent of system decay. This transparency can then serve as the linchpin to more effective progressive reform.

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I. INTRODUCTION

As a result of the economic downturn that has plagued our country in recent years, every level of government has been repeatedly asked to reduce "nonessential" services.[1] The feeling of many administrators is that there is no longer fat to trim, only muscle and bone.[2] During times of hardship, social services agencies are often most susceptible to financial pressures.[3] Despite the current fiscal climate, however, many courts seem to have the power to order social

[1] *See City Council Preliminary Budget Hearing* 1-2 (2010) (testimony of John B. Mattingly, Comm'r, New York City Admin. for Children's Servs.), *available at* http://www.nyc.gov/html/acs/downloads/pdf/ACS_Preliminary_Budget_Testimony_March_2010.pdf.

[2] *See, e.g., id.*

[3] The reasons for this susceptibility are both operational and political. Compared to many of their counterparts whose costs may be related to facilities or maintenance, social services agencies have few spending areas beyond staff and client service contracts, both of which directly impact the agency's core mission. In addition, jurisdictions that provide more enriched services often fund these systems through locally taxed dollars, a category of funding at greatest risk during budget reductions. Finally, from a political standpoint, social services agencies frequently lack the political clout held by uniformed service agencies whose unions hold more sway over legislators. *See, e.g.*, OFFICE OF MGMT. & BUDGET, THE CITY OF NEW

service spending whenever they conclude that the spending is appropriate in the particular case before them.[4] Either through statutorily granted authority or historical practice, these courts appear to have the power to order government agencies to take action on behalf of children without regard to financial constraints.[5] New York City Family Court is one such court system. This Article will examine the powers exercised by family court judges in New York in light of controlling higher court precedent and a specific statute that can be read as giving judges exceedingly broad powers to order that limited funds be spent to further the well-being of the particular child before the court. These orders are sometimes issued in response to bad actor behavior; but the courts do not always limit themselves to cases of executive branch misconduct. More commonly, courts order an executive agency to purchase or procure goods and services when they conclude that such action would best serve the children who appear before them. In their eagerness to act as a child's knight in shining armor, however, courts are violating basic separation of powers principles and unintentionally undermining the systems that serve the very children that they seek to save.[6]

To illustrate, imagine the fictional case of thirteen-year-old Johnny Doe. Johnny suffers from cerebral palsy and is wheelchair-bound as a result. After an incident when Johnny's mother left him unattended in a locked room for two days, child protective services placed Johnny in the medical foster home of Mrs. Ex. To help Johnny's transition, Mrs. Ex would like Johnny to join her family on their weekend trips to the mall and other local sights. Unfortunately, Mrs. Ex's own car is not equipped to accommodate Johnny's wheelchair. Mrs. Ex asks her friend, who is a car dealer, what it would cost to purchase a wheelchair accessible van. The friend tells Mrs. Ex that he is willing to sell her such a van for $25,000. Although the vans normally sell for over $30,000, given the circumstances, Mrs. Ex's friend will give her a $5,000 discount. Mrs. Ex is overjoyed to hear this news, and she asks her case planner for funds to purchase the van.

Since Medicaid will not cover the cost, the child welfare agency would need to utilize its discretionary funds to purchase the van. The agency determines that the van is not "essential" to Johnny's care and well-being, and the case planner tells Mrs. Ex that the agency is unable to purchase the van for her. The case planner informs Mrs. Ex that she may utilize the city's Access-a-Ride van service to help her transport Johnny. Frustrated, Mrs. Ex tells the case planner that Access-a-Ride will not provide transportation for her and her other children, so they will be unable to make trips together as a family. Although the

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YORK EXECUTIVE BUDGET, FISCAL YEAR 2012 (2011), *available at* http://www.nyc.gov/html/omb/downloads/pdf/peg5_11.pdf.

[4] *See infra* notes 74-76.

[5] *Id.*

[6] *Bell v. Wolfish*, 441 U.S. 520 (1979).

case planner is sympathetic to Mrs. Ex, she states that the agency's decision is final. Angered and exasperated, Mrs. Ex shares this information with Johnny's assigned counsel from the Legal Aid Society. After speaking with Johnny, who expresses a desire for more opportunities to bond with his new foster family, the Legal Aid attorney requests that the Family Court order the child welfare agency to provide Mrs. Ex with funds to purchase the van.

In the scenario described above, it is clearly in Johnny's best interest for Mrs. Ex to receive the wheelchair accessible van. At the same time, the child welfare agency may have legitimate reasons for choosing not to spend $25,000 on a single child when alternative transportation is available. From Johnny and Mrs. Ex's perspective, bureaucratic rules and insufficient funding have resulted in the system failing to best serve a child in its care. From the child welfare agency's perspective, their decision has ensured fairness and efficiency in the use of limited taxpayer resources. Stepping into this stalemate, the family court judge must now decide whether to order the agency to provide Johnny's van.

Stories like Johnny's play out before judges every day. Advocates often praise judicial intervention as a mechanism for propelling agency action, but the fact that these orders can reverse the decision of a separate branch of government raises many critical and fundamental questions. Do court orders that supersede the exercise of executive discretion violate the constitutional separation of powers doctrine? Is it a legitimate exercise of discretion to weigh the system's financial realities equally with the intense human impact on the individual served? What standard of review should courts utilize when determining whether to override a decision of the social services agency? And finally, does the judge's role as knight in shining armor ultimately help or impede the system's progress towards better service for all? Although it cannot resolve all of these questions, this article will confront the important issues raised by cases like Johnny's through a detailed examination of family court orders in New York.

New York is one of a handful of jurisdictions in which the legislature has statutorily defined the family court's power to intervene in executive agency behavior.[7] As a result of this statutory context, New York courts have developed case law that directly addresses the implicit tension inherent to judicial orders of the executive branch.[8] New York therefore provides an exemplary body of judicial decisions through which to analyze the role of the family court in overseeing executive actors. A review of this body of case law can serve as a case study through which to analyze the broader separation of powers issue that impacts family court practitioners throughout the country.

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[7] *See* Leslie J. Harris, *Rethinking the Relationship Between Juvenile Courts and Treatment Agencies—An Administrative Law Approach*, 28 J. FAM. L. 217, 225-235 (1990) (discussing N.Y. FAM. CT. ACT § 255 (McKinney 1983); D.C. CODE ANN. § 16-2320(a)(5) (1989); and ALASKA STAT. § 47.10.080(b)(1) (1984)).

[8] *See infra* Part I.B-D.

Part II will provide the statutory and legal background of section 255 of the New York Family Court Act.[9] Section 255 is the statute that explicitly grants New York Family Courts the power to order that executive agencies perform specific actions within their legal authority. Looking both at the statute and case law, Part II will establish the context for the subsequent analysis. The case law discussion will survey early decisions that first examined the statute in its present amended form, before focusing on the seminal 1980 New York Court of Appeals case that addresses the law. The New York Court of Appeals broadly addressed the family court's power under section 255 in *Lorie C. v. St. Lawrence County Department of Social Services*.[10] Following this close read of the *Lorie C.* decision, Part II will examine the three decades of lower court decisions that have come after the New York Court of Appeals' decision. Although *Lorie C.*'s progeny present some initial challenges to review, using day-to-day practice within the system as a guide to understanding the case law, Part II demonstrates that New York Family Courts continue to exercise a degree of power that the New York Court of Appeals meant to curb. Construing *Lorie C.* extremely narrowly, the family courts instead choose to rely on a standard of review that pre-dates *Lorie C.* and purports to achieve the purposes of the Family Court Act. This standard is ultimately little more than a "best interest of the child" standard and the result is that judges issue orders outside their proper authority on the basis that such orders best serve the children and families at issue.[11]

Judges ostensibly are relying on statutory authority granted by the legislature to impose their judgment on the executive branch. The courts' interpretation of section 255, however, conflicts with the basic rule stated in *Lorie C.* that statutes should be construed in a manner that preserves their constitutionality.[12] Part II will conclude by revisiting the case of Johnny and Mrs. Ex. By analyzing outcomes under both the best interest standard and a more restrictive standard in line with *Lorie C.*, Part II argues that the standard of review adopted by the court has a direct impact on the outcomes reached for Johnny and all of the children in the child welfare system.

Part III is a critical assessment of New York Family Courts' practice of adopting a best interest of the child standard with respect to section 255. As previously argued by numerous scholars in the area of child representation, the best interest of the child standard is the least restrictive form of judicial review.[13] When considering the child's "best interest," the judicial actor is simply substituting her own judgment for that of the administrative body. The practice in New York Family Courts is thus the opposite of the judicial forbear-

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[9] N.Y. FAM. CT. ACT § 255 (McKinney 2011).

[10] Lorie C. v. St. Lawrence Cnty. Dep't of Soc. Serv., 400 N.E.2d 336 (N.Y. 1980).

[11] *See id.*

[12] *See id.*

[13] *See infra* Part III.A. and note 119.

ance that *Lorie C.* calls for, and it stands in stark contrast to the practice of other New York state courts reviewing executive agency decisions.[14] In their desire to assist the children who appear before them, the family courts, and on occasion even the appellate division, focus instead on *Lorie C.*'s concluding ambiguous caveat that "[t]his is not, on the present record, to rule out the possibility that, in the proper circumstances, section 255 might empower the family court to fashion a remedy that extends beyond the immediate needs of a particular child."[15] These courts choose to factually distinguish their cases from *Lorie C.* rather than adopt the New York Court of Appeals's clearer message of judicial forbearance. As a result, judicial practice in New York has strayed from the law as expressed in a decision of the state's highest court. The courts' divergence from the spirit of *Lorie C.* has been further encouraged by executive agencies, who have implicitly condoned the judiciary's behavior by failing to challenge improper orders through appeal. The most problematic aspect of the courts' actions on behalf of children's interest however, is not that it is inconsistent with *Lorie C.* and separation of powers principles. Instead, the biggest threat is that their practices directly impede the social services system's move to change. To illustrate this point, Part III will revisit Johnny's case and examine in detail what effect the family court's grant of Johnny's order would have on the system as a whole. Part III will demonstrate that by adopting a standard that appears on its face to be more "child friendly," the courts have undermined the system's accountability and deflected impetus to solve its most severe problems. Drawing from arguments made in scholarly criticism of institutional litigation, Part III argues that the courts' willingness to create safety valves only addresses the immediate harms suffered by a few children, without doing anything to solve the root cause of the harms. The courts' actions thereby arbitrarily privilege those children represented by the most zealous counsel and unintentionally deflect the attention of the advocates who are the most empowered agents of system change.

Although critics may counter that following a more restrictive standard would invariably result in unjust outcomes for individuals before the family court, this argument must be challenged. The law has long established in other subject areas that adopting a more restrictive standard of review does not undermine the judiciary's role in upholding justice.[16] Furthermore, to the extent courts seek to challenge the unjust resource constraints that plague agency decision-making, case-specific court orders are undeniably a poor mechanism for achieving this type of system transformation. Even those who argue that children and communities of poverty are uniquely disenfranchised and require an individualized approach cannot deny the inherent limitation of adjudication as a tool for creating social policy. As the history of judicial consent decrees has

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[14] *See infra* Part II.C.

[15] *Lorie C.*, 400 N.E.2d at 341.

[16] *See infra* note 147.

demonstrated, courts have neither the ability nor resources to effectively resolve the type of injustice that is rooted in fundamental system dysfunction.[17] Given that courts cannot themselves fix the system, they should avoid adopting an approach that effectively masks that dysfunction for those who can.

Part IV concludes by arguing that, in order to resolve the systemic defects described in Part III, each branch of government must come to terms with its responsibility to children. As an initial matter, executive actors must be willing to appeal improper orders. Pursuing these appeals will require agencies to risk adverse precedent and negative political consequences. To the extent these risks do not appear justified, executive actors must confront the defensibility of their policies and actions. If executive agencies are unwilling to stand by their policies and agents in a court of appeal, how can they justify unleashing these forces on the most vulnerable members of the community? Regarding the judicial branch, judges should refrain from expanding their authority even when doing so would appear to go against the child's interests. New York Family Court judges should adopt standards of review for section 255 orders that are more akin to those used by their peers assessing executive decision-making in other proceedings. Such an approach would be consistent with *Lorie C.* and the Family Court Act and would avoid inadvertently sacrificing unrepresented interests in favor of the interests before the court. Most importantly, by exercising forbearance, judges would encourage the type of system transparency that ultimately best serves children. If lower courts refuse to exercise forbearance on their own, higher courts should hold them accountable through the appeals process.

To the extent that New York Family Court practices continue as they have for the past three decades, the New York Court of Appeals should revisit section 255 and reiterate with even greater clarity than in *Lorie C.* how separation of powers principles should apply in this judicial area. Although it may seem counterintuitive for courts to adopt a "conservative" approach as a means of triggering radical progress, this is precisely how judicial actors who desire system change must proceed. To do otherwise not only allocates power to the wrong branch of government, but impedes sustainable progress in the name of a chimerical ideal of justice that can never be fully realized. It also follows that, when executive actors remain consistent and transparent with respect to their decision-making, advocates are in a better position to flush out the root causes of injustice. Only after the executive and judicial branches assume their proper roles can the public and advocates, either through the legislature or other channels, begin addressing the systemic problems that plague social services agencies.

