

1994

Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?

Melanie B. Abbott
Quinnipiac College of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>

 Part of the [Housing Law Commons](#)

Recommended Citation

Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?*, 22 Fordham Urb. L.J. 1 (1994).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol22/iss1/1>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?

Cover Page Footnote

Associate Professor of Law, Quinnipiac College School of Law, Bridgeport, Connecticut, member of the bars of the States of Connecticut and New York. The author wishes to thank her colleagues Martin B. Margulies, W. John Thomas and Neal Feigenson for their comments on earlier drafts of this Article, and Margaret Trimarchi, '92, Julie Enowitch, '93, and Jill Teitel, '96, for their assistance in the research for this article.

HOMELESSNESS AND SUBSTANCE ABUSE: IS MANDATORY TREATMENT THE SOLUTION?

Melanie B. Abbott*

Introduction

Mrs. Hexler still loves shopping
though she has no credit cards.
Now she fills her rusty handcart
with junk from strange backyards.
Most of the time she can't remember
just who she used to be,
so she takes a swig of Night Train
and sorts through the debris.
But there's shelter at the flophouse
if you can put up with the smell,
and never be too trusting
of this hotel's clientele.
Still the government won't help out -
the whole damn thing's a mess.
No job
No home
No money
No forwarding address.¹

The problem of homelessness has been part of America's national consciousness for over a dozen years.² During that time, public attention has waxed and waned. As governments at all levels have tried, and failed, to solve the problem of homelessness, and to address the despair of those in such straits, the public has become increasingly impatient.

* Associate Professor of Law, Quinnipiac College School of Law, Bridgeport, Connecticut, member of the bars of the States of Connecticut and New York. The author wishes to thank her colleagues Martin B. Margulies, W. John Thomas and Neal Feigenson for their comments on earlier drafts of this Article, and Margaret Trimarchi, '92, Julie Enowitch, '93, and Jill Teitel, '96, for their assistance in the research for this article.

1. Kevin Roth and Mike Renshaw, *No Forwarding Address, on The Gentleness in Living* (Marlboro Records, 1992) (used by permission of the authors).

2. A search of Lexis' News Database, MAJPAP file, reveals only a handful of references to homelessness in major United States newspapers prior to 1981. Beginning in that year, the problem became the focus of greater public attention, with stories relating to shelters and people living on the streets becoming increasingly common.

This governmental insufficiency and public frustration result, at least in part, from a failure to address the link between substance abuse and homelessness.³ Whether abuse of alcohol or drugs caused the original loss of housing, or whether the loss of housing initiated a pattern of substance abuse, it is clear that use of drugs and alcohol play a role in preventing the homeless from securing and maintaining permanent housing.⁴ This connection has become more important in recent years. As advocates, critics and commentators alike have begun to focus their attention on the problems precipitating and extending homelessness,⁵ it has become increasingly clear that a solution that fails to address substance abuse will not succeed.⁶ Since the problem has persisted and worsened without a solution in sight, recognition of the true emergency nature of the problem at all levels of American society has grown.

Compounding the problem is the underlying, and usually unstated, moral dilemma presented by efforts to assist the homeless. Inherent in the issue is the question of moral judgment—are the homeless “worthy” of help or are they “unworthy”? And if their homeless condition is caused or exacerbated by substance abuse, should society be even less willing to offer assistance? Should a solution offer help first to those who are deemed somehow more “deserving” of America’s limited compassion? Solutions that fail to confront these painful realities cannot succeed.

This Article focuses on the problems presented by substance abuse among the homeless. Part II examines the connection between substance abuse and homelessness. Part III reviews federal and state attempts to address the problems of poverty and homelessness, which were made over the last decade. In particular, attention will be paid to the insufficiency of attempted “cures” for both the abuse and housing problems of substance-abusing homeless. Part IV will consider the problems inherent in seeking a solution, and Part V reports on some model programs currently in operation or in the planning and construction processes. Part VI

3. See, e.g., *infra* notes 8-10, 39-43 and accompanying text.

4. See *infra* note 6 and accompanying text.

5. For a particularly clear example of the debate concerning the issue of homelessness, compare Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 391 (1990-91) (asserting that the advocate’s approach to homelessness is as important to the policy debate as is academic, theoretical analysis, because any adequate policy solution must address immediate needs of the homeless as well as the long-term policy needs) with Robert C. Ellickson, *The Homelessness Muddle*, 99 PUB. INTEREST 45, 59 (1990) (arguing that traditional policy approaches, urging the creation of governmental solutions to homelessness, are “wrongheaded”).

6. See *infra* notes 39-43 and accompanying text.

proposes a federal solution, arguing that the only long-term approach with any chance of achieving real success is a national remedy that includes treatment for substance abuse as a condition attached to the provision of housing. Part VI concludes by arguing that fiscal, statutory and civil rights concerns, which are inherent in the linking of housing with mandatory participation in treatment programs, are not insurmountable barriers. For readers who wish to review the causes and characteristics of the homeless, the Appendix describes the homeless population and examines the causes of homelessness.

II. Substance Abuse and Homelessness

Significant segments of the homeless population have either a history and/or a practice of abuse of alcohol and/or drugs.⁷ Whether the substance abuse is responsible for the homeless condition, or whether homelessness itself creates such insecurity that it exacerbates pre-existing propensities toward substance abuse, are much-discussed issues.⁸ However, it is clear that there is an important connection between substance abuse and homelessness, and therefore, a successful solution must address substance abuse.⁹

Dr. Pamela Fischer has contributed significantly to the compilation of statistical information concerning substance abuse and the homeless. Dr. Fischer collected some eighty studies of homeless

7. Many reports combine statistics for mentally ill homeless people with those for substance abusers, but even with that added confusion, the studies indicate that the prevalence of substance abuse among the homeless population is important. See, e.g., Constance Holden, *Homelessness: Experts Differ on Root Causes*, 232 SCIENCE 569, 570 (May 2, 1986) ("Mental health professionals . . . cited studies showing that in most homeless populations at least two-thirds are mentally ill or alcoholic." Holden also notes that a study undertaken by a Harvard Medical School psychiatrist "found that 90% of a Boston shelter population were disabled by schizophrenia, alcoholism, or severe personality disorders"); James K. Langdon II & Mark A. Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J. L. & SOC. PROBS. 305, 308 n.21 (1985) (noting that in the New York shelter study 20% of the homeless persons questioned "acknowledged past or present drinking problems, and 17% hard drug usage"). For purposes of this Article, the term "substance abuse" will be used when the discussion applies to any combination of alcohol or drug abuse, while the specific term will be used when the reference applies to only one or the other.

8. See, e.g., Bruce G. Vladeck, *Health Care and the Homeless: A Political Parable for Our Time*, 15 J. HEALTH POL., POL'Y & L. 305, 310 (1990) (suggesting that "the development of certain adaptive behavior patterns, especially among single homeless men, leads to a variety of forms of substance abuse"); Ellickson, *supra* note 5, at 51 (acknowledging that "the wretched social environment in many shelters may aggravate underclass pathologies of dependence, unemployment and substance abuse").

9. See *infra* notes 39-43 accompanying text. See also Wizner, *supra* note 5, at 390 n.19.

populations evaluated in a variety of sources, including shelters, single room occupancy hotels (SRO's), jails, detoxification centers, hospitals and other treatment facilities.¹⁰ Her summary reveals both the disparity of the various substance abuse studies and the problems related to reliance on these different types of studies as a means of analyzing homelessness.

Dr. Fischer's report first addressed national studies of alcohol use. She reported that studies conclude that alcoholism affects approximately 10% of the general population.¹¹ Two studies undertaken in Veterans' Administration (VA) clinics reported that 48.5% to 55.2% of homeless VA patients experienced problems with alcohol.¹² Another study of nearly 20,000 homeless men, undertaken by a clinic, revealed that 47.4% exhibited signs of alcohol abuse.¹³ A survey of shelter providers reflected a 38% substance abuse problem among users of those shelters.¹⁴ Other regional studies revealed a wide disparity in reported alcohol abuse, ranging from 7%¹⁵ to 86%.¹⁶

Dr. Fischer's study reported a similar range of drug abuse among the homeless. Among the general population, up to 60% of 18-25 year-olds and 20% of persons 35 and over report use of illegal drugs.¹⁷ The findings of drug abuse in national studies demonstrated low estimates of from 1.9% to 38%.¹⁸ Regional studies revealed an extremely wide range of reported drug abuse problems, from 1%¹⁹ to 70%.²⁰

10. Pamela J. Fischer, *Estimating the Prevalence of Alcohol, Drug and Mental Problems in the Contemporary Homeless Population: A Review of the Literature*, CONTEMPORARY DRUG PROBLEMS at 333 (Fall 1989).

11. *Id.* at 358.

12. *Id.* at 336, Table 1. The manner in which the information was obtained differed between the two studies, as did the way in which the presence of a problem was defined.

13. *Id.*

14. *Id.*

15. Fisher, *supra* note 10 at 342, Table 1 (reporting on a study of 191 adults in shelters and on the streets, where self-reporting by the homeless persons studied and observation of the surveyors resulted in a finding that there was a 7% of those surveyed had alcohol-related impairments).

16. *Id.* at 341, Table 1 (reporting on a study done at a shelter in Anchorage, Alaska, in which 86% of the 54 adults self-reporting acknowledged problems with alcohol abuse).

17. *Id.* at 360.

18. *Id.* at 343, Table 2. The figure of 1.9%, the lower end of a range of 1.9 - 3%, was reported in a study of 11,747 homeless adults whose medical records were reviewed at a clinic. The higher estimate reflected a conclusion from shelter provider surveys that 38% of shelter users had substance abuse problems. *Id.*

19. *Id.* (reflecting results of a study in which 78 Boston families were evaluated by

Dr. Fischer's analysis reveals that the wide disparities among the methods used to conduct the studies she summarizes make it difficult to draw conclusions from the numbers reported.²¹ For example, studies use widely divergent definitions of homelessness.²² Thus, where large numbers of persons who do not fit the more generally-understood definition of homelessness are included in studies, the prevalence of problems affecting those who are truly homeless may not accurately be reflected.²³ Further, the method of screening for substance abuse problems affects the outcome of the study. Among the methods used to elicit indications of substance abuse are psychiatric examinations, standardized instruments, prior treatment history, review of records and self-reporting.²⁴ Dr. Fischer attempted to adjust for the inconsistencies among the different reporting methods and concluded that the most accurate studies showed that from 12.5% to 66% of the homeless had alcohol problems and that up to half of the homeless abused other drugs.²⁵ Notwithstanding the uncertainties reflected in her studies, Dr. Fischer concludes that the studies "offer strong

psychiatrists, who concluded that 1% of those reviewed met the clinical definition of DSM-III drug dependence [[get full term for DSM III from Fiscvher article]]).

20. Fisher, *supra* note 10 at 345, Table 2 (summarizing a study undertaken at St. Vincent's Hospital in New York City, in which a review of the medical records of 300 patients revealed that 70.0% demonstrated evidence of intravenous drug use).

21. *Id.* at 335. Among the different features of the studies making comparisons problematic are "how homelessness is defined, how individuals meeting the definitional criteria are identified and sampled, and how alcohol, drug and mental health problems are defined and assessed."

22. *Id.* For example, in some studies those who seek meals at soup kitchens are counted, even though they may include persons who have shelter and merely seek to supplement inadequate food budgets. Other studies count actual shelter residents.

23. *Id.* at 360-62 (noting that, in one study, persons using Salvation Army services were studied and the low prevalence of mental illness among them was used as an argument against the provision of mental health services for the homeless. However, because many low-income but not homeless persons used the Salvation Army soup kitchens, the actual needs of those who were truly homeless were not clearly indicated.)

24. *Id.* at 368-73. Further, even within each sampling mechanism, inconsistencies based on differences in definitions of homelessness and of alcohol and drug abuse render such studies less than fully reliable for purposes of comparison.

25. Fisher, *supra* note 10 at 373-75 and Table 8. Her summary reported that in four studies using psychiatric examination as the assessment method, from 12.2% - 68% of those tested had alcohol problems, while from 1% - 23.1% assessed in that manner had drug problems. In eight studies of alcohol use based on standardized assessment scales, from 28.3% - 66.8% reported alcohol problems.

In two studies of drug abuse using standardized assessment scales, the frequency of drug use was reported at 10.1% - 48%. Thus, her summary indicates that from 12.2% - 66.8% of homeless persons assessed according to these "accurate assessment methods" had alcohol problems, and from 1.0% - 48% had drug problems.

evidence that alcohol[.], . . . drug . . . and mental health problems . . . are widespread among the contemporary homeless."²⁶

A more recent study conducted in New York City shelters paints an even bleaker picture. In 1991, Mayor David Dinkins appointed a commission, headed by Andrew Cuomo, to study the problem of homelessness in New York City.²⁷ Obtaining its information through a combination of urine testing of shelter residents and interviews that included questions about drug and alcohol use,²⁸ the commission conducted a comprehensive study of the City's shelter population. This study reported that up to 80% of homeless men housed in the City's mass shelters and about 30% of the adults in family shelters used drugs or alcohol.²⁹

Advocates for the homeless have long been divided over the advisability of publicly revealing the extent of substance abuse among the homeless. When the homelessness crisis began, the advocacy community made conscious efforts to portray the homeless as mainstream, middle-Americans.³⁰ This was in part based on reality, but it is more likely that it occurred because of the advocates' awareness that the public would respond more favorably to pleas for help from those with whom they could associate and feel comfortable.³¹ Portraying the problem as one that could be solved by

26. *Id.* at 358.

27. Celia Dugger, *New York Report Finds Drug Abuse Rife in Shelters*, N.Y. TIMES, Feb. 16, 1992, at 1, col. 6 [hereinafter *New York Report*]. For a particularly clear example of the debate concerning the issue of homelessness, compare Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387 (1990-91) (asserting that the advocate's approach to homelessness is as important to the policy debate as is academic, theoretical analysis, because any adequate policy solution must address immediate needs of the homeless as well as the long-term policy needs) with Robert C. Ellickson, *The Homelessness Muddle, The Public Interest* 45, 45 (1990) (arguing that traditional policy approaches, urging the creation of governmental solutions to homelessness, are "wrongheaded"). Andrew Cuomo, son of New York's former governor, achieved prominence as a creator of private programs providing housing for the homeless in New York State. See *infra* notes 195-206 and accompanying text.

28. *Id.* at 44 col. 2. The overall finding of drug abuse revealed in urinalysis testing conducted on men living in all types of shelters was 65%, with those in the large armory shelters evincing a rate of 80% with traces of drugs, mostly cocaine, in their blood. Similar testing of 495 adults, mostly women in family shelters, revealed that 26% had alcohol or drugs in their blood, as compared to 34% of women in large shelters whose tests revealed evidence of those substances.

29. *Id.* at p.1.

30. Gina Kolata, N.Y. TIMES, May 22, 1989, § A, at 1, col 2 (quoting Robert Hayes, who noted that television news programs and congressional committees ". . . want someone who will be sympathetic to middle America.).

31. See Celia Dugger, *Search for Shelter: New York and Its Homeless*, N.Y. TIMES, July 6, 1993, at A1. (quoting a board member of the Coalition for the Homeless:

an increase in the availability of housing protected the homeless against the backlash that would inevitably follow the public acknowledgement that the problem was almost impossibly complicated.³² In addition, some advocates feared that focusing too much attention on the personal problems of those who were homeless would divert attention from the fundamental unfairness of American society caused by the unequal distribution of wealth among Americans.³³

As the homelessness crisis persisted, advocates tried many different solutions, but they often failed.³⁴ The reasons for the failures were not limited to the substance abuse of many of the homeless, but that problem was certainly an element.³⁵ As solutions focusing exclusively on housing proved inadequate in light of the growing numbers of the homeless, and as the substance abuse problems of the homeless became better-known, the relationship between these problems became more glaring.³⁶

Finally, advocates began to admit that viable solutions required an acknowledgement of the problem of substance abuse. Sometimes that admission came voluntarily,³⁷ and sometimes, as in New York, official action forced it. New York City began to emphasize the connection between treatment and housing only after Mayor Dinkin's commission completed its report. The report concluded that only a comprehensive program, which would include smaller shelters furnishing services to aid in the treatment of problems like substance abuse, could begin to address the needs of the city's homeless.³⁸ Further, the commission advocated limiting the provision of permanent housing to those who successfully completed

"There was a discussion that went on among us all, . . . Do you market it as a problem of shelter, or do you tell people about alcoholism, drug addiction, mental illness, concerns about child abuse?").

32. *Id.* See also Wizner, *supra* note 6, at 390.

33. See Holden, *supra* note 7, at 570.

34. See also Langdon & Kass, *supra* note 7; Kenneth M. Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 WASH. U. J. URB. & CONTEMP. L. 155 (1987) (analyzing range of lawsuits brought in state courts).

35. See Wizner, *supra* note 5 at 394-95.

36. Celia Dugger, *Gambling on Honesty on the Homeless*, N.Y. TIMES, Feb. 17, 1992, at B1.

37. Sara Rimer, *Law Seeks Drug Treatment on Demand*, N.Y. TIMES, June 14, 1989, § B, p.1, col.3 (reporting on institution of suit by New York Coalition for the Homeless seeking treatment on demand for homeless substance abusers); see also N.Y. TIMES, Feb. 17, 1992, at B2 (noting that advocates, including Bob Hayes, had acknowledged that more than just "housing, housing, housing" was necessary to deal successfully with the problem of homelessness).

38. See Dugger, *New York Report supra* note 27.

substance abuse or other treatment or training.³⁹ According to Andrew Cuomo, recognition of the problems experienced by homeless substance abusers was an essential step toward winning public support for the expenditures necessary to mount a campaign capable of success.⁴⁰

New York City's experience is consistent with that of other municipalities and states dealing with the homelessness crisis.⁴¹ The reluctance of advocates to publicize the connection between substance abuse and homelessness, while understandable, may make public acceptance of further efforts to create additional housing less likely.⁴² While New York's redirection of its efforts is still in the formative stages, it is clear that recognition of the need for services in addition to housing is an essential step in the development of realistic solutions to the problem of substance abuse and homelessness. Perhaps a more open acknowledgement of the connections will light the path toward successful solutions. As the next sections will illustrate, this new approach is essential because the efforts of governments at all levels have been remarkably unsuccessful thus far.

III. Previous Governmental Attempts to Address Poverty and Homelessness

Both federal and state governments have attempted to confront the problem of homelessness. Made with varying degrees of seriousness and commitment, these attempts have included the legislative efforts described in the following sections. Whether they address homelessness itself or the underlying poverty that causes homelessness, these efforts have been unsuccessful. To force or supplement government efforts to solve the homelessness crisis, advocates and homeless people have also tried to use judicial means. Although some lawsuits have met with positive results, the likelihood of long-term success via these avenues is minimal.⁴³ Even

39. *Id.*

40. *Id.* Celia Dugger, author of *Gambling on Honesty on the Homeless* *supra* note 36, commented, "[b]y documenting that crack use is widespread among the homeless in New York City, a mayoral commission is betting that leveling with the public about just how bad the problem is will pay off in support for new programs to treat the addicted. . . ."

41. See Langdon & Kass, *supra* note 7, at 345-49; Lauren M. Malatesta, Note, *Finding a Right to Shelter for Homeless Families*, XXII SUFFOLK U. L. REV. 719, 724-26 (1988) [hereinafter *Right to Shelter*].

42. See *supra* notes 29-30 and accompanying text.

43. See *infra* notes 169-82 and accompanying text.

where the governmental programs described below provide some relief for those rendered homeless by poverty alone, their inability to address the additional problems posed by substance abuse makes them unsuitable as a solution to the more complex problem facing society. A comprehensive governmental solution, focusing on the complex combination of problems, is essential.

A. Federal Laws

In 1983, President Reagan asserted that “[t]he provision of a home and a suitable living environment for every American family continues to be a national housing goal.”⁴⁴ However, the House Committee on Government Operations reported in 1985 that the Reagan administration demonstrated “a general ambivalence and lack of commitment on the part of the Federal Government toward the homeless crisis.”⁴⁵ A critic asserted, “. . . [the] housing shortage . . . has been brought on by a concerted effort in Washington *not* to have a national policy which guarantees a decent home for all people.”⁴⁶ Rather than addressing the problem through a unified federal approach, the Reagan and Bush administrations advocated focusing action against homelessness, like other social problems, in the states and the cities. Unfortunately, decreases in federal aid to those local entities made comprehensive treatment virtually impossible at those levels.

The United States Constitution does not provide a right to housing.⁴⁷ Advocates, attempting to force the federal government to take a more active role and embrace their cause, generally focus their efforts on a variety of federal legislative programs, including general assistance for persons living below the poverty line,⁴⁸ the social security program,⁴⁹ Section 504 of the Rehabilitation Act of

44. Proclamation No. 5096, 48 FED. REG. 41,751 (1983).

45. HOUSE COMM. ON GOVERNMENT OPERATIONS, *THE FEDERAL RESPONSE TO THE HOMELESS CRISIS*, H.R. Rep. No. 47, 99th Cong., 1st Sess. 12, 18 (1985) (hereinafter *THE FEDERAL RESPONSE*).

46. Nancy K. Kaufman, *Homelessness: A Comprehensive Policy Approach*, 17 URB. & SOC. CHANGE REV. 21, 22 (1984).

47. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). See *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1981) (holding that the constitution does not guarantee access to dwellings of a particular quality.) See also Donna Mascari, Note, *Homeless Families: Do They Have a Right to Integrity*, 35 UCLA L. REV. 159, 170-71 (1987) [hereinafter *Right to Integrity*], at 174; *Right to Shelter*, *supra* note 41, at 723.

48. Aid to Families with Dependent Children Act, 42 U.S.C. §§ 601-687 (1991); Food Stamp Program, 7 U.S.C. §§ 2011-2032 (1994).

49. 42 U.S.C. §§ 421-423, 1381-1385 (1988).

1973,⁵⁰ the Fair Housing Amendments Act of 1988⁵¹ and the Stewart B. McKinney Homeless Assistance Act of 1987⁵² (hereinafter "the McKinney Act"). While these programs may address certain aspects of the problem, none provides a comprehensive approach to treatment of those who are both homeless and substance abusers. Those few legislative efforts, however, suggest a greater degree of respect for the problem of homelessness than has been illustrated in recent years.

1. General Assistance

Aid provided by the federal government under the programs generally referred to as "welfare" but more properly categorized as "general assistance" is of little use in solving the problems of most substance-abusing homeless persons. The eligibility requirements and limitations on funding make it impossible for these programs to provide the scope of assistance needed by most homeless substance abusers. These programs include Aid to Families with Dependent Children (AFDC)⁵³ and the Food Stamp program.⁵⁴

AFDC provides funding to states that have submitted to the Secretary of Health and Human Services programs for assistance to "needy families with children."⁵⁵ The federal statute sets general eligibility criteria for participating states to use in awarding aid to needy families, requires that states contribute financially to the AFDC programs and mandates that states provide a wide range of general assistance conforming with other federal requirements.⁵⁶ The requirement for approval of participants expressly forbids

50. Pub. L. No. 93-112, Tit.5, § 504, 87 Stat. 394 (1973)(codified as amended at 29 U.S.C. § 794 (1988)).

51. Pub. L. No. 100-430, 102 Stat. 1619 (1987) (to be codified at 42 U.S.C. §§ 3601-3619 (1988)).

52. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1988), (to be codified at 42 U.S.C. §§ 11301-11472 (West Supp. 1993)). The McKinney Act was named after a popular Republican Congressman from the Fairfield County area of Connecticut, who, despite the relative wealth of the majority of his constituency, devoted significant efforts to the problems of the homeless prior to his death in 1987.

