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# THE HOMELESS: JUDICIAL INTERVENTION ON BEHALF OF A POLITICALLY POWERLESS GROUP

Neil V. McKittrick\*

## I. Introduction

Homelessness<sup>1</sup> in the United States is a significant social problem.<sup>2</sup> Although homelessness is not a new phenomenon, the contemporary

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1. Researchers and state legislators define homelessness in several different ways. Each attempt at categorization deems those who sleep in the streets and those who reside in shelters to be homeless people. A broader definition also encompasses those forced to stay with family or friends because they lack a place of their own, and those currently in hospitals or jails who will become homeless upon release. Although this definition tends to provide a more complete picture of the problem, most states define homelessness more restrictively to exclude those families forced to "double up" in an apartment. *The Federal Response to the Homeless Crisis: Hearings Before a Subcomm. of the House Comm. on Gov't Operations*, 98th Cong., 2d Sess. 398 (1984) (report of Mario Cuomo, Governor of New York) [hereinafter *Federal Response*].

This Article defines homeless people as "those individuals and families who lack sufficient resources to provide for their own shelter." H.R. REP. NO. 47, 99th Cong., 1st Sess. 2 (1985) [hereinafter H.R. REP. No. 47]. The House Report describes typical dwelling places of the homeless: "Such persons are found in emergency shelters, transition houses, Single Room Occupancy (SRO) hotels, the streets, subways, bus terminals, living under bridges and in abandoned buildings." *Id.*

2. The number of homeless is widely debated. A Department of Housing and Urban Development (HUD) report released in May 1984, estimated that 250,000 to 350,000 people are homeless nationwide. See H.R. REP. No. 47, *supra* note 1, at 7. However, the Community for Creative Non-Violence (CCNV), a shelter provider and advocacy group in Washington, D.C., estimates that there are 2 to 3 million homeless Americans. See *id.* Unfortunately, neither estimate rests on an actual count of the homeless population because many of the homeless avoid shelters and cannot easily be counted. See *id.*

The HUD report has been attacked as an effort to deny the existence of the problem or to minimize its magnitude so that the federal government will not have to address the situation. See *HUD Report on Homelessness: Joint Hearing Before*

homeless population is different from its predecessors. In the past, the majority of homeless people were elderly white males,<sup>3</sup> many of whom were alcoholics who lived in metropolitan "Skid Row" districts.<sup>4</sup>

The "new" homeless are more diverse, encompassing more minorities, women and younger people.<sup>5</sup> Increasingly, the ranks of the homeless include entire families.<sup>6</sup> In short, the number of homeless

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*the Subcomm. on Hous. and Community Dev. of House Comm. on Banking, Finance and Urban Affairs and the Subcomm. on Manpower and Hous. of the House Comm. on Gov't Operations, 98th Cong., 2d Sess. 7 (1984). Representative Barney Frank (D.-Mass.) described the report as "intellectually shoddy, methodologically lacking, and morally incredibly callous." See id. (statement of Rep. Barney Frank).*

Despite the inability of researchers to determine the number of homeless, studies have identified two important trends: the number of homeless has been increasing annually and "the homeless exist in epidemic proportions." H.R. REP. NO. 47, *supra* note 1, at 7. Moreover, whether there are 250,000 or 3 million homeless, the problem "has become so overwhelming that public and private shelters do not have the capacity to meet the demand." *Id.* at 8. Specifically, HUD's report stated that, nationally, shelters can house 110,000 people each night. *Id.* Even using HUD's lower estimate of the homeless population, this means that over 100,000 people lack shelter nightly. *Id.* at 8-9.