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[17] ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT (2003) [hereinafter DEMOCRACY BY DECREE].

II. Overview of Section 255 and Its Legal Framework

A. *Section 255 of the New York Family Court Act*

If New York Family Courts have rightful authority to make demands on the behavior of the executive branch, then this power must primarily be grounded in section 255 of the Family Court Act.[18] Section 255 contains the critical sentences:

> It is hereby made the duty of, and the family court or a judge thereof may order, any state, county, municipal and school district officer and employee to render such assistance and cooperation as shall be within his legal authority, as may be required, to further the objects of this act . . . . It is hereby made the duty of and the family court or judge thereof may order, any agency or other institution to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act. The court is authorized to seek the cooperation of, and may use, within its authorized appropriation therefore, the services of all societies or organizations, public or private, having for their object the protection or aid of children or families, including family counseling services, to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare.[19]

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[18] It should be noted that there are other statutes within the New York Family Court Act that practitioners may rely upon to request court orders for goods and services. *See, e.g.*, N.Y. Fam. Ct. Act §§ 1015(a), 1055(c), and 1089(d)(2)(viii). With respect to the circumstances this article is primarily concerned with, namely cases where courts choose to overturn proper exercises of executive discretion, these statutes do not authorize broader judicial intervention than section 255. This article's separation of powers and policy arguments therefore apply identically to these other statutory contexts. To the extent that other statutes authorize more specific forms of judicial oversight than what is granted by section 255, the breadth of this authorization is limited by "the comprehensive annual services program plan." *Id.* at § 1015-a. Since this article is focused exclusively on cases where no argument can be made that the court "must" order the agency to act, only that the court "should" act, it is unnecessary to address orders grounded in claims that the agency failed to satisfy a minimum legal standard or requirement established in an annual services plan. Such failures would be outside the scope of proper executive discretion, and are subsequently irrelevant to the focus of this Article. For all of these reasons, the author has chosen to limit her analysis to section 255.

[19] *Id.* at § 255. The text omitted with an ellipsis is "provided, however, that with respect to a school district an order made pursuant to this Section shall be limited to requiring the performance of the duties imposed upon the school district and board of education or trustees thereof pursuant to sections forty-four hundred two and forty-four hundred four of the education law, to review, evaluate, recommend, and determine the appropriate special services or programs necessary to meet the needs of a handicapped child, but shall not require the provi-

Section 255 is divided into "three separate and distinct situations" which "must be considered discretely."[20] The first sentence describes the duties of individual state actors ("officers and employees") to provide "assistance and cooperation" within their legal authority.[21] This sentence also authorizes the family court judges to order such actors to fulfill these duties, provided that it is within the legal authority of the person and is required to "further the objects" of the Family Court Act.[22] The second sentence describes the duties of an "agency or institution."[23] This sentence also gives the family court power to order an agency or institution to "render assistance and cooperation."[24] Unlike the first sentence, however, the agency or institution also has a duty to provide "information"[25] and the agency and institution's obligations are framed in the context of duties towards a specific "child who is or shall be under its care, treatment, supervision or custody," as opposed to the first sentence's more general charge.[26] The final sentence speaks most broadly to the court's relationship to "all societies or organizations, public or private, having for their object the protection or aid of children or families."[27] With respect to these entities the statute authorizes the court to "seek the cooperation of" and "use, within its authorized appropriation."[28] Notably, the statute does not itself expressly definte the procedures for issuing the orders described in the first two sentences,[29] nor does it "define exactly what 'assistance and cooperation' means in the context of the section."[30] Looking at section 255 as a whole, the language of the statute appears to authorize the family court's broad oversight of government and even non-government actors, without defining how this authority should be properly exercised. This ambiguity has led to an internal tension in the statute's intended scope. Indeed, as the *Lorie C.* court observed,

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sions of a specific special service or program, and such order shall be made only where it appears to the court or judge that adequate administrative procedure to require the performance of such duties is not available." *Lorie C.*, 400 N.E.2d at 338. This language was added as a result of a 1977 amendment to the statute, and in light of other statutory restrictions that preceded the 1977 amendments, the court of appeals held in *Lorie C.* that "the 1977 amendment cannot, therefore, be viewed as later legislative interpretation enlarging the meaning of the section." *Id.* at 340. In light of this holding and the language's special focus on educational accommodations which are addressed in detail through other statutes, the omitted language is irrelevant to the current context.

[20] *Lorie C.*, 400 N.E.2d at 339.

[21] N.Y. FAM. CT. ACT § 255.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] Lorie C. v. St. Lawrence Cnty. Dep't of Soc. Serv., 400 N.E.2d 336, 339 (N.Y. 1980).

[30] *Id.* at 341.

"the concepts of a court 'order' on the one hand and rendering 'assistance and cooperation' on the other are to some degree antithetical."[31]

The legislative history unfortunately provides little guidance that would help to resolve any ambiguity created by the language of section 255. The statute was originally derived from section 56 of the Domestic Relations Court Act and section 37 of the Childrens Court Act.[32] Both of these original statutes were essentially hortatory, and the original language was amended in 1972 to include a provision granting family courts the ability to make orders.[33] The 1972 amendments altered the first two sentences of the original text, which previously stated:

> It is hereby made the duty of every county and municipal officer and employee to render such assistance and cooperation as shall be within his jurisdictional power, to further the objects of this act. All institutions or other agencies to which any child shall be committed are hereby required to give to the court or its representative such information concerning such child as the court or a justice thereof may require. The court is authorized to seek the cooperation of, and may use, within its authorized appropriation therefore, the services of all societies or organizations, public or private, having for their object the protection or aid of children or families, including family counseling services, to the end that the court may be assisted in every reasonable way to give the children and families within its jurisdiction such care, protection and assistance as will best enhance their welfare.[34]

By adding to the statute the phrase "and the family court or judge thereof may order," the 1972 amendments gave judges the explicit authority to order others to act, and this additional language remains in the statute's present form.[35] These changes to the statute were made, however, without any legislative commentary or guidance.[36] The New York Court of Appeals lamented that "[n]othing specific in the legislative history of . . . the 1972 . . . amendment to the section is helpful in determining the intent behind those amendments."[37]

B. *First Decade of Case Law Addressing Section 255*

The New York Court of Appeals did not provide any significant guidance on the 1972 amendments to section 255 in its opinions from the 1970s. In the only

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[31] *Id.*

[32] *Id.* at 338.

[33] *Id.*

[34] N.Y. FAM. CT. ACT § 255 (1971) (amended 1972).

[35] N.Y. FAM. CT. ACT § 255 (2011).

[36] *Id.*

[37] *Lorie C.*, 400 N.E.2d at 340. *See also* Merril Sobie, McKinney's Practice Commentary, Family Court Act § 255 (2010) ("The section has no antecedents . . . and apparently no legislative history.").

two decisions from this period that mentioned the statute, *Ellery C. v. Redlich* and *In re Antonio P.*, the New York Court of Appeals addressed neither the framework for applying the statute nor the factors that judges should take into consideration when issuing orders.[38] In *Ellery C.*, the court held that a youth judged as a Person in Need of Supervision (PINS) could not be treated as a juvenile delinquent and confined to a training school due to lack of other placement options, and that "[s]uch confinement is not consistent with the implied, if not explicit, purposes set forth in section 255."[39] Although this ruling implied that family courts should use section 255 to avoid placing PINS in training schools, it failed to explain how courts should determine whether a specific order conformed to the "purposes set forth" in the section.[40] In *Antonio P.*, the New York Court of Appeals merely referenced section 255 when it relied on an earlier decision which held that the family court lacked the authority to order the expungement of all criminal records.[41] Neither of these decisions offered any meaningful insight into the New York Court of Appeal's interpretation of the statute, and lower courts were largely left to make their own determinations.

Although lower courts in the 1970s avoided applying section 255 to areas of authority which would require an executive agency either to overstep its statutory authority or to violate its own regulations,[42] they exercised less restraint in areas where the requested order would fall under the agency actor's statutory authority. Lower courts struggled with the need to reconcile long-held precedent that "courts do not interfere with an administrative agency's court of action merely because another course might be preferable," with the amended section 255's potential as a tool for courts to use where they found that "the needs of the . . . children in this proceeding are indeed real, and our society may not, through its several agencies, nonchalantly assert that there is no way to

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[38] *See In re* Antonio P., 359 N.E.2d 427 (N.Y. 1976); Ellery C. v. Redlich, 300 N.E.2d 424 (N.Y. 1973).

[39] *Ellery C.*, 300 N.E.2d at 425.

[40] *See id.*

[41] *Antonio P.*, 359 N.E.2d at 427 (citing Richard S. v. City of New York, 32 N.Y.2d 592 (N.Y. 1973)).

[42] *See, e.g., In re* Carpenter, 405 N.Y.S.2d 972, 973 (N.Y. Fam. Ct. 1978) ("Since the regulations consistently refer to the application process and operate prospectively, the court concludes that it is not within the legal authority of the Department of Social Services to retroactively provide support prior to an application for assistance."); New York Hous. Auth. v. Miller, 390 N.Y.S2d 806, 809 (N.Y. Sup. Ct. 1977) ("The laudable purpose of these orders is to facilitate the transfer of the children from foster care to their parents or other relatives and to obtain living accommodations for such purpose. However, the Authority is an independent authority . . . subject to the statutes under which it was created and its own rules and procedures designed to accomplish its purposes . . . . To the extent that tenant selection is subject to judicial review . . . [n]othing in section 255 of the Family Court Act confers such power on that court.").

care for them . . . ."[43]

Many family courts therefore interpreted section 255 as broadly authorizing their intervention when such action would promote the purposes of the Family Court Act to "give the children . . . within its jurisdiction *such care, protection and assistance as will best enhance their welfare*."[44] These courts based their decision on what would be in the child's best interest, rather than any theory of judicial oversight.[45] Although some of the courts utilizing a best interest standard went so far as to hold that section 255 allowed them to supersede principles of judicial forbearance,[46] others still appeared to struggle with issuing these case-specific orders when "a permanent solution must await action by the Legislature to appropriate funds and earmark them."[47] In proclaiming, however, that "the interest of the child and the family must not be subordinated to agency claims of insufficient time, staff, or funds," family courts necessarily had to wade into the waters of second-guessing agency decision making.[48] Once courts determined that "the party subject to the proposed order ha[d] the

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[43] Usen v. Sipprell, 342 N.Y.S.2d 599, 606-07 (N.Y. App. Div. 1973) (deciding to transfer the case for an evidentiary hearing in Family Court to adduce what "care, education and treatment" could be appropriately afforded to the child, despite the court's finding that a petition like the one before it "should be dismissed where, as here, any reasonable explanation of the conduct can be found.").

[44] *Ellery C.*, 300 N.E.2d at 425 (citing *In re* Ellery C., 337 N.Y.S.2d 936, 940 (N.Y. App. Div. 1972) (Shapiro, J. dissenting) (emphasis supplied)).

[45] *See, e.g., In re* Leopoldo Z., 358 N.Y.S.2d 811, 813-14 (N.Y. Fam. Ct. 1974) ("[T]he court can no longer in good conscience indefinitely continue the incarceration of Leopoldo at J. C., particularly in light of B. D. S.'s acknowledgment that such incarceration has in all probability caused the child to become depressed and hostile. . . . B. D. S. is hereby ordered to render its assistance and co-operation by exploring placement alternatives and by reporting on its efforts . . . ."); *In re* Graham S., 356 N.Y.S.2d 768, 771-72 (N.Y. Fam. Ct. 1974) ("This court is outraged that the great State of New York has not seen fit to provide closed psychiatric settings for youngsters who are in need of such a surrounding and who are dangerous to our communities. . . . [I]t is further ordered that, pursuant to powers granted the court under section 255 of the Family Court Act, the Commissioner of Mental Hygiene provide a facility for respondent which will offer him the setting and treatment specifically recommended for his condition . . . .").

[46] *See, e.g., In re* Edward M., 351 N.Y.S.2d 601, 608 (N.Y. Fam. Ct. 1974) ("I am mindful of the rule applied in article 78 proceedings that the court should not substitute its judgment for the judgment of those whose duty it is to administer agencies and institutions. However, under section 255 that rule may be superseded in a particular case where the nature and urgency of the need presented and the consequences of the failure to provide services require court action.").

[47] *In re* Dennis M., 370 N.Y.S.2d 458, 461 (N.Y. Fam. Ct. 1975) (finding that agency's inaction did not constitute "reasonable efforts" while also acknowledging that the "nonfeasance" of other government actors "has impeded the efforts of the commissioner to find placement for seriously emotionally disturbed children who do not need hospitalization.").