53. Aid to Families with Dependent Children, 42 U.S.C. §§ 601-617 (1991).

54. 7 U.S.C. § 2011 (1991).

55. 42 U.S.C. § 601 (1991). See *Right to Shelter*, *supra* note 41, at 729-33.

56. 42 U.S.C. § 602(a). The AFDC provisions define a "dependent child" as one "who has been deprived of parental support or care by reason of the death, continued absence from the home . . . or physical or mental incapacity of a parent". Thus, in general, children of intact families, or children whose parents do not meet the statutory definition of incapacity, are not covered. Further, dependent children must be living "in a place of residence maintained by" a relative, including parent, grandparent, sibling, aunt, uncle or cousin. Thus, even though a state may not use residency

states to condition eligibility on residency of children or parents.⁵⁷ Presumably, AFDC payments may be used to pay for shelter expenses as well as for other specific needs of the dependent child.⁵⁸ However, by definition, AFDC does not provide assistance to adults who do not have dependent children.

Unlike AFDC, the Food Stamp program applies to families without absent or incapacitated adult members as well as to other "households."⁵⁹ The Food Stamp program is intended to effect a congressional policy of alleviating "hunger and malnutrition among members of [low-income] households."⁶⁰ Congress created the program to provide a means of enhancing the food-purchasing power of eligible households. The plan allows a state to provide an allotment of food stamp coupons to eligible households each month. The consumers use these coupons to purchase food at retail stores or, in some cases, to purchase meals from various service providers. The store or provider then remits the coupons to the U.S. Department of Agriculture, which redeems them at face value.⁶¹ In general, households whose income either does not exceed the poverty line defined in the Community Services Block Grant Act,⁶² or, in certain cases, exceeds the poverty line by not more than 30%, are considered eligible under the Food Stamp program's standards.⁶³

Food stamps are certainly of some use to substance-abusing homeless persons, but alone they are not likely to be of any great assistance in resolving the fundamental problems confronting these persons. First, homeless people, whether substance abusers or not, are often unaware of their eligibility for Food Stamps because they are not adept at gaining access to the governmental machinery that makes Food Stamps and other benefits available.⁶⁴ The Food

requirements as a condition of eligibility, it must still consider whether a child living with a parent in a shelter, or on the street, fits within this definition.

57. *Id.*

58. 42 U.S.C. § 606(b) defines "aid to families with dependent children" to include "money payments to meet the needs of the relative with whom any dependent child is living." See *Right to Shelter supra* note 42, at 730-31 (noting that a federal district court held that states have wide discretion in choosing how to use the funds provided by AFDC, but that if a state promises in its AFDC plan to use funds for shelter it must do so, (citing *Koster v. Webb*, 598 F. Supp. 1134 (E.D.N.Y. 1983)).

59. 7 U.S.C. § 2012(i) (1991).

60. 42 U.S.C. § 2011 (1964).

61. 42 U.S.C. § 2013(a) (1971).

62. 42 U.S.C. § 9902(2) (1991).

63. 7 U.S.C. § 2014(c)(1),(2) (1991). Those households without an elderly or disabled member are eligible if their income is not more than 30% over the poverty line.

64. See, e.g., Langdon & Kass, *supra* note 7, at 316; Donna Mascari, *supra* note 47.

Stamp program eligibility requirements have been modified to cover persons who live on the streets and have no place to prepare food,⁶⁵ but obtaining assistance under the program requires more of a connection to the provider networks than many homeless people have. Second, and more importantly, even where homeless substance abusers are able to get food, the underlying substance abuse creates significant health hazards for the homeless that are not assuaged by nutrition. Alcoholics, for example, often have serious health problems, including nutritional deficiencies and damage to the stomach, brain and digestive system.⁶⁶ Hence, even where Food Stamps might make food available, the underlying health problems may make the alcoholic unable or unwilling to eat and unable to achieve the benefits of eating nutritious meals.

However, one aspect of the Food Stamp program is helpful. The program considers substance-addicted people participating in treatment programs as "individual households" rather than as residents of institutions.⁶⁷ By considering these people as such, the program allows them to use food stamp coupons to pay for meals prepared and served as part of the services provided by "drug addiction or alcoholic treatment and rehabilitation programs."⁶⁸

65. 7 U.S.C. § 2012(g) (West Supp. 1993) defines "food" as, *inter alia*, "any food or food product for home consumption. . ." For persons who are sixty years of age or older, or who receive SSI benefits, *Id.* § 2012(g)(3), or for elderly or disabled persons who are unable to prepare meals for themselves, *Id.* § 2012(g)(4), Food Stamps can be used to purchase meals prepared by public or private nonprofit organizations. Similarly, "narcotics addicts or alcoholics" in treatment programs can use Food Stamps to pay for meals provided by those programs. *Id.* § 2012(g)(5). Most importantly for our purposes, "households that do not reside in permanent dwellings and households that have no fixed mailing addresses," *Id.* § 2012(g)(9), may use Food Stamps to pay for meals provided at shelters or public or private nonprofit organizations. See also THE FEDERAL RESPONSE, *supra* note 46, at 18 and House Comm. on Government Operations, *Homeless Families: A Neglected Crisis*, H.R. Rep. No. 982, 99th Cong., 2d Sess. 1, 5 (1986) [hereinafter *A Neglected Crisis*].

66. J. WRIGHT & E. WEBER, HOMELESSNESS AND HEALTH, Ch. 5, at 73 (1987) ("In general the chronic alcoholics are debilitated and often malnourished and are thus especially prone to nutritional and infectious diseases.").

67. 7 U.S.C. § 2012(i) (1991). Those living in institutions are not eligible for Food Stamps, presumably because food service is provided as a part of the institution's services.

68. 42 U.S.C. § 2012(g)(5) (1979). In § 2012(f) the Act limits the scope of eligible treatment programs to include "any such program conducted by a private nonprofit organization or institution, or a publicly operated community mental health center, under Part B of Title XIX of the Public Health Service Act (42 U.S.C. § 300(a)-(d)) to provide treatment that can lead to the rehabilitation of drug addicts or alcoholics." The Public Health Service Act covers the Alcohol and Drug Abuse and Mental Health Services Block Grant program. Under this program, Health and Human Services provides funds to states for the creation and operation of "projects for the development of more effective prevention, treatment, and rehabilitation programs and

Thus, if homeless addicts are able to obtain treatment in eligible treatment centers, they may be able to pay for at least the meal component of their treatment. Although this assistance is not substantial, it makes a small contribution to the overall financial element of the addict's recovery.

2. Social Security

The Social Security program provides old-age benefits and disability benefits for those with certain qualifying disabilities.⁶⁹ Although advocates for the homeless have attempted to use the social security system to obtain funds for individuals who are homeless,⁷⁰ only the disabled are eligible for benefits before retirement age.⁷¹ The Social Security Administration (SSA) will, however, provide benefits to a person who is disabled by substance abuse, if that abuse meets the standard for classification as a physical or mental impairment.⁷²

activities to deal with alcohol and drug abuse" and for grants to community mental health centers. *Id.* at § 300x-3 (1),(2). While these grants may be of long-term assistance in the development of new treatment options, they are not otherwise relevant for purposes of the instant issue.

69. Social Security Act, 42 U.S.C. §§ 421 - 423, 1381-1385 (1988).

70. *See Right to Shelter*, *supra* note 41, at 729-34.

71. The Social Security Act defines disability as follows: "The term 'disability' means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months, or (B) [blindness]. . . ." 42 U.S.C. § 423(d)(1) (1991).

72. 42 U.S.C. § 423(d)(2),(3) (1991); *see also* 20 C.F.R. Part 404, Subpart P, § 12.09 (1992). Subpart P of 20 C.F.R. describes the standards according to which the Social Security Administration makes disability determinations. Section 12 addresses mental disorders, and "Substance Abuse Disorders" are one category within that section. The eligibility for benefits of a person with a substance abuse disorder is measured only by reference: the regulation indicates that "other listed mental or physical impairments must be used to evaluate the behavioral or physical changes resulting from regular use of addictive substances." Pt. 404, Subpt. P, App. 1, § 12.00(A). *See also* David Dreis, *Alcohol and Drug Abuse as a Basis for a Finding of Disability Under the Social Security Act: An Advocate's Perspective*, CLEARINGHOUSE REVIEW 1218, 1220 (March 1989). Dreis notes that the approach noted above represents a change from the early view of the SSA. Under 20 C.F.R. § 404.1519(c) (1967), the former regulation that set out the SSA's view on addiction as a basis for a finding of disability, the SSA mandated that "a severe personality disorder characterized solely by chronic alcoholism or drug addiction could never constitute a disability within the meaning of the Social Security Act." *Id.* at 1220 (citing former 20 C.F.R. § 404.1519(c)(1967)). Chronic alcoholism was listed as evidence of a "pattern of socially unacceptable behavior" characterizing a personality disorder. *Id.*

Through the course of a number of amendments to the regulations, the SSA first required that substance abuse could be a disabling condition if it included "evidence of irreversible organ damage" and then eliminated that requirement. *Id.* (citing for-

Courts applying the SSA regulations to determine a claimant's eligibility for benefits follow a two-part analysis.⁷³ First, the court will determine "whether the claimant is addicted to alcohol [or other drug] and as a consequence has lost voluntary ability to control its use."⁷⁴ Second, the court will consider "whether the abuse of alcohol [or other drug] causes the claimant to be unable to perform substantial gainful activity."⁷⁵ In applying the first prong of this test, courts will focus on the claimant's ability voluntarily to control his or her use of psychoactive substances.⁷⁶ Courts will consider the second prong of the test according to the SSA's standard five-part evaluation process.⁷⁷

mer 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.04(G)(3) (1974)); *See also* 40 Fed. Reg. 30262 (1975)).

73. This test was developed for use with claimants addicted to alcohol by the Eighth Circuit in *Adams v. Weinberger*, 548 F.2d 239 (8th Cir. 1977).

74. 548 F.2d at 244.

75. *Id.* *See also* Dreis, *supra* note 72, at 1220-22 (noting that the approach used by the Eighth Circuit in *Adams v. Weinberger* represented a shift from views of earlier courts, which had stressed the perceived voluntariness of use of alcohol and drugs and had found substance abuse therefore not disabling). Dreis lists over a dozen cases from other circuits that support his conclusion that substance abuse can be a disability under the Social Security Act's requirements. Courts use similar analysis in dealing with cases where the applicant uses drugs in addition to or in place of alcohol. *See, e.g.,* *Smith v. Sullivan*, 776 F. Supp. 107, 111-12 (E.D.N.Y. 1991) (holding claimant's drug abuse was a disability under the Section 12.09 standards); *see also* *Schoolcraft v. Sullivan*, 971 F.2d 81, 83 (8th Cir. 1992) (evaluating claims challenging exhaustion requirement, considering alcohol and other drug use as requiring application of same mode of analysis); *Gavin v. Heckler*, 811 F.2d 1195, 1198-99 (8th Cir. 1987) (considering disability claim by applicant with alcohol and drug problems).

76. Dreis, *supra* note 72, at 1223-24. Dreis points out that the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* provides a list of characteristic symptoms of dependence on psychoactive substances, which include alcohol, amphetamines, cannabis and cocaine. Dreis notes that these symptoms, supported by medical evidence of addiction or inability to control use, may be of use to claimants seeking to assert claims for disability payments based on substance abuse before the SSA.

77. *Id.* at 1223-27. Dreis notes that the SSA requires that claimants for disability payments be evaluated according to a five-part process. 42 U.S.C. § 423 (d)(2)(1991), 20 C.F.R. Pt. 404, Subpt. P. First, the agency examiner will consider whether the claimant is engaged in substantial gainful activity at the time of his or her claim. Second, the agency will consider whether the claimant's impairment is sufficiently severe and has existed for the required duration. Third, the examiner will consider whether the claimant's substance abuse disorder is equal to an impairment listed in the SSA's listing of impairments. Fourth, as with all other disorders, the examiner will determine whether the substance abuse condition renders the claimant unable to perform his or her past work. And fifth, the agency must decide whether the claimant is able to perform other jobs existing in significant numbers in the national economy. In reaching this conclusion, the agency will consider both the claimant's vocational history and abilities as well as grids developed by the agency to facilitate the process of comparing medical and vocational data.

Even if the SSA determines that a substance abuser meets the criteria for disability, it will not award disability benefits to that person unconditionally. Where the disability is based on substance abuse, the Social Security Act requires that the claimant participate in a treatment program in order to continue receiving benefits.⁷⁸ To receive benefits, the claimant must demonstrate that he or she is receiving treatment that is appropriate for his or her condition, and that he or she is complying with the "terms, conditions and requirements" of the treatment.⁷⁹ These requirements apply only where the claimant would not be considered disabled but for the substance abuse.

The Social Security Act's mandatory treatment requirement, while appropriate in its recognition of the need for treatment for substance abuse, presents something of a "Catch-22" for homeless claimants. In order for a treatment plan to be approved as appropriate for a claimant's condition, there must be a vacancy in a treatment facility that administers the necessary plan.⁸⁰ Even if treatment slots were available for all who need them, requiring both knowledge of and access to these facilities would impose substantial limitations on homeless addicts. Further, suitability of treatment facilities may depend on something as mundane as the availability of public or private transportation,⁸¹ yet another hurdle for the homeless.

The Social Security Act also requires that benefits for a person who is medically determined to be a drug addict or alcoholic must be paid to a representative payee.⁸² The apparent intent of this requirement is to protect claimants who are under age or are for other reasons deemed to be unable to manage the funds paid on their behalf. A person otherwise determined eligible for benefits may have his or her benefits suspended if the SSA is unable to identify such a payee.⁸³ Therefore, if a suitable payee cannot be found, which is entirely possible unless the claimant is in a treatment facility or other secure place of treatment and shelter, the

78. 42 U.S.C. § 1382(e)(H)(3)(A) (1992); *See also* Dreis, *supra* note 72, at 1234-36.

79. 42 U.S.C. § 1382(e)(H)(3)(A).

80. Program Operations Manual System of the Social Security Administration [hereinafter POMS].

81. *Id.*

82. 42 U.S.C. § 1383(a)(2); 20 C.F.R. § 416.610(a)(3) (1990). *See also* Dreis, *supra* note 72, at 1236. The regulations do not permit a claimant to appeal the decision to pay benefits on his or her behalf to a representative payee, although the claimant may challenge a particular appointment. 20 C.F.R. §§ 416.1402(d), 416.1402(e) (1990).

83. POMS at DI II060.025B.

benefits otherwise payable to a homeless substance abuser can be suspended.

3. Federal Housing Laws

Some existing federal housing laws assist in the provision of housing for the homeless, but none has yet achieved that goal to any substantial degree. The Fair Housing Amendments Act of 1988⁸⁴ ("FHAA") expanded the Fair Housing Act,⁸⁵ which had been passed for the purpose of ending racial discrimination in housing. Congress intended the FHAA to extend the protections of the Fair Housing Act to persons with disabilities. In passing the FHAA, Congress intended both to ensure that housing providers make "reasonable accommodations" for disabled residents and to allow disabled persons to choose where and in what circumstances they wish to live.⁸⁶ The FHAA applies to all housing, both public and private.⁸⁷

Despite its breadth, the FHAA will not likely serve as a method of obtaining housing for many drug-abusing homeless people. The FHAA excludes from its definition of "handicap"⁸⁸ persons who are currently using or addicted to controlled substances.⁸⁹ However, a person who is participating in a drug treatment program, including a twelve-step program like Narcotics Anonymous, is deemed handicapped and therefore is protected by the FHAA.⁹⁰

84. Pub. L. No. 100-430, 102 Stat. 1619 (codified at 42 U.S.C. §§ 3601-3619 (1988)).

85. Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. §§ 3601-3617 (1988)). See also Bonnie Milstein, et al., *The Fair Housing Amendments Act of 1988: What It Means for People with Mental Disabilities*, CLEARINGHOUSE REVIEW 128 (June, 1989).

86. Milstein, *supra* note 85, at 129.

87. See Note, *The Impact of Federal Antidiscrimination Laws on Housing for People with Mental Disabilities*, 59 GEO. WASH. L. REV. 413, 414 (1991) [hereinafter *Impact*].

88. FHAA, § 5, 102 Stat. 1619, 42 U.S.C. § 3602 (1988). The definition of "handicap" under the FHAA is intended to be the same as that under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1988). Congress apparently intended that subsequent interpretations of Section 504 be considered applicable to the FHAA as well. See Milstein, *supra* note 85, at 131.

89. 42 U.S.C. § 3602(h)(3) (1988). See also *Impact*, *supra* note 88, at 426.

90. See *Impact*, *supra* note 87, at 426. See also Milstein, *supra* note 86, at 131 (quoting from the House Report for the FHAA, which notes that those in treatment for drug problems do not pose a danger to a residence merely because of their status as former drug users, and continuing, "[d]epriving such individuals of housing, or evicting them would constitute irrational discrimination that may seriously jeopardize their continued recovery"). For a thorough analysis of the inherent ambiguities of the statutory language, see *United States v. Southern Management Corp.*, 955 F.2d 914, 920-23 (4th Cir. 1992).

Unlike drug users, alcoholics are included in the FHAA's definition of handicap whether or not they are in treatment programs, and are therefore protected from discrimination in housing.⁹¹ The FHAA provides that a person who believes he or she has been denied housing on the basis of a disability may file an action against the housing provider either with the Department of Housing and Urban Development or in federal court.⁹²

One possible source of relief for homeless persons under the FHAA is its prohibition of discrimination against households that have members with disabilities.⁹³ The scope of this provision means that state statutes or local ordinances prohibiting unrelated adults from living together may not be used to prevent the establishment of group homes for persons with disabilities, such as substance-abusing homeless persons.⁹⁴ To the extent that the FHAA provisions are effective in preventing local authorities from using local laws to block the development of group homes for disabled homeless persons,⁹⁵ the FHAA may be a potent weapon in the limited arsenal available to advocates seeking federal solutions to the problems of substance-abusing homeless persons. This alternative is useful, however, in addressing problems of substance abusers

91. See *Impact*, *supra* note 87, at 427 ("[A]lthough practically speaking drug addiction is no different than alcohol addiction, the FHAA provides for different results based on a user's drug of choice.").

92. There is no requirement that a person exhaust administrative remedies before seeking judicial redress. 42 U.S.C. § 3610(g) (1988). See Milstein, *supra* note 86, at 139-40.

93. 42 U.S.C. § 3604(f)(1)-(3) (1988).

94. *Id.* See also Milstein *supra* note 85, at 134-35. The Milstein article notes that in the FHAA Congress language found in the Fair Housing Act that has been broadly interpreted by the courts in the intervening years. Thus, according to Milstein and her co-authors, Congress intended to make clear that the ambit of the [FHAA] renders unlawful a wide range of practices that are not specified in the Act but that otherwise make unavailable or deny housing to persons with disabilities. *Id.* at 133, citing from the FHAA, 42 U.S.C. § 3604(f)(1) (1988). See also Milstein, *supra* note 85, at 134-36 (discussing FHAA's prohibition on use of local health, safety, land use and zoning regulations for purposes of excluding persons with disabilities); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (granting Oxford House's summary judgment motion against application of Babylon's single family zoning ordinance against home for recovering addicts); *Oxford House, Inc. v. City of Albany*, 819 F. Supp. 1168 (N.D.N.Y. 1993) (preventing Albany from using ordinance prohibiting non-related persons from living together to prevent Oxford House facility from opening but requiring Oxford House to apply for a variance under Albany's procedures).

95. The FHAA also prohibits the use of special permit requirements for group homes for the disabled, thereby eliminating another weapon often used by local authorities to restrict the access of disabled individuals to mainstream housing options. See Milstein, *supra* note 85, at 136-37.

only to the extent that they can avoid exclusion under the following limiting provisions.

Two provisions in the FHAA seriously restrict its application to the homeless substance abuser. The FHAA's "reasonable accommodations" requirement is borrowed from § 504 of the Rehabilitation Act.⁹⁶ Section 504 requires a provider of housing to take actions that are reasonably necessary to make housing available to disabled persons in the same way it is available to non-disabled persons.⁹⁷

This might require the housing provider to assist a formerly homeless resident, who receives social security disability payments for drug treatment, by facilitating the fulfillment of the payee requirement. The reasonable accommodation requirement probably would not require the landlord to arrange transportation to the treatment location or to waive the security deposit and prepayment requirements that so often stand between a homeless person and housing.⁹⁸

Moreover, the FHAA allows a housing provider to refuse housing to a disabled person "whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."⁹⁹ It seems plausible that an active alcohol abuser is likely to meet the "direct threat" test if he or she is one who becomes destructive, or even threatening, when under the influence of alcohol. Thus, even though the terms of the FHAA prohibit the exclusion of actively-drinking alcoholics, the "direct threat" exception may prevent them from using the FHAA to escape homelessness.

96. 29 U.S.C. § 3604(f)(3)(B) (1988). See also Milstein, *supra* note 85, at 133.

97. For example, a landlord must provide the disabled tenant with access to parking and recreation facilities as well as services provided to other tenants. A landlord must also enforce rules in ways that do not adversely affect the disabled tenant. The housing provider, however, is not required to hire special staff to assist disabled residents. Milstein, *supra* note 85, at 134.

98. See *Impact*, *supra* note 87, at 414 (noting that despite their limited resources, providers of public housing are more likely to have to confront the needs of disabled tenants than are providers of private housing who might be better able to shoulder the increased burden).

99. 42 U.S.C. § 3604(f)(9) (1994). In Milstein, *supra* note 85, at 137-38, the authors note that Congress intended that the standards used by the courts in applying Section 504 be applied in this context as well, and that Congress imposed significant evidentiary burdens on the landlord to prevent the use of this provision as an easy way to avoid the requirements of the FHAA.

4. Section 504, Rehabilitation Act of 1973; Americans with Disabilities Act of 1990

Congress enacted § 504 of the Rehabilitation Act of 1973¹⁰⁰ to end discrimination against individuals with disabilities. Section 504 addresses discrimination against the disabled in all activities, not just housing. Yet, it is limited in scope: it applies only to “any program or activity receiving Federal financial assistance.”¹⁰¹ Although the application and interpretation of § 504 are similar in many ways to those of the FHAA, § 504 differs in one material respect.

Unlike the FHAA, § 504 treats all substance abusers as disabled.¹⁰² Therefore, even drug users who continue to use their addictive substances may not be excluded from federally-funded public housing if their drug abuse does not present a direct threat.¹⁰³

Section 504’s regulations impose essentially the same “reasonable accommodations” requirement as does the FHAA,¹⁰⁴ although the regulations of the Department of Housing and Urban Development (HUD) do not use precisely the same terms. A provider of public housing is required under § 504 to “modify its housing policies and practices to ensure that these policies and practices do not discriminate” against a disabled person.¹⁰⁵ For individuals with substance abuse problems, the limited scope of the reasonable

100. Pub. L. No. 93-112, § 504, 87 Stat. 355, 394, (codified at 29 U.S.C. § 794 (1988)).

101. *Id.* See generally *Impact*, *supra* note 87, at 416-20.

102. Substance abusers may be excluded from programs receiving federal assistance only where their substance abuse “would constitute a direct threat to the property or safety of others.” 24 C.F.R. § 8.3 (1990). See *Impact*, *supra* note 87, at 422 (explaining that under Section 504 landlords are permitted to evict handicapped tenants for only two reasons: first, that the applicant is unable or unwilling to adhere to “legitimate tenancy rules,” and second, that the applicant’s presence constitutes a “direct threat” to the person or property of others, and noting that housing providers must make reasonable accommodations that would eliminate the threat rather than deny housing on that basis); see also *Teahon v. Metro-North Commuter Railroad, Inc.* 951 F.2d 511, 517 (2d Cir. 1991), *cert. denied*, 113 S. Ct. 54 (1992) (noting that substance abuse—in this case alcohol use—is a handicap for purposes of Section 504).