3. *Homelessness in America: Hearing Before the Subcomm. on Hous. and Community Dev. of the House Comm. on Banking, Finance and Urban Affairs, 97th Cong., 2d Sess. 31 (1982) (statement of Kim Hopper, National Coalition for the Homeless) [hereinafter Homelessness in America].*

4. *See id.*

5. *See* H.R. REP. NO. 47, *supra* note 1, at 24. Studies indicate that the average age of the homeless population is 34. Forty-four percent of the homeless are minorities, 13% are single women, and 21% are members of homeless families. *Id.* Two studies, conducted by researchers at the University of Southern California and Harvard Medical School, indicate that homeless families now comprise 28% of the homeless population in major cities. *See* USA Today, Sept. 18, 1986, at 7A, col. 4.

6. *See* Wash. Post, Apr. 18, 1987, at A1, col. 1. A United States Conference of Mayors report labelled the increase in homeless families the most significant change in the homeless population. *See id.* For example, in December 1985, the *New York Times* reported that New York City was housing four thousand families a day. N.Y. Times, Dec. 27, 1985, at B3, col. 1; *see also* N.Y. Times, Dec. 14, 1985, at 31, col. 1. Hundreds of homeless people spent nights in welfare offices because no city shelter was available. N.Y. Times, Dec. 12, 1985, at B3, col. 1.

Unlike the poor of the past, the contemporary homeless are not confined to Skid Row districts but can be found throughout modern American cities. *Federal Response, supra* note 1, at 999. For example, homeless people live on city-owned beaches in Honolulu. *See* Wash. Post, Aug. 24, 1985, at A3, col. 1. Homeless people also inhabit the suburbs. Wash. Post, Dec. 12, 1985, at B1, col. 1 (describing increased occupancy rate at homeless shelters in suburban Maryland); Wash. Post, Nov. 2, 1985, at B3, col. 1 (describing use of motels to house homeless in suburban Virginia).

In essence, Skid Row has expanded, at least metaphorically. Instead of being confined to a distinct location, it now exists as a "way of life." *Homelessness in America, supra* note 3, at 34.

in the United States is greater now than at any time since the Great Depression.<sup>7</sup> The size of this population and the number of families it includes, suggest that, absent appropriate governmental action, a permanent underclass of homeless people may soon develop.

Until recently, federal and state legislators had failed to implement any comprehensive approach to the problem.<sup>8</sup> Despite recent federal legislation, however, governmental policies at all levels have failed to address the problem effectively.<sup>9</sup> This Article argues first, that judicial intervention on behalf of the homeless is necessary and appropriate because the homeless constitute a politically powerless group<sup>10</sup> and second, that comprehensive legislation, beyond that which has been enacted thus far, is necessary to address the causes of the problem.<sup>11</sup> In particular, Congress should enact a national statutory right to shelter to aid the homeless.<sup>12</sup> This Article maintains that the omission of such a right from recently enacted federal legislation renders that legislation inadequate.<sup>13</sup>

Part II of the Article sets forth the judicial doctrine of political powerlessness as developed by the Supreme Court in *United States v. Carolene Products Co.*<sup>14</sup> and *Frontiero v. Richardson*.<sup>15</sup> Part III then examines the application of the doctrine to the homeless as victims of both discrimination and ineffective government policies. Part IV discusses the bases for judicial intervention and advocates expansive judicial interpretation and enforcement of state constitutional provisions, state statutes and city ordinances to protect the short-term needs of the homeless and provide a right to shelter. Part V of this Article recommends long-term solutions to the problem of homelessness. Specifically, Part V discusses the need for more effective

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7. *Federal Response*, *supra* note 1, at 456; *see also supra* note 2. A Special Task Force of the United States Conference of Mayors reported that the demand for emergency food aid and shelter increased by approximately 25% in 1986. *Wash. Post.*, Dec. 19, 1986, at A5, col. 1. During the winter of 1986-87, homelessness increased 20% according to a survey conducted by the Partnership for the Homeless. *Wash. Post.*, Mar. 31, 1987, at A17, col. 3.

8. *See infra* notes 226-89 and accompanying text. In June 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987). The Act constitutes the first major congressional act in this area. For a discussion of its provisions and an analysis of its inadequacies, *see infra* notes 290-338 and accompanying text.

