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Age Discrimination in New York's Medicaid Benefit Payment Recoupment Statute

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AGE DISCRIMINATION IN NEW YORK'S MEDICAID BENEFIT PAYMENT RECOUPMENT STATUTE

INTRODUCTION

In 1966, the State of New York instituted its Medicaid Program. This program, while allowing aid recipients to retain ownership of certain assets, provided for recovery of benefit payments by means of a lien placed against their estate.[1] This recoupment is limited by New York Social Services Law § 369, subd. 1(b) which provides as follows:

> 1. All provisions of this chapter not inconsistent with this title shall be applicable to medical assistance for needy persons and the administration thereof by the public welfare districts. Any inconsistent provision of this chapter or other law notwithstanding, ...
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> . . . .
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> (b) there shall be no adjustment or recovery of any medical assistance correctly paid on behalf of such individual under this title, *except from the estate of an individual who was sixty-five years of age or older when he received such assistance,* and then only after the death of his surviving spouse, if any, and only at a time when he has no surviving child who is under twenty-one years of age or is blind or permanently and totally disabled, provided, however, that nothing herein contained shall be construed to prohibit any adjustment or recovery for medical assistance furnished pursuant to subdivision three of section three hundred sixty-six of this chapter.[2]

This Comment suggests that this provision, which allows recovery of expenditures from those who received assistance after reaching age sixty-five, while prohibiting recovery from those who received such assistance prior to reaching age sixty-five, is contrary

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1. 1966 N.Y. Laws, chap. 256.

2. N.Y. Soc. Serv. Law § 369 1(b) (McKinney) (1966) (emphasis added). It is noteworthy that the amount recovered pursuant to this section is a very small fraction of the total cost of the program. The projected state and federal assistance to the program alone amounts to over $2.6 billion for fiscal year 1980-81. *See* State of New York Executive Budget for the Fiscal Year April 1, 1980 to March 31, 1981, Report 430. Of this amount it was estimated that about $10 million would be recovered due to auditing activities of the Department of Social Services. *Id.* This auditing activity included not only recovery under § 369 1(b) but also actions pursuant to N.Y. Soc. Serv. Law § 366 3(a) (recovery from responsible relatives who are absent or who refuse to provide assistance at the time of the expenditures) and § 366 3(b) (recovery of incorrectly paid assistance). Therefore, only a very small percentage of the total Medicaid expenditures are recovered under § 369 1(b).

to public policy and would not withstand a modern equal protection analysis under the fourteenth amendment of the United States Constitution[3] or article I § 11 of the New York State Constitution.[4] Although the statute has been challenged in New York, the courts have not yet disposed of the constitutional question.[5]

I. History of New York's Medicaid Program and Section 369 1(b).

New York's Medicaid Program was enacted to bring the state into compliance with the provisions of Title XIX of the Federal Social Security Act of 1965.[6] This cooperative federal-state program evolved from earlier medical assistance legislation.[7] Its predecessor, the Kerr-Mills Program of Medical Assistance to the Aged, beginning in 1960 gave the states a chance to obtain matching federal grants for expenditures used to meet the medical expenses of elderly citizens. Many of these citizens had previously been ineligible for help.[8] The intent of the Kerr-Mills plan was to provide health services to those aged individuals who, although not eligible

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3. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
U.S. Const. amend. XIV, § 1.

4. No person shall be denied the equal protection of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdividion of the state.
N.Y. Const. art. 1, § 1 (McKinney) (1969).

5. *See, e.g.*, Scarpuzza v. Blum, 73 A.D.2d 237, 426 N.Y.S.2d 505 (2d Dept. 1980) (petitioner lacked standing to consider the constitutional question since the issue at hand had been settled by statutory determination); Matter of the Estate of Harris, 88 Misc. 2d 60, 387 N.Y.S.2d 796 (1976) (Surrogate's Court, Wayne County, found on statutory grounds that the Department of Social Services was not entitled to reimbursement from a widow's estate for Medicaid correctly paid to her husband during his lifetime. In doing so the court avoided the constitutional issue).

6. Pub. L. No. 89-97, 79 Stat. 286, H.R. 6675 (codified at 42 U.S.C. § 1396 *et seq.* (1965)).

7. An excellent summary of the Title XIX legislation can be found in [1979] Medicare and Medicaid Guide (CCH) 14,010; and in Data on the Medicaid Program: Eligibility, Services, Expenditures 1-2 (rev. ed. 1979).