103. In Note, *Impact*, *supra* note 87, the author suggests that courts deciding cases based on a claim of exclusion from public housing because of the use of drugs by a drug addict not in treatment might decide that the FHAA, representing a more recent indication of Congress’ views on the subject, should govern, so that the exclusion should be allowed to stand. Conversely, the courts might conclude that Section 504’s scope should not be limited by the more restrictive provisions of other statutes. *Id.* at 427-28.

104. See *supra* notes 98-100.

105. 24 C.F.R. § 8.33 (1992).

accommodation requirement erects a significant barrier. HUD does not require that a housing provider supply supportive services where to do so would fundamentally change the nature of the provider's program.¹⁰⁶ Thus, § 504 does not require a landlord who does not furnish supportive services for any residents to provide services for disabled residents. Where support services are available to others, however, landlords must make commensurate services available to disabled residents who would qualify to live in the housing if not for their disability.

Therefore, even though the scope of § 504 prohibits discrimination against active users of addictive substances, either the "direct threat" exception¹⁰⁷ or the limits on the reasonable accommodation requirement may bar homeless substance abusers from using § 504 to obtain housing. Indeed, this may well be understandable, given that public housing mixes a wide range of vulnerable populations, including the elderly and single parents with small children. The types of services necessary to enable each of these groups to function independently are quite different. A public housing program that does not have a wide range of services may not be the best place for formerly homeless substance abusers, particularly those not in treatment. Without support services and treatment options, few homeless substance abusers will be able to overcome their problems and live independently.¹⁰⁸ Moreover, without support, it is unfair to expect public housing providers to shoulder the substantial burdens inherent in providing a meaningful solution.

The Americans with Disabilities Act¹⁰⁹ ("ADA") addresses discrimination against those with disabilities in employment,¹¹⁰ transportation,¹¹¹ public accommodation¹¹² and telecommunications spheres.¹¹³ Since it does not address the provision of housing, it is not likely to be helpful to advocates for the homeless in securing

106. 24 C.F.R. § 8.3 (1992).

107. *See supra* note 103.

108. *See Wizner, supra* note 5 at 397-98; Langdon & Kass, *supra* note 8 at 353-55. *See also* Michael L. Perlin, *Competency, Deinstitutionalization and Homelessness: A Story of Marginalization*, 28 HOUSTON L.REV. 63, 133-35 (1991).

109. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101 - 12213 (West Supp. 1991)).

110. 42 U.S.C. §§ 12111 - 12117 (West Supp. 1991).

111. 42 U.S.C. §§ 12131-12165 (West Supp. 1991).

112. 42 U.S.C. §§ 12181 - 12189 (West Supp. 1991).

113. Amending Title II of the Communications Act of 1934, 47 U.S.C. § 225 (West Supp. 1991). For a general discussion of the application of the ADA to substance abusers, see Reese J. Henderson, Jr., Note, *Addiction as Disability: The Protection of Alcoholics and Drug Addicts Under the Americans with Disabilities Act of 1990*, 44 VAND. L. REV. 713, 714 (1991) [hereinafter *Addiction as Disability*].

housing and treatment for substance abusing homeless persons.¹¹⁴ However, it could be of use to assist in the securing of employment for those homeless persons who are able to enter into treatment programs and cease their use of alcohol or drugs.¹¹⁵

5. McKinney Act

In 1987, Congress enacted the McKinney Act to acknowledge the need for a national solution to the problem of homelessness. In the Act's findings, Congress recognized that homelessness presented "an immediate and unprecedented crisis"¹¹⁶ and asserted that "the Federal Government has a clear responsibility and an existing capacity to fulfill a more effective and responsible role to meet the basic human needs and to engender respect for the human dignity of the homeless."¹¹⁷ The Act created the Inter-agency Council on the Homeless¹¹⁸ to coordinate and monitor the progress in implementation of the Act's provisions. One task of the Council members¹¹⁹ is to report annually to Congress and the Council on a number of issues, among them "the impediments, including any statutory and regulatory restrictions, to the use by the

114. The ADA uses the same definition of "disability" as does Section 504 of the Rehabilitation Act of 1973. 42 U.S.C. § 12102(2) (West Supp. 1991). To avoid the inclusion of current drug users within the scope of the ADA's provisions, however, as has occurred through judicial interpretation of Section 504, the ADA specifically excludes from its definition of "disability" substance use disorders resulting from the current use of illegal drugs. 42 U.S.C. § 12114 (West Supp. 1991). A former user who is no longer using the drugs and is participating in a "supervised rehabilitation program" is protected by the ADA's provisions. *Id.* See also Bonnie P. Tucker, *The Americans with Disabilities Act: An Overview*, 1989 U.I.L.L.REV. 923, 925-26 (1989).

115. One aim of the ADA is to prevent discrimination against disabled individuals in the obtaining of employment. See *Findings and purposes*, 42 U.S.C.A. § 12101 (West Supp. 1991). A former substance abuser seeking employment as a means of escaping from homelessness might face such discrimination. The ADA's provisions could be of value in battling such bias. See generally *Addiction as Disability*, *supra* note 113 (examining the reasons for the ADA's approach to substance abuse and concluding that the ADA standard will provide for fair treatment of both substance abusers and employers).

116. § 102, 42 U.S.C. § 11301(a)(1) (1988).

117. § 102, 42 U.S.C. § 11301(a)(6) (1988).

118. 42 U.S.C. § 11311 (1988).

119. The membership of the Council, as described in the Act, includes the following Cabinet Secretaries or their designees: the Secretaries of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, Transportation and Veterans Affairs. Also named to the Council are the Director of the ACTION Agency, the Director of FEMA, the Administrator of General Services and the Postmaster General or their designees, along with the heads of such other Federal agencies "as the Council considers appropriate." 42 U.S.C. § 11312 (West Supp. 1993).

homeless" of the programs for which that individual is responsible.¹²⁰

In the early years of its existence, housing advocates and attorneys reported a number of problems in the implementation of the McKinney Act provisions in the states. First, the lack of enthusiasm on the part of the executive branch and the agencies responsible for putting its provisions into effect delayed the initial implementation of the program.¹²¹ In some cases, only the filing of lawsuits forced the federal government to issue the funds required under the Act.¹²² Second, the Council was essentially inactive during its first two years of existence.¹²³

Problems on the state level also hampered implementation of the Act. Initially, state agencies accepted few of the programs that applied for aid.¹²⁴ And, perhaps more seriously, states were hard pressed to come up with funds to meet the matching requirement, thus placing federal funding in peril.¹²⁵

The Act contains twelve different programs that provide services of different types to the homeless.¹²⁶ In keeping with the Reagan

120. 42 U.S.C. § 11313(c)(1)(B) (West Supp. 1993).

121. Michael A. O'Connor, *A Local View of the McKinney Act*, CLEARINGHOUSE REV., 116, 120 (June 1989).

122. *Id.*

123. *Id.* at 120-21.

124. *Id.* at 121.

125. *Id.*

126. Among the Act's provisions are:

— the creation of an Interagency Council on the Homeless, an "independent establishment" within the executive branch, intended to coordinate, evaluate and monitor all federal programs intended to assist the homeless, 42 U.S.C. §§ 11311-11320;

— the development of a Federal Emergency Management Food and Shelter Program allowing the Director of the Federal Emergency Management Agency to award Emergency Food and Shelter Grants to the Emergency Food and Shelter Program National Board "for the purpose of providing emergency food and shelter to needy individuals through private nonprofit organizations and local governments, 42 U.S.C. §§ 11331-11352;

— the creation of an Emergency Shelter Grants Program requiring the Secretary of Housing and Urban Development (HUD) to make grants to qualifying state and local governments and, through those entities, to private nonprofit organizations for the purpose of preparing buildings for use as emergency shelters, running those shelters, and providing financial assistance to families in danger of losing their residences, 42 U.S.C. §§ 11371-11378;

— the development of a Supportive Housing Program to provide for grants through HUD for use by housing providers attempting to create programs providing supportive services, including child care, employment assistance, outpatient health care, assistance in obtaining counseling, security arrangements and assistance in obtaining other federal, state and local benefits, 42 U.S.C. §§ 11381-11389;

— the creation of a Demonstration Program for the development of Safe Havens for Homeless Individuals, or low-cost housing programs for those who are seriously

administration's professed desire to limit the involvement of the federal government in social programs, the Act's general approach is to involve state and local governments in the creation and operation of the programs with which the Act deals. Most of the McKinney Act's programs require that recipients of federal funds receive matching funds from other sources, either state or private.¹²⁷ The Act requires states, cities or urban counties applying for housing assistance to have developed a comprehensive homeless assistance plan¹²⁸ or a current housing affordability strategy.¹²⁹

mentally ill, homeless and unable or unwilling to participate in treatment programs, intended to provide secure housing for those eligible until they are willing or able to accept treatment, 42 U.S.C. §§ 11391-11399;

— the development of a Shelter Plus Care Program, offering rental assistance to disabled homeless persons, particularly those with mental illness, chronic substance abuse or AIDS problems, in connection with supportive services funded by other sources, 42 U.S.C. §§ 11403-11408a;

— the establishment of a Rural Homeless Housing Assistance program requiring the Secretary of HUD to award grants to programs aiding the homeless in rural areas, 42 U.S.C. §§ 11408-11408a;

— requiring the Secretary of HUD to coordinate a program under which all federal agencies that hold property must identify unused or underused federal property and surrender the properties deemed suitable by HUD's Secretary for use to assist the homeless, 42 U.S.C. §§ 11411-11412;

— instituting a variety of education, training and community services programs, including Adult Education for the Homeless, 42 U.S.C. § 11421, Education for Homeless Children and Youth, 42 U.S.C. §§ 11431-11435, Job Training for the Homeless, 42 U.S.C. §§ 11441-11466, and Family Support Centers, 42 U.S.C. §§ 11481-11489.

127. 42 U.S.C. §§ 415 (a)(1), 11375(a)(1) (1988 & Supp.V. 1993). The state, city or county receiving funds must certify that it has complied with the matching funds requirement and must identify the sources and amounts of the matching funds it receives. *Id.*

128. 42 U.S.C. §§ 401, 11361(2) (1988 & Supp.V. 1993). The plan must have been approved by the Secretary of Housing and Urban Development "during the 180-day period beginning on November 28, 1990." *Id.* The Secretary also has the option of extending the period for approval "in any case for good cause." *Id.* See generally Dave Furman & Mike McGurrian, Note, *Hunger and Homelessness in America: A Survey of State Legislation*, 66 DEN. U. L. REV. 277, 282-83 (1989) [hereinafter *Hunger and Homelessness*].

Section 401, which imposes the CHAP requirement, also indicates that assistance under Subchapter IV may alternatively be provided to a grantee that is following a "current housing affordability strategy." *Id.*

129. *Id.* at § 11361(1). This requirement was added to the Act by way of Section 12705 of the Cranston-Gonzalez National Affordable Housing Act, Title 1, 42 U.S.C. §§ 12701-12899i (West Supp. 1993). The Cranston-Gonzalez Act, passed in 1990, stated Congress' goal that "every American family be able to afford a decent home in a suitable environment", 42 U.S.C. § 12701, and attempted to "strengthen[] a nationwide partnership of public and private institutions" to ensure access to shelter, increase the supply of affordable housing, expand the amount of mortgage funds available and "encourage tenant empowerment and reduce generational poverty in federally-assisted and public housing by improving the means by which self-sufficiency may be achieved." 42 U.S.C. § 12702(7)(1993).

In its original form, the McKinney Act focused on the Emergency Shelter Grants Program, pursuant to which the HUD Secretary would award funds to state and local governments for the development of a variety of programs.¹³⁰ The Act originally included a Supportive Housing Demonstration Program intended to encourage the development of "innovative approaches for providing supportive housing, especially to deinstitutionalized homeless individuals, . . . homeless individuals with mental disabilities and other handicapped homeless persons."¹³¹ The Act also contained as Part D, "Supplemental Assistance for Facilities to Assist the Homeless," a program authorizing the Secretary to award funds to states, cities, counties or nonprofit organizations for extra assistance "to meet the special needs of . . . the handicapped . . . or (C) to provide supportive services for the homeless."¹³² None of these provisions addressed specifically the needs of homeless substance abusers.

A number of programs added to the Act in 1990 and 1992 provide greater cause for hope for homeless substance abusers.¹³³

42 U.S.C. 12705, requires locales seeking aid to submit plans for current housing affordability strategies to the Secretary and to update these plans annually. The Secretary must approve the plans and updates. The scope of the information required to be submitted in the current housing affordability strategies is significant. A locale seeking federal funds must inform the Secretary of the housing needs of the area, the number and types of residents it plans to aid, the nature and extent of homelessness, and the public policies of the area that affect housing policies, including "tax policies, . . . land use controls, zoning ordinances, building codes, fees and charges, growth limits, and policies that affect the return on residential investment." *Id.* at § 12705(b)(4). The locale must also address the resources available to assist in the implementation of a housing strategy and must demonstrate the locale's adherence to a wide variety of other federal requirements. *Id.* at § 12705(b). In part, this wide-ranging submission should have the effect of forcing locales to consider the magnitude of the problem and the true extent of their contributions to solution of the problem. Further, it should enable HUD to coordinate the provision of housing services to use its money in the most effective manner. The actual effect of this approach has yet to be determined.

130. 42 U.S.C. §§ 11372, 11374 (1988 & Supp. V. 1993).

131. 42 U.S.C. § 11381(a) (1988 & Supp. V. 1993).

132. 42 U.S.C. § 11392(a)(1)(C) (1988).

133. Other programs included within the scope of the McKinney Act also recognize the need for substance-abuse-related services. For example, the Rural Homeless Housing Assistance grant program permits eligible organizations to use federal funds for a wide range of programs and services, including substance abuse treatment. 42 U.S.C. § 11408(b)(1)(F)(viii) (West Supp. 1993). The Job Training for the Homeless program permits the Secretary of Education to give "special consideration" to programs "implementing a holistic approach:" i.e., those that "include formal reciprocal referral agreements with other programs such as substance abuse counseling . . . that provide a holistic service approach on an individual case management basis." 42 U.S.C. § 11443(b)(2). Finally, in the Family Support Centers program, the Secretary

However, even these programs have their flaws.

A. Supportive Housing Program

The Supportive Housing Demonstration Program was relabeled and amended by the Stewart B. McKinney Homeless Housing Assistance Amendments Act of 1992¹³⁴ (the "1992 Amendments"). The 1992 Amendments expanded the scope of the program, defined the types of housing and services covered and increased the appropriations authorized.¹³⁵ Despite these changes, it seems unlikely that the Supportive Housing Program will provide much assistance for homeless substance abusers. Some aspects of the program, however, could be interpreted to offer some hope. This program allows HUD to supply funding for programs providing supportive housing, which includes transitional housing, permanent housing for disabled homeless persons and "particularly innovative projects" directed at meeting the needs of the homeless.¹³⁶ Housing projects assisted by the program must provide supportive services that "address the special needs of individuals (such as homeless persons with disabilities and homeless families with children) intended to be served by a project."¹³⁷

Grants made pursuant to this program are made to the entity responsible for the housing project, whether it be a state, city, county, or private nonprofit organization.¹³⁸ The regulations implementing both the programs for transitional housing and the permanent housing for the disabled define "handicapped" specifically to exclude persons "whose sole impairment is alcoholism or drug addiction."¹³⁹ The regulations describing the types of assistance available for transitional housing, however, do not limit such assist-

of Health and Human Services is authorized to make grants to demonstration programs offering "intensive and comprehensive supportive services," which is defined to include "services designed to better enable parents and other family members to contribute to their child's healthy development and that shall include . . . substance abuse education, counseling, referral for treatment, . . ." 42 U.S.C. § 11481(6)(B).

134. 42 U.S.C. § 11391, as amended Pub. L. No. 102-550, 106 Stat. 4022, (1992).

135. *Id.*

136. 42 U.S.C. §§ 11383, 11384 (1988 & Supp. V. 1993).

137. 42 U.S.C. § 11385(b). Qualifying supportive services include child care systems, employment assistance programs, outpatient health services, assistance in obtaining permanent housing, security arrangements and assistance in obtaining benefits offered by federal, state or local governmental entities. *Id.* at § 11385(c).

138. 42 U.S.C. §§ 11383, 11382 (definitions).

139. 24 C.F.R. § 577.5 (1993) (definitions section, transitional housing), 24 C.F.R. § 578.5 (1993) (definitions section, permanent housing for homeless handicapped persons).

ance to housing designed for handicapped persons.¹⁴⁰ In other words, transitional housing need not be for the handicapped—it may be for any homeless person, possibly including those disabled by substance abuse. Therefore, this program may be used to obtain 50% of the funding for transitional housing that addresses the special needs of substance abusers.¹⁴¹

Clearly, the provision allowing the awarding of funds for “permanent housing for homeless persons with disabilities”¹⁴² does not apply to those disabled by substance abuse. Although the definition of “disability” in the Act¹⁴³ could be interpreted to include those whose disability is based on substance abuse, the regulations implementing the permanent housing program, like those implementing the transitional housing program, explicitly exclude substance abuse from the definition of “handicap.”¹⁴⁴

There are as yet no regulations in effect that specifically address

140. 24 C.F.R. § 577.100 (1992) (listing the six types of assistance available for transitional housing, including acquisition, substantial rehabilitation, or both, advances for certain types of new construction; grants for: moderate rehabilitation, annual operating costs and supportive services costs (up to five years), establishing and operating employment assistance programs, and technical assistance).

Of the six types of aid available to transitional housing programs, only the “supportive services” provision might cause problems for providers of housing attempting to create programs for homeless substance abusers. The types of costs that may be paid include “salaries paid to providers of supportive services, the costs of conducting resident supportive services needs assessments, and any other costs directly associated with providing such services.” 24 C.F.R. § 577.115(c) (1993).

The exclusion of persons whose sole impairment is alcoholism or drug addiction in the definition of handicapped, presumably means that a housing provider seeking to provide services specifically to substance abusers would be unable to obtain funding for treatment services through this funding scheme. Thus, a halfway house for substance abusers might be unable to obtain funding for continuing substance abuse counseling for its residents, although it might be able to obtain funding for acquisition, rehabilitation, covered construction or any of the other permissible activities.

141. See 42 U.S.C. § 11386(e)(1993) (requiring that the recipient obtain matching funds in an amount equal to that provided under this section).

142. 42 U.S.C. § 11384(a)(2)(B).

143. Section 11382(2) of the Act defines “disability” to mean:

(A) a disability as defined in section 423 of this title,

(B) to be determined to have, pursuant to regulations issued by the Secretary, a physical, mental, or emotional impairment which (i) is expected to be of long-continued and indefinite duration, (ii) substantially impedes an individual’s ability to live independently, and (iii) of such a nature that such ability could be improved by more suitable housing conditions,

(C) a developmental disability. . . , or

(D) [AIDS or related conditions]. 42 U.S.C. § 423 does not contain any definitions. Since there are some substance abusers whose condition is arguably worsened by their homelessness, a construction of the definition to include substance abuse is not beyond the realm of rationality.

144. 24 C.F.R. § 578.5 (1993).

the "particularly innovative projects" provision of the Supportive Housing Program. Thus, it is possible that a housing provider seeking funding for such a program addressing the needs of substance abusers in a "particularly innovative" way might be able to obtain funding from HUD pursuant to this provision.

B. *Safe Haven Demonstration Program*

The Safe Haven for Homeless Individuals Demonstration Program was also added by the 1992 Amendments.¹⁴⁵ This program provides grants to programs offering "very low-cost housing" to seriously mentally ill homeless people who are "unable or unwilling to participate in mental health treatment programs or to receive other supportive services."¹⁴⁶ Unfortunately, its definition of those eligible expressly excludes "a person whose sole impairment is substance abuse."¹⁴⁷ To the extent that substance abusers display other qualifying impairments, they should be eligible for programs receiving funds under this provision.

C. *Shelter Plus Care Program*

The Shelter Plus Care Program, added to the McKinney Act by way of the Cranston-Gonzalez National Affordable Housing Act¹⁴⁸ (the "Affordable Housing Act"), has the greatest potential to help homeless substance abusers. This Program is intended to "provide rental housing assistance, in connection with supportive services funded from sources other than this part, to homeless persons with disabilities (primarily persons who are seriously mentally ill, have chronic problems with alcohol, drugs or both, or have [AIDS]) and the families of such persons."¹⁴⁹ The usual matching funds requirement in this case takes the form of an obligation by the housing provider to obtain supportive services in an amount equal to the rental assistance funds provided by HUD.¹⁵⁰

A housing program provider may obtain rental assistance funds from HUD by submitting an application describing the program, the service providers, the method to be used for selection of eligible residents, and additional information.¹⁵¹ In addition to the ser-

145. 42 U.S.C. § 11391(a) (1993).

146. *Id.*

147. 42 U.S.C. § 11392(2) (1988).

148. 42 U.S.C. §§ 12701-12899i (1993).

149. 42 U.S.C. § 11403 (1993).

150. 42 U.S.C. § 11403b (imposing a matching funds requirement, and mandating that recipients of funds certify compliance with this requirement to the Secretary).

151. 42 U.S.C. § 11403c.

vice-based funds, the Affordable Housing Act also allows the Secretary of HUD to grant funds for "tenant-based" rental assistance.¹⁵² Subject to certain durational and geographic limitations, the eligible person may select the housing project in which he or she will live.¹⁵³ Presumably, this approach is intended to allow for small numbers of formerly homeless persons to be housed in projects where the availability of supportive services can be assured.

Although this program is the federal government's best attempt to address the needs of substance-abusing homeless persons, there are some significant barriers to the wide usage of this program. First, and most important, the availability of matching funds for supportive services presents a potentially substantial hurdle, as does the availability of such supportive services programs. Therefore, it is necessary to find a consistent source of funds for those other services before the Affordable Housing Act's provisions can be fully implemented. The funds authorized for appropriation for this purpose by the Act, \$266,550,000 for fiscal year 1993 and \$277,745,100 for fiscal year 1994,¹⁵⁴ represent the largest amounts authorized for any of the individual programs under the McKinney Act. The relative size of this authorization indicates that Congress has begun to realize that disabled homeless persons are a group with substantial needs. Nevertheless, securing funds equal to that amount from other sources presents a daunting challenge.

Second, the Shelter Plus Care Program imposes somewhat intimidating quality control and reporting standards on housing providers. In addition to securing commitments for services to help meet the needs of the substance-abusing residents, the program requires that the provider obtain a certification from the local public official responsible for housing policy. This certification must state that the program for which funds are sought is consistent with the "approved housing strategy of the unit of general local government within which housing assistance . . . will be provided."¹⁵⁵ As noted above, the statutory filing requirements imposed on locales seeking HUD assistance are comprehensive.¹⁵⁶ Further, a state or local

152. 42 U.S.C. § 11404.

153. *Id.*

154. 42 U.S.C. § 11403h.

155. 42 U.S.C. § 11403c(b)(9). Undoubtedly, this requirement is a reflection of the fact that the Shelter Plus Care Program is a part of the Affordable Housing Act, 42 U.S.C. § 12701 (1993), which requires states and local areas seeking federal aid to submit to HUD a "comprehensive housing affordability strategy."

156. *See supra* note 151.

government that has chosen not to cooperate with the Affordable Housing Act's provisions will not be receptive to such a request from a provider. Moreover, the Act's imposition of housing quality standards and inspection obligations,¹⁵⁷ while clearly a positive consideration from the tenant's perspective, may be seen by some providers as overly intrusive and therefore may discourage their participation.