9. *See infra* notes 290-341 and accompanying text.

10. *See infra* notes 16-83 and accompanying text.

11. *See infra* notes 226-341 and accompanying text.

12. *See infra* notes 315-26 and accompanying text.

13. *See id.*

14. 304 U.S. 144 (1938).

15. 411 U.S. 677 (1973).

federal legislation to address the problem properly. In addition, Part V evaluates the recent federal response to the homeless crisis, identifies its flaws and suggests improvements.

## II. The Doctrine of Political Powerlessness

The notion that courts should protect the politically powerless had its genesis in Justice Stone's famous *Carolene Products* footnote<sup>16</sup> which suggested the possibility of heightened judicial scrutiny of legislative classifications that have an unfair impact on "discrete and insular minorities" or that curtail minorities' use of the political process.<sup>17</sup> In reviewing an equal protection<sup>18</sup> challenge to a statutory classification, the Supreme Court generally requires only that a rational basis exist for the classification.<sup>19</sup> When the classification is based upon race or national origin, however, it is subject to strict judicial scrutiny; the classification is considered "suspect"<sup>20</sup> and will

16. 304 U.S. at 152 n.4.

17. The footnote, in pertinent part, is set out below:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the [f]ourteenth . . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the [f]ourteenth amendment than are most other types of legislation . . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (citations omitted).

18. The equal protection clause of the fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

19. See *Loving v. Virginia*, 388 U.S. 1, 9 (1967) (in "cases . . . involving distinctions not drawn according to race, the Court has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures") (citing *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949)).

20. See *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("racial classifications 'constitutionally suspect' ") (quoting *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954)).

At one time, the Court suggested that poverty was a suspect classification, see, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969), but that view has not prevailed. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

be sustained only if justified by a compelling state interest.<sup>21</sup> Degrees of such heightened scrutiny have also been applied to classifications based on gender<sup>22</sup> and illegitimacy.<sup>23</sup>

In *Frontiero v. Richardson*,<sup>24</sup> the Supreme Court held that gender was a suspect classification.<sup>25</sup> Justice Brennan's plurality opinion discussed several factors used by the Court to determine whether a group is a suspect class. The first of these factors is whether the group's characteristic is immutable.<sup>26</sup> Justice Brennan reasoned that to be classified on the basis of a quality that one cannot change is unfair.<sup>27</sup> The opinion noted that the history<sup>28</sup> and continued practice<sup>29</sup> of discrimination against a particular group are important factors in the consideration of whether a group constitutes a suspect class. In addition, a suspect classification is likely to exist when the statute at issue stereotypes a group without regard to the individual's capabilities,<sup>30</sup> or when the statutory trait bears no relation to the individual's ability to perform or contribute to society.<sup>31</sup> Justice Brennan also observed that the political powerlessness of a group is a significant feature of the suspect class determination.<sup>32</sup> In this connection, he noted that women were denied the vote for much of this country's history and continued to lack political power because

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21. See *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). The *Plyler* Court noted that "[w]ith respect to . . . [suspect] classifications, it is appropriate to enforce the mandate of equal protection by requiring the [s]tate to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 217.

22. See, e.g., *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) ("gender-based discriminations must serve important governmental objectives and . . . the discriminatory means employed must be substantially related to the achievement of those objectives"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives").

23. See, e.g., *Lalli v. Lalli*, 439 U.S. 259, 265 (1978) ("classifications based on illegitimacy are not subject to 'strict scrutiny' . . . [but] are invalid under the [f]ourteenth [a]mendment if they are not substantially related to permissible state interests").

24. 411 U.S. 677 (1973).

25. *Id.* at 688. Although the plurality held that gender was a suspect class, the Court has not adopted this position. Instead, the Court considers gender a quasi-suspect class receiving intermediate scrutiny. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-27 (1982).