8. Report by the Senate Subcommittee on Health of the Elderly to the Special Committee on Aging, Medical Assistance for the Aged (the Kerr-Mills Program 1960-1963), 88th Cong., 1st Sess. 3 (1963).

for welfare, were unable to afford them.[9] Unfortunately, the Kerr-Mills plan proved to be ineffective.[10] Title XIX was enacted in hopes of correcting the deficiencies of its predecessor.

The new program expanded eligibility by requiring those states implementing the plan to include the categorically needy and, at the state's option, the medically needy.[11] In New York, eligibility is further expanded by adding all those on public assistance[12] and those who are stricken with catastrophic illness.[13]

According to Title XIX, a state is not required to establish a Medicaid program, but should it choose to do so, the program must conform to federal guidelines in order to obtain matching funding.[14] Section 1396(a)(18) of Title 42 of the United States Code severely limits the circumstances under which states can demand recoupment of its expenditures from aid recipients and their relatives.[15] It was under the enabling authority of this section that

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9. *Id.*

10. *Id.* at 1-8. Among the several defects of the Kerr-Mills program were: (1) only slightly more than half of the states had instituted a program; (2) stringent eligibility tests, lien provisions, and responsible relative provisions discouraged participation in the program; (3) benefit levels varied widely from state to state; (4) high administrative costs; (5) grossly disproportionate distribution of federal matching funds since wealthier states were best able to finance their phase of the program; (6) states had distorted congressional intent by transferring persons already receiving welfare assistance to the Kerr-Mills program in order to take advantage of the higher matching grant provisions; and, (7) reduced participation due to aspects such as cumbersome investigations and depletion requirements.

11. The "categorically needy" includes those eligible to receive cash benefits through one of the existing welfare programs established by the Social Security Act (Aid to Families with Dependent Children and Supplemental Security Income). The "medically needy" are those who fit into one of the categories of people covered by the federal cash welfare programs (aged, blind, or disabled individuals, or members of families with dependent children when one parent is absent, incapacitated, or unemployed), but are ineligible for welfare because they have enough income to pay for their basic living expenses. If the state deems that their income is insufficient to pay for their medical expenses, they fall within the class. DATA ON THE MEDICAID PROGRAM, *supra* note 5, at 1.

12. In New York, public assistance includes both the Aid to Families with Dependent Children and Home Relief programs.

13. The "catastrophic illness" eligibility can be claimed by any person otherwise ineligible who incurs qualifying medical expenses in excess of twenty-five percent of annual net income, or the amount of such income in excess of public assistance levels, whichever sum is smaller. DEPARTMENT OF SOCIAL SERVICES, PUBLICATION No. 1006, April, 1978.

14. 42 U.S.C. § 1396(a) (1965).

15. 42 U.S.C. § 1396(a) (18) provided that:

> (a) . . . A state plan for medical assistance must . . . (18) provide that no lien may be imposed against the property of an individual prior to his death on account of medical assistance paid or to be paid on his behalf under the plan (except pursuant to the judgment of a court on account of benefits incorrectly paid

New York's § 369 1(b) was formulated.

II. Public Policy Considerations

One rationale Congress found for limiting the states in this manner was to eliminate the hardships created by requiring certain individuals to pay for the support and medical care of their relatives.[16] Although Congress felt that it was proper to expect spouses to support each other and for parents to be held responsible for the support of minor children and those who are permanently and totally disabled, it concluded that support requirements beyond these degrees of relationship were harmful to the family unit.[17] The legislative history of the recovery statute gives no explicit policy reason for the "over 65" distinction. In fact, the reports indicate that the lien provided for in Title XIX is simply a narrowing of the recovery statute enacted under the Kerr-Mills Medical Assistance for the Aged Program.[18] Since the Kerr-Mills plan was available exclusively to citizens aged sixty-five or older, this could serve as one possible explanation for the age classification in the current statute.

In adopting its Medicaid Program, the New York State Legislature stated that its intent was to meet all necessary federal requirements under the Social Security Act and not risk the loss of

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on behalf of such individual), and that there shall be no adjustment or recovery (except, in the case of an individual who was 65 years of age or older when he received such assistance, from his estate, and then only after the death of his surviving spouse, if any, and only at a time when he had no surviving child who is under age 21 or (with respect to States eligible to participate in the State program established under subchapter XVI of this chapter), is blind or permanently and totally disabled, or is blind or disabled as defined in section 1382c of this title (with respect to states which are not eligible to participate in such program)) of any medical assistance correctly paid on behalf of such individual under the plan.