Nonetheless, the Shelter Plus Care Program is an important statement by the federal government that it is now willing to take the problems of the disabled homeless seriously. The program should encourage many housing providers to follow the necessary steps to provide housing assistance to substance abusers. While the Affordable Housing Act's effect may not be as comprehensive as advocates might wish, the fact that it now contains a program specifically directed at this segment of the homeless population may be all the impetus that is needed to stimulate additional development in the supported housing arena.

As illustrated, the federal laws present a maze of different regulations, varying eligibility standards and hopelessly confusing methods of initiating participation in their programs. Although some federal laws may provide support that is meaningful for the homeless substance abuser, full exploitation of that support may be difficult to achieve. For a homeless person without access to legal assistance, the challenge is essentially insurmountable.¹⁵⁸ Further, substance abuse makes the improbable virtually impossible, complicating the solutions available and decreasing the likelihood that the substance abuser will be able to negotiate the quagmire of options for assistance.

B. State Laws

Because of the United States Supreme Court's decision that the

157. 42 U.S.C. §§ 11403c, 11403e, 11403e-1.

158. Even for a person who has legal assistance, the substantive basis for a legal challenge under federal law is unclear. Although there may be grounds for a valid suit in the denial of assistance to a person who meets a statute's eligibility criteria, the potential for a successful equal protection challenge to the inconsistencies among the criteria of the different federal laws seems slight. Presumably, according to the analysis used by the Court in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973), review of the government's action would be deferential because the financially disadvantaged are not a suspect class and the interest involved is not a fundamental right. However, equal protection analysis under a state constitution might have a more positive result, at least in a state whose constitution demonstrates a concern for the financially disadvantaged.

United States Constitution does not provide a right to shelter,¹⁵⁹ advocates attempting to confront the current homeless crisis have relied on state constitutions and laws as the basis for legal action.¹⁶⁰ Unfortunately, relatively few states have constitutional language clearly providing for a right of the poor to care and, implicitly, to housing.¹⁶¹ Those states that have clear constitutional directives have been the site of numerous litigation efforts, with a wide range of results. Despite some piecemeal success, the likelihood of uniform accomplishment is less than encouraging. As on the federal level, the additional problems posed by substance abuse complicate already unreliable sources of assistance provided by the states.

1. State constitutions and statutes

According to Langdon's and Kass' exhaustive study of state homelessness efforts, "only seventeen state constitutions contain any provisions concerning aid to the poor."¹⁶² This study also asserts that constitutions in only six of those seventeen states "unambiguously obligate[] the government to provide for the needs of the poor."¹⁶³ New York's constitution is one of the few that explic-

159. *Lindsey v. Normet*, 405 U.S. 56 (1972).

160. A number of commentators have devoted substantial attention to the role of the states in addressing homelessness. For a comprehensive consideration of possible state remedies, the reader should examine in detail Chackes, *supra* note 34, and Langdon & Kass, *supra* note 7. See also *Hunger and Homelessness*, *supra* note 130 and *Right to Shelter*, *supra* note 41.

161. See Langdon & Kass, *supra* note 7, at 332-34 and Appendix (containing a survey of all fifty states, listing the constitutional provisions, general assistance, protective service and mental health statutes that might be used in each state to assert the rights of the homeless).

162. *Id.* at 332.

163. *Id.* at 333. See Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (contending that an equal protection challenge could be made on behalf of poor people treated in a discriminatory fashion by governmental actions making housing, employment and other necessities of life less available to the poor). Edelman's argument might provide a basis for a claim under state constitutional analysis where federalism concerns limiting the reach of federal equal protection analysis do not exist.

The constitutions of Alabama, Ala. Const. art. IV, § 88, Kansas, Kan. Const., art. 7, § 4, Montana, Mont. Const. art. 12, § 3(3), Oklahoma, Okla. Const. art. 17, § 3, and Texas, Tex. Const. art. XI, § 2, also impose a clear duty on those state governments to provide for the poor. See also Langdon & Kass, *supra* note 7, at 332-34. But see *Butte Community Union v. Lewis*, 712 P.2d 1309 (Mont. 1986), where the Supreme Court of Montana rejected a trial court's conclusion that article 12, § 3(3) of the state constitution created "a fundamental right to welfare." *Id.* at 1311. The court concluded instead that the legislature's concern for the welfare of state residents required that "a classification which abridges welfare benefits is subject to a heightened scrutiny under an equal protection analysis." *Id.*

itly acknowledges the state's duty to care for the poor: "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 manner and by such means, as the legislature may from time to time determine."¹⁶⁴ Yet, even where constitutional language seems to support the conclusion that a right to housing exists, using that language as a basis for a successful challenge is not easy.¹⁶⁵ An attempt to extend the statutory language as a means of obtaining substance abuse treatment for the poor is almost guaranteed to fail.

State legislative provisions typically address general assistance to needy residents or a variety of caretaking services aimed at those unable to care for themselves.¹⁶⁶ Those protected by such laws typically must be unable to provide for themselves, generally because they are mentally ill or legally incapacitated in some other way.¹⁶⁷ As noted in Langdon & Kass' article, the eligibility requirements of most of these laws eliminate those with no certain address from the laws' protection.¹⁶⁸ Further, these authors suggest that state courts considering the scope of a state's duty under such laws are likely to be reluctant to interpret these laws broadly at a time when state fiscal resources are seriously threatened.¹⁶⁹

2. State litigation

There have been lawsuits seeking housing for the homeless in

164. N.Y. Const., art. XVII, § 1. New York's highest court has, however, ruled that the constitutional language does not require that recipients of state benefits receive individual grants, rather than flat grants, where the legislature has exercised its discretion within the constitutional command. *Bernstein v. Toia*, 373 N.E.2d 238 (1977). The court also noted that it did not view the state constitution "as commanding that . . . the state must always meet in full measure all the legitimate needs of each recipient." *Id.* See also Chackes, *supra* note 34, at 167.

165. Although some state constitutions contain provisions that may appear helpful to advocates for the homeless, attempts to base claims for subsistence rights on those provisions may be less than successful. For discussions of state constitutional provisions and their possible application to a solution for homelessness, see Connell, *A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution*, 18 RUTGERS L.J. 765 (1987); Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U.L.REV. 272 (1986).

166. See Langdon & Kass, *supra* note 7, at 325-32. These authors also discuss state housing laws, although they conclude that such laws typically fail to offer a means of relief for homeless persons. See also *Hunger and Homelessness*, *supra* note 130, at 283-86 (summarizing other state attempts to deal with homelessness through such efforts as emergency shelter assistance, coordination of relief efforts in limited areas and increases in general assistance for homeless families).

167. Langdon & Kass, *supra* note 7, at 327-31.

168. *Id.* at 326-27.

169. *Id.*

many states.¹⁷⁰ The best-known litigation was that brought by the New York Coalition for the Homeless in 1979 in New York. In *Callahan v. Carey*,¹⁷¹ the parties reached a settlement pursuant to which the city and the state agreed that they had an obligation to provide shelter for all New York City residents, and the State agreed to reimburse the city for the costs of the shelter system.¹⁷² The trial court cited the state constitutional language¹⁷³ along with statutory provisions and case precedents in support of its opinion. On account of the consent decree, however, no definitive ruling was rendered.

The history of the shelter struggle in New York illustrates the difficulties of resolving the homelessness crisis despite a relatively supportive constitutional, legislative and judicial environment.¹⁷⁴ New York City attempted to provide shelter space for all of its homeless residents, as well as simultaneously eliminate SRO hotels.¹⁷⁵ When the city succeeded in constructing new apartment-style residences for homeless families, the number of such families in the system increased.¹⁷⁶ Finally, in the summer of 1993, the city declared a change of policy: it would now investigate claims of homelessness before providing housing.¹⁷⁷ This change in policy was a public manifestation of a painful realization on the part of the city government—that it was not succeeding in stemming the tide of homelessness.

170. See Chackes, *supra* note 34. Chackes presents a thorough analysis of advocates' efforts to use the courts to combat poverty and provides a comprehensive abstract of litigation in many states. He summarizes judicial responses in cases in which state-offered benefits have been denied, stressing that courts are often willing to intervene where state administrative agencies reject benefits applicants on improper bases. *Id.* at 169-71. He also notes that, where the challenge is based on the nature or amount of benefits awarded, state agencies have far more discretion. *Id.* at 172-75. Chackes further analyzes the applicability of such challenges to cases involving the homeless, concluding that state laws providing aid for the poor can generally be used to assist the homeless and suggesting solutions to the typical defenses offered by states, such as lack of justiciability of the questions and intrusiveness of possible remedies. *Id.* 176-94. See also Langdon & Kass, *supra* note 7, at 334-48 (highlighting the New York case and focusing on limitations of litigation as a means of solving the homelessness crisis); *Hunger and Homelessness*, *supra* note 130, at 283-84.

171. No. 42582/79 (N.Y. Sup. Ct. consent decree entered Aug. 26, 1981).

172. See Langdon & Kass, *supra* note 7, at 335-45 for a detailed summary of the litigation, which went on for a number of years.

173. See *supra* note 170.

174. See *supra* note 163 and *infra* note 173.

175. See Langdon & Kass, *supra* note 7, at 343-45.

176. Celia Dugger, *New Rules Tighten Access to Shelter in New York City*, N.Y. TIMES, Aug. 11, 1993, at A1.

177. *Id.*

The public officials were not alone in facing disturbing truths. In 1989, the New York Coalition for the Homeless, created in 1979 to bring the *Callahan* case, found it necessary to admit the connection between substance abuse and homelessness. In *Palmieri v. Cuomo*,¹⁷⁸ the Coalition sought injunctive relief requiring the state to provide drug abuse treatment and "medically appropriate emergency housing that includes immediate drug treatment."¹⁷⁹ The Appellate Division, First Department, rejected the Coalition's argument that state law required that drug treatment be provided to homeless substance abusers.¹⁸⁰

Despite the occasional successes represented by *Callahan* and other cases,¹⁸¹ it has become clear that litigation in state courts will not resolve the homelessness crisis. Substantial resources are necessary to mount a successful challenge in court. Few local advocates have access to such resources.¹⁸² Further, courts are often unwilling to intrude into the discretion of local governments.¹⁸³ Where public treasuries are seriously threatened by increasing costs, governments attempting to operate with ever-decreasing federal participation are likely to convince state courts of their inability to do better. Unless state or local governments are violating clear mandates of state law, courts are unlikely to order greater expenditures.¹⁸⁴

178. 566 N.Y.S. 2d 14 (1991); See also N.Y. TIMES, Jan. 14, 1989, at B1.

179. 566 N.Y.S.2d at 14-15.

180. In a brief opinion, the court rejected arguments based on Mental Hygiene Law § 19.01(b), Social Services Law § 364-a(3), Public Health Law § 2805-b(2)(a), the constitution, and administrative directives.

181. See, e.g., Massachusetts Coalition for the Homeless v. Secretary of Human Services, 511 N.E.2d 603 (Mass. 1987) discussed at length in *Right to Shelter*, *supra* note 41, at 731-33 (Massachusetts Supreme Court held that state had a duty to provide permanent housing rather than emergency shelter to families on AFDC, but remanded on the question of whether the state Department of Welfare had satisfied its duty in the face of decreasing legislative allocations); *Boehm v. Superior Court*, 223 Cal. 716, 722 (1986) (holding that Merced County acted arbitrarily and capriciously in reducing general assistance grants without taking into consideration all necessities of life rather than only food and housing; County should have considered clothing, transportation and medical care before reducing monthly payments); *Klostermann v. Cuomo*, 463 N.E.2d 588 (1984) (finding justiciable New York Coalition's suit brought on behalf of individuals released from state psychiatric hospitals who sought residential placement, treatment and services required under state Mental Hygiene Law, and holding that declaratory judgment and mandamus were available remedies); *Hodge v. Ginsberg*, 303 S.E.2d 245 (W.Va. 1983) (granting a writ of mandamus sought by homeless persons on basis of statutory scheme providing for protection of "incapacitated adults").

182. Langdon & Kass, *supra* note 7, at 345.

183. Chackes, *supra* note 34, at 183-87.

184. See *id.*; see also Langdon & Kass, *supra* note 7, at 346-48 (Discussing New

Reliance on the state courts for a solution to the problems of homeless people who are substance abusers is particularly unwise. Even where courts are willing to find that states have undertaken a duty to provide shelter to needy residents, the added costs imposed by substance abuse treatment will likely shift the balance and persuade courts that to order the additional expenditures would be unacceptably intrusive. General legislative provisions requiring states to care for the poor often lack the specificity of language necessary to convince a court that the state has a clear duty to provide substance abuse treatment as well. A clearly-mandated federal solution, using funding sources that are widely available, is the only practical alternative.

III. Is a Solution Possible?

Homelessness has proved to be an intractable problem for American society. Although courts have ordered a number of states and cities to provide housing, the nature of the housing provided in response to court-ordered solutions has been such that relatively few homeless persons choose to take advantage of it.¹⁸⁵ Where cities and states have tried on their own initiative to provide shelters, they have encountered virulent opposition from residents in surrounding areas. Much of this opposition has centered on the expected presence of substance abusers among the homeless populations.¹⁸⁶ Requiring treatment for these residents should alleviate some of these concerns.

Yet arranging for treatment for the homeless substance abuser also poses problems, both complex and practical. One problem is that there are relatively few treatment slots available in drug abuse treatment programs in comparison to the number of persons with

York Court's reluctance to order the expenditure of extensive start-up costs and direct the development of a complicated services provisions program).

185. See generally *In re Billie Boggs*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (1st Dept. 1987) (reversing lower court's order releasing from involuntary confinement a homeless woman who had refused help by the City of New York).

186. See, e.g., Celia Dugger, *Gambling on Honesty on the Homeless*, N.Y. TIMES, Feb. 17, 1992, at B1, (noting that many New York leaders sensitive to fears of neighborhood residents that the City planned to place shelters housing "drug using homeless people" in the vicinity, opposed the City's plan and preferred the Cuomo Commission's approach, which was to allow nonprofit organizations to choose sites in non-residential areas). See also Raymond Hernandez, *Shelter Foes Reorganize as Helpers; Forced to Take the Homeless, Queens Neighbors Join Them*, N.Y. TIMES, March 24, 1993, at B1, (New York City has been sued "at least 44 times" by neighborhood residents seeking to block placement of homeless shelters in their neighborhoods).

substance abuse problems.¹⁸⁷ When such slots are available, they often go to those with a greater connection to the area in which the program exists. The program may require an address for enrollment, or it may be necessary to have some 'clout' in local circles in order to obtain one of the available slots.¹⁸⁸ In some cases, a referral from a private physician is necessary to obtain admission to a treatment program. In most cases, the homeless person, without an address, without access to regular medical care and among society's most disenfranchised, will lose the battle.¹⁸⁹

Payment for treatment programs presents another substantial problem. As discussed above, Social Security Disability Insurance does provide benefits for substance abusers who are currently enrolled in a treatment plan.¹⁹⁰ In order to obtain the benefits, however, an individual must be able to navigate the complex series of administrative proceedings discussed in the previous section. Even with assistance from advocates, it may be infeasible for a homeless person to provide the level of documentation and evidence required to succeed in the SSA's administrative proceeding. Therefore, the administrative burdens imposed upon homeless applicants will often result in the denial of benefits for a treatment program.

Assuming slots in treatment programs are available, the homeless claimant must be able to obtain transportation to the treatment site, often a major problem for many homeless persons in non-urban areas. In addition, as noted above, the SSA requires that benefits for a person who is a substance abuser must be paid to a third-party recipient on the claimant's behalf.¹⁹¹ For a homeless

187. According to information published by the United States National Institute on Drug Abuse, *National Household Survey on Drug Abuse: 1991*, U.S. Department of Commerce, *Statistical Abstract of the United States* (112th ed. 1992), there were 344,529 participants in 6,170 drug abuse treatment programs. The total budgeted capacity for such programs was reported to be 433,847 treatment slots. Thus, according to this survey, there are some 89,318 slots available in treatment programs. The types of programs reported in the survey included hospitals, community mental health centers, residential and outpatient facilities run by private for-profit, private nonprofit, and governmental organizations.

If, as studies estimate, there are between 3% and 70% of the homeless who have substance abuse problems, and if the homeless population is in the two million range, see *supra* notes 11-27 and accompanying text, there are between 60,000 and 1,400,000 homeless persons with substance abuse problems.

188. See Perlin, *supra* note 108, at 102-04. See also Pedro J. Greer, Jr., M.D., *Medical Problems of the Homeless: Consequences of a Lack of Social Policy-A Local Approach*, 45 U. MIAMI L. REV. 407 (1990-91).

189. See Perlin, *supra* note 108, at 414-15.

190. See *supra* notes 73-84 accompanying text.

191. See *supra* note 83.

claimant who attempts to take advantage of an outpatient treatment program, that requirement alone may make treatment inaccessible. Although the conditions attached to eligibility for Social Security Disability Insurance payments appear reasonable, requiring that all of the conditions be met may make payment for treatment unavailable to those who need it most.

Tied to the problem of arranging for treatment is the public's view of substance-abusing homeless as particularly unworthy of help. There has long been a view, only recently beginning to abate, that addictions are voluntary and that those who are addicted to alcohol or drugs are weak or bad in some fundamental moral sense.¹⁹² When added to the more common perception that those who are homeless are so by choice,¹⁹³ this moral disapproval creates a disincentive for politicians, sensitive to such widespread public perceptions, to consider seriously the problems of those who are homeless and who are substance abusers.

This underlying sense that providing aid for homeless addicts is somehow rewarding bad conduct may be the basis for the notable reluctance of governmental entities to acknowledge the connections between homelessness and substance abuse. Of course, there may also be a more practical reason: to acknowledge that many of the homeless need expensive treatment before they can free themselves of their problems is to recognize that solving the problem is much more expensive than anyone is willing to admit. Although creating huge shelters is costly, to require that individual care be provided for all who need it would be infinitely more costly, and would intolerably burden already overextended governmental resources.

The first step in solving any problem is to recognize its existence. In the case of homeless substance abusers, this acknowledgement has only recently occurred. Now that the connection between homelessness and substance abuse has been made, it is essential that recognition of the problem's complexity not be used to excuse governmental inaction.

IV. Model Programs

Although there have been numerous attempts to solve the homelessness crisis, the programs currently attracting the most at-

192. See Dreis, *supra* note 72, at 1220.

193. See Sara H. Strauss & Andrew E. Tomback, Note, *Homelessness: Halting the Race to the Bottom*, 3 YALE L. & POL'Y REV. 551, 552-53 (1985) [hereinafter *Race to the Bottom*].

tention are those that avoid the large shelter solutions, thereby integrating smaller, less obtrusive facilities into residential or commercial areas. The nature of the housing units, large and small, and other services provided through these programs, and the sources of the funding used to create them, may prove instructive in considering the future course of federal homelessness policy in the United States.

1. *The Programs*

HELP: The programs created in New York by Andrew Cuomo have garnered significant attention. *HELP*, or Housing Enterprise for the Less Privileged, has focused public debate on the scope and nature of housing projects for the homeless.¹⁹⁴

HELP's first project began in 1987 with the opening of *HELP One*, a transitional housing project requiring formerly homeless residents to participate in social service programs as a condition of their residency.¹⁹⁵ *HELP One* is located in a residential area in the East New York section of Brooklyn. The services provided to homeless families include day care, health care, recreation and counseling.¹⁹⁶ *HELP*'s transitional housing tenants spend an average of six months in the program, which is intended to provide a bridge from shelters to permanent housing.¹⁹⁷ Since *HELP One* began operation, the organization has opened several other transitional programs in New York State, including programs in Albany, Westchester County and New York City.¹⁹⁸

Following the successful completion and operation of a number of such transitional programs, *HELP* broadened its approach to include projects offering both transitional housing for formerly homeless persons and permanent housing for low- and moderate-income residents. The first such project was constructed across the street from *HELP One* in East New York.¹⁹⁹ With 149 apartments, most with two or three bedrooms, the *HELP Homes* project provides a secure common entrance, public areas with space for a variety of services, and a full-time staff to provide those services.²⁰⁰

194. Alan S. Oser, *Perspectives: Andrew Cuomo's Buildings; HELP's Transition to Permanent Housing*, N.Y. TIMES, Dec. 22, 1991, § 10 at 3.

195. N.Y. TIMES, Feb. 4, 1991, at B1.

196. *Id.*

197. *Id.*

198. *Id.*

199. Alan S. Oser, *Perspectives: Andrew Cuomo's Buildings; HELP's Transition to Permanent Housing*, N.Y. TIMES, Dec. 22, 1991, § 10, at 3, col. 3.

200. *Id.* The *HELP Homes* project in East New York contains 18 one-bedroom

Funding for construction of the HELP Homes project came from tax-credit financing, including a program called Permanent Housing for the Homeless, funded equally by the state and the city and operated by New York's Housing Finance Agency.²⁰¹ Similar programs are planned or under construction in other areas in and around New York City.

Andrew Cuomo's goal in developing shelters that offer services in addition to housing was to treat the complete problem rather than merely the lack of shelter. At a time when few advocates were trumpeting the need for services such as treatment for substance abuse addictions, Cuomo's program mandated participation in such treatment for addicts who were tenants in HELP shelters. This focus arose from the awareness of program officials that housing alone was insufficient. Cuomo and his colleagues challenged housing advocates who were reluctant to admit the connection between "social ills related to inner-city poverty . . . drug abuse, alcoholism, family breakdown, welfare dependency . . ." ²⁰² and homelessness. HELP created transitional housing programs offering services aimed at addressing these problems. The goal was to prepare formerly homeless residents for permanent housing by treating the underlying causes of their homelessness.²⁰³

apartments, 70 two-bedrooms, 59 three-bedrooms and 2 four-bedrooms. A reporter described the design as "architecturally . . . distinctive," with "[p]itched roofs, cupolas and campanile-like elements, . . . [a] brick facade, in two tones of light brown, . . . and a decorative fence." *Id.*

201. *Id.*

202. Celia W. Dugger, *Homeless Shelters Drain Money From Housing, Experts Say*, N.Y. Times, July 26, 1993 at B1.

203. The approach taken by New York City is instructive with respect to the problems inherent in the task of setting homelessness policy. New York's welfare hotels and mass shelters were the focus of virulent opposition in the 1980s because of the poor quality of life provided for residents.

When David N. Dinkins ran for Mayor of New York in 1989, he promised to address the problem of homelessness. His efforts were unsuccessful until 1991, when he appointed the Cuomo Commission. The Commission's task was to provide advice on the revamping of the shelter system. In February, 1992, the Commission reported back to the Mayor, advocating the creation of a new agency to oversee the homelessness problem, creation of small shelters run by nonprofit organizations rather than by the City, and the implementation of programs offering social services to address problems such as alcohol and drug addiction among the homeless. Members of the Mayor's administration bitterly contested the panel's recommendations, arguing that the City should continue to operate the shelter system. Celia W. Dugger, *Panel's Report on Homelessness is Criticized by Dinkins Staff*, N.Y. TIMES, Feb. 1, 1992, § 1 at 1.

Although some of the Dinkins' Administration's concerns were characterized as "turf guarding," *id.*, the dispute reflected a basic fact concerning the homelessness problem: every solution offered poses new problems of its own. While there was

expertise among nonprofit organizations, achieved because of necessity as a result of the governmental budget cuts of the 1980s, there was also concern about the strength of these organizations to withstand the political pressures applied whenever a shelter-related decision was to be made.