26. See *Frontiero*, 411 U.S. at 686.

27. *Id.*

28. *Id.* at 685.

29. *Id.* at 686.

30. *Id.* at 687.

31. *Id.* at 686.

32. *Id.*

of past discrimination. Despite their numbers, women remained underrepresented in the political arena.<sup>33</sup>

The factors discussed by the *Frontiero* plurality<sup>34</sup> describe the subjects of the *Carolene Products* footnote.<sup>35</sup> Classes of persons who can be characterized under *Frontiero* as politically powerless and victims of stereotyping and discrimination generally comprise *Carolene Products*' "discrete and insular" minorities.<sup>36</sup> Thus, the theoretical basis for strict judicial scrutiny is Justice Stone's notion in *Carolene Products* that the judiciary may have a responsibility to protect these "discrete and insular" minorities.<sup>37</sup>

### III. Theoretical Justification for Judicial Intervention: The Doctrine of Political Powerlessness and the Homeless

In the past, the term "discrete and insular" has referred primarily to racial and ethnic minorities.<sup>38</sup> This restrictive reading, however, does not comport with the definition of that phrase offered by

33. *Id.*

34. See *supra* notes 24-33 and accompanying text.

35. See *supra* notes 16-17 and accompanying text.

36. Cf. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (strict scrutiny for aliens who "as a class are a prime example of a 'discrete and insular' minority") (citing *Carolene Products*, 304 U.S. at 153 n.4). But cf. Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1105 & n.72 (1982) ("discrete and insular" classification for alienage is an "amazing assertion") [hereinafter Lusky].

37. See J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 530-31 (3d ed. 1986); Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1088 (1982) ("footnote [four] now is recognized as a primary source of 'strict scrutiny' judicial review"); see also *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (suspect class status to groups historically "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process' ") (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), and citing *Carolene Products*, 304 U.S. at 153 n.4).

38. See, e.g., *Trimble v. Gordon*, 430 U.S. 762, 780 (1977) (Rehnquist, J., dissenting) (core of equal protection clause is protection of blacks and other races and Supreme Court logically extended this principle to prohibit classifications based on national origin); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall J., dissenting) ("[c]ertain racial and ethnic groups have frequently been recognized as 'discrete and insular minorities' who are relatively powerless to protect their interests in the political process'") (citations omitted); see also *Graham v. Richardson*, 403 U.S. 365, 372 (1971) ("classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate") (footnotes and citation omitted). Justice Rehnquist has stated, in dissent, that only racial minorities should be considered "discrete and insular" minorities. See *Sugarman v. Dougall*, 413 U.S. 634, 649-50 (1973) (Rehnquist, J., dissenting).

Professor Louis Lusky, Justice Stone's law clerk at the time of the Court's decision in *Carolene Products*.<sup>39</sup> Although the *Carolene Products* doctrine may not provide a judicial remedy for all who lose in the political process,<sup>40</sup> Lusky suggests that "discrete and insular applies to groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power."<sup>41</sup> Any group not represented in the political process is unlikely to have its needs addressed.<sup>42</sup> The powerlessness of the homeless<sup>43</sup> suggests that courts should closely scrutinize the treatment the homeless receive at the hands of the law.

Judicial intervention on behalf of the homeless can be further justified by extending Professor John Hart Ely's "representation-reinforcing" approach to judicial review.<sup>44</sup> Relying on the *Carolene Products* footnote, Ely argues that courts should protect politically unrepresented minorities from the majoritarian political system by ensuring that decision-making is characterized by fair process.<sup>45</sup> Where the decision-making process results in laws that infringe on the rights of minorities, courts should intervene to protect minorities from the political process.<sup>46</sup> Although Ely's theory of judicial review applies to federal constitutional questions, its underlying theme—protecting the politically powerless—can also justify judicial interpretation of state law to aid the homeless.