16. Many earlier welfare programs would not allow government expenditures if certain relatives were financially able to provide for the needs of the individuals.

17. *See* [1965] U.S. Code Cong. & Ad. News 1943, 2018.

18. The Kerr-Mills recovery statute is 42 U.S.C. § 302 (a)(11)(E) (repealed by Pub. L. No. 92-603 effective Jan. 1, 1974, except with respect to Puerto Rico, Guam, and the Virgin Islands). This provision limited recovery to a lien against the estate of the deceased recipient, and then only after the death of his spouse. The title XIX provision which replaced § 302 (a)(11)(E) further limited the possibility of recoupment by forbidding recovery from a recipient who received his assistance before attaining age 65 or who was survived by a child under the age of 21.

federal reimbursement.[19] Nevertheless, this fails to explain the substance of § 369 1(b). The Social Security Act merely *allows* states to implement a scheme to recover expenditures; it does not *require* it. Many states have no such recovery statutes.[20]

In fact, New York's recovery provision seems to exist despite, rather than in light of, current public policy. Society is rediscovering that the elderly should be treated with respect rather than as marginal human beings. Governmental policies should strive to reaffirm this commitment to human dignity. Yet laws such as § 369 1(b) punish, rather than reward, the elderly for a long and productive life. The image of retirement and the "golden years" seems much less rosy when a person is faced with being forced out of work, living on a fixed income, and having to make the difficult decision of either forsaking needed medical assistance or risking a government lien on his estate.

This "over 65 provision" actually undermines the intent of the federal limitation on recovery statutes. Rather than facing the prospect of not being able to pass on to loved ones the remainder of their meager estates, many of the elderly refuse to apply for the public assistance which they so desperately need.[21] This psychological burden is further magnified by the fact that the lion's share of a Medicaid recipient's estate normally consists of the individual's home.[22] Although the younger generation seems little bothered by

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19. Matter of the Estate of Harris, 88 Misc. 2d 60, 387 N.Y.S.2d 796 (1976). *See* note 5 *supra*.

20. In re Estate of Colon, 83 Misc. 2d 344, 346, 372 N.Y.S.2d 812, 818 (Surr. Ct. Kings Co. 1975).

21. LEGAL RESEARCH AND SERVICES FOR THE ELDERLY, NATIONAL COUNCIL OF SENIOR CITIZENS, INC., LEGISLATIVE APPROACHES TO THE PROBLEMS OF THE ELDERLY: A HANDBOOK OF MODEL STATE STATUTES, 110-11 (1971). The study recommends the adoption of the following statute:

> Section 2. No liens or claims on property of Applicants or Recipients
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> (a) No department, agency, or other subdivision of this State, or representative of any of them, shall attach a lien or make a claim on the property of any applicant for or recipient of old age assistance for the propose of securing reimbursement of old age assistance granted.
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> (b) All liens attached or claims made on the property of applicants for or recipients of old age assistance by any department, agency or other subdivision of this State, or by any representative of any of old age assistance granted are hereby released. Notation of this release shall be made on encumbered titles by the department, agency or other subdivision of the State responsible for placing the encumbrance on the title.

22. "Time and again, throughout this committee's hearings and in all parts of the country, older people made it obvious that anything which in any way threatened their sense of

living in a heavily mortgaged home, to the elderly, owning a home that is free of all encumbrances is often all that remains of their dignity and sense of independence.[23]

Another rationale for limiting recovery provisions is that a lien placed upon a recipient's assets would only prove to be a disincentive for that person to ever strive for economic stability and thus remove himself from the welfare rolls. With this in mind, the legislature, by using the age distinction found in § 369 1(b), seems to be creating a presumption that at age 65, a person has reached the point where he would no longer be able to extricate himself from financial difficulties. Again this flies in the face of rational public policy. Increasing life expectancy will prove of little, if any, use if the law eliminates any incentive for a person to remain a productive individual. The image of the elderly worker as a burden on his employer has proved to be a false stereotype. The preponderance of gerontological research has shown no valid reason to distinguish the over 65 worker from his under 65 counterpart on the basis of

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free and outright ownership of the homes they had struggled to make their own was intolerable." *Supra* note 8, at 34.