A more fundamental problem is reflected in the City's recent announcement that it will no longer accept at face value the assertions of those who seek shelter as to their homeless status. The City announced in August of 1993 that it will now require that claims of homelessness be verified prior to a decision to provide shelter. Celia W. Dugger, *New Rules Tighten Access to Shelter in New York City*, N.Y. TIMES, Aug. 11, 1993, at A1. The provision of shelter to anyone who sought it had been a fundamental element of the City's response to the crisis since the 1981 settlement of the *Callahan* case. Celia W. Dugger, *New York and Other Cities Diverge Over How to Help the Homeless*, N.Y. TIMES, March 1, 1992, § 1 at 31. City officials, however, suspected that those who wished to escape dangerous, uncomfortable, crowded or unpleasant living conditions in low-income housing used the shelter system as a means of avoiding endless waiting lists at more desirable public housing projects or the costs associated with better-quality rental housing. Thus, the City has stated that it will now investigate whether those seeking housing are truly homeless or whether they have other alternatives available, including doubling-up with friends or relatives.

This policy, of course, assumes that one is truly homeless only if one has absolutely no other alternatives, and that those who are in precarious housing circumstances are not eligible for the emergency provision of shelter. This approach is understandable from the fiscal perspective of a city attempting to stretch limited financial resources over an ever-increasing base of citizens at risk. Nonetheless, it fails to address the fundamental concerns of housing advocates, some of whom assert that those in precarious housing arrangements should be counted as homeless for purposes of assessing the true scope of the need for housing.

A 1993 visit by Henry Cisneros, U.S. Secretary of Housing and Urban Development, to an apartment-style shelter in Queens, New York highlighted the fundamental concern with the focus of housing efforts. Cisneros spent a night at the Briarwood shelter, where 91 families live in private, furnished apartments, assisted by a staff trained to deal with the child care, housing, health and education needs of the residents. Cisneros touted the shelter as a model. In so doing, he unintentionally emphasized the contrast between such shelters, intended to provide only transitional services, and much less attractive public housing projects, which are supposed to be the permanent housing goal of formerly homeless residents using the transitional shelters. Celia W. Dugger, *Homeless Shelters Drain Money From Housing, Experts Say*, N.Y. TIMES, July 26, 1993, at B1. Cisneros reportedly said to a family in the shelter, "It would be great if you could just stay here." *Id.* at 2, col. 3. Advocates for increased funding for permanent housing reacted with despair.

The fact that federal and state policies now provide significantly more funding for shelters for the homeless than for permanent low-cost housing targeted at the working poor and middle-income persons has become a major concern for housing advocates. Many such advocates have redoubled their efforts toward urging the government to provide increased funding for low-cost housing, asserting that no increase in shelter services will provide permanent housing to all who need it.

Thus, New York's problems reflect the larger dispute—should the efforts of advocates be directed solely toward increasing the stock of available housing, or should they acknowledge that many who are without housing would not be able to take advantage of its increased availability without the provision of supportive services directed at combatting problems such as substance abuse. Andrew Cuomo's Commission came down strongly on the side of full service shelters for New York City. The future direction of the nation's housing policy is not yet clear.

However, special housing, like that offered by HELP, is generally aimed at homeless families rather than at homeless single adults.²⁰⁴ Families remain the highest priority for improved social services. This may be a reasonable policy choice, in light of the needs of homeless children. In addition, homeless parents may be more amenable to housing solutions when the welfare of their children is at stake. Therefore, adult substance abusers without children have not been the target population at which the majority of HELP's services have been directed.

Since its original projects began construction, however, HELP has broadened its focus to include plans for shelters for childless substance abusers in need of rehabilitation. Unlike the apartment-style transitional shelters, these planned facilities will be located in non-residential areas. HELP resolves the location issue, a major source of political tumult for housing advocates and city officials alike, by allowing the nonprofit organizations administering each shelter to negotiate with local officials regarding the appropriate placement for each project.²⁰⁵ Although these facilities appear to be more similar to in-patient hospitals than residences, they have the advantage of creating treatment slots and housing at the same time. Thus, these facilities may be making a more significant contribution to the needs of the substance-abusing homeless than those programs offering only housing and attempting to enroll residents in pre-existing treatment programs.

House of Hope: For ten years a nun in Chicago has been offering a particular brand of "tough love" to homeless women and their children, achieving a success rate significantly better than most other shelter providers in that city.²⁰⁶ Sister Connie Driscoll, founder of St. Martin de Porres House of Hope, has reported that "only 4 to 5 percent of our residents return to Chicago's shelter

204. In a July, 1993 article, New York Times writer Celia Dugger reported that nearly 4,000 homeless New York families are now housed in apartment-style housing. Although the use of welfare hotels has dropped proportionately, the City's expenditure for each family in a shelter has increased to \$3,200 from the \$2,600 it paid for hotel shelters. Celia Dugger, *Homeless Shelters Drain Money from Housing, Experts Say*, N.Y. TIMES, July 26, 1993, at B1.

205. Andrew Cuomo was quoted as saying that transitional housing facilities should be in residential areas, while for "a social-services facility the analysis must be different You don't put hospitals or nursing homes in the middle of residential neighborhoods." Alan Oser, *Perspectives: Andrew Cuomo's Buildings; HELP's Transition to Permanent Housing*, N.Y. TIMES, Dec. 22, 1991, § 10, at 3.

206. Sister Connie Driscoll, *Chicago's House of Hope; Tough, Loving Methods of Helping the Homeless*, POL'Y REV., Summer 1993, at 50 [hereinafter *Chicago's House of Hope*].

system,” a ten-fold improvement over the system-wide recidivism rate.²⁰⁷ The House of Hope program is funded almost entirely from private donations and accepts no governmental support, although many of its residents do receive welfare payments and Food Stamps. The program reserves two-thirds of its 110 beds for women who are substance abusers.

Sister Connie describes the focus of her program as one stressing “personal responsibility and accountability.”²⁰⁸ The residents have a highly-structured lifestyle including chores, group meetings and twelve-step meetings (Alcoholics Anonymous and Narcotics Anonymous) for the residents who are substance abusers, as well as classes in parenting skills, high-school equivalency and financial responsibility. Residents receiving state and federal financial assistance are required to save a substantial portion of those funds so they will be able to afford to live on their own when they have completed their recovery period at the House of Hope.²⁰⁹ Residents who are unable to comply with the rules and with the strict curfews are relocated, although those moves are rare.²¹⁰ In addition, the House of Hope offers continuing services to residents who succeed in regaining control over their lives. According to Sister Connie, most of their “graduates” find apartments in the same neighborhood and continue to attend Narcotics Anonymous and other meetings at the House of Hope.²¹¹

The success of the House of Hope program led Chicago’s Mayor, Richard Daley, to appoint Sister Connie Driscoll as the Chair of the Mayor’s Task Force on the Homeless in 1989.²¹² Among Sister Connie’s recommendations to those attempting to address the problem of homelessness are “to take off the rose-colored glasses,” to keep homeless programs from becoming too large (she believes that 50-60 beds is the optimum size for a program) and to eliminate government assistance, which she views as a part of the homeless problem.²¹³

207. *Id.* (noting that nearly 40% of shelter residents outside of the House of Hope return to the shelter system).

208. *Id.*

209. *Id.* at 51.

210. *Id.*

211. *Chicago’s House of Hope supra* note 208. Sister Connie noted that the group support provided by the close proximity both to each other and to the House of Hope is helpful to the “graduates,” and that they also rely on their own weekly meeting, in addition to the twelve step meetings.

212. *Id.* at 52. Sister Connie referred to herself as “the first non-bureaucrat to hold the position.”

213. *Id.* at 53. (“I’d like to see the whole system abandoned; people should not live

Residences for Homeless Veterans: A formerly homeless, alcoholic veteran has created a series of group homes for veterans seeking to overcome alcohol and drug habits, with significant albeit small-scale success.²¹⁴ Stephen J. Murphy, who emerged from Vietnam in an alcohol-fueled downward spiral, joined Alcoholics Anonymous and conquered his drinking habit. He managed to renew a lapsed securities broker's license and founded a successful investment company. Through buying foreclosed commercial properties, he accumulated sufficient funds to create the American Capital Foundation for the Homeless. The Foundation has so far obtained three foreclosed residential properties and turned them into group homes for addicted homeless veterans.²¹⁵ The program is currently free to the residents, although Murphy has indicated that he planned to purchase a car wash at which the residents would be expected to work in exchange for their rent.²¹⁶ The treatment programs, run by nonprofit organizations, include group therapy for the veterans, assertiveness training, community service and group governance of the facility.²¹⁷

Murphy's interest in assisting those who were, like himself, traumatized by the horrors of front line combat in Vietnam is admirable. Although the program has not been in operation long enough to produce a track record, his willingness to provide funding for small, highly-focused programs offers one approach that might aid in the development of a series of model solutions.

2. *The Funding*

As the federal deficit has grown, the breadth of the United States' commitment to providing a solution for most social ills has shrunk. Although the Clinton administration appears to be more sympathetic to an active governmental role in solving homelessness,²¹⁸ the need for deficit reduction has made any significant in-

continually on the dole. People must obtain job skills; they have to decide on their own what they want to make of their lives").

214. Connie Benesch, *Stephen J. Murphy, Once A Homeless Vietnam Vet And Now A Millionaire, Has Not Forgotten His Past*, L.A. TIMES, April 29, 1993, § B at 9.

215. *Id.* Two of the three residences are located in the Los Angeles area and the third is in New Haven, Connecticut. The newest, in Mar Vista, California, will provide housing and treatment for 45 to 50 veterans. *Id.*

216. *Id.*

217. *Id.*

218. See Jason DeParle, *Report to Clinton Sees Vast Extent of Homelessness* N.Y. TIMES, Feb. 17, 1994 at A1. (discussing draft of report from Clinton Administration concerning need for large-scale intervention into the problem of homelessness, although noting that specific funding options are not discussed).

crease in federal financial support unlikely. Thus, successful programs must develop other sources of funding. The most likely choices involve some combination of (i) better use of federal funds already devoted to housing and/or treatment and (ii) increased use of private funds.

Stephen Murphy has the financial resources to fund his programs himself, although he does plan to seek additional ways of obtaining financial support.²¹⁹ Sister Connie Driscoll spends most of her time seeking contributions from corporations, foundations, individuals and groups willing to pay her to speak.²²⁰ The HELP projects,²²¹ although operating on a much larger scale than Murphy's program or the House of Hope, have achieved an impressive level of private financial support. For HELP Homes, the mixed transitional and low-income housing project in East New York, the Chevron Corporation bought \$16 million in tax credits. The income from that sale will provide funds to meet the project's operating budget for fifteen years.²²²

Other sources of funding for new housing/treatment programs may involve government intervention, although on a different scale than in the past. One of HUD's first initiatives under the Clinton administration is a joint venture between HUD and the AFL-CIO's Investment Trusts pension fund.²²³ Under this program, called the National Partnership for Community Investment, the Trusts would provide HUD with \$660 million of pension funds to finance the cost of renovating or building 10-12,000 units of low-income housing over a five-year period.²²⁴ In addition, the Trusts would secure an additional \$550 million from other sources for the same purpose. HUD's investment of federal funds, only \$100 million, would be used to provide rent subsidies for the residents living in the new housing, thus furnishing a secure income stream for the Trusts.²²⁵ If approved by Congress, this program would provide a substantial infusion of private funds into the housing construction business, all directed at increasing the available stock of low-income housing.

The National Community Development Initiative (NCDI) is an-

219. *See supra* note 214.

220. *See* Driscoll, *supra* note 206.

221. *See supra* notes 206, 214.

222. N.Y. TIMES, Dec. 22, 1991, § 10, at 3.

223. Guy Gudliottu, *Shallow Pockets and Business Needs Produce Small Thinking at HUD*, WASH. POST., July 13, 1993 § A, p.6.

224. *Id.*

225. *Id.*

other proposed program relying largely on private funds. NCDI, a joint venture among HUD and seven charitable organizations, is directed at the training of "community-based development groups in inner cities."²²⁶ HUD's contribution would be only \$25 million, while \$100 to \$800 million would possibly be available from outside sources. The NCDI would be run, as it has for three years, by non-profit foundations, with HUD and other investors continuing to play an oversight role.²²⁷

On a much smaller scale, a group of a dozen foundations announced a plan to donate \$8 million to a number of New York City neighborhood organizations to support permanent housing and supportive services for "homeless adults with special needs[:] . . . AIDS, mental illness or a history of alcohol or drug abuse."²²⁸ The Corporation for Supportive Housing, with programs already in operation in San Francisco and Chicago, funded the New York area organizations and announced plans for a similar program in Connecticut.²²⁹ The funds will allow local organizations to obtain low-cost loans and housing subsidies from state and national governments.

While it is clear that political support for increased spending for new shelter programs will be limited, it is also clear that the funds devoted to shelters have failed to stem the increasing tide of homelessness.²³⁰ Thus, a combination of more effective use of public funds and greater access to private funds is required to begin to provide real solutions.

V. A Proposed Solution: Housing/Treatment Programs

The model programs described above adopt the most promising methods of addressing the combined problems of homelessness and substance abuse. They all mandate treatment for homeless substance abusers as a condition of access to housing, and they all either create treatment options or provide access to pre-existing

226. *Id.*

227. *Id.*

228. Kathleen Teltsch, *Foundations Give \$8 Million To House New York Homeless*, N.Y. TIMES, Dec. 17, 1992, § B at 12.

229. *Id.*

230. See Celia Dugger, *Judge Cites New York City on Homeless*, N.Y. TIMES, Sept. 28, 1994, at B1, (reporting on judicial and legislative criticisms of the Giuliani administration's budget-cutting strategies contending that these cuts have created a "bottleneck in the shelters"); Celia Dugger, *Setbacks and Surprises Temper a Mayor's Hopes to House All*, N.Y. TIMES, July 5, 1993, at B1 (noting the Dinkins administration's increasing reluctance to spend money on the homeless); see also Wizner, *supra* note 5, at 388-89; *Race to the Bottom*, *supra* note 193, at 553-55.

treatment as a part of the housing program. Because of the prevalence of substance abuse among the homeless, and because of the failures of the governmental programs described above, new combined solutions are necessary. A Housing/Treatment Program (H/TP) model, including the components that follow, offers the most significant opportunity to confront, and eventually to solve, the problems of many homeless substance abusers. While some components of the H/TP model may seem harsh and distasteful to some members of the homelessness advocacy community, an aggressive approach may be the only way to succeed in meeting the needs of homeless substance abusers. Treatment for substance abuse must be an essential element of housing. Otherwise, any housing solution will merely provide temporary aid. Further, without a federal acknowledgement that treatment is essential to any comprehensive remedy for homelessness, governments at all levels will continue to evade their responsibility to find successful solutions.²³¹ This acknowledgement should lead to efforts to increase the availability of treatment options, the only real solution to the problems of homeless substance abusers.

A. Components of H/TPs

1. Federal control and implementation

A federal solution to the problem of homelessness is essential. Allowing or requiring state and local governments to bear full responsibility for solving the homelessness crisis virtually guarantees the failure of their efforts. States must be involved in the implementation of any solution, as they are in the provision and administration of other federally-mandated benefit programs like AFDC and Food Stamps. For the same reasons as in those cases, however, states must not be required to carry the full load.²³²

Accepting homelessness as a national crisis in need of a federal solution, need not require massive additional expenditures. In this era of scaling back and cutting down, to propose anything even hinting at increased federal spending for "social programs" smacks of heresy. It is clear, however, that governments at all levels are already making significant expenditures to improve the quality of life, to attack substance abuse and to provide shelter. Thus, the better approach would be to consider the nature of those expendi-

²³¹. See *Race to the Bottom*, *supra* note 193 at 555-60; see also Langdon & Kass, *supra* note 7, at 322-23.

²³². See generally *Race to the Bottom*, *supra* note 193; see also Langdon & Kass, *supra* note 7, at 349-60.

tures and to channel the existing federal, state and local funds into programs where they will be most useful.²³³ With additional encouragement and incentives, private funds should become available to help create and operate some of the H/TP programs, thus supplementing the governmental funds.

Failure to provide a national solution will allow states and cities to continue to compete with each other to provide the least attractive shelters. In what one team of commentators has deemed a "race to the bottom," local governments fear that they will attract homeless persons from other areas if their programs are viewed as attractive or enticing.²³⁴ They provide as little protection as possible and hope that those among the homeless population who are mobile enough to do so will go elsewhere.²³⁵ Often, they do—many of the homeless choose the streets over filthy, dangerous, disease-ridden facilities.²³⁶

Homelessness is a national problem that requires a national solution. The passage and continued re-funding of the McKinney Act, together with President Clinton's recent executive order directing the federal agencies involved in the homelessness problem to develop a "single coordinated Federal plan for breaking the cycle of existing homelessness and for preventing future homelessness"²³⁷ may signal a greater federal willingness to accept this responsibility.

2. *Nature of housing*

The housing offered by the H/TP model should provide more than just a stained mattress in a dangerous mass shelter. Instead, accommodations should be based on those in the HELP programs, offering private or semi-private rooms or small apartments in

233. Marsha A. Martin, formerly involved in the New York City homelessness efforts, is the Clinton administration's executive director of the Interagency Council on the Homeless. In an interview for a series of articles in the New York Times in July, 1993, Ms. Martin indicated her awareness of the need to reevaluate the use of the available funds for homeless programs when she said, "We cannot solve the crisis of poverty . . . We're going through a budget crisis now We have committed ourselves to organizing the resources we have in a more effective, efficient fashion." Celia W. Dugger, *Search for Shelter: New York and its Homeless*, N.Y. TIMES, July 6, 1993, at A1.

234. See *Race to the Bottom*, *supra* note 193, at 555-56.

235. See generally *Race to the Bottom*, *supra* note 193.

236. See *Race to the Bottom*, *supra* note 193, at 555; see also Langdon & Kass, *supra* note 7, at 316-19.

237. Exec. Order No. 12,848, 58 Fed. Reg. 29, 517 (1993). See also Celia W. Dugger, *Search for Shelter: New York and Its Homeless*, N.Y. TIMES, July 6, 1993, at A1.

pleasant surroundings. To succeed, any H/TP must be perceived by potential residents as a desirable housing situation, far superior to life in a shelter or on the street.²³⁸ The scope of the services provided will enhance this perception.

The H/TP model requires that transitional housing be provided for substance abusers who are seeking to escape from homelessness. While permanent housing should be the eventual goal of the program, homeless substance abusers should be in a more restricted environment, at least until they are able to control their addictions. Just as the House of Hope and the HELP programs do, the H/TP structure should offer a short-term stay (in most cases for less than one year) in a transitional program, with the opportunity for a move to a permanent apartment following completion of the treatment phase of the recovery.

Housing provided for substance-abusing homeless persons can be in any size or form that fits into the selected location. If security concerns of the neighbors can be addressed, it may be placed in residential neighborhoods, or it may make use of unused hospitals or other large buildings. Newly-built homeless facilities should focus on modifying existing structures or on creating small-scale programs that fit unobtrusively into their surroundings rather than on creating large buildings that draw attention to themselves and to their residents.

In addition to ensuring the safety and security of the residents, it is equally important to avoid placing substance abusers in close proximity to other vulnerable populations, particularly the elderly and families who often occupy public housing. The placement decisions made by Andrew Cuomo's New York programs reflect the concern for the needs of adjacent populations. Cuomo's program acknowledges the need to place homeless people with additional problems, such as mental illness or substance abuse, away from those whose primary burden is poverty. Further, Cuomo acknowledged that some facilities exclusively for those in need of treatment, should be placed in non-residential areas.²³⁹

3. *Provide wide range of support services*

In addition to substance abuse treatment, the H/TP model should offer the types of services offered by the HELP programs,

238. See, e.g., Driscoll, *supra* note 206 (even though the House of Hope program imposes substantial behavioral requirements on its residents, Sister Connie Driscoll asserts that "women beat our doors down to get in to St. Martin's").

239. See *infra* note 260 and accompanying text.

including counseling, education, assistance in negotiating the maze of governmental benefit programs, job training, financial planning, and child care for those who need it.²⁴⁰ These general life skills services will help the resident to learn to live independently while gaining control over their addictions.

4. *Mandate participation in substance abuse treatment*

All homeless substance abusers placed in publicly-funded transitional housing must be in treatment programs. Creating a mandatory connection between access to housing and participation in treatment programs will emphasize the need for substantial increases in treatment opportunities.²⁴¹ This new treatment obligation will provide the impetus for a recognition that housing with treatment is the solution to the homelessness of substance abusers. Because this obligation has a foreseeable end, and because it has the potential of limiting the tenure of program residents, it should escape at least a portion of the political stigma that attends any attempt to establish a new governmental entitlement.²⁴²

As with the HELP programs, incoming residents should be evaluated through personal interviews and by blood and urine tests to determine their substance-abuse status. The testing of all incoming residents, combined with the assurances as to the limits on the use of the information offered below, should help to assuage the civil rights concerns of the would-be residents.²⁴³

The treatment provided should take whatever form is necessary. Because many addicts find considerable assistance in twelve-step programs, Alcoholics Anonymous and Narcotics Anonymous programs should qualify as available treatment.²⁴⁴ These programs are

240. For example, the House of Hope program in Chicago requires that all residents save 80% of their welfare payments and 50% of their Food Stamps so that they will have a nest egg to help them in establishing an independent life when they move into permanent housing. See *supra* notes 207-214. A similar requirement should be explored for the H/TP model, although imposing such a requirement in a government sponsored program might well raise constitutional questions. See also Kim Hopper, *Deviance and Developing Space: Notes on the Resettlement of Homeless Persons With Drug and Alcohol Problems*, CONTEMP. DRUG. PROBLEMS 391, 407-08 (Fall, 1989) (arguing from anthropological perspective that creative solutions to provision of housing for homeless substance abusers is necessary, providing not just "bricks and mortar" but "modalities of support and local norms of conduct").

241. See *supra* Part IV.

242. See Wizner, *supra* note 5, at 392-98; see also *Race to the Bottom*, *supra* note 192, at 555-58. See also, Tom Redburn, *Plan for Sitting Social Services Stirs Disputes*, N.Y. TIMES, May 16, 1994, at B1.

243. See *infra* notes 249-65.

244. Experts characterize twelve-step programs, such as Narcotics Anonymous, as

particularly important because they require virtually no financial support, other than the provision of a meeting room. They are also important because they can often help to buttress the effects of other, more intensive therapies.²⁴⁵ In addition, methadone clinics can be of assistance to heroin addicts.²⁴⁶ Other treatment models used successfully in public or private settings should be made available as well.²⁴⁷

An unavoidable result of the treatment requirement will be a distinction between formerly homeless substance abusers, who must be in treatment to live in H/TP housing, and substance abusers who are already living in publicly funded housing, who are not subject to the treatment requirement. This distinction can be viewed in one of two ways. Some advocates may argue that guaranteeing treatment only for formerly homeless substance abusers is discriminatory. Those who are poor enough to live in public housing but are not homeless are treated differently from those who are homeless. The response to this charge must be that the H/TP approach is intended to confront the problem of homelessness among substance abusers by connecting treatment with housing. While there are certainly other serious problems to be addressed, including the prevalence of substance abuse among the poor, no one so-

among the most effective methods of treatment for substance abuse addictions. *See, e.g.,* Daniel J. Anderson, *Twelve steps aid recovery for those with dual disorders*, Hazelden Report, STAR TRIB., Oct. 19, 1993, at 3E (quoting Dr. Kenneth Minkoff, Chief of Psychiatry at Choate Health Systems, Inc. and Assistant Professor of Psychiatry at Harvard Medical School, as asserting that twelve-step programs are useful in treating both chemical dependency and psychiatric illness, and stating "the most common and successful 'medication' that people use, the one that's been the most successful, is participation in Twelve Step recovery programs. Participating in those programs on a regular basis helps people stay sober"). *See also* Jane G. Haas, *Alcohol: Age-old Curse*, CHICAGO TRIB., July 21, 1993, at 7 (quoting Dr. Karen C. Douglas, Associate Clinical Professor in the Department of Family Medicine, discussing treatment for alcoholism, and stating "The solution is to find a way to stop drinking My recommendation to patients is to call Alcoholics Anonymous."). *Cf.* Pat Kossan, *AA Solution Sometimes Slips*, PHOENIX GAZETTE, January 28, 1993, at E1 (discussing Rational Recovery, an alternative to AA, but noting that AA's history of success is persuasive and quoting "informal statistics" showing that "about 29 percent" of AA members are sober after five years).