#### **A. The Homeless are Politically Powerless: Governmental Indifference and Political Impotency**

By definition, the homeless lack economic power. Since economic power is closely related to political power in our society, it follows that the homeless lack political power as well. As Justice Marshall wrote in dissent in *Clark v. Community for Creative Non-Violence*,<sup>47</sup>

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39. See Lusky, *supra* note 36, at 1093.

40. *Id.* at 1105.

41. *Id.* at 1105 n.72.

42. For a discussion of the early political powerlessness of blacks and the emergent civil rights struggle, see generally J. BLOOM, CLASS, RACE, AND THE CIVIL RIGHTS MOVEMENT (1987); SOUTHERN JUSTICE (L. Friedman ed. 1965); U.S. COMM'N ON CIVIL RIGHTS, FIFTEEN YEARS AGO . . . RURAL ALABAMA REVISITED (December 1983).

43. See *infra* notes 47-83 and accompanying text.

44. See generally J. ELY, DEMOCRACY AND DISTRUST (1980) [hereinafter ELY].

45. See *id.* at 86, 148-70.

46. See generally *id.* at 135-36, 148-70.

47. 468 U.S. 288 (1984) (park service regulation permitting camping only in designated area upheld against first amendment challenge brought by organization wishing to demonstrate in non-designated area against plight of homeless).



“the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion.”<sup>48</sup>

The political powerlessness of the homeless extends beyond their economic trouble and inability to influence the political process financially. As Justice Marshall observed, the homeless are physically (and often, mentally) vulnerable because of the hardships that accompany their predicament.<sup>49</sup> Moreover, they are truly politically impotent in that they are denied the right to vote in most states because they lack permanent residences.<sup>50</sup> Consequently, they have

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48. *Id.* at 304 n.4 (Marshall, J., dissenting).

49. *Id.* (“detrimental effects of homelessness are manifold and include psychic trauma, circulatory difficulties, infections that refuse to heal, lice infestation and hypothermia”). Not surprisingly, the homeless have greater medical problems than the country’s population at large. They suffer a high rate of tuberculosis, trauma, acute respiratory disorders, lung disease and skin ulcers. The homeless are a high risk population “because of their higher rate of substance abuse, constant exposure to weather and trauma, inadequate diet and irregular hygiene, prolonged periods on their feet, unwillingness or inability to obtain medical treatment and other factors.” *Am. Med. News*, Apr. 12, 1985, at 2, col. 3. The homeless mentally ill are easy victims for criminals and die in disproportionate numbers. Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 *EMORY L.J.* 375, 391-92 (1982).

50. *Community for Creative Non-Violence*, 468 U.S. at 304 n.4 (Marshall, J., dissenting); see also Note, *Building a House of Legal Rights: A Plea for the Homeless*, 59 *ST. JOHN’S L. REV.* 530, 532 (1985) [hereinafter *Legal Rights*]. In addition, as of 1980, seven states statutorily excluded the homeless from voting. *Id.* at 532 n.12 (citing A. REITMAN & R. DAVIDSON, *THE ELECTION PROCESS: LAW OF PUBLIC ELECTIONS AND ELECTION CAMPAIGNS* 17-18 (2d ed. 1980)).

Recently, suits in three jurisdictions established the right of the homeless to register to vote. See *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); *Committee for the Dignity and Fairness for the Homeless v. Tartaglione*, No. 84 Civ. 3477 (E.D. Pa. Sept. 14, 1984), cited in *Pitts*, 608 F. Supp. at 708; Silas, *Alley Voters: D.C. Lets “Homeless” Register*, 70 *A.B.A. J.* 37 (Sept. 1984) [hereinafter Silas]. Whether the franchise will translate into political power for the homeless remains to be seen. The case of Washington, D.C. may be illustrative. In the spring of 1984, the local elections board denied three homeless men the right to register. The CCVN appealed this denial on behalf of the men and the elections board reversed itself in June 1984, establishing registration procedures. By the middle of July, however, only seven homeless people had registered. *Id.* Even after securing the right to vote, the homeless may not choose to exercise that right. See *id.*