23. Those of the younger generation who proudly lay claim to "ownership" of heavily mortgaged homes in suburbia may find this idea strange and difficult to understand. Its existence is nonetheless a fact, and a most important fact for the Congress to keep in mind in evaluating programs designed to aid the elderly in a way that will not outrage their sense of decency and dignity.

These older people with whom we are concerned grew up and matured in a tradition of rugged Americanism in which home ownership was an objective of paramount importance. To them "ownership" meant — and still means just that — outright ownership, free and clear. "Paying off the mortgage" was *the* goal in life for every couple. Its achievement, whether the home was valued at $5,000, $10,000 or $50,000 meant that one had proved himself, had acquired the status of a respectable, responsible, "solid" citizen.

To many of our older citizens, the home they own represents the totality of their life savings. This is important of course. But even more important is the fact that with income low or nonexistent, with friends dead or moved away, without the satisfaction that comes with employment, an older person's ownership of his home becomes to him the last remaining vestige of dignity, of security and of independence. These are all too often all that gives life meaning in old age. To rob an older person of dignity, of independence, and of the feeling of security, is to make of his life a mockery. The Kerr-Mills Act, itself, does not threaten to take away the home. A claim on one's home enforcible after death does not take that house away. Yet to the elderly, it seems to. To permit the state "to take a mortgage" on the home — whether it is or is not a mortgage in fact — is to admit defeat in life.

Supra note 8, at 34.

either work ability or contribution to the employer.[24]

Since the inception of the Medicaid Program, Congress has tightened the eligibility requirements. At the same time, the New York Legislature has shown a constant concern that the program is becoming too costly.[25] Even though the financial savings from recoupment is minimal,[26] this concern makes it doubtful that the legislature, on its own initiative, will repeal the recovery provision. Only judicial intervention will eliminate this "arbitrary quality of thoughtlessness" that our constitutional scheme was designed to prevent.[27] Litigation based on the equal protection clauses of both the federal and state constitutions would be the most effective means of eliminating this discrimination.

III. Equal Protection Analysis

When courts consider present day equal protection claims they apply one of three standards of review in determining the constitutionality of a statute. These standards are: (1) "strict scrutiny"; (2) the traditional rational basis test; and (3) the "middle tier" or "minimum scrutiny with a bite" test.[28] The argument against the validity of § 369 1(b) will be evaluated under each level of scrutiny.

A. *Strict Scrutiny Analysis*

Courts invoke the strict scrutiny analysis whenever a fundamental interest or right is infringed upon or when a detrimental classification is based upon a suspect class of individuals.[29] A persuasive argument can be made that this age classification should be judged according to this level of inquiry.

Although the United States Supreme Court held in *Massachusetts Board of Retirement v. Murgia*[30] that age is not an inherently

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24. Note, *Age Discrimination in Employment*, 47 So. Calif. L. Rev. 1311 (1974).

25. *See* 101st Annual Report of the New York Board of Social Welfare and New York State Department of Social Services, No One Can Stop It — Except Us (1967).

26. *See* State of New York Executive Budget, *supra* note 2.

27. Hobsen v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967).

28. An excellent history and analysis of the three standards of review can be found in Gunther, Cases and Materials on Constitutional Law 657-65 (9th ed. 1975).

29. *Id.* at 658.

30. 427 U.S. 307 (1976) (per curiam).

suspect classification,[31] the classification found in the present situation is distinguishable and deserves reconsideration. The age classification in § 369 1(b) places elderly Medicaid recipients into a "discrete and insular" group in need of extraordinary protection from the majoritarian political process.[32] Unlike *Murgia,* where the disadvantaged group consisted of middle aged government employees,[33] this statute discriminates against a class of elderly individuals who, by definition, are impoverished to the degree that they are medically needy.[34] Age combined with poverty, unlike some other classifications, is not an elective status from which one can escape by choice.[35] Section 369 1(b) presents a case where a majority government passes a law which is not benign, but is outwardly detrimental to the rights of a small, disadvantaged segment of the population, politically powerless because of its size and impoverishment.[36] Although the state has a valid interest in recovering expenditures, that interest bears none of the "pressing public necessity"[37] that is required in order to justify a suspect classification.[38]

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31. In a per curiam decision, the Court utilized the traditional rational basis test to uphold the age classification. Although other cases have presented the question of age classification, courts have generally relied upon *Murgia* as conclusive evidence that age, by itself, is not a suspect class.

32. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

33. *Murgia* concerned the mandatory retirement of Massachusetts State Police at age 50. It can be argued that the age classification in *Murgia* is based upon a greater public necessity due to the lessened physical ability of most men over age 50. This lessened ability might be considered to be a factor in adequately performing their duties as policemen. The age classification in § 369 1(b) bears no such public protection rationale and seems to exist solely for financial reasons. *See also* text accompanying notes 30 & 31 *supra.*

34. *See* note 11 & accompanying text *supra.*

35. Alienage, religion, citizenship, and political affiliation are all examples of statuses which are elective. It should be noted that the Supreme Court has not refrained from declaring even elective statuses to be suspect. *See* Graham v. Richardson, 403 U.S. 365 (1971), where the Court found alienage to be an inherently suspect classification.

36. The Supreme Court has defined a suspect class as one that is saddled with such disabilities as to be relegated to a position of being politically powerless. San Antonio School District v. Rodriquez, 441 U.S. 1 (1973). This quality distinguishes the improverished aged from other non-elective statuses, such as gender, which the court declined to declare suspect in Reed v. Reed, 404 U.S. 71 (1971).

37. Korematsu v. United States, 323 U.S. 214, 216 (1944). In *Korematsu,* the Court held that wartime emergency justified different treatment of a suspect class. It is unlikely that the possibility of recovering a small percentage of expenditures would reach such a high level of necessity.

38. "The state . . . may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare

The age classification found in § 369 1(b) also fails on the grounds that it infringes upon a fundamental right guaranteed by the New York State Constitution.[39] Unlike the Federal Constitution which recognizes no fundamental right in public assistance, article 17 of the state constitution mandates the public care and support of the needy.[40] The dual purposes of this article are evident from the comments made by Edward F. Corsi, Chairman of the Committee on Social Welfare, in moving the adoption of this provision by the Constitutional Convention:

> Here are the words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the state to those who must look to society for the bare necessities of life; and secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.
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> The legislature may continue the system of relief now in operation . . . . It may devise new ways of dealing with the problem. Its hands are untied. What it may not do is to shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government.[41]

A supremacy clause argument is unpersuasive in advocating the validity of this statute. The fact that the Federal Constitution recognizes no fundamental right to public assistance is irrelevant where the issue at hand is the rights secured by the state constitution.[42] Similarly, one cannot claim that the obligation to provide

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costs cannot justify an otherwise invidious classification." Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

39. *See* N.Y. CONST. art. 17, § 1 (McKinney) (1969).

40. "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such a manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. 17 § 1 (McKinney) (1969).

By classifying certain groups as eligible for Medicaid, the legislature has deemed these people to be "needy". *See* note 11 & accompanying text *supra*. Section 369 1(b) discriminates against certain of these individuals based not upon need but upon age.

41. REVISED RECORD OF THE CONSTITUTIONAL CONVENTION, vol. III, 2126 (1938). Evidence that article 17 was intended to include state responsibility for health care can be found in HINDMAN, THE NEW YORK CONSTITUTIONAL CONVENTION OF 1938, THE CONSTITUENT PROCESS AND INTEREST ACTIVITY 263-68 (1938).

42. Lee v. Smith, 43 N.Y.2d 453, 373 N.E.2d 247, 402 N.Y.S.2d 351 (1977), *aff'g* 87 Misc. 2d 1018, 187 N.Y.S.2d 952 (Special Term N.Y. Co. 1976) (statute denying eligibility for a state assistance program solely on the grounds that the individual is eligible for assistance under a federal program is violative of equal protection insofar as it denies the indi-

medical assistance is dismissed due to the federal participation in the program. The state's duty remains and cannot be avoided by assigning the needy to a federally funded program.[43]

A strong argument could be made that no fundamental right has been violated in this situation because the statute does not deny assistance to any individual, it merely requires the recovery from his estate of benefits accrued to him during his lifetime. Nevertheless, it is obvious that those sixty-five or older are paying a price for such assistance as compared to those who are similarly situated but who are under age sixty-five. The effect of § 369 1(b) is to force elderly recipients to make a crucial decision: either they must forfeit their consitutionally guaranteed right to public medical assistance, or pay the price by sacrificing their ability to bequeath to loved ones their estate unencumbered by liens. The legislature should not be able to mandate such a decision where it concerns such a fundamental constitutional privilege. This constitutes differing treatment of similarly situated individuals by statutory classification; thus, there is a clear violation of equal protection.