[48] *In re* Lofft, 383 N.Y.S.2d 142, 145 (N.Y. Fam. Ct. 1976).

legal authority to provide such services or information," their analysis dissolved into nothing more than "examin[ing] and balanc[ing] specific need for services and/or information against the legitimate but conflicting demands of the agency" (i.e., deciding whether the agency had correctly allocated its own resources).[49] It was in this "best interest" legal framework that the New York Court of Appeals finally addressed section 255 in its 1980 decision in *Lorie C. v. St. Lawrence County Department of Social Services*.[50]

C. *Lorie C. v. St. Lawrence County Department of Social Services*

The New York Court of Appeals first gave its guidance on the powers authorized by section 255 in *Lorie C. v. St. Lawrence County Department of Social Services*. As discussed in the preceding section, although the New York Court of Appeals referenced section 255 twice since its 1972 revisions, the earlier decisions did not interpret the statute.[51] *Lorie C.* marked the first time that the Court of Appeals provided any substantive guidance on how to apply the statute. The question presented in *Lorie C.* was whether section 255 authorized a family court judge to put into effect a plan allocating responsibility between the court's Probation Department and the local Department of Social Services.[52]

The family court judge in *Lorie C.* oversaw the creation of a plan that bifurcated responsibilities for youth designated as juvenile delinquents or persons in need of supervision between St. Lawrence County DSS and the Probation Department.[53] The plan required Social Services to "identify and certify foster homes and to maintain a reserve of such homes, to train foster parents and certify to Probation the completion of such training, and to supervise children not on probation."[54] The family court's plan then charged the Probation Department with "responsibility for planning, placement, and supervision of children who were on probation."[55] The court further prohibited the Department of Social Services from intervening in the Probation Department's assigned responsibilities.[56] Since the plan was instituted through an order by the family court judge, any party that violated the plan risked being found in contempt of court.[57]

The New York Court of Appeals ultimately affirmed the New York Appellate Division's judgment that, although the family court judge was sincere in

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[49] *Id.*

[50] Lorie C. v. St. Lawrence Cnty. Dep't of Soc. Serv., 400 N.E.2d 336 (N.Y. 1980).

[51] *Id.* at 338.

[52] *Id.* at 336.

[53] *Id.*

[54] *Id.* at 165.

[55] *Id.*

[56] *Id.*

[57] *Id.*

his attempts to fix responsibilities between the two agencies, "the plan he sought . . . is invalid both because . . . it exceeded the authorization contained in section 255 of the Family Court Act and because it encroached upon powers granted by section 398 of the Social Services Law to the Department of Social Services."[58] To reach this decision, the Court of Appeals examined both the statute's plain language and lack of legislative history[59] before going on to explain why "several reasons" rooted in separation of powers principles prohibited a reading of the statute that would authorize the plan at issue.[60] The first reason cited by the court of appeals stemmed from the recently decided United States Supreme Court case *Bell v. Wolfish* where the Court held that "under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan."[61] Using this language as a guide, the New York Court of Appeals held that the family court's plan improperly allocated to the Probation Department powers that the legislature had given to the Department of Social Services.[62] The *Lorie C.* Court went on to hold that section 255 could not be read to authorize such action because "the power to order 'assistance and cooperation' cannot be read as permitting an order which denigrates from that officer's statutory authority, any more than it can be read as expanding such an official's authority into areas not granted by statute."[63]

Having stated that the family court judge's interpretation of the statute could not stand constitutional muster, *Lorie C.* next addressed a second "related but more important reason" why section 255 could not be construed as authorizing the family court judge's actions: "courts do not normally have overview of the lawful acts of appointive and elective officials involving questions of judgment, discretion, allocation of resources and priorities."[64] The New York Court of Appeals acknowledged that it was within the legislature's authority to broaden the judicial branch's power through statute.[65] It emphasized, however, the danger of courts interpreting laws too casually to enhance judicial power. The court stated that this practice could intrude into executive functions in too casual a manner, without a clear authorization from the legislature.[66] The Court of Appeals further explained that the familiar obligation to construe a statute "so as to avoid doubts concerning its constitutionality" requires that courts interpret

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[58] *Id.* at 166.

[59] *See supra* Part II.A.

[60] *Lorie C.*, 400 N.E.2d at 340.

[61] *Id.* (citing Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

[62] *Id.* at 340-41.

[63] *Id.* at 341.

[64] *Id.* (citing Jones v. Beame, 45 N.Y.2d 402 (N.Y. 1978); Saxton v. Carey, 44 N.Y.2d 545 (N.Y. 1978); James v. Bd. of Educ., 42 N.Y.2d 357, 368 (N.Y. 1977); *In re* Abrams v. N.Y. City Tr. Auth., 39 N.Y.2d 990, 992 (N.Y. 1976)).

[65] *See id.*

[66] *Id.* at 341 (citing Saxton v. Carey, 378 N.E.2d 95 at 97).

statutes in light of the fundamental doctrine of distribution of powers: " . . . each department should be free from interference, in the discharge of its peculiar duties, by either of the others."[67] The court in *Lorie C.* thus found that any reading of section 255 that would authorize the family court's actions in the case would violate basic separation of powers principles and "raise serious questions concerning the constitutionality of the section."[68]

Lorie C. relied on fundamental principles of separation of powers. Although *Lorie C.* was a relatively easy case based on the specific facts before it, the thrust of the decision goes considerably beyond the holding itself. Ultimately, the New York Court of Appeals concluded that the family court overreached its authority by encroaching on the Department of Social Services' powers, which it derived from the legislature.[69] The language and logic of the decision therefore espoused general separation of powers principles that would apply well beyond the specific holding of the case. Although advocates of judicial intervention may argue that the *Lorie C.* decision was driven by the extremity of the facts presented, given the Court of Appeals's reliance on Supreme Court precedent and explicit discussion of the sanctity of separation of powers, *Lorie C.* is best read as a strong warning against an overly broad reading of section 255. The court's decision, however, remained ambiguous on how a statute could authorize courts to "order" an executive agent's "assistance and cooperation."[70]

Any remaining legal confusion on how executive assistance can be judicially compelled underscores the conflict between what section 255 appears to condone and what courts are properly permitted to do. The conflict has been further exacerbated by the New York Court of Appeals' unwillingness to "define exactly what 'assistance and cooperation' means in the context of the section."[71] Despite the underlying emphasis on separation of powers principles, the Court concluded its decision with the caveat that "[t]his is not, on the present record, to rule out the possibility that, in the proper circumstances, section 255 might empower the Family Court to fashion a remedy that extends beyond the immediate needs of a particular child."[72] By leaving itself open to the possibility that future facts might create the opportunity for section 255 to be applied beyond the needs of an individual child, the Court of Appeals inadvertently created a loophole that lower courts have seized upon to issue orders that run against the core principles of *Lorie C.* In this sense, *Lorie C.* announced both a broad and narrow ruling whose final sentences were sufficiently ambiguous to leave room for subsequent courts to interpret the decision in a manner that runs

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[67] *Id.*

[68] *Id.* at 172.

[69] *Id.*

[70] *Id.* at 171 ("[W]e note that the concepts of a court 'order' on the one hand and rendering 'assistance and cooperation' on the other are to some degree antithetical.").

[71] *Id.*

[72] *Id.* at 172.

counter to the court of appeals' overriding message of respect for separation of powers and call for judicial forbearance.

D. *Case Law and Judicial Practice in the Generation Following Lorie C.*

Although the New York Court of Appeals declined to specify the type of judicial intervention authorized by section 255, *Lorie C.* makes clear that a separation of powers analysis should guide judicial decision makers. Given this directive, one would expect that decisions following *Lorie C.* would be characterized foremost by an adherence to separation of powers principles. This is not the case; the body of case law addressing section 255 after *Lorie C.* is neither unified nor obviously defined by any legal doctrine. This uneveness is partially explained by limitations of the written decisions, which frustrate attempts to discern a governing principle that defines the family court's practice from the case law alone. By viewing the case law in conjunction with the experience of system actors, however, one finds that the majority of family courts have been guided by post-*Lorie C.* decisions which emphasized the court's role to "further the objects" of the Family Court Act by ensuring that a child's best interests are met.[73] This approach disregards the judicial forbearance called for by the New York Court of Appeals and instead adopts a standard of review that predates the *Lorie C.* decision.

E. *Overcoming Initial Confusion and Limitations of the Case Law*

An initial review of the case law in the generation following *Lorie C.* can be both frustrating and disorienting. The decisions appear at first glance to lack any internal cohesion,[74] and at times explicitly contradict each other.[75] This is

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[73] *Id.* at 171.

[74] *Compare In re* Ronald W., 801 N.Y.S.2d 312, 316 (N.Y. App. Div. 2005) (reversing order directing nonparty Commissioner of Office of Mental Retardation and Developmental Disabilities to arrange the immediate reevaluation of a 20-year-old youth on the basis that section 255 "does not extend to the issuance of an order directing executive agencies to take specific discretionary action."), *with In re* Nicole JJ., 706 N.Y.S.2d 202, 204 (N.Y. App. Div. 2000) (ordering that agency pay for day care expenses, noting that section 255 "was designed as a specific remedy to enable [Family Court] to cut through the bureaucracy, fragmentation and lack of co-ordination which so inhibits the provision of services for families and children before the court.") (alteration in original) (citation omitted).

[75] *Compare* Enrique R. v. Gladys T., 512 N.Y.S.2d 837, 841 (N.Y. App. Div. 1987) ("The order of the Family Court clearly may not authorize the expenditure of public funds to provide counsel to private litigants. No provision in the Family Court Act exists or has been cited to authorize such action, which we find to be beyond the limited power conferred upon the Family Court by the Legislature."), *and* Anne P.C. v. Steven P., No. V-10620/21-06/06A, 2007 WL 2871012, at *4 (N.Y. Fam. Ct. Sept. 7, 2007) ("The Legislature places the burden of commencing a FCA Article 10 proceeding on the Department-that administrative body must then regulate when it is 'necessary' to do so.") (citation omitted), *with In re* Dale P., 595 N.Y.S.2d 970, 977 (N.Y. App. Div. 1993) ("Finally, there is no dispute that the

exacerbated by the fact that, while the Appellate Division has been relatively consistent in holding that section 255 does not authorize interventions that are outside the scope of the family court's authority[76] or inconsistent with the executive agency's statutory authority,[77] subsequent decisions suggest that family courts consistently disregard this line of appellate precedent.[78] In addition, the New York Appellate Division also has been inconsistent in deciding actions that fall within the executive agency's statutory authority, but are arguably matters of discretion. When addressing questions of executive discretion, the appellate division has at times reversed orders as improperly intruding on the executive branch.[79] At other times, however, the Appellate Division has ap-

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direction to aid Mary H. in adopting Dale by providing legal representation furthers the objectives of the Family Court Act."), *and* Tosto v. Julio F., No. S-18932-2001, 2001 WL 1607601, at *6 (N.Y. Fam. Ct. Oct. 25, 2001) ("[T]he Court moves sua sponte to substitute a neglect petition under Article Ten of the Family Court Act for the pending petition to determine whether Julio is a person in need of supervision.").

[76] *See, e.g., In re* James A., 856 N.Y.S.2d 192, 192-93 (N.Y. App. Div. 2008) ("[T]he court exceeded its authority under Family Court Act § 255 by directing the nonparty New York City Department of Education . . . to provide an Individualized Education Plan for the child, James A., ..."); *In re* Janyce B., 831 N.Y.S.2d 189, 189 (N.Y. App. Div. 2007) (reversing order on the basis that Family Court has no authority to order that Department of Social Services notify respondent's employer of the results of her drug test); Remillard v. Luck, 768 N.Y.S.2d 714, 715 (N.Y. App. Div. 2003) ("While Family Court has broad power to direct municipalities, public agencies and officials to render assistance in providing services to children and families . . . we find merit in the County's argument that Family Court's payment order cannot be sustained because it was made against a nonparty."); *In re* Jillana C., 765 N.Y.S.2d 290, 290-91 (N.Y. App. Div. 2003) ("The court had 'no power to grant relief against an individual or an entity not named as a party and not [properly] summoned before the court.'") (alteration in original) (citation omitted); *In re* Baby Boy O., 748 N.Y.S.2d 811, 813 (N.Y. App. Div. 2002) ("Family Ct Act § 255 does not expand Family Court's legal authority . . . and the Family Ct Act sets forth no procedures for appointing and compensating a guardian ad litem."); *In re Enrique R.*, 512 N.Y.S.2d at 842 ("The order exceeds the permissible scope of the Family Court's authority and unnecessarily and improperly interferes with the Commissioner's discretion.").

[77] *See, e.g., In re* Michelle HH., 797 N.Y.S.2d 567, 569 (N.Y. App. Div. 2005) (reversing order on the grounds that Family Court cannot order access to documents by a non-party without regard for the Mental Hygiene Laws); *In re* Sarah FF., 797 N.Y.S.2d 571, 573 (N.Y. App. Div. 2005) (reversing order on the grounds that section 255 cannot authorize actions which may be in conflict with other sections of the Social Services Law); *In re* James E., 770 N.Y.S.2d 196, 197 (N.Y. App. Div. 2003) (reversing order which places a child in a facility without regard for certification and other statutory requirements); *In re* Hasani B., 600 N.Y.S.2d 694, 698 (N.Y. App. Div. 1993) (reversing order which is a "veiled mandate" and effectively "nullifies" Commissioner's responsibilities under statute).

[78] *See supra* notes 76 and 77. These decisions covered similar circumstances over a period from 1987 to 2010 and all came to the appellate division following the family court's grant of the contested order.