245. *See* Anderson, *supra*, note 244, at 3E.

246. *See* Leslie Berkman, *Kicking a Heroin Habit; Methadone Treatment is Plentiful—but Only for the Addicts Who Can Afford It*, L.A. TIMES, Jan. 11, 1993 at B1. (discussing availability of methadone treatment for addicts in Orange County, California, and noting that there are waiting lists for slots in methadone treatment programs, which can help heroin addicts stay off heroin, although they often must continue to use methadone for life as a result of the chemical imbalance created by heroin use).

247. *See supra* notes 207-214 and accompanying text.

lution can address all problems of such magnitude. Advocates may also argue that it is unfair to homeless substance abusers to condition housing for them on participation in treatment, while those already living in public housing have no such obligation imposed on them. Here again, the point is a valid one. The answer may be that the overriding goal of the H/TP model is to find a pragmatic solution to homelessness, not to ensure that every individual without housing is housed immediately.

5. *Limit access to test results*

The test results of all incoming residents should be used only for determining the treatment needs of the residents, and not for any law-enforcement purposes. If a new H/TP solution is to be effective, potential residents must understand that no information will be provided to any law-enforcement agencies concerning their substance-abuse practices or histories. This aspect of the housing/treatment combination will likely pose the most difficulties in recruiting new residents, for the suspicion of government and bureaucracy among the homeless is high.²⁴⁸ Repeated assurances, combined with clearly-explained and defined security procedures, may help.

6. *Provide ongoing monitoring*

All residents in publicly-funded housing programs should be monitored on a regular basis, with no discretion given to the housing provider to choose those residents to be monitored. Attendance at treatment programs should be checked, as should adherence to all other regulations governing the housing units. Again, this aspect of the program will create some discomfort among residents. It should be made clear that all residents are treated in the same manner, with no opportunity for favoritism or harassment.

7. *Procedures for dealing with those refusing to participate*

The goal of the H/TP solution is to increase the likelihood that homeless substance abusers will find and take advantage of some treatment that enables them successfully to confront their addictions. To that end, encouragement and persuasion should be emphasized to assuage the fears of reluctant participants. Counseling

248. See Perlin, *supra* note 108, at 80 and 102-03. See also *Race to the Bottom*, *supra* note 195, at 555.

should be offered, along with attempts at conveying the realities of life on the streets for those who persist using alcohol or drugs. A resident who continues to participate in treatment programs should be allowed to remain in the funded housing until it becomes clear that he or she is genuinely unwilling to stop using addictive substances. At that point, the unwilling resident should leave the program. When residency ends, the provision of additional services should also end. Nevertheless, because successful treatment, rather than punishment, is the goal, it is essential that continued attempts be made to engage the unwilling participant in counseling in order to determine the reasons for his or her reluctance. However, the specialists should exercise their professional judgment as to the extent of such persuasive efforts. Experts may well counsel that a more strict approach is necessary to encourage progress for those who genuinely seek to conquer their addictions.²⁴⁹

Residents who attempt to conceal their use of addictive substances while they are residents of the program should be offered as many opportunities to comply with the program requirements as substance-abuse specialists deem practical. In the event that they continue to be recalcitrant, the housing provider should have the power to dismiss them from the program, after due process in conformity with legal requirements.²⁵⁰ Because there are likely to be homeless people who refuse or are unable to give up their addictions, there must be some shelter facilities available for those who do not meet the requirements of the H/TPs. As reflected in the HELP programs, however, scarce governmental resources are better directed at those who can eventually become self-sufficient. Access to permanent subsidized housing should therefore be restricted to those who have successfully completed treatment programs. For those who have not and will not complete treatment, the state must provide some combination of inpatient treatment in state psychiatric hospitals for those meeting state standards for commitment, and access to traditional shelters, for those who do not.

249. *Symposium: Law and the Homeless: Essay and Article: Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337 (1991); Stanley S. Herr and Stephen M.B. Pincus, *A Way to Go Home: Supportive Housing and Housing Assurances Preferences for the Homeless*, 23 STETSON L. REV. 345 (1994).

250. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 266-67 (1970) (requiring that individual terminated from federal benefits program providing life-sustaining benefits must receive notice and opportunity to be heard prior to termination).

8. *Completion of treatment*

Once a resident has completed the treatment phase of his or her H/TP, that resident should be eligible for placement in permanent subsidized housing. Medical and psychological judgments must determine the standards for declaring any treatment program complete. It seems unlikely that any predetermined period of time will be appropriate for all participants; thus a system of ongoing evaluation by psychiatrists, psychologists or physicians must be created to make it possible for experts to make individual assessments on the basis of the nature and seriousness of the substance-abuse problem, the support system available to each person, and other relevant variables. If medically necessary, successful residents must be placed in ongoing maintenance programs, such as twelve-step or group counseling situations. In addition, job counseling, child care and other ongoing support services necessary to enable the former resident to maintain his or her status in permanent housing must remain available. Many such services, and the funding to pay for them, are available through the private and governmental social service structures that are already in place.²⁵¹ Where such services exist, the H/TP counselors can assist in arranging enrollment in or access to those programs.

B. **Problems Presented by H/TP Model**

There are clearly a number of hurdles, both practical and philosophical, to the type of model presented above. These hurdles, however, are not insurmountable.

1. *Availability of treatment programs*

The shortage of available treatment slots is the first hurdle to be overcome in securing combined housing and treatment.²⁵² As noted above, relatively few slots exist, and those individuals who are less connected to their communities are less likely to receive the few slots that are available.²⁵³ Thus, fresh housing solutions must incorporate the creation of new treatment programs. The provisions of the McKinney Act's Shelter Plus Care Program²⁵⁴ provide a valuable incentive for treatment providers to include treatment as a substantial part of any new housing program. By

251. See *supra* notes 195-206 and accompanying text.

252. See *supra* notes 188-190.

253. See *supra* notes 189, 190.

254. See *supra* notes 149-159 and accompanying text.

mandating that providers obtain supportive services in an amount equal to the rental assistance funds provided, the Program effectively doubles the value of the public funds used for housing.²⁵⁵

But until new treatment programs can be developed, advocates should explore treatment solutions that satisfy the requirements of the other federal programs. For FHAA purposes, twelve-step programs like Narcotics Anonymous satisfy the requirement.²⁵⁶ Such programs have the advantage of being readily available in most cities and large towns, free or very inexpensive to participants, and more successful than most solutions for those who participate fully.

2. *Funding—The Clinton Health Care Plan*

Funding is another major hurdle. The creation of low-income housing, particularly with treatment included, is not a profit-making endeavor. Government, either federal or state, must make funds available to encourage the creation of H/TP facilities. The Clinton Health Care Plan promises to make a significant contribution in this regard. The Plan, as originally proposed by the Administration, includes payment for treatment of mental health problems, including substance abuse, as a part of its guaranteed benefits.²⁵⁷ The Plan places significant limitations on coverage for treatment, including a requirement that the treatment be provided in the "least restrictive inpatient or residential setting that is effective and appropriate for the individual,"²⁵⁸ as well as a time limit of thirty days of inpatient treatment per episode "unless the individual receiving treatment poses a threat to their own life or the life of another individual."²⁵⁹ In any event, as originally proposed, the Plan includes an aggregate annual limit of sixty days for inpatient treatment.²⁶⁰

The Plan also provides for "intensive nonresidential mental

255. 42 U.S.C. § 11403b (1993).

256. See *supra* note 91 and accompanying text.

257. Health Security Act (proposed), Tit. I, Subtit. B, 42 U.S.C. § 1115 (1994). The proposed Clinton plan provides both inpatient and outpatient mental health and substance abuse treatment for "eligible individuals," 42 U.S.C. § 1115(a), which is defined to include persons who have or "had during the 1-year period preceding the date of such treatment, a diagnosable mental or substance abuse disorder; and (B) [are] experiencing, or [are] at significant risk of experiencing, functional impairment in family, work, school, or community activities." 42 U.S.C. § 1115(b)(1)(A-B).

258. 42 U.S.C. § 1115(c)(2)(A)(i).

259. 42 U.S.C. § 1115(c)(2)(C).

260. Further, the proposed plan limits payment for inpatient substance abuse treatment to "medical detoxification associated with withdrawal from alcohol or drugs." 42 U.S.C. § 1115(c)(2)(E).

health and substance abuse treatment," subject to a time limitation of 120 days.²⁶¹ Outpatient treatment, the third category of treatment available for substance abusers, is subject to a limit of thirty visits per year, and includes a 50% copayment.²⁶²

The extent and scope of the mental health and substance abuse treatment provided by the Clinton Plan has been the focus of much heated debate since the Plan was introduced. Critics of the Plan have argued that inclusion of mental health and substance abuse coverage would be "uneconomical" and "frivolous."²⁶³ The Health Care Financing Administration estimated that the per capita cost of including mental health and substance abuse benefits in the Clinton Plan would be between \$241 and \$259 per year.²⁶⁴

However, a study introduced by Columbia University's Center on Addiction and Substance Abuse supports the inclusion of substance abuse treatment in health care programs so that treatment would be available for all who need it.²⁶⁵ The study estimates that Medicare will pay \$7.4 billion for treatment for health problems related to substance abuse in 1994 alone.²⁶⁶ This estimate is based on a conclusion that some seventy disorders are directly or indirectly related to substance abuse. In addition, this estimate includes costs for such illnesses as pediatric AIDS caused by the substance abuse of the mother.²⁶⁷ Illnesses more directly considered within the scope of the substance abuse problem, such as "treatment for obvious substance abuse disorders such as drug overdoses, delirium tremens, drug or alcohol dependence and abuse, [and] psychoses in general and psychiatric hospitals ac-

261. 42 U.S.C. § 1115(d)(2)(C)(i-iii).

262. 42 U.S.C. §§ 1115(e)(2)(C)(i), (ii). The limitation to thirty visits and the copayment were added by a modification of the plan presented by the Administration shortly following the initial introduction of the plan. See BNA MEDICARE REPORT, 4 MCR 47 d50, Dec. 3, 1993.

263. BNA MEDICARE REPORT, 4 MCR 21 d28, May 21, 1993 (reporting on Hillary Rodham Clinton's response to the criticism prior to the Plan's introduction, in which Mrs. Clinton argued that a comprehensive plan must include such benefits).

264. BNA MEDICARE REPORT, 5 MCR 18 d39, May 6, 1994. The American Psychiatric Association recently offered a study indicating that more comprehensive mental health and substance abuse treatment could be offered for an annual per capita sum of just \$185-224, covering medically necessary treatments, if the 80/20 copayment were changed to 79/21. *Id.* This study also criticized the actuarial data used by HCFA in reaching its conclusions, stating that use of more current figures would make it clear that this coverage could be made available prior to 2001, as the Clinton Plan proposed. *Id.*

265. BNA HEALTH CARE POLICY REPORT, 1 HCPR 21 d35, July 26, 1993.

266. *Id.*

267. *Id.*

counted for \$0.7 billion of the \$4.2 billion [spent by Medicare on hospital care in 1991]."²⁶⁸

The treatment limitations may be insufficient to provide meaningful solutions for substance abusers, although the detoxification and intensive treatment will certainly allow an initial intervention to occur. More importantly, however, the actual efficacy of this source of funding will depend on whether or not this element of the Plan survives the forthcoming debates. Even if substance abuse treatments are a part of the Plan as it is finally adopted, the duration of payment for those benefits may be less than is necessary to achieve success.

Perhaps the strongest argument for the inclusion of substance abuse treatment in the Plan, however, relates to the economies resulting from the impact of more widely available drug treatment on criminal drug control efforts. Lee P. Brown, Director of the Office of National Drug Control Policy, has estimated that there are some 2-3 million "hard core drug users" in the United States of which only 1.3 million are in treatment.²⁶⁹ Brown pledged the Clinton administration's support for efforts to enhance drug treatment programs as a part of addressing the national crime problem.²⁷⁰ The Clinton administration's drug control strategy, announced early in 1994, partially alters the previous focus on drug interdiction and crime prevention by devoting 40% of drug funding in its initial stages to treatment for these drug users.²⁷¹ This drug strategy proposed by the President and Brown demonstrates the Administration's intent to address the root causes of crime rather than merely treating the symptoms.²⁷² This comprehensive approach bodes

268. *Id.* The study noted that of the \$21.6 billion spent by Medicare on hospital care in 1991, \$4.2 billion could be attributed to substance abuse treatment.

269. BNA HEALTH CARE POLICY REPORT, 1 HCPR 40 d18, December 13, 1993. Lee Brown, former Police Commissioner of New York City, testified before the House Energy and Commerce Subcommittee on Health and the Environment in December. He stated that an additional 1.1 million people could use such programs if there were treatment slots available.

270. *Id.*

271. Douglas Jehl, *Clinton to Use Drug Plan to Fight Crime*, N.Y. TIMES, Feb. 10, 1994, at D20. The Clinton Administration efforts will alter the Bush approach, which devoted funding to interdiction and crime control efforts. The current plan cuts funds from Coast Guard, Customs Service and other interdiction efforts and promises to make 74,000 treatment slots available for "heavy users," with a promise of still another 66,000 as part of the crime control bill. Still, even if Brown's estimate is accurate, this is still far from adequate to address the full scope of the problem.

272. The President described drug addiction as a "disease," and asserted that it can be successfully treated. Mitchell Locin, *U.S. Drug Policy Gets a New Look: Clinton Stresses Care, Prevention*, CHICAGO TRIB., Feb. 10, 1994 at N1.

well for future efforts to address substance abuse in the homeless population.

Other funding support exists as well. As discussed above, the McKinney Act's Shelter Plus Care System pays for the housing portion of rental housing/treatment programs.²⁷³ If housing providers could secure funds for the treatment portion of these programs, they could create new combined H/TP facilities. These additional funds may already exist. States and cities now spend substantial amounts of money on shelters.²⁷⁴ If some of these funds were redirected into supportive services for programs covered under the McKinney Act's provisions, the value of the funds spent would, in effect, have doubled.

Providers of low-income public housing currently receive some federal funding under a variety of federal programs, including funds provided by the Housing and Community Development Act of 1992.²⁷⁵ The Federal Housing Act Amendments and Section 504 of the Rehabilitation Act of 1973 prohibit these providers from discriminating against the disabled, including, in some cases, substance abusers.²⁷⁶ If assistance could be provided through a comprehensive federal program, the funding already supplied to housing providers through existing funding sources could furnish a portion of the funds necessary to address the housing shortage and provide housing better suited to meet the needs of the homeless population.

In addition to the funds paid to those who run housing programs, the various governmental benefits currently paid to individuals through programs like AFDC, Food Stamps and Social Security Disability Insurance should be a component of any comprehensive solution. As noted above, Social Security Disability Insurance payments are available, with certain restrictions, for substance abusers participating in treatment programs.²⁷⁷ Veterans' benefits may also be available for those who qualify.²⁷⁸ Those in treatment at resi-

273. See *supra* notes 149-51 and accompanying text.

274. The State of New York spends some \$500 million per year on homeless programs, an increase from approximately \$10 million per year in the early 1980s. James Dao, *Compromise is Reached on Rent Rules*, N.Y. TIMES, July 4, 1993, at 28.

275. See, e.g., Housing and Community Development Act of 1992, 12 U.S.C. § 1701x(b) (West Supp. 1992) (authorizes HUD to make loans to nonprofit organizations developing public housing).

276. See *supra* notes 85-100, 102-116 and accompanying text.

277. See Section III(A)(2) above for a description of the restrictions imposed on substance abusers who wish to receive Social Security payments.

278. See 38 U.S.C. §§ 1712, 1720A(a)(1) (1991) (outlining benefits available to veterans who are substance abusers).

dential treatment programs may use Food Stamps to pay for their meals. Some shelter programs currently use the benefits paid to individual residents to help fund their programs,²⁷⁹ so it is clear that these types of funds may be used in such a fashion. Finally, the Shelter Plus Care program also offers the option for "tenant-based" rental assistance. This option allows residents to use the funds for small programs that might not otherwise be reached by federal sources.²⁸⁰

Moreover, some new housing programs, like those described above,²⁸¹ have been able to secure at least partial funding from private sources. Entrepreneurs seeking new investments have been convinced that the creation of low-income housing may be profitable.²⁸² Detailed exploration of additional means of providing incentives for private funding would be invaluable.

3. Local ordinances

State or local ordinances present another hurdle. Those opposing the creation of group homes or small shelters in residential areas often interpret such statutes to bar unrelated adults from living together. As previously discussed, the Federal Housing Act Amendments of 1988 prohibit the use of such governmental efforts to discriminate against the disabled.²⁸³ Nevertheless, the process of responding to legal action brought pursuant to such local laws is costly, and this cost may be enough to derail a proposed H/TP.

Other, and more threatening, local laws prohibit "aggressive street begging," as Atlanta does, and camping or sleeping on public grounds, as a number of cities do.²⁸⁴ In 1990, the former Mayor of San Francisco, Art Agnos, ordered city workers to dismantle a tent

279. See Langdon & Kass, *supra* note 7, at 319, n.72 (describing the St. Francis residence, a non-profit residence run by a private group which helps homeless residents obtain public assistance benefits and then uses those benefits to pay "rent" for the homeless persons).

280. See *supra* notes 153-155 and accompanying text.

281. See *supra* Part IV.

282. See Richard L. Colvin, *A Safe Place Off the Streets*, L.A. TIMES, July 20, 1992, SB at 4 (describing new apartment complex for mentally ill homeless people and noting that \$1.3 million of the \$4 million cost of the project came from a state tax credit program which provides tax benefits for private investors in low-cost housing).

283. See *supra* notes 94-95 and accompanying text.

284. Cities with such laws include Santa Ana, Santa Monica, Long Beach and Santa Barbara, California. *Everybody's Problem, How Cities Around the Country are Dealing with the Homeless*, S.F. CHRONICLE, July 5, 1992, This World, at 10. But see *People v. Davenport*, 222 Cal. Repr. 736 (Cal. Super. 1985), cert. denied, 106 S. Ct. 1794 (1986) (reversing lower court decision holding anti-sleeping ordinance unconstitutional because the sleeping at which this ordinance was directed, that occurring over-

city in the city's Civic Center area.²⁸⁵ All of these efforts signal a new frustration with the homeless and with the increasingly relentless nature of the problem. Nonetheless, homeless advocates continue to challenge these legal efforts, in some cases represented by the American Civil Liberties Union. ACLU lawyers condemn the ordinances as unconstitutional, arguing that they focus on begging, which is protected speech under the First Amendment of the Constitution.²⁸⁶ Advocates for the homeless in Atlanta assert that that city's "aggressive panhandling" law is "used as a hunting license, . . . as an excuse for massive harassment of the homeless, so [the police] can do sweeps whenever they want."²⁸⁷ The legal outcome of suits challenging the newly-drafted anti-panhandling laws is unclear.²⁸⁸ Reports suggest, however, that cities are willing to risk litigation and settlement costs as a necessary by-product of the governmental effort to sweep homelessness under the rug.²⁸⁹

4. Civil rights concerns

Civil rights concerns present yet another potential barrier to the mandatory treatment requirements of the H/TP as a prerequisite to obtaining housing under this federally-mandated program. There has been considerable debate over the civil rights implications of the forced commitment of the mentally ill or substance-abusing persons to mandatory treatment programs.²⁹⁰ Many of the same

night in public areas, was not expressive conduct, and the law could have many legitimate purposes).

285. *Id.*

286. *Id.*

287. *Id.* quoting Anita Beatty, director of the Atlanta Task Force for the Homeless. She connected the city's interest in removing the homeless to the desire of city officials to "clean up and look nice" for events such as the Peach Bowl and the 1996 Olympics.

288. See generally Paul Ades, *The Unconstitutionality of "Antihomeless" Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 Cal. L. Rev. 595 (1989) (summarizing cases involving various "antihomeless" laws and arguing that a federal rule is necessary because enforcement of such laws burdens the fundamental right to travel).

289. *Id.* quoting John Acosta, a city council member in Santa Ana, California, as saying, "[s]ure, in the last two years we've taken it in the shorts pretty bad with the lawsuits But we've got to do something about it" See generally Paul Ades, *The Unconstitutionality of "Antihomeless" Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989) (arguing that a uniform federal rule is necessary to prohibit anti-sleeping ordinances, which are most often used against the homeless).

290. See, e.g., Hafemeister & Amirshahi, *Civil Commitment for Drug Dependency: The Judicial Response*, 26 LOY. L.A.L. REV. 39 (1992); Paul S. Appelbaum & Warren F. Schwartz, *Minimizing the Social Cost of Choosing Treatment for the Involuntarily Hospitalized Mentally Ill Patient: A New Approach to Defining the Patient's Role*, 24

concerns will arise in evaluating the requirement of treatment as a condition of housing for the substance-abusing homeless.

State laws generally allow drug abusers to be committed to inpatient treatment programs if they are dangerous to themselves or others, or if they are unable to care for themselves.²⁹¹ Courts using these commitment laws often adopt modes of analysis based on criminal incarceration, recognizing both the illegality of drug abuse and the need for the protection of individual civil liberties.²⁹² Other states approach the problem from the perspective of a mental illness treatment model, where the analysis is based on the need to protect the patient from harm that he or she might suffer.²⁹³

The basis of a civil rights claim raised by a homeless substance abuser would be that he or she has a right to obtain housing equal to that provided in the H/TP without being required to participate in mandatory treatment. Such a claim would likely charge that a governmental benefit, such as access to publicly-funded housing, cannot be conditioned on the surrender of constitutionally protected rights. The claim would also assert that the mandatory nature of the treatment component of the H/TP model, particularly its requirement of substance abuse testing, requires participants to surrender their rights.

These claims would likely fail. First, housing is not a fundamental right.²⁹⁴ Even if the adoption of the H/TP model creates an entitlement to housing, that entitlement does not give rise to a fundamental right. The Supreme Court has held that programs limiting the awarding of welfare benefits are subject only to rational basis review, not to strict scrutiny.²⁹⁵ Alcohol or drug use is the only basis for distinguishing between substance abusers and other homeless persons in the provision of housing, and it is clear that

CONN. L. REV. 433 (1992); Elyn R. Saks, *Competency to Refuse Treatment*, 69 N.C.L. REV. 945 (1991); Gerry McCafferty & Jeanne Dooley, *Involuntary Outpatient Commitment: An Update*, 14 M.P.D.L.R. 277 (May-June 1990).

291. See Hafemeister & Amirshahi, *supra* note 290, at 49-50 (summarizing state requirements for civil commitment of drug-dependent persons).

292. *Id.* at 46-47.

293. *Id.*

294. See *supra* note 48 and accompanying text. See also Martha H. Good, *Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights*, 1984 HUMAN RIGHTS Q. 335, 336.

295. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (holding that state AFDC law limiting the number of children for whom benefits could be paid was subject only to rational basis review as a law concerning "economics and social welfare."). See also Good, *supra* note 294, at 337-39.

these behaviors do not create a fundamental right either. Thus, a court would apply a highly deferential rational basis test to evaluate the constitutional impact of the tie between mandatory treatment and the provision of housing to substance abusers.²⁹⁶

A court using such a standard would determine whether the connection between the treatment requirement and the federally-mandated housing program for homeless substance abusers is rationally related to a legitimate governmental interest.²⁹⁷ The government's interest in providing housing that truly meets the needs of the homeless, particularly in light of the limited financial and administrative resources available, would likely satisfy this rational basis standard.