Even though it would be justified, it is doubtful that the courts would resolve this issue by invoking strict scrutiny. Such a resolution would be impractical. A finding of a suspect class or a fundamental right would virtually eliminate the ability of the legislature to make any classification in this important field of law.[44]

B. *Traditional "Mere Rationality" Test*

Under the mere rationality test of equal protection, a statute is upheld as constitutional if it rationally furthers some legitimate state interest. As stated in *Moore v. Nassau County Dept. of Public Transportation,*[45] the purposes of § 369 1(b) are to give medical assistance recipients a greater opportunity to become financially

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vidual supplementation needed in order to reach the state determined subsistence level). *Cf.* Tucker v. Toia, 89 Misc. 2d 116, 390 N.Y.S.2d 794 (Sup. Ct. Monroe Co. 1977), *aff'd* 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977) (statute imposing additional eligibility requirements upon those receiving aid pursuant to a state funded program but not upon those under a similar federal program is violative of equal protection insofar as it raises substantial barriers to efforts of some to receive assistance).

43. *See* note 42 *supra.*

44. The finding of a suspect class or an infringement of a fundamental right invalidates all classifications unless a compelling state interest can be shown. *See* note 28 *supra.*

45. 78 Misc. 2d 1066, 1071, 357 N.Y.S.2d 652, 657 (Sup. Ct. Nassau Co. 1974).

independent and to avoid encumbering their property with liens in return for medical aid furnished. This provides no rational justification for treating two similarly situated recipients differently merely because one is sixty-five years of age or older and one is not. There may be a valid state interest in recovering expenditures, but different treatment according to age does not further this interest.

It is even questionable whether the statute is rational as a means of cutting expenditures. For example, in many instances, the estate might be so small that the cost to the state of enforcing the claim is greater than the amount recovered. Yet by statute no distinction is made for such a situation. By complicating and delaying the closing of these small estates, these liens also prove to be a major inconvenience to the administrators. A statute should not cause more problems than it solves.

It is possible to argue that there has been no denial of equal protection since the state has declared that relatives, except for spouses and parents of minor children, are not responsible for a person's medical needs and in their place the state has assumed this responsibility. Therefore, as "payment" for this service, the state is entitled to recoupment of its expenditures. In effect, this means that heirs have bargained away their rights to divide up an unencumbered estate for the privilege of not being responsible for their relatives' medical needs. But this is not the pertinent issue. The discrimination inherent in § 369 1(b) is not against any legatee under the will. The discriminatory effect is that Medicaid recipients sixty-five years of age or older lose their right to devise an estate free from a Medicaid recovery lien while those under sixty-five do not.

Classification by age under § 369 creates a vastly under-inclusive category. For example, in 1976 only 36.5% of the total medical assistance expenditures were made to individuals aged sixty-five or older.[46] Thus, almost two-thirds of the payments were made without any possibility for recovery. The amount actually recovered is a very small percentage of the total expenditures.[47] Therefore, it appears that the furtherance of a legitimate state interest is mini-

46. NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, MEDICAID 1976: THE LOCALLY ADMINISTERED MEDICAL ASSISTANCE FOR NEEDY PERSONS PROGRAM IN NEW YORK STATE, PROGRAM ANALYSIS REPORT NUMBER 60 (Publication No. 1053) (1978).

47. *See* STATE OF NEW YORK EXECUTIVE BUDGET, *supra* note 2.

mal at best.

C. *"Middle Tier" or "Minimum Scrutiny with a Bite"*

Modern equal protection analysis has taken a dramatic shift due to the Burger Court's dissatisfaction with the traditional approaches whereby "strict scrutiny" led to virtual assurance that the statute would be invalidated and "mere rationality" lent itself to practically unchecked deferrence to legislative wishes.[48] Both the United States Supreme Court and the New York Court of Appeals have in recent years adopted a middle level of judicial scrutiny in certain instances for equal protection cases. Although the majority of the Supreme Court has not adopted this approach by name, in several cases it has invalidated a law that did not *substantially* further a state interest.[49]

The New York Court of Appeals has explicitly adopted and utilized this level of scrutiny.[50] Following the Court's lead, the Supreme Court, Nassau County, in *Board of Education Levittown Union Free School District, Nassau County v. Nyquist,*[51] ennunciated the guidelines to be used for a middle tier analysis. Initially, it must be determined whether the challenged statutory discriminations satisfies a substantial state interest. The discriminatory treatment must have a basis in actuality and not be merely conjectural. It must further some legitimate articulated purpose. Then, if it is found that the statute serves such a purpose, an examination must be made to determine if less objectionable alternatives would adequately fulfill the governmental objective.