[79] *See, e.g., In re* Jermaine H., 914 N.Y.S.2d 485, 486 (N.Y. App. Div. 2010) (reversing

peared to overlook questions of discretion and instead focused on the best interests of the child in the proceeding.[80] This judicial variance in seemingly identical cases, further frustrates attempts to discern unifying legal rules. Finally, separate from the content of the decisions, the issues addressed and the frequency of appellate review conflicts with the day-to-day experiences of system actors.[81] Taken together, these inconsistencies and defects challenge any effort to ascertain the principles guiding recent family court interpretations of section 255.

Some of the difficulties posed by section 255's case law can be explained by the narrow view adopted by written decisions. Many aspects of daily family court practice are not captured through written decisions, especially with respect to orders pursuant to section 255. These orders typically arise when parties make verbal requests during court appearances, often without the support of written papers.[82] Judges then decide whether to grant the orders from the bench, and it is rare for a written decision to be issued afterwards.[83] This disconnect between daily practice and case law is evident in the disparity between the number of available post-*Lorie C.* family court decisions that cite to section 255 and the number of orders generated each day.[84]

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order and holding that court had "encroached upon powers granted" to the Department of Human Services); Brian L. v. Admin. for Children's Servs., 859 N.Y.S.2d 8, 17-19 (N.Y. App. Div. 2008) (reversing order for sex reassignment surgery on the basis that the court cannot usurp ACS' authority, the surgery does not fall under procedures which are an "unqualified and nondiscretionary obligation," and the surgery "falls outside the scope" of acts the court can order as part of the "comprehensive annual services program plan"); Ann P.C. v. Steven P., No. V-10620/21-06/06A, 2007 WL 2871012, at *5 (N.Y. Fam. Ct. 2007) (denying request for order requiring the Department of Human Services to file an Article 10 neglect petition); *In re* Support Collection Unit of Rensselaer Cnty. Dep't of Soc. Servs., 471 N.Y.S.2d 38, 39 (N.Y. App. Div. 1983) ("Section 255 of the Family Court Act . . . does not authorize Family Court to dictate the location of the office of a particular officer of the local agency.").

[80] *See, e.g., In re* Sing W.C., 920 N.Y.S.2d 135, 142 (N.Y. App. Div. 2011) (ordering Administration for Children's Services to perform a court ordered investigation for a 20-year-old youth); *In re* Paul Z., 891 N.Y.S.2d 530, 533 (N.Y. App. Div. 2009); *In re* Nicole JJ., 706 N.Y.S.2d 202, 204 (N.Y. App. Div. 2000); *In re Dale P.*, 595 N.Y.S.2d at 977.

[81] The case law addresses issues of authority and discretion with equal frequency, and appellate division and court of appeals decisions constitute 40 percent of the total written New York state court decisions that cited section 255 (percentage determined from author's Westlaw search on June 30, 2011). Based on the author's experience working at Children's Services in New York City, however, the majority of orders that arise in daily practice address issues that are a matter of discretion, and appeals to the appellate division are extremely rare. *See also infra* discussion in note 84.

[82] Interview with Ray Kimmelman, Director of Legal Compliance, New York City Administration for Children's Services, in N.Y.C., N.Y. (Feb. 28, 2011).

[83] *Id.*

[84] Since the *Lorie C.* decision in January 1980, there have been 109 written New York

In addition to the limitations of the written record as a whole, the development of law in this area is further stymied by a general avoidance of appeals by both private parties and administrative agencies. For practical reasons, parties who lose motions do not typically appeal the judge's denial. Orders are generally sought for time sensitive goods and services.[85] When a judge denies an order, the losing party will usually find it inconvenient and impractical to await the lengthy appeals process for a resolution on the issue.[86] To the extent judges grant orders over the administrative agency's opposition, it is also extremely rare for the agency to pursue an appeal. From the agency standpoint, there are a number of factors that recommend against pursuing an appeal. Given the adverse impact of a negative decision as precedent, the de minimus amounts at issue in any individual case, and the relative sympathies of the parties, administrative agencies will generally choose to appeal a court's orders only in cases where the amount of money at issue is uniquely large or they have extreme confidence in obtaining a favorable ruling.[87] The reluctance of parties who have been denied orders to appeal and "selective" appeals on the part of executive actors seeking to overturn orders skews the questions presented for the New York Appellate Division and suggests that the proportion of orders historically affirmed by the appellate division may be artificially depressed.[88] All of these factors further limit the extent to which a case review can provide the complete overview of current judicial practice in this area.

The case law's inherent limitations do not, however, negate the judicial insights reflected within it. As discussed in the introduction of this article, New York's library of written and reviewable case law stemming from section 255 provides a unique opportunity to analyze judicial thinking in this area of practice. Due to the aforementioned limitations, however, a case law review in this area must be supplemented with other sources. The experiences of those work-

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state court decisions that have cited to section 255 (number based on author's Westlaw search on June 30, 2011). In contrast, during the period when the author was employed as the Chief of Staff for the Division of Child Protection at New York City Administration for Children's Services from June 2008 to January 2011, the Deputy Commissioner for Child Protection received approximately three to seven requests for payment approvals originating from such court orders each month.

[85] *Id.*

[86] *Id.*

[87] *See, e.g., Brian L.*, 859 N.Y.S.2d at 16-19 (agency chose to appeal judge's order to provide a sex reassignment surgery that, at the time, would have cost the agency approximately $75,000); cases cited *supra* notes 76 and 77. These cases represent the vast majority of published appellate division decisions that speak to section 255; and the facts in these cases were more favorable to the social services agency, because the basis of the argument was that either the family court or the agency lacked sufficient statutory authority to legitimize the order.

[88] Since *Lorie C.*, the appellate division has upheld a family court's section 255 order in only four cases. *See supra* note 80.

ing in the system can inform a case law analysis when, as with section 255, the case law itself fails to provide a comprehensive picture. An examination of "real life" practice in conjunction with case law can offer greater insight into the driving ideology behind judicial decision-making.

F. *Day-to-Day Practice Within the System*

The practice surrounding section 255 orders in New York City Family Courts is generally outcome and fact driven. The majority of requests for section 255 orders are for case-specific relief, and the requests typically arise when a party has an unmet need that could be resolved by the social services agency.[89] The tendency for section 255 practice to focus on case-specific circumstances may be driven by the perception that requests for case-specific relief that has limited ramifications outside the case are more likely to prevail.[90] Counsel seeking to help their clients obtain goods and services from the agency will therefore frame their request for a section 255 order as one seeking individualized relief already within the agency's authority.[91] The end result is that section 255 orders are most often argued and decided on the basis of case-specific facts, rather than on principles of appropriate judicial review.

Although counsel for children and parents may request section 255 orders as needed recourse against government inaction or incompetence in a specific case, government agencies may see these orders as overstepping the judiciary's proper role. By design, section 255 orders seek to force an executive agency to take an action that it has already decided against. The agency's decision may be motivated by facts specific to the case,[92] or by policy and cost considerations for the system at large.[93] Unlike the other parties whose interests are limited

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[89] Interview with Ray Kimmelman, Director of Legal Compliance, New York City Administration for Children's Services, in N.Y.C., N.Y. (Feb. 28, 2011).

[90] *See, e.g.*, Michele Cortese, *Crafting Arguments for Services in Child Protective and Permanency Proceedings: Digest of Relevant Cases*, *in* 198 PRACTISING LAW INSTITUTE, LITIGATION AND ADMINISTRATIVE PRACTICE COURSE HANDBOOK SERIES 23, 26 (2004) ("Generally speaking, orders pursuant to 255 are most likely to be entertained when the relief sought can be viewed as individualized and the relief sought does not seek to mandate a major shift or expansion of services beyond the family before the court AND does not seek to contradict or expand ACS' statutory duty/obligations.") (emphasis in original).

[91] *Id.*

[92] *See, e.g., Brian L.*, 859 N.Y.S.2d at 12-13 (Agency cited as one reason for denying petitioner's sex reassignment surgery the fact that "petitioner had not satisfied certain eligibility requirements for sex reassignment surgery under the Harry Benjamin standards. Specifically, petitioner did not have a psychological evaluation and psychotherapy if required or recommended, and he lacked demonstrable knowledge of costs, procedures, complications of various surgical procedures and an awareness of different competent surgeons.").

[93] *See, e.g., In re* Sing W.C., 920 N.Y.S.2d 135, 136-41 (N.Y. App. Div. 2011) (Administration for Children's Services opposed order requiring their agency to perform a court ordered investigation for a 20-year-old youth).

only to the case at bar, the agency also has an interest as the system administrator. This difference in the scope of the parties' interests is at the heart of how each party perceives the section 255 order. As in our initial illustration of Johnny, from the child or foster family's point of view, the agency's interests in allocating scarce resources are not compelling. For the individual client, the salient point is that in the agency has failed to provide the requested good or service. The section 255 order is therefore seen by those parties as a tool for ensuring that the individual's best interests are met. From the agency's point of view, it is a critical component of the executive branch's role to make difficult decisions when present resources are insufficient to meet all needs. The unfortunate reality is that agencies are often insufficiently funded to fully meet the system's aspirations.[94] Given this practical context, agency actors must often choose between the quintessential rock and hard place, and section 255 orders may be perceived by government actors as improper judicial intervention in the executive branch's decision of how to allocate scant resources.

In spite of an agency's opposition to section 255 orders, the day-to-day practice in New York City Family Courts is for judges to look at the facts before them and grant these orders when it best serves the child or family's interest.[95] Since the orders generally seek individual-specific relief, the courts appear to see their responsibility as ensuring that the individuals before them receive fairness and justice. Although it may be fair for an agency to deny a particular resource based on an acknowledged system-wide constraint, in light of the compelling human circumstances at issue in any individual case, such a decision will frequently strike the court as unjust. This notion of "justice" may be especially compelling to family court judges, who face little risk of their decisions being appealed and may therefore be more swayed by outcomes rather than rules.[96] The family court's view of "fairness" will also be influenced by the fact that judges are poorly situated to observe the burden that their decisions may inflict on the agency. The burdens imposed by such orders generally reveal themselves in the aggregate rather than in an individual case.[97] In addition

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[94] *See* DEMOCRACY BY DECREE, *supra* note 17, at 140 ("Congress enacts rights that cannot be fully honored. A traditional right, such as the right against government treating people differently on account of their race, can trump ordinary policy considerations because government can, as a practical matter, comply with that right in the real world. But many rights in modern statutes are aspirations rather than practical possibilities.").

[95] Kimmelman, *supra* note 89.

[96] *See* DEMOCRACY BY DECREE, *supra* note 17, at 167 ("A lower court judge knows that less than 20 percent of the cases are appealed, that the facts found will be accepted unless clearly wrong, and that what is done in the case will affect only those parties and does not become a precedent binding other cases. A lower court judge is more likely to do 'justice,' solve problems, and look to outcomes.").

[97] *See* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 35 (1977) ("The lawsuit is the supreme example of incremental decision-making. As such, it shares the advantages and the defects of the species. The outcome of litigation may give the illusion of a decisive

to these factors that weigh in favor of granting the order, a lack of faith in the agency's competency and a desire to counterbalance this perceived inadequacy may influence a judge. For these reasons, and the fact that the ambiguity of the case law allows for arguments in favor of such action, the New York Family Court will be especially inclined to decide on the basis of a best interest standard and reject the agency's system-based justification.[98]

G. *Case Law Driving Current Practice*

Having outlined the reality of daily practice, this article now turns to the extensive and conflicting case law to assess which line of cases appears to best represent what happens in family courts every day. Examining the decisions issued in the years following *Lorie C.*, one finds that the current practice of family courts appears to be mostly driven by a strain of cases that sees section 255 as "a specific remedy to enable [family court] to cut through the bureaucracy, fragmentation and lack of co-ordination which so inhibits the provision of services for families and children before the court."[99] This line of cases is most consistent with the experience of practitioners in family courts, and by examining this case law, one understands better the legal principles driving current practice.

Cases that define the family court's current approach characteristically focus on whether a particular order "furthers the objectives of the Family Court Act."[100] These cases read *Lorie C.* as primarily requiring that section 255 orders are first, "within the legal authority of the person or institution to which it is addressed," and second, that they "further the objectives of the Family Court Act."[101] With respect to orders that fail to meet the first criteria of falling within the actor's statutory authority, these cases are generally consistent with the majority of decisions that deny orders on these grounds.[102] Once orders meet the first criteria, however, this case law diverges from the principles of *Lorie C.*[103] Courts adopting this approach understand the object of the Family Court Act as promoting outcomes that "are in the best interest of a child and

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victory, but the victory is often on a very limited point. The judge's power to decide extends, in principle, only to those issues that are before him. Related issues, not raised by the instant dispute, must generally await later litigation.").

[98] *See, e.g., In re* L.P. Children, 2010 WL 2651632, at *8 (N.Y. Fam. Ct. June 16, 2010) (In spite of the agency's claims that policy dictated that school age children should not receive day care, "[t]he Court reject[ed] [New York City Children's Services'] assertion that agency policy prohibits the payment of day-care expenses for children older than four-and-one half-years of age.").

[99] *In re* Nicole JJ., 706 N.Y.S.2d 202, 204 (N.Y. App. Div. 2000) (alteration in original) (quoting *In re* Edward M., 351 N.Y.S.2d 601, 785 (N.Y. Fam. Ct. 1974)).

[100] *In re* Dale P., 595 N.Y.S.2d 970, 975 (N.Y. App. Div. 1993).