Potential residents may claim that their constitutional rights are violated by requiring them to submit to substance abuse tests as a condition of admission to H/TP facilities. This claim too, should fail. In recent years the Supreme Court has considered a somewhat analogous issue in cases involving drug testing of employees in sensitive positions, such as United States Customs Service agents and railroad employees.²⁹⁸ The Court affirmed, in *National Treasury Employees' Union v. Von Raab*,²⁹⁹ that urine tests are in fact "searches" and are therefore subject to the requirements of the Fourth Amendment.³⁰⁰ Yet, because the results of the Custom agents' urine tests were not used for law enforcement purposes and because the field supervisors did not have discretionary power over whether to administer the test, the Court held that no search warrant was required.³⁰¹ The Court also opined that the governmental interest in preventing agents with drug habits from receiving pro-

296. See Good, *supra* note 294, at 337.

297. See, e.g., *DANDRIDGE*, 397 U.S. at 486 (state has "legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor," so Maryland's law imposing a maximum on AFDC grants to families is permissible); see also *Jefferson v. Hackney*, 406 U.S. 535, 546-49 (1972) (using *Dandridge* analysis to uphold Texas' method of calculating AFDC benefits in a manner which negatively affected recipients of AFDC as compared to those of other benefit programs, and holding that Texas' method was neither "invidious or irrational"); *James v. Valtierra*, 402 U.S. 137, 141-43 (1971) (upholding against Equal Protection challenge a California constitutional provision requiring a referendum on development of "low-rent" housing, and concluding that the provision was permissible because the impact was economic and political rather than racial or otherwise impermissibly discriminatory).

298. *Consolidated Rail Corp. v. Railway Labor Exec. Ass'n*, 491 U.S. 299 (1989); *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989).

299. 489 U.S. at 665-66.

300. U.S. Const. amend. IV.

301. 489 U.S. at 666-67.

motions and taking more prominent roles in the interdiction of drugs was compelling, outweighing the infringement on the agents' personal expectations of privacy.³⁰²

Obviously, the nature of both the governmental interest and the expectations of privacy differ in the H/TP case. The right to be protected from illegal searches is a fundamental right, unlike the right to housing or the right to use illegal drugs. In *Von Raab*, however, the results of the drug tests could have been used to dismiss an employee from his or her job with the Customs Service. Although the Court did note that the information could not be used in a criminal case without the permission of the effected agent, the fact that the stakes for the individual were so much higher in that case should make a difference. The only possible uses to which positive drug test results should be put in the H/TP case are, first, to enroll a substance-abuser in the housing and treatment programs, and second, to dismiss a recalcitrant drug user from the program and, ultimately, to determine eligibility for permanent subsidized housing.

None of these results carries the stigma of a dismissal from a job. Enrollment in the H/TP program, based on a positive test, would enable the resident to receive substance abuse treatment. This is clearly not a detriment. Further, a recalcitrant resident, dismissed on account of a positive drug test, would remain eligible for whatever federal benefits he or she had received prior to entering the H/TP.³⁰³ As discussed above, the H/TP model requires that drug use information obtained in testing be used only for the purposes of determining admission to and compliance with the H/TP requirements.³⁰⁴ In addition, program officials have no discretion in determining who will be tested: all potential residents are tested, and all participants in the program are regularly monitored in the same fashion.

Moreover, in the H/TP, the government has an interest in protecting those residents who are no longer using drugs. The legislative intent shown in the FHAA's exemption of active users of controlled drugs from the protections of the FHAA,³⁰⁵ particularly

302. *Id.* at 674-75.

303. *See* Goldberg, 397 U.S. at 266-67 (deprivation of life-sustaining benefits without due process is a constitutional violation). Here, on the other hand, the resident would continue to be eligible for any life-sustaining benefits he or she had previously received; social security, state welfare, and others.

304. *See supra* Section V (A)(5).

305. *See supra* note 90 and accompanying text.

as modified by the "direct threat" provisions,³⁰⁶ reflects Congress' understanding that active users of drugs may pose a danger to those around them. In view of this danger, and in light of the goal of the H/TP model to permit homeless substance abusers to remedy their homelessness permanently through treating their addictions, the governmental interest in monitoring all residents should be found to be rational.

Similarly, a procedural due process analysis would likely result in the validation of the H/TP model. The Supreme Court has consistently held that the deprivation of non-fundamental rights is acceptable where the procedure to take away such rights is adequate to satisfy the due process requirements of the Fifth and Fourteenth amendments.³⁰⁷ The requirement that a hearing be held prior to removal from the H/TP should satisfy the procedural requirements imposed by *Goldberg v. Kelly*.³⁰⁸ Further, the fact that none of the former resident's benefits (other than residence in the H/TP facility and a place in the treatment program connected with the facility) cease upon termination from the H/TP program should further un-

306. See *supra* note 100 and accompanying text.

307. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972) (college professor's deprivation of property right in public employment was permissible even without a hearing or a statement of the university's reason for not rehiring him); *Perry v. Sindermann*, 408 U.S. 593 (1972) (where system of "de facto tenure" existed based on material printed in college publications, teacher was entitled to present evidence supporting his claim of entitlement to tenure); *Cleveland Board of Educ. v. Loudermill*, 467 U.S. 1204 (1984).

Even according to the doctrine of "unconstitutional conditions," described by Professor Van Alstyne as stating that "whatever an express constitutional provision forbids government to do directly it equally forbids government to do indirectly," the H/TP mandatory treatment provisions should survive. William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445-46 (1968). The rights of which a substance abuser is being deprived in the H/TP are not of the type guaranteed by the Constitution. Presumably Professor Van Alstyne would agree that the limits imposed on the use of the information obtained through the initial testing and monitoring of the H/TP residents, and the imposition of a hearing requirement before a resident could be terminated from his or her participation in the H/TP, would be adequate even when judged not against the right/privilege measure but against the standards of procedural due process instead. ". . . [W]here substantive statutory standards have been met—or where there are no such standards—and there is no recognized constitutional infringement, the right to procedural due process will not serve to expand substantive rights." *Id.* at 1454.

308. 397 U.S. 254, 266-67 (1970) (holding that, where an individual is to be deprived of life-sustaining, governmentally-provided benefits, the agency must first provide him with a hearing at which he is to be able to present his side of the story and to confront those on whose testimony the decision to deprive has been based). Presumably, the fact that housing and treatment are provided under the H/TP model would require the pre-termination hearing rather than the post-termination hearing deemed acceptable by the Supreme Court in *Matthews v. Eldridge*, 424 U.S. 319 (1976).

dermine any procedural due process claim. Benefits for which the resident was eligible prior to enrollment in the H/TP program, such as Food Stamps, veterans' benefits or state welfare payments, would continue.

Housing providers who already condition residence on participation in treatment have not yet faced serious legal challenges from rejected applicants because these programs are relatively new. The closest statutory analogy would be the FHAA. As discussed above, the FHAA distinguishes between drug abusers participating in treatment programs and those still using drugs, allowing public and private housing providers to refuse housing to those not currently in treatment for their addictions.³⁰⁹ Because those using drugs who are not in treatment are not considered handicapped under the FHAA, they would not have a cause of action for discrimination under the terms of the Act. Just as with the proposed H/TP, addicts refusing to accept the conditions of living in FHAA-protected housing suffer no deprivation of constitutional stature.

The adequacy of this compulsory treatment approach depends on whether the goal of a new federal program providing treatment for substance-abusing residents is to treat all who are in need or merely to lessen the magnitude of the problem by treating all who will accept treatment. Presumably, the goal should be the former rather than the latter. In reality, however, housing programs are primarily intended to cope with the problem of homelessness. Those who are homeless because of substance abuse problems, and whose desire to achieve stable housing outweighs their desire to continue using illegal drugs, will be helped by the H/TP model proposed above. Those whose desire to continue using drugs is more powerful than their desire for stable housing may find themselves in need of the solutions presented by state laws allowing for civil commitment to institutions for drug dependency.³¹⁰ Significant protections exist in most states for persons subject to such procedures.³¹¹

309. See *supra* notes 89-92 and accompanying text.

310. See Hafemeister & Amirshahi, *supra* note 290. See also Perlin, *supra* note 108, at 116-24.

311. See Hafemeister & Amirshahi, *supra* note 290, at 68-82 (summarizing the procedural protections offered to persons subject to civil commitment for drug dependency, including availability of a jury trial, right to counsel, protection from self-incrimination and burden of proof required).

Conclusion

Homelessness is a complex and challenging problem. Large-scale governmental efforts have failed both to stem the tide of the problem and to ease the suffering of those without shelter. As the public grows increasingly weary, support for more humane solutions has abated. And because the severity of the crisis has grown in lockstep with cutbacks in federal funding, state and local governments have demonstrated increasing skepticism about their ability to resolve the matter without scraping the bottom of their budgetary barrels.

The highly intricate problems of the substance-abusing homeless are substantially more difficult to solve than are those of their non-addicted fellows. Without access to treatment, those who suffer from drug or alcohol addictions will be unable to take advantage of housing that becomes available. Thus, it is apparent that treatment for substance abuse must be an essential component of housing programs.

Notwithstanding the magnitude of the problem, there may be some hope for a better future. Recent federal legislative efforts demonstrate that the climate surrounding governmental consideration of the problem is more receptive to the link between substance abuse treatment and housing than at any time in recent years. The time is right for advocates to present cogent proposals that comprehensively address all aspects of the problem.

Moreover, advocates may be able to use these proposals to address the problems still blocking the provision of housing and treatment on a large scale. First, the Interagency Council on the Homeless should attempt to limit the roadblocks presented by the inconsistent requirements of different federal programs as they apply to the homeless. Second, the advances made by HUD in developing partnerships with private industry should continue, with greater attention to ways of prompting such investment. Third, private developers should be encouraged to invest in public housing if those programs meet the treatment models found to have the best chance of success. The H/TP model, proposed above, incorporates the best elements of successful programs, and should provoke debate about the role of treatment in the creation of housing solutions.

Finally, open acknowledgment of the need to treat substance abuse while providing housing will perhaps once again convince the disillusioned public of the good faith of homelessness advocates. If the attitudinal barriers fall, which prevent local and state

governments from recognizing that homeless people with substance abuse problems deserve treatment rather than hostility everyone involved will be able to devote their energies to resolving the crisis instead of hurling brickbats of blame at their opponents.

Appendix

Homelessness in America

Most Americans would agree that homelessness became far more apparent in the 1980s than it had been in preceding decades. While most large cities had their "Skid Rows" in the 1930s and 1940s, few Americans came face-to-face with homelessness on a daily basis until the 1980s. The increase in number and visibility of homeless Americans has been blamed for, or attributed to, a dramatic level of social disintegration that is particularly apparent in urban society.³¹² There are, however, wide disparities in the estimates, descriptions and asserted causes of homelessness.³¹³

A. Who Are the Homeless?

Analysts studying the problem of homelessness have looked at a variety of demographic factors, including sex, age, race, marital or family status, and alcohol and drug use. Although the results of the studies vary widely, depending on where and when they were conducted, they provide support for some general conclusions about the face of homelessness in America. For example, according to most reports, men are more likely to be homeless than are women.³¹⁴ One 1986 study, for example, reported that seventy-six percent of the homeless population in Chicago were men.³¹⁵

The demography of the homeless population has changed in recent years however. A 1991 study, published by the author of the 1986 Chicago study, reflected the number of women among different homeless populations as ranging between 7% and 33%.³¹⁶ Other commentators agree that the proportion of homeless women has increased.³¹⁷ In addition, because most studies of the homeless are done in large urban shelters, which serve a predominantly male population, the proportion of women may actually be larger than the studies reveal.³¹⁸

312. See, e.g., Vladeck, *supra* note 8, at 305.

313. See *supra* notes 22-27.

314. Vladeck, *supra* note 8, at 307. See also *Right to Integrity*, *supra* note 65, at 163 ("Traditionally, the homeless person was single, male and chronically homeless.").

315. Vicky G. Neumeier, Note, *An Overview of Homelessness in America*, 35 *LOYOLA L. REV.* 216, 221 (1989) [hereinafter *Overview*]. The article reported on a study conducted in shelters and nondwelling places by Peter A. Rossi of the University of Massachusetts.

316. See Perlin, *supra* note 108, at 71-72, n.50 (reporting on results published by Peter Rossi in 1989). Perlin also notes other studies confirming Rossi's insights.

317. See, e.g., Langdon & Kass, *supra* note 7, at 308-09; *Right to Integrity*, *supra* note 47, at 163; *Hunger & Homelessness*, *supra* note 128, at 278-79.

318. Fischer, *supra* note 10, at 366.

The current homeless individual is younger than the traditional elderly "Skid Row" inhabitant.³¹⁹ One estimate suggests that half of the homeless may be under the age of forty.³²⁰ In 1984, the median age of New York shelter residents was less than 36.³²¹ In another study, the average homeless person was found to be in his mid-thirties.³²² Other recent studies confirm this result and suggest that the "baby-boom" generation's entry into the ranks of the homeless has contributed to a decrease in the average age of the homeless.³²³

Just as the traditional "Skid Row" resident was an older man, he was also usually white.³²⁴ This is also no longer the case. In fact, many studies show that a majority of the homeless are members of racial minorities. For example, one study of the New York shelter system revealed that nearly 90% of homeless men using the system were either African- or Hispanic-American.³²⁵ Other studies are less specific, but most commentators agree that minorities make up an increasing percentage of the homeless population.³²⁶

Although the majority of the homeless are single, the increase of homelessness among families has received significant public attention.³²⁷ The Report of the House Committee on Government Operations, published during the first session of the 99th Congress, indicated that "[t]he surveys find that . . . more families, . . . women and children are becoming homeless."³²⁸ One survey indicated

319. See Perlin, *supra* note 108, at 71 (noting that "Skid Row" residency was in part due to "disability through advanced age").

320. Perlin, *supra* note 108, at 71, n.49 (citing a 1981 study which found that 63% of New York City homeless people were under 40 and a 1982 study in which 42% of Baltimore's homeless were between 20 and 29 years of age).

321. Langdon & Kass, *supra* note 7, at 308, n.21.

322. See *Overview*, *supra* note 315, at 221.

323. *Id.* See also Holden, *supra* note 7, at 569 (agreeing that the average age has "sharply decreased, to the mid-30's" as baby-boomers have become homeless); and Perlin, *supra* note 109, at 75 (noting that Vietnam veterans, a "hidden subset" of the baby-boom generation, are another significant component of the homeless population).

324. Langdon & Kass, *supra* note 7, at 308, n.21.

325. *Id.* (citing a 1984 study of the New York City shelter system, HUMAN RESOURCES ADMIN. OF THE CITY OF NEW YORK, CORRELATES OF SHELTER UTILIZATION: ONE DAY STUDY (Aug., 1984)).

326. See, e.g., Vladeck, *supra* note 8, at 307; Perlin, *supra* note 108, at 72. See also THE FEDERAL RESPONSE, *supra* note 46, at 12-13.

327. See, e.g., *Right to Shelter*, *supra* note 41; *Right to Integrity*, *supra* note 47. In addition, Congress has considered this particular aspect of the problem as well. See *A Neglected Crisis*, *supra* note 66.

328. THE FEDERAL RESPONSE, *supra* note 45, at 12-13.

An obvious corollary of the increase in homeless families is an increase in the number of children who are enduring their formative years without the benefit of a

that studies undertaken in the late 1980s estimated that homeless families accounted for between 30% and 40% of the homeless population.³²⁹ Another suggested that the number is closer to 20%.³³⁰ Yet another study reported that in Massachusetts during one two-year period, some three-fourths of those becoming homeless were families.³³¹ Many such families were comprised of single women with one or more children.³³²

B. How Many Are There, and How Are Their Numbers Counted?

As seen above, different sources report vastly dissimilar numbers of homeless Americans. Government estimates in the mid-1980s

safe, predictable and secure living arrangement. This particularly cruel aspect of the problem of homelessness has generated much discussion in recent years. The Report of the House Committee on Government Operations quotes at length from a statement by Robert M. Hayes, former head of the Coalition for the Homeless, concerning the effect of the shelter system, or its alternatives, on children:

The municipal shelter system is bad enough when it is not at overflow. Children, caught up in that system, cannot help but be damaged by the lack of food, the lack of schooling, the lack of security, while they dwell in the city's worst flophouses or, even worse, in these barracks shelters which resemble refugee camps for war victims.

Mr. Hayes then went on to describe the scene in city welfare offices, where mothers and children, including newborns and handicapped children, were forced to spend nights sleeping on desks and chairs because of the lack of space in the city's shelters. *Id.* at 9.

329. See *Right to Shelter*, *supra* note 41, at 721.

330. Holden, *supra* note 7, at 570.

331. Raymond B. Marcin, *Homelessness: A Commentary and a Bibliography*, 4 J. CONTEMP. HEALTH L. & POL'Y 203, 210 (1988) (citing statement of director of Mass. Coalition for the Homeless concerning two years preceding 1986). See also Vladeck, *supra* note 9, at 307 (commenting that there exists "general agreement that the fastest-growing segment of the homeless population is families with young children" and adding that, although most such families are headed by single mothers, in the western United States "two-parent homeless families are reportedly more common").

332. *Right to Shelter*, *supra* note 41, at 721-22. See also Marcin, *supra* note 331, at 210. Other commentators have reported only that the number of homeless families was "growing" without giving specific estimates. Langdon & Kass, *supra* note 7, at 309. See also *Right to Integrity*, *supra* note 47, at 163 (noting that "[e]ver-increasing numbers of homeless families, women with children. . . can be found in cities, suburbs, and rural areas").

However, one team of writers opined that such families were better able to obtain housing than were homeless individuals and so the housing problems of homeless families are less critical. Langdon & Kass, *supra* note 7, at n.24. Whether or not that is correct, or, more dramatically, whether the current support system for poverty-level Americans has the effect of destroying the family structure of the poor, are subjects open to heated debate and beyond the scope of this Article. See Marcin *supra* note 331, at 210-15 (discussing the effect of governmental attempts at solutions on the family structure of those the government is trying to serve, and describing the limitations of federal emergency assistance programs).

placed the number of homeless at 250,000.³³³ Homeless advocates disputed that number, claiming the homeless population was in the range of two to three million.³³⁴ The National Institute of Mental Health has accepted the homeless advocates' estimate of the two to three million range.³³⁵ Both the numbers themselves and the counting methodology on which they are based reflect ideological differences concerning the proper definition of homelessness. With these differences come corresponding value-based disputes about the scope of the solution needed. Where federal, state or local funding is based on a concrete number, however, these ideological disputes have very practical and disquieting effects.

An attempt to define the problem of homelessness raises many troubling questions. Should the term "homeless" apply only to those who are literally living on the streets, or should it include those who are living doubled-up in inadequate residences with friends or relatives? Should it include those who are squatting in abandoned buildings, awaiting only the final approach of the wrecking ball? What about those, undoubtedly additional millions, whose savings and resources are so inadequate that they would find themselves on the street in the event of a fire or natural disaster?³³⁶ Should those who are protected from homelessness only by virtue of temporary hospitalization, whether it be for mental or physical illness or because of substance abuse, be counted as

333. Langdon & Kass, *supra* note 7, at 310, n.27.

334. *Overview*, *supra* note 315, at 218; *see also* Perlin, *supra* note 108, at 68 n.21.

335. *See Overview*, *supra* note 317, at 218.

336. According to some estimates, Hurricane Andrew left upwards of 250,000 residents of Florida homeless in its wake. Larry Rohter, *For Victims of the Hurricane, The Crisis is Here to Stay*, N.Y. TIMES, Sept. 6, 1992, at D3. The storm created a devastating shortage of affordable housing, the long-term effects of which remain to be seen.

Although unemployment rarely gets the coverage of natural disasters such as the hurricane and the storms which followed it during the winter of 1992-93, the effects of loss of a job are just as catastrophic for the individuals involved. No reliable widespread estimate exists of the number of Americans who are protected from homelessness only by the existence of a job whose security is often very tenuous, although to include these people within the definition would clearly make the class of potentially homeless so large as to render a solution impossible.

It is interesting to note that a 1994 draft of a new Clinton Administration homelessness plan includes in its description of the population "at risk of homelessness" not only those who are visible, such as addicts and the mentally ill who are often in public, but "those suffering from chronic poverty, who can be plunged into homelessness by a sudden crisis, such as a fight with a family member." Jason DeParle, *Report to Clinton Sees Vast Extent of Homelessness*, N.Y. TIMES, Feb. 17, 1994, at A20, (reporting on early draft of the Clinton plan, prior to its presentation to the President). The plan's approach suggests that more widespread housing assistance should be provided to combat the effects of poverty.

among those "precariously" housed and therefore subject to homelessness?³³⁷

Perhaps the wide disparity among the numerical estimates results from the different sources of information used to categorize individuals as homeless. These sources include shelter and soup kitchen usage records, public assistance records indicating applicants who list no address, police records, observations on city streets, and actual counts.³³⁸

One commentator suggests that the homeless are those lacking a permanent residence, although a broad definition of homelessness should also include those "living in unsafe or unsanitary housing."³³⁹ Another commentator notes that homelessness is not a permanent condition, so that the number of those homeless during an entire year is much greater than the number who are homeless at any given time.³⁴⁰ He estimates that, in 1988, there were in excess of 700,000 persons homeless at any one time and as many as two million homeless over the course of the year, while "perhaps as many as six million lived in socioeconomic circumstances that put them at extremely high risk of homelessness."³⁴¹ Whether this last group should be counted as homeless is the basis for much intense debate between advocates for the homeless and those who believe that the seriousness of the problem is exaggerated.³⁴²

The 1990 census estimated that there were 230,000 homeless people in the country.³⁴³ Census workers obtained this figure by visiting approximately 11,000 shelters and 11,000 open-air sites on the night of March 20-21, 1990 ("S-Night").³⁴⁴ These shelters and

337. See generally Wizner, *supra* note 5, at 392-98.

338. See *Hunger and Homelessness*, *supra* note 128, at 278 (personal observations of the homeless are presumably more anecdotal than actual counts of the homeless population of a given city or area).

339. Chackes, *supra* note 34, at 155.

340. Vladeck, *supra* note 8, at 306.

341. *Id.*

342. Among those who assert that those "living in unsafe or unsanitary housing" should be counted is Kenneth Chackes, who is a law professor and advocate for the homeless in St. Louis. See Chackes, *supra* note 34, at 155. See also *Right to Integrity*, *supra* note 47, at 162, n.12 ("...[T]he homeless are not simply those who occupy emergency shelters. They are also people who live on park benches, under bridges, in campgrounds, in cars, in a friend's garage or living room floor, etc.").

Robert C. Ellickson, *supra* note 5, represents the opposite perspective. For a discussion of his views, see notes 357-364 accompanying text.

343. *Census Bureau Releases 1990 Decennial Counts for Persons Enumerated in Emergency Shelters and Observed on Streets*, 1990 Census, April 12, 1991 [hereinafter *Census Bureau Release*].

344. According to the *Census Bureau Release*, 178,828 persons were counted in

pre-determined street sites were located almost exclusively in cities with populations in excess of 50,000.³⁴⁵ The Census Bureau stressed that it intended only to provide an estimate of the extent of the homeless population and that its figures could not be used to provide more general information about the homeless.³⁴⁶ The figures reflected only the homeless population at certain locations on S-Night rather than the "prevalence of homelessness over a given year."³⁴⁷ The count excluded "persons who were well hidden, moving from one location to another" or in shelters other than those identified to the Bureau by local governments. In addition, the count excluded particularly dangerous street locations and "persons living in cars, dumpsters, rooftops, and other non-traditional housing structures."³⁴⁸

Despite its disclaimers, the Census Bureau's estimate of the homeless elicited a vociferous response from both advocates for cities and for the homeless.³⁴⁹ Both groups are concerned with the potential use of the census numbers in calculating amounts to be allocated for aid to the homeless pursuant to various federal programs.³⁵⁰ A census count representing only a percentage of those truly homeless, if interpreted to define the parameters of the problem, would seriously impair the ability of remedial programs to achieve the level of success necessary to provide meaningful

shelters on S-Night and 49,793 persons were observed and counted at the open-air locations.

