

# New York In Handcuffs

**O**N Tuesday, the state Appellate Division ruled that Mayor Bloomberg could suspend from the city's homeless shelters men who refuse to cooperate in assessing their needs or are too disruptive.

State regulations adopted in 1995 explicitly authorized the city to adopt such a policy, but attorneys representing homeless men argued that a consent decree entered between themselves and Mayor Ed Koch in 1981 in a case called Callahan was in essence a contract that bound city in perpetuity to provide shelter to all men, including those who are uncooperative or disruptive.

Reasonable people can differ on how to run homeless shelters, but the issue before the court on Tuesday was which people would run them — today's mayor and his commissioner of Human Services, or the officials and attorneys who signed the consent decree 22 years ago. The court gave the power to the officials of today, but on the narrow ground that the 1981 consent decree, as the judges read it, did not preclude the city "from establishing reasonable standards to ensure that homeless individuals be required to take steps to achieve self-sufficiency."

If the court had read the decree differently, and another group of judges might well have, the city would have been stuck with a policy made in a decree whose signing former Mayor Koch now calls

**ROSS SANDLER & DAVID SCHOENBROD**

one of the biggest mistakes of his administration. New York and other cities across the country are bound by many decrees that are so long and detailed that no court could find much room for changing policy in light of experience and new circumstances.

The decree in the Jose P case, dealing with special education in Gotham's schools, began in 1979 as a 47-page document — then incorporated 515 pages of added requirements within two years, and has continued to grow in the following decades. Not even the attorneys for plaintiffs can guess how many thousands of pages of requirements constrain the city.

This spring, when Chancellor Joel Klein announced wide reforms in the city's special-ed programs, a \$3 billion expense item in his budget, the first thing he had to do was get the plaintiffs who control the 1979 Jose P. decree to agree. They didn't — so in June the city was compelled to agree that the plaintiffs' lawyers could second-guess every aspect of the program if they chose.

Courts like to say that consent decrees are like contracts, but are they really? When private parties

settle a case like a divorce action or an accident claim, the settlement is not like a contract, it is a contract. It can be enforced to the letter. But how a city spends \$3 billion to provide special education for children with disabilities is neither a contract, nor like a contract. It is a governmental program — full of choices based on ever-changing legal requirements, expert opinion, management imperatives and political judgments.

The ins and outs of such a vast program are always up for grabs, which is why we periodically go to the election polls to elect new officials to run these programs for us. Contracts that hogtie policies, however well intentioned, are contrary to democratic government.



**Brennan: Warned of locked-in misrule.**

In a fierce dissent to a Supreme Court majority opinion that ruled that a prior contract with bondholders prevented the Port Authority from later adopting environmentally helpful regulations, Justice William Brennan wrote that "nothing would so jeopardize the legitimacy of [our] system of government that relies upon the ebbs and flows of politics to 'clean out the rascals' than the possibility that those same rascals might perpetuate their policies simply by locking them into binding contracts."

Those who signed the many old decrees binding cities and states weren't rascals, but neither were they prophets who could divine the right policy for the distant future.

*Ross Sandler and David Schoenbrod are professors at New York Law School and authors of "Democracy by Decree: What Happens When Courts Run Government."*