[101] *Id.*

[102] *See supra* note 76.

[103] This line of cases is also at odds with a smaller group of post-*Lorie C.* cases that

society in general."[104] To fulfill this obligation of promoting best interests, these courts have found that "[w]here necessary to effect the best interests of the child, directing participation by an agency is appropriate."[105] The result is a body of case law that is fact-specific and awards section 255 relief whenever it would be within the agency's statutory authority to serve the best interests of the child, as determined by the family court.[106] With their focus on the ideological goals of the Family Court Act and the child's best interest, these cases that best represent current practice appear to read *Lorie C.*'s call for forbearance as applying narrowly to the type of extreme judicial intervention carved out by the Family Court in *Lorie C.* The courts thus disregard the separation of powers principles articulated in the *Lorie C.* decision[107] in favor of the case-specific and outcome driven pre-*Lorie C.* approach.[108]

H. *Returning to Johnny Doe and the Impact that Standards of Review Have on Outcomes*

Having discussed both the practice of family courts following *Lorie C.* and the legal decisions that have driven this practice, this article now returns to the earlier example of Johnny Doe. As discussed in the introduction, Johnny is a foster child whose attorney has requested that the family court order the child welfare agency to provide him with a $25,000 wheelchair accessible van. It is the agency's position that, since Access-a-Ride is available to transport Johnny, the benefit to Johnny does not justify the van's expense. Analyzing outcomes under both the family court's current standard of review and a stricter standard that more closely incorporates *Lorie C.*'s separation of powers justifications, one finds that the outcome of Johnny's request for a section 255 order hinges directly on the standard of review adopted by the court.

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denied requests for section 255 orders on the ground that they improperly overrode the agency's exercise of discretion. See supra note 76.

[104] *In re* Nathan S., 603 N.Y.S.2d 210, 212 (App. Div. 1993). *See also In re* Daniel M., 631 N.Y.S.2d 470, 474 (N.Y. Fam. Ct. 1995) ("As placement in the certified foster home . . . *would promote the best interests of Daniel M.* and would be consistent with applicable laws and regulations . . . the Commissioner is ordered to so place the child and pay for the required nursing care.") (emphasis added).

[105] *In re* Paul Z., 891 N.Y.S.2d 530, 533 (N.Y. App. Div. 2009).

[106] *See, e.g., In re* L.P. Children, 2010 WL 2651632, at *9 (N.Y. Fam. Ct. June 16, 2010) ("The Court finds that this result would be in the child's best interests and would be consistent with applicable statute, case law, regulation and the Plans."); *In re* Andrea D., 883 N.Y.S.2d 696, 700 (N.Y. Fam. Ct. 2009) ("[T]he Court finds that Andrea . . . is entitled to benefit from driver's education. . . . Andrea articulates that driver's education—as the first step to a driver's license—is a key component of self-sufficiency."); *In re* Chrystol B., 429 N.Y.S.2d 358, 361 (N.Y. Fam. Ct. 1980) ("And, finally, it is public policy to preserve and reunite the family unit whenever possible.").

[107] *See supra* Part II.C.

[108] *See supra* Part II.B.

Adopting the best interest standard that appears to influence most family courts, the judge will likely grant Johnny's request and order that the agency provide Mrs. Ex with the wheelchair accessible van. This result is reached by applying a two-part analysis. First, it is clear that the child welfare agency would have statutory authority to provide Johnny with the van. Johnny is now in the temporary custody of the state, and the child welfare agency has authority over all aspects of his care. Second, since the order is within the power of the child welfare agency, the next step of the analysis would be for the judge to consider whether the order would further the objects of the Family Court Act. To the extent the Family Court Act seeks to promote the well-being of children by easing their social and psychological transition to foster care following the trauma of abuse, the judge should grant Johnny's request for the order. Providing the van is in Johnny's best interest, and the agency's denial is grounded in managing system resources rather than facts specific to Johnny. A judge seeking to promote the objects of the Family Court Act would be more likely to find that Johnny's well-being outweighs the agency's desire to manage resources. The former is an ideological goal of the family court whereas the latter is not. The judge may also be disinclined to consider the system-wide implications of the decision as her role is limited to considering the interests presently before the court. Following the judge's order, the agency must purchase the van or risk being held in contempt of court.

In contrast, a judge adopting a standard of review rooted in *Lorie C.'s* separation of powers principles would almost certainly come to the opposite result. Although it is within the child welfare agency's authority to provide the van, it is also within the agency's discretion to spend the $25,000 in another way. The agency may deny Johnny the van based entirely on its decisions regarding allocation of resources. *Lorie C.* held that "courts do not normally have overview of the lawful acts of appointive and elective officials involving questions of judgment, discretion, *allocation of resources* and priorities."[109] In addition, the agency may argue that their alternative plan is for Mrs. Ex to use Access-a-Ride to transport Johnny to locations where the foster family can meet him. Johnny's attorney may respond that the agency's plan is not in Johnny's best interest because Access-a-Ride is not as nurturing an environment and it unnecessarily imposes a higher administrative burden on Mrs. Ex. These arguments, although persuasive, are not necessarily relevant. The New York Court of Appeals explained in *Lorie C.* that "the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan."[110] Since the child welfare agency has been given the authority to plan for Johnny, *Lorie C.* would seem to dictate that the court refrain from overturning their plan. In light of all this, without any evidence

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[109] Lorie C. v. St. Lawrence Cnty. Dep't of Soc. Serv., 400 N.E.2d 336, 341 (N.Y. 1980) (emphasis added).

[110] *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)).

that the child welfare agency fabricated their reason for denial or were otherwise bad actors, it would appear that separation of powers should lead the family court judge to deny Johnny's request for a section 255 order. Therefore, Johnny would be unable to compel the agency to purchase his van.

This analysis demonstrates how the seemingly procedural issue of the review applied by a family court in reviewing section 255 orders has a direct impact on the substantive outcomes achieved by family court actors. A judge in today's New York Family Courts would likely order the child welfare agency to provide Johnny and Mrs. Ex with the wheelchair accessible van.[111] In its desire to achieve an outcome that most benefits Johnny's interest, however, the family court would have to disregard the separation of powers guidance that *Lorie C.* relied upon. This type of decision by family courts raises the larger question of whether, by eschewing the New York Court of Appeals's reasoning in favor of an earlier best interest approach, New York Family Courts are ultimately best serving children.

III. Impact of Current Judicial Practice

A. *The Best Interest Standard is the Polar Opposite of Judicial Forbearance*

By choosing to adopt a best interest of the child standard in the review of section 255 orders, New York Family Courts have embraced a form of review that is at the opposite end of the spectrum from what *Lorie C.* envisioned. The decision in *Lorie C.* espoused a view that judges should limit their "overview" of other branches of government.[112] Judges adopting a best interest of the child standard do the opposite and decide based on their own opinion of the equities. A judge utilizing a best interest standard has been described as:

> [N]ot applying law or legal rules at all, but is exercising administrative discretion which by its nature cannot be rule-bound. The statutory admonitions to decide the question of custody so as to advance the welfare of the child is as remote from being a rule of law as an instruction to the manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state.[113]

Unlike traditional judicial adjudication, which involves applying laws and legal rules to events that occurred in the past, a best interest of the child analysis is more aptly compared to what decision theorists describe as a "rational

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[111] In fact, a New York City Family Court judge did order ACS to provide such a wheelchair accessible van in the real-life case that Johnny's fictional story is loosely based upon.

[112] *Lorie C.*, 400 N.E.2d at 341.

[113] Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 Law & Contemp. Probs. 226, 255 (1975) (alteration in original) (quoting Lon Fuller, Interaction Between Law and Its Social Context 11 (item 3 of unbound class material for Sociology of Law, Summer 1971, University of California, Berkeley)).

choice model."[114] Under a rational choice model, a "decision-maker specifies alternative outcomes associated with different courses of action and then chooses that alternative that 'maximizes' his values, subject to whatever constraints the decision-maker faces."[115] Although a rational choice model could incorporate countervailing policy considerations, the best interest of the child standard focuses only on the specific child appearing before the court. When a judge makes a determination as to what is in a child's best interest, she must decide which of several alternatives will result in the "best" future outcome for that specific child. In order to do this, the judge will invariably need "considerable information and predictive ability," as well as, "some source for the values to measure utility for the child."[116] Given a judge's extremely limited access to information on the family and the difficulty of predicting future outcomes, it will be nearly impossible for the judge to reach a decision without drawing upon her own knowledge and experiences.[117] In addition, since there is no societal agreement as to the core values from which to measure utility, the judge cannot avoid directly applying her own value system in determining which outcome "best" serves the child.[118]

The best interest standard's susceptibility to the whims of the individual decision-maker makes it intrinsically indeterminate,[119] and is thus the antithesis of

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[114] Although there has been significant scholarship regarding the merits of rational choice theory as a tool for explaining or predicting the behavior of decision makers, *see, e.g.*, Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603 (2000) and BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000), this article references rational choice only as a model that describes the best interest analysis better than traditional adjudication. The relative strengths and weaknesses of rational choice theory itself are therefore beyond the scope of this article.

[115] Mnookin, *supra* note 113, at 256. *See also* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 14-17 (1994) (defining "utility maximization" as a generally accepted assumption amongst rational choice theorists) [hereinafter PATHOLOGIES].

[116] Mnookin, *supra* note 113, at 257.

[117] *Id.* at 257-59. *See also* PATHOLOGIES, *supra* note 115 at 19 (noting that one of the large areas of disagreement amongst rational choice theorists is the amount of relevant information that agents can normally be presumed to possess and act on).

[118] Mnookin, *supra* note 113, at 260. *See also* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 43 (1985) ("No matter what branch of government shapes children's policy, a troubling paradox remains. Children need advocates . . . . And yet, because children often cannot define their own interests, how can the advocate know for certain what those interests are? More fundamentally, how can there be any assurance that the advocate is responsive to the children's interests, and is not simply pressing for the advocate's own vision of those interests, unconstrained by clients?").

[119] *See also* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 40 (2005) ("The best interests standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best."); Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody*

Lorie C.'s proscription against judges substituting their judgment for that of the executive branch. Although judges may differentiate their cases by reading *Lorie C.* narrowly, courts that adopt a best interest standard are acting in direct opposition to separation of powers principles that *Lorie C.* embodied. The courts' preference for a best interest standard stems from the presumption that this standard better serves the children who appear before the family court, and whose interests the court seeks to further through its intervention.

B. *Revisiting Johnny Doe: The Effect of Judicial Intervention*

Although the lower courts' disregard for *Lorie C.* is troubling as a matter of law, the impact of their disregard has far graver consequences. The damage done by the family courts' selective reading of *Lorie C.* is not simply restricted to the abstract value that separation of powers principles has within our legal system. The irony of the courts' behavior is that, in their desire to protect the interests of children, courts have actually stymied a more lasting resolution of the systemic problems that plague the social service systems that serve those children. Even if one disagrees with this article's position on the indeterminacy of the best interest standard, these troubling consequences of judicial intervention are difficult to deny. When courts impose judicial remedies onto problems beyond alleged violations of clearly established and defined rights, their intervention can dilute the urgency with which system actors tackle the greater pervasive dysfunction.[120]

To illustrate, let us return to Johnny's case. As discussed in the preceding section, a family court judge hearing Johnny's case will most likely apply a best interest of the child standard to his counsel's request for a section 255 order. For the reasons previously outlined, an application of the best interest standard would almost certainly result in the judge ordering the child welfare agency to provide the $25,000 wheel chair accessible van to Johnny's foster parent, Mrs. Ex. While this result may initially seem like a clear victory for Johnny, an examination of the consequences that flow from the judge's deci-

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Doctrines to the American Law Institute's Family Dissolution Project, 36 FAM. L.Q. 11, 11-12 (2002) (outlining the critiques of the best interest of the child standard in custody determinations); Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 16 (1987) (criticizing the best interest standard as undervaluing the rights of parents and other parties).

[120] *See* DEMOCRACY BY DECREE, *supra* note 17, at 150 ("Large public institutions have multiple, conflicting objectives. Power is widely diffused. Congressional mandates may be unrealistic. Quick action is difficult because of the necessity of going through legislation, rule making, competitive bidding, and civil service requirements, each of which is mandated to meet an objective other than efficiency. Perhaps most difficult of all, it is hard to reach the lower-level staff members who actually implement policy. When courts react to routine failures as if it were intransigence, they may succeed in focusing the attention of top leadership on the problem in court but at the cost of taking attention away from other problems, thus making government less responsive to the overall needs of the public.").

sion reveals that the situation is far more complex. In particular, by looking at the impact on individuals not represented in the courtroom with Johnny, one finds that the family court's actions may actually disserve, not only other children in the child welfare system, but Johnny as well.

C. *Decision Not to Appeal*

Following the judge's order that the child welfare agency must provide Mrs. Ex with funds to purchase the van, the child welfare agency must decide whether to challenge the judge's order in a higher court and to seek a stay while the case is pending appeal. As previously noted, it is extremely rare for executive agencies to appeal section 255 orders.[121] Given the facts presented in Johnny's case, it is unlikely the child welfare agency would appeal. The executive agency's decision to accept the court's intervention opens the door to all the negative consequences that flow directly from the court's behavior. Furthermore, a general tendency to avoid appeals creates an incentive for judicial actors to continue ignoring the strictures of the law, as they will have no fear of being overturned.[122] The executive agency does not consider these negative consequences, however, in reaching its decision not to appeal. Instead, the decision-making is motivated by factors that have nothing to do with resolving the systemic inadequacies and inefficiencies that necessitate such orders.