345. Felicity Barringer, *U.S. Homeless Count is Far Below Estimates*, N.Y. TIMES, April 12, 1991, at A11 [hereinafter *Far Below Estimates*]. In its press release about the count, the Census Bureau explained that "S-Night tended to favor areas where most of the homeless population is likely to be sheltered, e.g., cities versus rural areas, since local jurisdictions with higher concentrations of homeless persons may have been more likely to have more information about the location of homeless persons." *Census Bureau Release, supra* note 342.

346. *See Census Bureau Release, supra* note 343.

347. *Census Bureau Release, supra* note 343, at 20.

348. *Census Bureau Release, supra* note 343, at 90. WESTLAW Cendata at 9. Census takers were ordered to count only those homeless persons sighted at the specified locations and were not permitted to list others seen on the streets or in non-specified locations during the same time period. *Far Below Estimates, supra* note 345.

Note that, according to the approach advocated by Ellickson, *infra* note 355 and accompanying text, the census count thus failed to tally *any* of those whom he would accept as truly homeless.

349. The National Law Center on Homelessness and Poverty attacked the census count as "fundamentally flawed" and as unconstitutional in that it excluded the homeless from representation in Congress and state legislatures. *Supra* note 345, at A11.

350. *Far Below Estimates, supra* note 345, at A11. The article referred specifically to calculations governing aid for the homeless to be provided by the Department of Housing and Urban Development through the McKinney Act.

solutions.³⁵¹

As the problem of homelessness has persisted without solution, disagreements about all aspects of the problem have become increasingly common. Experts continue to debate the manner in which the homeless should be counted and the true scope of the homeless population. Robert C. Ellickson, a professor at Yale Law School, argues that most numbers reported by advocates for the homeless are artificially inflated.³⁵² Professor Ellickson contends that the definition of homelessness, for statistical purposes, should include only those who are sleeping in places not designated as residences: vehicles, parks and bus stations.³⁵³ He asserts that the reporting of shelter populations should distinguish those arriving to shelters from non-residential living spaces from those who had previously been staying in "places designed for residential living"—i.e., "doubl[ing] up with friends or relatives, living in cheap rented rooms, or confined in hospitals, detox centers or other institutions."³⁵⁴ Because newly-available shelter spaces are allocated to those already housed in residential living circumstances like those listed, he asserts that the "paradoxical result [is] that greater governmental spending on shelter programs increases the reported number of homeless people."³⁵⁵ Professor Ellickson concludes that aid to the homeless has been decried as "inadequate and ineffectual" because shelters attract persons other than those who are truly homeless.³⁵⁶

Professor Ellickson also argues that, at least for families, there is a correlation between the amount of aid provided by a governmen-

351. This concern was reflected in comments by Ohio Congressman Thomas C. Sawyer, Chair of the House Subcommittee on Census and Population of the Post Office and Civil Service Committee. Just a few months after S-Night, Representative Sawyer expressed his concern about the use of the census figures for distribution of federal aid to the homeless, Felicity Barringer, *Count of Homelessness is Seen as Flawed*, N.Y. TIMES, June 11, 1990, at A17. In particular Rep. Sawyer was concerned with the use of these figures to determine the level of aid necessary for the education of homeless children. *Id.*

352. Ellickson, *supra* note 5, at 45.

353. *Id.* at 46.

354. *Id.*

355. *Id.* Professor Ellickson's colleague on the Yale Law School faculty, Stephen Wizner, points out that Ellickson's argument fails to recognize that short-term doubling-up is in many cases a less than satisfactory living arrangement and that more appropriate housing solutions are necessary in those cases as well as others in which the individuals are actually living on the streets. Wizner, *supra* note 6, at 384. *See also* DeParle, *supra* note 217 (indicating that draft report of Clinton administration seems to support a broader definition of homelessness).

356. *Id.*

tal entity and the number of homeless families reported to exist in that location.³⁵⁷ Where the government provides assistance, he argues, families will declare themselves homeless as a means of acquiring more desirable living arrangements.³⁵⁸ Consequently, Professor Ellickson maintains that family shelters substitute primarily for other forms of shelter rather than providing for those living on the streets or in other non-residential space.³⁵⁹

The intensity of the disputes concerning the proper scope of the definition of homelessness would, if allowed, overwhelm the true problem. Regardless of which estimates are accepted, the severity of the problem cannot seriously be challenged. In 1985, the Committee on Government Operations of the United States House of Representatives stated, "The committee believes that the magnitude of homelessness is so overwhelming that the problem must be treated as a national emergency."³⁶⁰

C. Why are They Homeless?

The homelessness literature points to a number of reasons why individuals and families find themselves without a place to live.

357. *Id.* at 48.

358. See generally Wizner, *supra* note 5, at 392-95 (challenging Ellickson's contentions, from the perspective of a front-line advocate in a clinical program serving homeless clients).

Arguments like Ellickson's gain credence from experiences like those of Nancy Wackstein, the former head of New York City's office on homelessness. Despite the credible commitment of the administration of New York Mayor David Dinkins to the belief that families would not take advantage of the provision of rent-subsidized apartments to homeless families, Wackstein found that as the attempts to place homeless families quickly into the apartments increased, so did the number of families entering the shelter system. Apparently some families who had tired of the long wait for public housing declared themselves homeless as a means of "leapfrogging" over others still on the waiting lists. See Celia W. Dugger, *Setbacks and Surprises Temper a Mayor's Hopes to House*, N.Y. TIMES, July 5, 1993, at A1.

Of course, other commentators would hasten to point out that a complete definition of homelessness should include those living with friends or relatives and susceptible to an "eviction" at the whim of their hosts. Those living in doubled-up housing and viewed therefore as not really homeless by the New York administration might well be accurately labeled as "precariously housed" and counted within the ranks of the truly homeless. See *supra* notes 338-340 and accompanying text.

359. *Id.*

360. H.R.REP.NO.47, 99th Cong., 1st Sess. 11, 12 (1985). Reports of the contents of the Clinton administration's draft of its homelessness plan suggest that the plan asserts that the problem is a significant one. See Jason DeParle, *Report to Clinton Sees Vast Extent of Homelessness* N.Y. TIMES, Feb. 17, 1994 at A1. (quoting Henry Cisneros, HUD Secretary as stating "[h]omelessness has become a structural problem in America: chronic, continuous, large scale, complex.").

The most significant reasons are discussed below.³⁶¹

It is important, however, to acknowledge that a number of policy-based issues are linked to the problems of characterization and categorization. These policy concerns make clear-headed analysis of the underlying causes of homelessness difficult. Some analysts resist an accurate description of the crisis because they recognize that linked with the problem of description are implicit moral judgments—are the homeless “worthy” or “unworthy”? If the homeless are determined to have alcohol or substance abuse problems or to be mentally ill, will society be more reluctant to address their plight?³⁶² Does a facile dismissal of the underlying problems represent an effort to blame the victim?³⁶³ With these concerns in mind, a description of several commonly-accepted causes of homelessness follows.

1. *Deinstitutionalization*

According to a study reported by Professor Raymond Marcin, of Catholic University of America School of Law, nearly 50% of the homeless have severe mental disorders.³⁶⁴ Other estimates range from 20% to 90%.³⁶⁵ The reasons for the significant overrepresentation of severe mental disorders among the homeless are both manifest and subtle.

Most persons with identified mental disorders were, until the development of drug-based therapies, confined in large mental institutions. Prior to the late 1940s, those individuals were out of public view and largely forgotten by society as a whole. The institutions

361. Other reasons occasionally offered for the increase include the baby boom generation, *see* Perlin, *supra* note 108, at 74-75 (asserting that, partly because of its sheer size, the baby boom generation represents a significant proportion of the homeless population, and that, when the numbers are combined with the presence of troubled Vietnam veterans and other boomers willing to use addictive substances, the likelihood of homelessness is increased); an increase in divorces and other personal crises, *see Hunger and Homelessness*, *supra* note 128, at 280 (suggesting that there is a significant connection between the incidence of divorce or other family crises, such as beatings, death or illness, and the homelessness of the broken family); *see also* THE FEDERAL RESPONSE, *supra* note 45, at 7; and natural disasters, such as fires, *see Overview*, *supra* note 317, at 225.

362. *See Hunger and Homelessness*, *supra* note 128 at 223.

363. Holden, *supra* note 8, at 570 (quoting the head of the National Coalition for the Homeless, anthropologist Louisa Stark, as expressing concern with extensive public attention paid problems of alcohol addiction and mental illness among the homeless, detracting from concern with “structural defects” in society).

364. Marcin, *supra* note 331, at 208, citing the views of the National Institutes of Mental Health as reported in THE FEDERAL RESPONSE; *supra* note 45.

365. *Overview*, *supra* note 315, at 223.

operated in whatever manner was necessary to keep the patients under control and out of sight. When post-World War II America began to direct its energies toward examining the "lifestyle" of those confined in such institutions, the larger, more genteel society was aghast to discover that these so-called "rest-homes" were often more like "snake-pits."³⁶⁶

As society's distaste for such large, overcrowded facilities became more pronounced, demands for a more "normal" mode of treatment also grew. Further, as psychotropic drug therapy became more successful and more accessible, formerly uncontrollable patients could often live in a less restricted setting than the mental institutions. Advocates believed that patients participating in ongoing drug treatment could survive on their own in the community, as long as community mental health centers were available to monitor their care and to provide the drugs and counseling that allowed them to function.

Congress demonstrated its support for this view by enacting legislation providing for the construction of these community mental health centers.³⁶⁷ These centers had the added advantage of being less costly to operate than inpatient institutions, presumably because patients were treated on an outpatient basis.³⁶⁸ Between 1955 and 1980, inpatient populations in state mental hospitals decreased by more than three-fourths, from 559,000 to 138,000.³⁶⁹

Unfortunately, the reality of deinstitutionalization failed to live up to its promise. Fewer than 800 of the 2,000 community mental health care facilities needed and provided for in the legislation were actually built.³⁷⁰ Even where they did exist, community centers were often unable, or unwilling,³⁷¹ to provide the services that

366. Marcin, *supra* note 331, at 206-07. Marcin quotes a 1987 story from the BALTIMORE SUN, discussing a 1949 series in the *Sunday Sun* and *Evening Sun* that had revealed the horrific conditions in Maryland's mental institutions. The 1949 article stated, "Maryland's overcrowded state mental hospitals are breeding chronic insanity faster than they can cure it. . . Inside the walls of these Maryland snake pits, men, women and children are living like animals." *Id.* at 206.

367. Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282.

368. See *Overview, supra* note 315, at 226.

369. THE FEDERAL RESPONSE, *supra* note 45, at 4. This decrease was in the face of a significant overall population increase during the same years.

370. *Id.* See also *Overview, supra* note 315, at 228, Nancy K. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness and Libertarian Theory*, 31 EMORY L.J. 375 (1982) (arguing that deinstitutionalization advocates devoted too much energy to winning release for patients and too little effort to ensuring that programs existed on the outside ready to continue their treatment).

371. Marcin, *supra* note 331, at 207-08. Marcin also attributes some of the failure

would enable some patients to function. Professor Marcin, for example, noted a dramatic increase in admissions to mental hospitals at the same time as total residency in such hospitals was decreasing, indicating that inpatient stays were shorter.³⁷²

2. Reduction in availability of low-cost housing

Since the growth of America's industrial base, financially-disadvantaged people who did not live in rural areas lived in low-cost housing in the inner cities. Whether this housing was in the form of publicly-financed housing projects, built at the government's expense and rented at subsidized rates, or single-room occupancy (SRO) hotel-like units, housing was available.³⁷³ Because of the convergence of several factors, however, the availability of low-

of the community mental health centers to the fact that these centers began to focus on preventive care, in the form of counseling for marital and adolescent problems. He argues that as the focus of their activities began to shift from those who were seriously troubled to those who were more 'normal,' these centers began to fail to meet the needs of their neediest constituencies. *Id.* at 208.

Although Marcin's argument may be historically meaningful, it is perhaps naive. In a society in which community-based care is the norm for all except those who can afford private therapy, it would be unrealistic to expect treatment centers to neglect those greater numbers who could be treated, and possibly 'cured', with less effort while devoting more attention to fewer and more troubled patients. Although this approach did clearly contribute to the increase of the mentally ill homeless, it seems unfair to lay so much of the blame on community mental health facilities that were supposed to be all things to all patients. Nonetheless, it is true that the community centers failed to provide the care that released inpatients needed.

372. *Id.* at 207. Marcin cites statistics demonstrating that, although mental hospital populations decreased by 75% between 1955 and 1980, admissions to residential mental hospitals rose from 178,033 in 1955 to 370,344 in 1980. He attributes this incongruity to the inability of those with some mental problems to survive for long in society outside the hospital walls - a "revolving hospital door." *Id.* (quoting Scott Shane, *Maryland's Shame*, BALTIMORE SUN, July 29, 1987, at § 12A, col.2.)

Paradoxically, the desire of well-meaning legal and social advocates for the mentally ill may also have contributed to the overrepresentation of those with mental problems among the homeless. Successful attempts by advocates to assert the civil rights of those living in mental institutions forced hospitals to discharge those patients posing no threat to others, despite the lack of support services in the communities into which they were to be released. Marcin, *supra* note 332, at 208. And those who were in the community and refused treatment were placed at risk as well. See THE FEDERAL RESPONSE, *supra* note 45, at 5, citing a New York incident involving a former psychiatric patient who refused to move out of her cardboard box on the city streets after her welfare benefits were terminated and who died of exposure to the cold. While these advocates may have had good motives for their actions, their efforts seem to have contributed to the increase of former patients living on the streets. However, some scholars insist that it is inappropriate to focus on blaming the advocates for the problems of the homeless. See Perlin, *supra* note 108, at 68 (charging that the American Psychiatric Association focuses on "frivolous nonissues" such as the American Civil Liberties Union's support of homeless patients in civil rights cases).

373. See Perlin, *supra* note 108 at 75-77; see also Langdon & Kass, *supra* note 7, at

cost housing has decreased.³⁷⁴ According to one study, the "aggregate supply of low-income housing fell by roughly 2.5 million units at the same time that the demand for such housing, defined in terms of the number of low-income households, was increasing."³⁷⁵ The House Committee on Government Operations labeled the "scarcity of low-cost housing" as "the main cause of homelessness."³⁷⁶

A crucial factor leading to the reduced availability of low-cost housing is the reduction of federal funding for housing during the past twelve years.³⁷⁷ One study estimates that federal funding for housing decreased by 81% during the 1980s.³⁷⁸ Another study documents a drop in federal housing funds from a high of \$31 billion in 1981 to \$10 billion in 1985.³⁷⁹ One frustrated commentator noted, "HUD under the Reagan Administration . . . virtually bowed out of low-income housing."³⁸⁰

Another critical element in the loss of low-cost housing has been "gentrification;" urban renewal programs have drawn wealthier residents back into inner-city areas that in previous years might have been available for low-income residents. As the number of reasonably well-off young professionals desiring to live in cities has increased, neighborhoods formerly housing low-income residents have been taken over by these more "desirable" tenants.³⁸¹ Landlords have chosen to invest in improvements to their properties

308, 311-12; *Right to Shelter*, *supra* note 41, at 720-21; *Hunger & Homelessness*, *supra* note 128, at 279-80.

374. See *Race to the Bottom* *supra* note 192, at 552, n.7 (attributing the decrease in low-cost housing to "the combined forces of conversion, abandonment, inflation, arson and demolition").

375. Vladeck, *supra* note 8, at 308.

376. THE FEDERAL RESPONSE, *supra* note 45, at 3.

377. The House Committee on Government Operations referred to the "virtual elimination of Federal funds" for low-cost housing as a factor leading to the lack of housing available. *Id.*

378. See Perlin, *supra* note 108, at 77.

379. *Right to Integrity*, *supra* note 47, at 72, n.60 (quoting Mary Ellen Hombs, *Social Recognition of the Homeless: Policies of Indifference*, 31 WASH. U. J. URB. & CONTEMP. L. 143, 144 (1987)).

380. Holden, *supra* note 7, at 569. See also Langdon & Kass, *supra* note 7, at 312. Professor Peter Edelman makes an intriguing argument about the effects of governmental policies that decrease housing, employment, education and pay available to the poor. Edelman, *supra* note 163. He contends that by "contribut[ing] to the intensification of poverty," the government has treated the poor differently from the non-poor, and thus is susceptible to an equal protection challenge. *Id.* at 45-48. He further argues that even if the government's intent in so acting was benign, the "unconscionable" result requires that government provide a remedy, a "survival income" for all. *Id.* at 48.

381. Holden, *supra* note 7, at 569.

with an eye toward greater revenues from higher-priced rental or sale units.

As an added impetus for these changes, some cities have instituted tax abatement programs allowing developers who convert SRO housing units into rental apartments to avoid tax burdens to which they would otherwise be subject.³⁸² The purpose for these tax benefits may well have been a positive one: the urban renewal efforts that began with the Kennedy administration focused on saving the cities and preventing middle-class residents from fleeing to the suburbs. The irony is that, by succeeding in stemming that flight, legislators hoping to save the cities may have also dramatically increased the problem of homelessness.³⁸³

3. Unemployment

Most commentators believe that the escalation in homelessness is connected in some measure to the instability of employment in the United States during the past dozen years. As industry becomes increasingly sophisticated, jobs requiring only unskilled or semi-skilled labor often become unnecessary.³⁸⁴ Workers with no formal training or skills find themselves repeatedly unemployed, despite their mobility and capability.³⁸⁵

Few Americans with low incomes have the resources to withstand the financial effects of the loss of a job for long, particularly

382. Langdon & Kass, *supra* note 7, at 311. See also Perlin, *supra* note 108, at 76-77.

383. See Perlin, *supra* note 108, at 76-77 (noting that 87% of New York's SRO's were lost between 1970 and 1982). See also Langdon & Kass, *supra* note 7, at n.35 (108,000 of New York's 127,000 SRO's were converted since 1970; 13,600 of Washington D.C.'s housing units had been converted between 1980 and 1985). Perlin cites one estimate asserting that over one million SRO units were lost throughout the nation between 1970 and 1982. Perlin, *supra*, note 108, at 79. See also *Right to Integrity*, *supra* note 47, at 72-73 (citing the same one million figure, and adding that changes in California laws or redevelopment plans in California's cities indicated that a projected half-million state residents would soon find themselves with no place to live).

384. *Right to Integrity*, *supra* note 47, at 169 (suggesting that, as the work force is restructured to require more "technical knowledge and skill," workers who find themselves unemployed have greater difficulty returning to work at the same pay level as before their jobs were terminated). See also *Overview*, *supra* note 315, at 226 (giving examples of the "de-industrialization" of the work force and pointing out that the result is a two-tiered work force, with low-skilled workers on the bottom tier).

The House Committee on Government Operations cited testimony of a professor associated with the UCLA Basic Shelter Research Project to the effect that during the 1970's, "at least 38 million jobs in basic industry were permanently lost to deindustrialization." THE FEDERAL RESPONSE, *supra* note 45, at 5.

385. See *Race to the Bottom*, *supra* note 193, at 552. See also Perlin, *supra* note 108, at 79 (highlighting the connection between lack of job skills, racial and ethnic minority and homelessness).

when unemployment becomes chronic. Those who had homes prior to the loss of a job may soon find themselves unable to pay the rent.³⁸⁶ Others may move to another part of the country in search of employment, finding themselves without a place to live if the hoped-for job fails to materialize.³⁸⁷

Once the cycle of unemployment and homelessness begins, it is difficult to break. Employers are often reluctant to hire a person who has no steady address, or even one who gives a shelter as an address.³⁸⁸ And the inability to gather sufficient funds to make the requisite initial housing payments (typically first and last month's rent plus a security deposit) makes it difficult for a person without a job or with a low-paying job to secure housing.³⁸⁹

4. *Reductions in public assistance programs*

During the Reagan administration, government officials, attempting to decrease federal expenditures on social programs, terminated the benefits of thousands of individuals and families who had formerly received federal aid of various types. Following these cuts, the House Committee reported that the poverty rate had increased from 11.4% in 1978 to 15% in 1982, the highest rate in fifteen years.³⁹⁰ The Congressional Budget Office concluded that "cuts in Federal programs such as Aid to Families with Dependent Children (AFDC) and Food Stamps contributed to the increase in poverty."³⁹¹

The Reagan administration also instituted a policy requiring re-

386. See Langdon & Kass, *supra* note 7, at 313.

387. *Id.* at 313 (noting that the homelessness problem in Atlantic City, New Jersey became significantly worse as the casino industry grew and people flocked to the city in search of employment).

388. See *Right to Integrity*, *supra* note 47, at 169-70.

389. The House Committee pointed out that a significant number of workers, even some with full-time jobs, remained below the poverty line in the 1980's. THE FEDERAL RESPONSE, *supra* note 45, at 5.

390. THE FEDERAL RESPONSE, *supra* note 46, at 6 (citing studies of the Congressional budget office). Perlin compares the annual income rate of the homeless to that of those similarly situated in 1958 and concludes that "the homeless are more than two-thirds poorer than they were thirty years ago." Perlin, *supra* note 108, at 79.

In a report issued in 1991, the Census Bureau reported that a Current Population Survey of 60,000 households throughout the nation indicated that real household median income declined 1.7 percent in 1990 and the number of persons in poverty increased by 6.7 percent during that period. Westlaw Cendata database, Release CB91-288, Sept. 26, 1991. The Bureau's study found that 33.6 million Americans lived below the poverty line in 1990, or 13.5 percent of the population. This was an increase of 5.5 percent from 1989, when 31.5 million Americans, or 12.8 percent, lived below the poverty line.

391. THE FEDERAL RESPONSE, *supra* note 45, at 6.

view of eligibility of recipients of Supplemental Security Income (SSI) benefits resulting in a loss of benefits for hundreds of thousands of recipients.³⁹² Similar cuts in Social Security Disability Insurance (SSDI) benefits resulted in a net decrease of some 291,000 benefits recipients during the 1980s.³⁹³

The Reagan administration intended to shift responsibility for the homeless from the federal government to the states and cities. Because each state has different policies and different resources,³⁹⁴ however, the effect of the federal cutbacks was devastating for those who had relied on federal largesse to live. Even private charities, encouraged by the federal government to assume responsibility for the poor, have been threatened by concurrent increases in demands for their aid and decreases in the federal funds they formerly received.³⁹⁵

All of these factors, and others, have combined to cause an increase in the number of chronically homeless at a time when resources are becoming increasingly unavailable. State and city budgets are stretched to their breaking points and private tolerance has decreased. Despite the magnitude of each of these factors, it is only when substance abuse is added to the equation that the true complexity of the problem becomes apparent. Solutions directed merely at resolving these problems will not succeed in stemming the tide of homelessness unless they also address substance abuse.

392. Perlin, *supra* note 108, at 78 (stating that one study had shown that over 350,000 people lost SSI benefits after the fall of 1981).

393. THE FEDERAL RESPONSE, *supra* note 45, at 6 (pointing out that over 491,000 SSDI recipients were cut from the program, but some 200,000 were reinstated following appeals).

394. See *Right to Integrity*, *supra* note 47, at 170 (in California, the responsibility falls on the counties so the amount, eligibility standards and procedures for aid vary widely throughout the state).

395. See Langdon & Kass, *supra* note 7, at 313-14.