Section 369 1(b) does not survive this analysis. It falls in the void between two irreconcilable governmental interests: to give

48. Alevy v. Downstate Medical Center, 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976). Justice Gabrielli of the N.Y. Court of Appeals, said:

> [t]he inflexibility of the traditional equal protection approaches is readily apparent for each is polarized and outcome-determinative. Modern day theorists, led by Professor Gerlad Gunther (see Gunther, The Supreme Court 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1) have detected a departure from the traditional approaches in recent precedent and argue, convincingly we think, that a middle level of review presently exists.

39 N.Y.2d at 333-34, 348 N.E.2d at 543-44, 384 N.Y.S.2d at 88.

49. *See, e.g.,* Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

50. 39 N.Y.2d 326, 348 N.E.2d 537, 384 N.Y.S.2d 82 (1976).

51. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. Nassau Co. 1978).

Medicaid recipients a greater opportunity to become financially independent,[52] and to recover governmental funds expended for the health care of the recipient. The knowledge that any net worth that an individual might have at death will not be devised but will go to the state proves to be a great disincentive to efforts at becoming economically sound.

In effect, the state is using an age classification for administrative convenience. Rather than making the more difficult determination of which individuals are likely to become financially independent, it is presuming that for those sixty-five years of age or older, the state interest in recouping its expenditures outweighs the rights of the individual to devise an unencumbered estate. Such a privilege might not be a fundamental right in the constitutional sense, but is one of the interests considered most essential by many older individuals.

The age classification in § 369 1(b) also suggests that there is no state interest in giving the elderly a greater opportunity to become financially independent. This could only be true if the state presumes that an individual sixty-five or older who is receiving medical assistance will never obtain financial stability and thus lose his eligibility for such assistance. This assumption is based on an archaic and overbroad generalization not tolerated under the Constitution.[53] Presumptions such as these are not justified by mere administrative convenience.[54] A state is forbidden by the Due Process Clause to deprive an individual of his rights on the basis of a permanent and irrebuttable presumption that is not necessarily or universally true in fact when there are alternative means of making the crucial determination.[55] For example, a hearing to determine the possibility of the recipient obtaining financial stability would suffice to overcome this constitutional roadblock.

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52. Moore v. Nassau County Dep't of Public Transportation, 78 Misc.2d 1066, 357 N.Y.S.2d 652 (Sup. Ct. Nassau Co. 1974).

53. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). Here the invidious distinction was based on the generalization that male workers' earnings are vital to their families' support while female workers' earnings are not. Similarly, the age distinction found in § 369 1(b) is based on the overbroad generalization that Medicaid recipients over age 65 are no longer capable of becoming financially sound.

54. United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973).

55. Vlandis v. Kline, 412 U.S. 441 (1973) (the State of Connecticut was forbidden by the Due Process Clause from denying an individual resident tuition rates based on an irrebuttable presumption of non-residence when the presumption was not necessarily or universally true in fact).

Other non-discriminatory, more narrowly tailored alternatives to the rigid age classification do exist. The state could declare that the lien against the estate of the recipient will be released if the individual loses his eligibility. With the use of this procedure, the state's goal of having the recipient become financially independent may also be realized.

Alternative legislation could also be used to nullify another argument for the age distinction. Since the value of a recipient's home is not considered for eligibility purposes,[56] it could be argued that a lien provision is necessary to prevent an elderly recipient from transferring all of his assets into a homestead and thus circumventing the asset limit for eligibility. On the contrary, a statutory presumption against such transfers which would disqualify a person from eligibility would eliminate this possibility while still allowing the homestead exemption.[57]

A court in considering this question should reject any hypothesized purposes or state interests and base its scrutiny on articulated purposes and the legislative history. Justice Brennan stated in *Weinberger v. Wiesenfeld*,[58] "[t]his court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." As discussed earlier, in the absence of any articulated, rational explanation to the contrary, it would appear that the age distinction found in § 369 1(b) is merely a carryover from earlier Kerr-Mills assistance programs,[59] and bears no substantial

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56. N.Y. Soc. Serv. Law § 366 2(a)(1) (McKinney) (1966).