As an initial matter, Johnny and Mrs. Ex's status as sympathetic parties makes it likely that the child welfare agency will not appeal the case. The compelling nature of Johnny's circumstances will factor not only in agency actors' attitudes towards appeal but also, in the risks for the agency that an appeal presents. From the perspective of agency actors who originally denied the request in accordance with policy, the judge's order may actually be a welcome result, in that it allows them to circumvent what they acknowledge to be undesirable constraints on the system.[123] Sympathy for Johnny stems from the fact that the agency's original denial had almost nothing to do with Johnny's

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[121] *See supra* Part II.D.

[122] *See* Joseph L. Smith, *Patterns and Consequences of Judicial Reversals: Theoretical Considerations and Data from a District Court*, 27 JUST. SYS. J. 28, 29-31 (2006) (explaining the function that reversals have in maintaining lower court compliance with the law).

[123] *See* Deborah Rhodes, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1217 (1982) ("If defendants are government employees operating on inadequate budgets, they may also prove sympathetic to the named representatives' objectives. In some desegregation and deinstitutionalization cases, defendants have depended on lawsuits to compel what they would like to do but lack the political courage to accomplish on their own.") (internal quotations omitted); DEMOCRACY BY DECREE, *supra* note 17, at 131 ("Lower-level officials from the agency being sued who chafe at ordinary bureaucratic restrictions gain valuable purchase on policy and budgets [as a result of agreeing to consent decrees] . . . . Commissioners and other heads of departments keep the budgetary advantages that can come from being subject to a decree.").

specific case.[124] The agency denied Johnny's request solely because it determined that his needs did not justify utilizing a scarce resource. Johnny and Mrs. Ex's status as sympathetic parties, especially in light of the factors that motivated the original agency denial, will likely weigh heavily on the minds of agency actors responsible for deciding whether or not to pursue an appeal. Like family court judges, these decision-makers may be swayed by feelings of empathy and frustration.

In addition, aside from increasing the likelihood that agency actors will feel more personally conflicted in pursuing an appeal, Johnny and Mrs. Ex's status as sympathetic parties also increases the practical risks that an appeal would pose for the agency. From a legal standpoint, a sympathetic adversary poses the danger that a judge may unduly seek an outcome favoring that party. Outside of the courtroom, if the appeal attract media attention, the child welfare agency risks being publicly vilified for pursuing the appeal. This latter risk may ultimately prove to be the most compelling, as the danger of negative media attention poses more practical dangers for any elected official to whom the child welfare agency ultimately reports.[125]

Separate from the sympathy of the parties, however, additional legal factors may also dissuade the agency from pursuing appeal. One major factor is the negative impact that an adverse decision would have on the agency. While Johnny may be unlikely to appear before the court on the same issue, the child welfare agency will inevitably face numerous similarly situated individuals in other legal proceedings. These individuals will likely be represented by institutional providers who are themselves repeat players. Any adverse decision reached in Johnny's case will be cited as authority in subsequent cases, including proceedings where the amounts of money at issue are very large. In such cases, with greater sums of money involved, the agency currently has a more successful track record on appeal. Johnny's case could then pose the risk of disrupting this otherwise favorable line of precedent. In addition, particularly in a small jurisdiction where a single agency is responsible for a host of social

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[124] In the absence of a judge's order, the agents of the child welfare agency may have even been unable to respond directly to Mrs. Ex's request. Rules and regulations designed to promote government fiscal responsibility may also prohibit the requested agency action. As an example, New York City procurement rules require that a mayoral agency must first formally solicit bids for any goods or services whose value exceeds $5,000. *See* NEW YORK CITY PROCUREMENT RULES § 3-08 (2011), *available at* http://www.nyc.gov/html/mocs/ppb/html/rules/rules.shtml. As applied to Johnny's case, the child welfare agency would have been in violation of city procurement rules had it responded to Mrs. Ex's original request by simply providing her with the funds to purchase the van.

[125] *See* DEMOCRACY BY DECREE, *supra* note 17, at 131 ("Mayors and governors are afraid to direct their attorneys to move for termination [of consent decrees] for fear of stimulating plaintiffs to launch a critique of their administration—one that could be highly publicized and may well induce additional dictates from the judge. Better to mollify plaintiffs' attorneys than to rock the boat.").

services, the fallout from any adverse decision may even extend beyond the reach of the child welfare agency. Since section 255 grants the court authority over a wide range of actors,[126] an adverse decision in Johnny's case may result in an increase of orders in other areas of law overseen by the family court, such as juvenile justice or adult protection cases. Given the legal repercussions that an appeal potentially sets in motion, the child welfare agency may decide that the existing inconsistent practice in the family courts suits its purposes better than would a clear adverse decision from the appellate division.

Finally, another factor that may motivate the child welfare agency simply to accept the court's order is the reality that the agency can probably afford to purchase Johnny's van. Given that the initial denial of Mrs. Ex's request was based entirely on a claim of insufficient resources, it may seem perverse to argue now that the availability of funds recommends against appeal. This seeming contradiction naturally arises, however, when the policies designed to manage a system are applied to a specific individual.[127] Unlike act-oriented legal adjudication, policy-making is a rule-oriented decision process.[128] The policy that drove the agency's initial decision to deny Mrs. Ex's request for the van was designed to ensure that limited funds were utilized in a manner most consistent with agency priorities. In a context of insufficient funds to meet all potential needs, a policy arose to ensure that funds are directed to the children who have the fewest alternative sources of funding. Since Johnny is able to use Access-a-Ride to achieve the same goals as the van, the policy would dictate that Mrs. Ex's request should be denied, even though the agency technically would have sufficient money to cover the cost of the van. This disconnect between the systemic factors that drive agency policy and the court's narrow case-specific focus results in judicial decision-making that neglects facts that were central to formulating agency policy. Executive actors are therefore dissuaded from pursuing appeals because they know that the reasoning which

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[126] N.Y. Fam. Ct. Act § 255 ("It is hereby made the duty of and the family court or judge thereof may order *any agency or other institution* to render such information, assistance and cooperation as shall be within its legal authority concerning a child who is or shall be under its care, treatment, supervision or custody as may be required to further the objects of this act . . . .") (emphasis added).

[127] *See, e.g.*, L.P. Children, 2010 WL 2651632 at *8 ("The court also rejects [New York City Children's Services'] assertion that the current Plan and the regulations only require the payment of day-care expenses for foster children under circumstances like these 'when the funds are available [and here] these funds are not available.' As counsel for NYCCS acknowledges, the agency has now 'obtained approval for a day-care subsidy for the subject child prospectively.' If the funds were, in fact, 'not available' then presumably the subsidy could not have been approved.").

[128] *See* HOROWITZ, *supra* note 97, at 51 ("Adjudication makes no provision for policy review . . . . Litigation is geared to rectifying the injustices of the past and present rather than planning for some change to occur in the future. The very notion of planning is alien to adjudication.").

drove their decision-making will not be considered by the court, and they will subsequently need to rely on weaker arguments to defend their actions.

D. *Direct Consequences for the Parties*

Once the executive agency makes a decision not to appeal the judge's order, there is no obstacle to judicial intervention into Johnny's case. The parties directly affected by this decision will be Johnny, Mrs. Ex, the child welfare agency, and Johnny's counsel who requested that the judge order the agency to provide Johnny with the van. For Johnny and Mrs. Ex, they will now have the funds to purchase the wheelchair accessible van. From the perspective of Johnny's assigned counsel and the Legal Aid Society, the judge's order closes their involvement with this aspect of the case. Although the attorney will continue to represent Johnny in any ongoing legal proceedings, and may re-raise this issue in court if the agency fails to comply with the order, her interest in the agency's failure to initially provide Johnny with the van has been largely sated by the judge's intervention. Note that both Mrs. Ex and Johnny's assigned Legal Aid attorney are unlikely to pursue any additional recourse following the judge's orders. Both Mrs. Ex and Johnny's attorney are impassioned and informed advocates, but once their interests related to Johnny have been resolved, it is unlikely that either will have much incentive to continue challenging the policy which led to the initial denial.

Contrast the outcome just described to what would likely happen if the judge denied the request for an order. Since Johnny would remain without the van, Mrs. Ex and the assigned Legal Aid attorney would need to continue their advocacy to reach a resolution. Mrs. Ex likely would have tried to raise her complaints outside the legal system. For example, Mrs. Ex may have notified advocacy organizations that represent foster parents, tried to advocate with executive managers within the child welfare agency, contacted her elected officials to make a complaint, or alerted the media.

Along with all of the steps that could be taken by Mrs. Ex, as a member of an institutional provider representing many similarly situated children, the assigned Legal Aid attorney could also pursue additional forms of advocacy. Following a denial of her request for an order, the attorney may observe in her own caseload a pattern of agency denials for legitimate programmatic needs such as Johnny's. She may discuss the situation with colleagues and find that others have experienced the same outcomes in their cases. This discussion among attorneys may lead the Legal Aid Society to examine more closely the child welfare agency's policy regarding expenses like Johnny's, and it may parse its hundreds of aggregated cases to find further evidence to support its view. If systemic policy deficiencies are found, the Legal Aid Society may then choose to present its evidence to officials at the highest level within the child welfare agency or local government. With the specter of institutional litigation looming over discussions, Legal Aid will have great leverage in its

efforts to direct the executive agency's attention to addressing the problems confronting clients like Johnny.

All of the forms of advocacy described above could potentially lead to a more permanent resolution of the issues that precipitated the agency's initial denial of Mrs. Ex's request. In the face of a judge's order, however, Mrs. Ex and the Legal Aid Society do not have any impetus to pursue these forms of advocacy. Given the fact that these situations do not arise with great frequency, it is unlikely that Mrs. Ex will reencounter this same situation in her future as a foster parent. The Legal Aid attorney, a repeat player in the system, is perhaps more likely to reencounter a situation like Johnny's. It is unclear, however, that the attorney's experiences would lead her to pursue more intensive forms of advocacy in the future. In fact, given the favorable outcome achieved in Johnny's case, the attorney is most likely to simply request another section 255 order if this situation reemerges in her caseload.

In contrast to Mrs. Ex and Johnny's assigned counsel, who lack internal information regarding agency finances and may therefore be unaware that unresolved problems related to funding Johnny's van remain, the child welfare agency will continue to grapple with the same underlying constraints that initially drove its decision-making. To comply with the order, the agency must now identify $25,000 of discretionary funds to pay for Johnny's van. Depending on the budget and size of the agency, this figure may represent a significant or negligible portion of the total funds available. To the extent the figure represents a significant or moderate percentage of available funds, the agency may need to reallocate funds from other purposes to satisfy the court's order. A reallocation of funds may be necessary because, although the order mandated payment to Mrs. Ex, it did not include additional resources to accomplish this result.[129] Although the agency will now be forced to purchase the van for Johnny, there continue to be insufficient resources to fulfill the needs of all children similarly situated to Johnny. As a result, the policy that led the agency to deny Johnny's request will remain unchanged for Johnny or anyone else, and the court's order might result in additional unintended consequences for children outside the courtroom.[130]

In order to fully appreciate how the sequence of events described above

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[129] Judicial action may, however, influence the other branches of government to expand the resources available to an agency. *See* HOROWITZ, *supra* note 97, at 258 ("[J]udicial decisions that are nominally redistributive can put pressure on the other branches to implement them by expansive exercises of the spending power.").

[130] *See id.* at 51-52 ("As the judicial process neglects social facts in favor of historical facts, so, too, does it slight what might be called consequential facts . . . . The very notion of planning is alien to adjudication . . . . Furthermore, there is nothing particularly unusual about the character of the unanticipated consequences produced by judicial decisions. A court decision may eliminate one obstacle to eligibility for welfare, only to cause welfare officials to tighten their enforcement of other eligibility requirements, thereby reducing the total number of beneficiaries . . . .").

could impact the system as a whole, it may help to consider the impact of a section 255 order on parties outside of a particular case. This analysis leads to more troubling results and clouds the instinctual view that judicial intervention in this case benefited children.

E. *Impact on System Actors Outside the Case*

Apart from Johnny, there are other children who may be affected by the judge's order on his case. Take for instance another fictional child, Janie Smith. Janie is a child in the foster care system at precisely the same time as Johnny, and she is placed with her aunt, Ms. Why. Ms. Why lives in a community not presently served by the city's contracted child care providers. In order to provide Ms. Why with childcare for Janie, the child welfare agency must utilize the same discretionary funds that will procure Johnny's van. Without child care, Ms. Why is unable to serve as a kinship foster parent for Janie, and there are no alternative payment streams through which Ms. Why can obtain child care funding. The $25,000 used to purchase Johnny's van could be used to provide over a year's worth of childcare for Janie, thereby saving Janie from the additional trauma of being placed in non-kinship foster care. If the child welfare agency does not have other funds available to comply with the judge's order, however, they may redirect the $25,000 from Janie's childcare toward Johnny's van. Although a single court order is admittedly unlikely to have such a direct impact on other children in the system, this illustration demonstrates the extenuating circumstances not taken into account in the court's best interest of the child analysis.

The reality is that, particularly in times of financial crisis, the child welfare agency has extremely limited funds not tied to state and federal reimbursement. The scarcity of discretionary dollars necessitates critical decisions by executive actors as to which children will benefit from these funds. The court's eagerness to overlook separation of powers principles on behalf of children's welfare effectively negates these critical decisions, and instead substitutes a judicial judgment that completely ignores Janie's existence in the system. This judicial usurping of power is particularly concerning in light of the fact that, even if Janie were aware of Johnny's efforts, she would have very little ability to raise her own interests to the attention of the court deciding Johnny's case.[131]

In addition, even if funds do not need to be redirected from one child to another, the section 255 order will still perpetuate disparate treatment of Johnny over other equally deserving children in the system. Judicial decision-making

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[131] *See* DEMOCRACY BY DECREE, *supra* note 17, at 158 ("Court rules exclude many concerned interests from meaningful participation. Normally, only official litigants get to speak. Always, only official litigants get to make motions, offer evidence, and appeal. Citizens with a palpable interest in the outcome of the court's policy making often cannot intervene. Some, like children not classified as having disabilities, do not qualify under the rules of court procedure. Even if they do, they may lack the funds to hire a lawyer.").

is highly influenced by the quality of the advocate assigned to the individual seeking the court's assistance, a fact which may also contribute to an arbitrary distribution of resources. Consider another fictional child, Joe, virtually identical to Johnny in almost every respect. The only difference between Joe and Johnny is that, through no fault of his own, Joe has been assigned a foster parent and an attorney who advocate far less aggressively for his interests. Joe's foster parent simply accepted the case planner's initial denial of the van. Or, in the alternate, the foster parent raised the issue to Joe's assigned counsel, but he decided not to pursue a section 255 order. In the absence of additional advocacy on his behalf, Joe will be left without a wheelchair accessible van. Johnny and Joe have thus achieved entirely opposite outcomes, although their circumstances are virtually indistinguishable. If anything, the family court's order has simply perpetuated the system's arbitrary preference of Johnny over Joe. Although Johnny has not himself deprived Joe of a van, by perpetuating a system that randomly prefers one similarly situated individual to another, Johnny's legal victory has effectively violated Joe's "right to an accountable government" that operates by a clear set of rules.[132]

Finally, the last group of outside actors who may be affected by the order in Johnny's case are children who are not currently competing for the child welfare system's resources but may at some point in the future. This group of children may even include Johnny. These future children will all face an agency that continues to maintain a policy of denying legitimate programmatic needs on the basis of cost constraints, and the resources available to these children may be reduced by the amount depleted to meet today's needs. These children will also risk being placed in the same situation as Joe, without aggressive advocates. Even Johnny himself is susceptible to these potential dangers.

Imagine that a year after the judge ordered the wheelchair accessible van for Johnny, Mrs. Ex must move to Florida to care for her elderly parents. Since Johnny's mother remains unable to care for him full-time, the child welfare agency must identify another foster home. Johnny has a great-aunt who may be able to serve as a kinship resource, but in order for Johnny to live with her, her home would need to undergo significant renovations to make it wheelchair accessible. These costs are again nonreimbursable through other channels. Given that the total expenses would exceed $100,000, the child welfare agency decides not to incur these expenses and instead places Johnny in a non-kinship foster home within walking distance of his great-aunt. What will happen to Johnny now? If his great-aunt is unfamiliar with the child welfare system, she may simply accept the agency's denial. What if Johnny no longer has the same attorney? These are all uncertainties that Johnny will face in his new set of circumstances. Although the judge's previous order for Johnny's wheelchair

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[132] *See id.* at 223 ("We want judges to enforce rights because government must not be above the law. Yet unless the rights that courts respect also include the right to an accountable government, we will have a government of lawyers, not of law.").

accessible van was initially embraced as a clear victory, in the face of an overall unchanged system landscape, the gains achieved by that order for Johnny now seem distant and piecemeal.

F. *Lessons from Johnny: The Dangers of Judicial Intervention*

Johnny's case demonstrates the ways in which judicial intervention through section 255 orders resolves the immediate needs of children before the court, without responding to the underlying inadequacies that contributed to these children seeking judicial intervention in the first place. To the extent that one seeks to significantly improve the system's treatment of Johnny, Janie, and Joe, section 255 orders granted on the basis of a best interest analysis are at best a pyrrhic victory and at worst a dangerous form of obfuscating system dysfunction. In her decision, the judge has attempted to act in such a way as to maximize benefits to Johnny. Her decision has not created a rule whose even application would most benefit Johnny and others moving forward. The judge's actions are thus more aptly described as act-oriented rather than rule-oriented utilitarianism. The judge's section 255 order is therefore a classic example of how the best interest standard can lead to act-utilitarianism which disserves children as a whole.[133]

When a section 255 order overrules an appropriate exercise of executive discretion, it achieves the desired outcome for a single individual without moving closer to a framework for achieving desirable outcomes for all children. In the absence of such a framework, other children will invariably be harmed in exactly the same way as the child who benefited from the order.[134] As demonstrated in our example, children outside the litigation will have limited ability to voice their concerns in the judicial forum. These children and their advocates will also be denied any elective recourse against the judges who acted against their interests. Judicial intervention subsequently results in a system that arbitrarily distributes its resources to those represented by the most effective advocacy. Even if resources will realistically never be sufficient to meet

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[133] *See* Elster, *supra* note 119, at 21 ("Another argument against the 'best interest of the child' principle is that by promoting the interest of the child in a particular case, one may work against the interests of children in general. This perverse result can come about in two ways: if legislators neglect the distinction between act-oriented and rule-oriented principles, and if they neglect the costs of legal decision making."); Kathryn L. Mercer, *The Ethics of Judicial Decision-making Regarding Custody of Minor Children: Looking at the 'Best Interests of the Child' and the 'Primary Caretaker' Standards as Utility Rules*, 33 IDAHO L. REV. 389, 399 (1997) (arguing that a return to rule utilitarianism rather than act utilitarianism would create less "unwanted variability" in custody decisions).

[134] *See* MNOOKIN, *supra* note 113, at 19 ("[P]olicy decisions affect many children—not simply the single child in our example. Children vary enormously. The prediction problem is made more difficult because one must predict the consequences of alternative policies on children in very different circumstances. The value problem is made more difficult because a policy that may benefit some children may hurt others.").

needs fully, children still deserve a transparent system with accountability.[135]

This right to government accountability is at the heart of separation of powers, and given the limits of the adversarial process, judges will never be able to serve as this fully transparent and accountable decision maker.[136] The authority granted in section 255 does little to change this inherent defect in relying upon judges to manage the dysfunction within social service systems.[137] Even more concerning, however, is the impact that section 255 orders have on slowing the momentum towards more significant improvements.

By offering artificial victories to the advocates who serve as the first guard for monitoring system defects, the New York Family Court placates a community that might otherwise drive real reform. When the family court creates a safety valve that sidesteps dysfunction, it effectively quells the frustration of advocates who would otherwise encounter that dysfunction.

Over time, frustration can give rise to outrage. Outrage can then serve as an incredibly effective motivation for persistent and aggressive advocacy. As a result of their successful requests for section 255 orders, advocates may lack sufficient frustration to pursue challenging the underlying lack of resources and bureaucratic mismanagement that creates the need for such orders. The court's actions can thus be seen as simply covering up the injuries, while doing nothing to improve the patient's overall health. The end result is a slower-to-change system that is less transparent, comprehensive, and accountable in its decision-making.[138]

G. *Responding to Criticism*

Given the current reliance on section 255 orders as the primary tool for procuring goods and services from social services agencies, judges and advocates may resist this Article's reading of section 255 and *Lorie C.*, as well as its critical view of current judicial practice. Arguments in favor of continuing judicial intervention through section 255 orders may be based on both a more liberal understanding of separation of powers as well as policy concerns regard-

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[135] *See* DEMOCRACY BY DECREE, *supra* note 17, at 154 ("Power is divided, first of all, between those who are empowered to govern and those who are governed. Those who are governed retain the power to vote the elected out of office . . . . Inherent in the whole scheme is that elected officials should bear responsibility for the key policy choices and must retain the power to change policy.").

[136] *See* MNOOKIN, *supra* note 113, at 257 ("One can question how often, if ever, any judge will have the necessary information. In many instances, a judge lacks adequate information about even the most rudimentary aspects of a child's life with his parents and has still less information available about what either parent plans in the future.").

[137] *See* N.Y. Fam. Ct. Act § 255.

[138] *See also* DEMOCRACY BY DECREE, *supra* note 94, at 139 ("Government should honor rights, yet democracy by decree is a good thing gone wrong: It goes beyond the proper business of courts; it often renders government less capable of responding to the legitimate desires of the public; and it makes politicians less accountable to the public.").

ing the interest of children. In light of the New York Court of Appeals' clear language regarding separation of powers and the fallacy of the court's superior ability to promote children's interest, however, these arguments must fail.

Relying on an alternative statutory interpretation, critics may argue that judicial intervention through section 255 orders does not violate separation of powers because the statutory authority that justifies this intervention was granted by the legislature. In support of this argument, critics may interpret the absence of statutory language in section 255 regarding standard of review as implicit evidence of the legislature's desire for a broader form of judicial oversight. This argument contradicts, however, *Lorie C.*'s specific language on how courts should read section 255: "[I]t is familiar law that a statute should be construed so as to avoid doubts concerning its constitutionality."[139] The decision's focus on upholding a statute's constitutionality and on separation of powers rebuts any interpretation of section 255 that would allow judicial override of a proper exercise of discretion.[140] Even assuming that the legislature intended to empower the court in this way, *Lorie C.* makes clear that courts cannot interpret section 255 in a manner that would result in the statute violating constitutional separation of powers principles.

Critics may then respond that the New York Court of Appeals did not hold that "the Legislature may never give such supervisory power to a court," instead, *Lorie C.*'s prohibition against construing section 255 broadly was intended to apply only to "a plan of administration as sweeping as that here in question."[141] This interpretation of the decision ignores, however, the forceful and reasoned language in *Lorie C.* which clearly advocates for a stronger respect for separation of powers and appears to prohibit precisely the kind of judicial intervention that is presently taking place.[142] A broader view of the court's proper role under the separation of powers doctrine is also inconsistent with the New York Court of Appeals's call for judicial forbearance in other contexts.[143]

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[139] Lorie C. v. St. Lawrence Cnty. Dep't of Soc. Serv., 400 N.E.2d 336, 341 (N.Y. 1980) (citing *In re* New York Post Corp. v. Leibowitz, 142 N.E.2d 256, 261 (N.Y. 1957) ("It is a well-settled canon of construction that a statute should be construed when possible in manner which would remove doubt of its constitutionality.") (internal quotations removed)). *See also* People v. Barber, 46 N.E.2d 329, 332 (N.Y. 1943) ("We may not impute to a legislative body an attempt to adopt a statute or ordinance which might be used as an instrument for the destruction of a right guaranteed by the Constitution which executive and legislative officers of government, no less than judges, are sworn to maintain.").

[140] *See id.*

[141] *Lorie C.*, 400 N.E.2d at 341.

[142] *See supra* Part II.C.

[143] The Court of Appeals has stated in numerous other decisions its respect for separation of powers and its desire that courts refrain from interfering in the responsibilities of the other branches. *See* N.Y. State Inspection, Sec. & Law Enforcement Emps. v. Cuomo, 475 N.E.2d 90, 93 (N.Y. 1984) ("While it is within the power of the judiciary to declare the vested rights of a specifically protected class of individuals, in a fashion recognized by statute, the manner

As discussed earlier in this Article and as illustrated in the example of Johnny's case, in the absence of bad actor behavior, judges who choose to override executive agency decisions through section 255 orders fundamentally disrespect the agency's exercise of discretion. Viewed in this light, the courts' behavior must be seen as out of sync with any reasonable interpretation of section 255 and the separation of powers principles espoused in *Lorie C.*

Without support in the law, proponents of a more liberal interpretation of section 255 may then argue that policy considerations support judicial intervention. This argument assumes that, without reserving the power to intervene on behalf of children's interest, family court judges cannot perform their proper role of ensuring justice. Although the notion that judges can guarantee justice to children by broadening their powers is extremely compelling, this argument is rooted in several flawed assumptions.