57. Although case law has not confirmed it, it is arguable that N.Y. Soc. Serv. Law § 366 1(e) has already eliminated the possibility of this type of circumvention of the asset limit. Section 366 1(e) states that:

> 1. Medical assistance shall be given under this title to a person who requires such assistance and who
>
> . . . .
>
> (e) has not made a voluntary transfer of property (i) for the purpose of qualifying for such assistance, or (ii) for the purpose of defeating any current or future right to recovery of medical assistance paid, or for the purpose of qualifying for, continuing eligibility for or increasing need for medical assistance. A transfer of property made within eighteen months prior to the date of application shall be presumed to have been made for the purpose specified in subparagraph (i) [to qualify for Medicaid]. . . .

58. 420 U.S. 636, 648 n.16 (1975).

59. *See* note 18 & accompanying text *supra*.

relationship to any state interest concerning the present program.

IV. CONCLUSION

The Supreme Court has traditionally given legislative bodies a great deal of deference in matters concerning economic and social rights. On the other hand, statutes infringing upon an individual's personal liberties such as the right to vote or the right to travel have undergone a more painstaking examination.[60] Yet in the last decade the Court has questioned this doctrine. In *Lynch v. Household Finance Corporation,*[61] the Court said:

> The dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without law deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other. That rights on property are basic civil rights has long been recognized.[62]

Furthermore, this statute is not purely economic in nature. As Justice Marshall urged in his dissent in *Richardson v. Belcher,*[63] special attention should be paid to the individual interest at stake: "Judges should not ignore what everybody knows, namely that legislation regulating business cannot be equated to legislation dealing with destitute, disabled or elderly individuals."

This line of reasoning has been evident in a series of Supreme Court decisions striking down provisions of the Social Security and welfare laws as violations of equal protection.[64] Similarly, the New

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60. *See* GUNTHER, *supra* note 28, at 594.

61. 405 U.S. 538 (1972).

62. *Id.* at 552.

63. 404 U.S. 78, 90 (1971) (dissenting opinion).

64. Califano v. Goldfarb, 430 U.S. 199 (1977) (Social Security Survivors benefits were awarded to widowers only if they could prove that their wife provided at least one half of their support. No such proof was required for widows.); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (Social Security Survivors benefits awarded to widow and children but denied to widower if his children received benefits); Jimenez v. Weinberger, 417 U.S. 628 (1974) (disability insurance benefits were awarded to illegitimate children only if they could prove that disabled parent contributed to their social support or resided with them); United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (the Food Stamp Act denied eligibility to any household where unrelated individuals lived together); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (any person over the age of 18 who was claimed as a dependent by a person who did not live in the same household was ineligible for food stamps).

York Court of Appeals has invalidated several public assistance statutes.[65]

Although it would be unlikely that the courts would resolve this issue by applying strict scrutiny standards,[66] the courts of New York State could declare the age classification in § 369 1(b) to be unconstitutional on the basis of a "middle tier" test of equal protection.[67] Due to the federal prohibition against liens placed against the estates of those who received Medicaid assistance prior to their sixty-fifth birthday,[68] it appears that New York would then have to either devise an alternative means of providing for recoupment or completely abandon its efforts to recover Medicaid benefit payments.

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65. Lee v. Smith, 43 N.Y.2d 453, 373 N.E.2d 247, 402 N.Y.S.2d 351 (1977), *aff'g* 58 A.D.2d 528, 394 N.Y.S.2d 1021 (1st Dep't 1977), *aff'g* 87 Misc. 2d 1018, 187 N.Y.S.2d 952 (Special Term N.Y. Co. 1976) (Home Relief benefits denied until the recipient had filed support proceeding against all responsible relatives); Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728, (1977) *aff'g* 89 Misc. 2d 116, 390 N.Y.S.2d 794 (Sup. Ct. Monroe Co. 1977) (Supplemental Security Income recipients were often entitled to less total benefits than if they received assistance under the state welfare programs).

66. *See* note 44 & accompanying text *supra.*

67. *See* notes 48-59 & accompanying text *supra.*

68. 42 U.S.C. § 1396 (a) (18) (1965).