The first flawed assumption is that courts must apply a more liberal standard of judicial review in order to serve the interests of justice. It is a longstanding principle of both New York and federal jurisprudence that courts can apply a more limited standard of review and maintain their ability to uphold justice.[144]

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by which the State addresses complex societal and governmental issues is a subject left to the discretion of the political branches of government."); Jones v. Beame, 380 N.E.2d 277, 279 (N.Y. 1978) ("Obviously, it is untenable that the judicial process, at the instance of particular persons and groups affected by or concerned with the inevitable consequences of the city's fiscal condition, should intervene and reorder priorities, allocate the limited resources available, and in effect direct how the vast municipal enterprise should conduct its affairs."); Abrams v. N.Y.C. Transit Auth., 355 N.E.2d 289, 290 (N.Y. 1976) ("It is with those agencies directly, not the judiciary that members of the public must lodge their complaints. Of course, the ultimate public remedy against poor government management is at the voting machine. Neglect, inefficiency, and erroneous but reasonably made exercise of judgment fall short of illegality, correctible by the judicial branch of government."); James v. Bd. of Educ. of City of N.Y., 366 N.E.2d 1291, 1298 (N.Y. 1977) ("The responsibility for resolving these questions is vested in a network of officials and boards, on both the local and State level. To permit this injunction to stand, and this proceeding to be continued, would in effect attempt displacement, or at least overview by the courts and plaintiffs in litigations, of the lawful acts of appointive and elective officials charged with the management of the New York City public school system."); Vetere v. Allen, 206 N.E.2d 174, 176 (N.Y. 1965) ("Disagreement with the sociological, psychological and educational assumptions relied on by the Commissioner cannot be evaluated by this court. Such arguments can only be heard in the Legislature which has endowed the Commissioner with an all but absolute power, or by the Board of Regents, who are elected by the Legislature and make public policy in the field of education.") (internal quotations omitted). *See also* Summers v. Earth Island Inst., 555 U.S. 488, 492-93 (2009) ("Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. This limitation is founded in concern about the proper-and properly limited-role of the courts in a democratic society.") (internal quotations and citations omitted).

[144] *See* Heckler v. Chaney, 470 U.S. 821, 830 (1985) (utilizing a standard consistent with abuse of discretion to determine whether the Food and Drug Administration could decline to

The law presently calls for judges to rely on a more limited standard of review in fields such as prisoner's rights, public benefits, immigration, education rights, and environmental protection.[145] These proceedings often involve property and liberty interests on par with the interests at stake in family court, and the law is established that the court's ability to protect these interests is not compromised in light of a more conservative standard of review.

One reason that courts can uphold justice even when utilizing a restrained standard is that these standards do not limit the judge's ability to correct and discipline the behavior of bad actors. To the extent a party contests an outcome that resulted from an executive actor's malfeasance or negligence, or that improperly denied a legal right or entitlement, the court maintains its ability to intervene against another branch of government. Judicial forbearance is demanded only in cases where the contested outcome was the result of a proper exercise of executive discretion, and judges seeking to intervene in the exercise of executive discretion improperly convert themselves into unelected executive agency monitors.[146] Although one may adopt the view that it was "wrong" for the agency to deny Johnny the wheelchair accessible van, "wrong" is not the same thing as "illegal." The denial of the request for Johnny's van fails to drop below any minimum legal standard of care. Since Johnny has no statutory or legally defined right to the van, the agency was properly within its legal authority to deny Mrs. Ex's request. Although the court may believe that Johnny

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take enforcement action under the Federal Food, Drug, and Cosmetic Act with respect to drugs used for lethal injections to carry out the death penalty); Pierce v. Underwood, 487 U.S. 552, 559 (1988) (utilizing an abuse of discretion standard to review a lower court's decision to award attorney fees over and above the statutory cap); Lyng v. UAW, 485 U.S. 360, 370 (1988) (utilizing rational basis standard of review for examining whether striking union members could be denied food stamp benefits); INS v. Abudu, 485 U.S. 94, 106 (1988) (adopting abuse of discretion standard for reviewing the Board of Immigration Appeals denial of a motion to reopen a deportation proceeding); Turner v. Safley, 482 U.S. 78, 89 (1987) (adopting a rational basis standard of review to assess the policy decisions of prison officials); Quinton A. v. Abrams, 402 N.E.2d 126, 131-32 (N.Y. 1980) (using a rational basis standard of review to assess whether the legislature could treat juveniles who commit crimes of violence against the elderly disparately from those who perpetuate crime against the general populace); *James*, 366 N.E.2d at 1297 (stating that court could only set aside the decision of the Commissioner of Education if the decision was "arbitrary or illegal"); *Vetere*, 206 N.E.2d at 176 ("Since we find that the determination of the Commissioner of Education is not arbitrary or illegal, the order of the Appellate Division must be affirmed.").

[145] *See supra* note 144.

[146] DEMOCRACY BY DECREE, *supra* note 17, at 179 ("The use of courts for expedient ends without restrictions that preserve their legitimate role reflects contempt for democratic accountability and depreciates the legitimacy of the courts. Courts should instead strike a balance that equally respects democratically accountable government and plaintiffs' rights.").

"should" receive the van, it violates separation of powers principles for the court to impose its own values on other state actors.

The second flawed assumption which drives an argument for broadening judicial power is that judges are capable of ensuring outcomes that achieve children's best interests. Although protecting children's interests is a laudable goal, the courts' limitations make this task impossible for even the most well-intentioned judicial actors. While it may be tempting to see judicial intervention as the magic bullet against bureaucratic dysfunction and incompetence, this view of the court is more grounded in ideology than in reality.[147] As many scholars have argued in criticism of institutional change litigation, courts are ill-equipped to resolve the systemic brokenness that plagues dysfunctional institutions.[148] Judges themselves are generalists "not recruited for their managerial interest or aptitude, and they often have little tolerance for administrative detail."[149] These qualities, although irrelevant for judicial decision-making, are anathema to the complex and specialized issues that face social service systems on both a macro and micro level.

In addition to the limits of judges, the adjudication process itself is not designed to handle the kind of fluid and multi-faceted concerns that social service systems present. "Success in making policy choices requires sensitivity to a wide spectrum of information. Adjudication is ill-suited to assembling and processing such information because judges lack the necessary experience and court procedures are too narrowly focused and backward looking."[150] Even if one adopts the position that children are a uniquely vulnerable constituency whose care requires individualized decision-making, the court's lack of social work competency and narrow scope make it ill-equipped to serve as this caregiver. Furthermore, given the limitations of the court's reach and the uneven quality of representation, advocates who rely on the court as a safety net for the disempowered are lulling themselves into a false sense of security that detracts from their efforts towards meaningful system-wide change.

In addition to the judiciary's inherent limitations, the idea that empowered judges can achieve children's best interests is also undermined by the very impossibility of doing what is "best" for children. Critics who argue that section 255 allows judges to override executive authority whenever it best serves children's interests are creating a limitless rule that ultimately collapses due to its own indeterminacy. A judicial quest to ensure that executive actors best serve children's interests is both paralyzing and self-defeating. As apparent from the simple fictional case study, there is absolutely no rule that simultaneously re-

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[147] *See* Heckler, 470 U.S. at 834 ("The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance.").

[148] See HOROWITZ, *supra* note 97, at 266.

[149] *Id.*

[150] DEMOCRACY BY DECREE, *supra* note 17, at 118.

sults in the best outcomes for Johnny, Janie, and Joe. By seeking to enforce such a rule in any individual case, courts are simply usurping the primary function of the executive branch without any accountability. Especially given the courts' inherent limitations, this expansion of judicial power seems ill-advised and potentially dangerous.

IV. LOOKING AHEAD

The current practice of New York Family Courts to override executive discretion in the interest of specific children, ultimately disserves all children. Arriving at this conclusion, the Article now summarizes the general lessons that can be gleaned from our study of New York and proposes next steps for executive agencies, judges, and advocates.

Not all states have a statute equivalent to New York's section 255, but the themes that emerge from the analysis of system behavior in light of this statute and *Lorie C.* are universal. Individuals who work in social services systems throughout the country are constantly bombarded with the Sisyphean task of achieving incremental gains for clients whose lives often reflect multiple layers of societal injustice. Poverty, racism, sexism, an inadequate education system, and a flawed criminal justice system; the list of evils that social service systems are expected to remedy is endless. Although faced with the most challenging of human circumstances, the systems themselves are universally acknowledged to be inadequate for the tasks they have been charged with. Social services are historically underfunded and plagued with bureaucratic inefficiency. In such a context, the future often looks hopelessly bleak to every actor in the system, whether they are an administrator, a judge, or advocate. It is human nature to long for the knight in shining armor, and the concrete requests that arise in court provide the opportunity to create such a knight.

No one can guarantee that Johnny will always have a foster parent as loving as Mrs. Ex. No one can guarantee that Medicaid will pay for Johnny to receive the very best medical care available. No one can guarantee that Johnny will receive a public education which best meets his special needs, and no one can guarantee that Johnny's mother will ever be able to safely care for him. In the face of all this uncertainty, giving Johnny the wheelchair accessible van provides every system actor with the rare opportunity to definitively do the "right thing" for a child. This is why each actor *wants* to give Johnny the van, even the child welfare agency officials who felt compelled to deny him.

It is extremely tempting to rely on the judiciary to address our dissatisfaction with social services systems. The temptation stems from an altruistic desire for simple and expedient solutions, and the concrete outcomes achieved by judicial decision-makers can provide rare affirmation in a discouraging field. This Article argues, however, that the fundamental problems plaguing social services systems are too complex and protracted to be resolved by judges or adjudication. While it may assuage frustration and guilt to award Johnny his van, system actors are overly optimistic in thinking that this piecemeal victory has

turned the tide on any of the harsh realities that face Johnny and his cohort every day. If anything, for the reasons discussed in the preceding sections, awarding Johnny his van may actually reduce the system's overall accountability and positive growth. The realization that a respect for separation of powers may best serve children should initiate a movement towards a system which does not treat judges like knights in shining armor, but instead seeks to transform its community of policy makers into an organized battalion.

For executive agencies, which bear the largest responsibility for improving the system, true leadership should manifest itself in a commitment to transparency and accountability. Rather than hide behind a perceived powerlessness to change, executive agencies should not make excuses for outcomes that result from their official acts. Agencies should instead stand behind their actions by aggressively pursuing appeals when courts override their decisions through orders or other mechanisms. Appeals increase transparency into agency practice and alert both advocates and higher courts as to the current status of the law in trial courts. In addition, agencies should also work towards greater transparency and accountability outside the courtroom. Policies and protocols should be public, and agencies should strive to make daily practice consistent with these written documents. By taking these steps, executive actors will ensure that an informed public can hold them to task. To the extent that social services agencies are uncomfortable with publicly sharing their own practices, either through direct communication or an appeals process, their leadership should critically examine the source of that discomfort and proactively seek to alleviate it. If the agency feels outside pressure to adopt practices that it disagrees with, this information should be shared publicly as well.

The clear lesson for the courts is to remove themselves from the policymaking role. This is achieved through the exercise of judicial forbearance with respect to matters within agency discretion, even in cases when the court believes that the executive's decision does not achieve the child's best interest. Although socially minded judges may perceive such forbearance as conservatism, for the reasons discussed in this Article, a respect for separation of powers is not inherently political[151] and to do otherwise impedes radical system change. As long as the agency's behavior does not fall below the statutory minimum level of care and is not otherwise illegal or improper, judges should refrain from issuing orders that override decisions rooted in executive discretion. Regardless of whether they utilize an "arbitrary and capricious" or "rational basis" standard, or another similarly constrained standard, judges should resist reducing their decision-making process to a best interest of the child anal-

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[151] RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 208-09 (1985) ("Structural restraint is not a liberal or a conservative position, because it is independent of the policies that the other institutions of government happen to be following. It will produce liberal or conservative outcomes depending on whether the courts in question are at the moment more or less liberal than those institutions.").

ysis. In New York, this change in judicial behavior will bring section 255 orders more in line with the principles that *Lorie C.* sought to make law. To the extent that lower courts fail to exercise forbearance on their own, courts of appeal have the responsibility to impose their authority by overturning orders. In New York, in order to address the inconsistency of practice in both the Family Court and Appellate Divisions, the Court of Appeals may have to provide further guidance and rectify the ambiguity created by the final sentences of *Lorie C.* through a decision in another case.

Once judges begin to exercise forbearance, advocates may initially mourn the loss of judicial orders as a mechanism for overriding policies with which they disagree. The increased executive transparency and accountability recommended, however, can serve as a new target to channel their efforts. If executive agencies were to truly open themselves to criticism in the manner described, the benefits of a shift towards a more traditional separation of powers model far outweigh the costs. Advocates will find their efforts most effective and lasting if their energies target the underlying causes of dysfunction. Whether those causes are resource constraints or ideology differences, real system transformation will only be possible by tackling these root issues. Incremental solutions may provide immediate comfort, but advocates must not allow themselves to be distracted by illusory gains such that they lose focus on systemic problems.

Finally, but most importantly, the public at large benefits when each branch of actors performs its proper role in full view of the others. By removing policy decisions from the realm of judges and into the responsibility of fully accountable officials, the public has the opportunity to voice its approval or disapproval of social service systems. At times, the public may not agree with the positions adopted by executive actors or advocates. Public opinion of social services systems may itself be contradictory and inconsistent. Even at its weakest, however, the public's decision-making through proper channels will reflect democratic principles. Given the impossibility of a system driven by the goal of achieving children's best interests, these democratic principles may perhaps constitute the soundest foundation upon which to build a public system.

Judicial forbearance, a transparent executive, and a community empowered by full information will be the keys for creating lasting change in social services systems. Any meaningful progress through democratic processes takes time and significant resources, but these obstacles should not dissuade system actors. Although there are no knights in shining armor, from agency caseworkers to parents' attorneys, there are committed advocates working in every area of social services. Only by properly channeling the passion of these advocates towards the most difficult and entrenched problems can we offer real hope for change to the thousands of Johnny Does who come into contact with social services agencies every day.