One commentator has suggested that the right to vote could lead to greater legislation for the homeless as they become a political force. *Legal Rights, supra*, at 556. This is unlikely. Homelessness has been defined as “‘a condition of detachment from society characterized by the absence or attenuation of affiliative bonds that link settled persons to a network of interconnected social structures.’” Collin, *Homelessness: The Policy and the Law*, 16 *URB. LAW.* 317, 317 (1984) (quoting H. BAHR, *SKID ROW, AN INTRODUCTION TO DISAFFILIATION* 17 (1973)) [hereinafter Collin]. Intuitively, one would expect the homeless to be more concerned

no political voice through which to influence public policy.

Ironically, government policies contributed to the recent increase in homelessness. For example, by providing tax incentives to developers to convert single-room occupancy hotels (SROs)<sup>51</sup> into condominiums, cities accelerated the process of gentrification.<sup>52</sup> These policies led to the depletion of the already shrinking stock of low-income housing,<sup>53</sup> thereby contributing to an increase in homelessness.<sup>54</sup> Similarly, by deinstitutionalizing<sup>55</sup> many former state mental patients, but failing to provide community care<sup>56</sup> for them on release, states contributed to an increase in the number of homeless mentally

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with daily subsistence than with the political process and hence, not to be a cohesive political force in themselves. The fact that so few people registered to vote in Washington, D.C. supports this view. After all, the voting cases were brought during a presidential election year in which registration was an important issue. Therefore, these cases do not necessarily demonstrate enthusiasm for political involvement on the part of the homeless.

Advocacy groups have heralded the cause of the homeless, but have accomplished little politically. For example, the CCNV placed a right-to-overnight-shelter initiative on the ballot in Washington, D.C., in 1984, and the electorate passed this initiative. However, the District government blocked the statute's operation through the courts even though the electorate passed the referendum. Wash. Post., Dec. 28, 1985, at A1, col. 5. In May 1986, the District of Columbia Court of Appeals reversed the trial court and declared the initiative valid. Board of Elections & Ethics v. District of Columbia, 520 A.2d 671 (App. D.C. 1986).

51. SROs are one-room residences. Low income people often reside in SROs because of the relatively low cost. See Werner, *On the Streets: Homelessness Causes and Solutions*, 18 CLEARINGHOUSE REV. 11, 13 (1984) (study of homeless women in New York found that approximately 50% lived in SROs before becoming homeless) [hereinafter Werner].

52. *Living Between the Cracks: Hearing Before the Senate Special Comm. on Aging*, 98th Cong., 2d Sess. 64 (1984) [hereinafter *Between the Cracks*]. Gentrification denotes the process of urban renewal which rehabilitates downtown housing for the affluent and eliminates low-cost boarding and residential hotels. *Id.*

53. See Collin, *supra* note 50, at 323. During the 1970's, the nation's supply of SROs may have diminished by as much as 50%, a loss of 1 million units. H.R. REP. NO. 47, *supra* note 1, at 3. New York City lost 81% of its SROs. *Id.* This reduction had a significant impact on the low-cost housing supply. *Cf.* Werner, *supra* note 51.

54. H.R. REP. NO. 47, *supra* note 1, at 3 ("scarcity of low-income housing appears to be the main cause of homelessness").

55. Deinstitutionalization "refers to the policy under which state governments have reduced the number of residents in their psychiatric hospitals by releasing to the community patients who do not require the intensive care of a hospital." Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. & SOC. PROBS. 193, 193-94 (1980).

56. See H.R. REP. NO. 47, *supra* note 1, at 4. An estimated 2000 Community Mental Health Centers (CMHCs) were necessary to provide community care, but only 800 were ever established. *Id.*

ill people.<sup>57</sup> Finally, the federal government's budget reductions in the early 1980's, which cut federal programs and tightened eligibility standards for program assistance,<sup>58</sup> pushed some people into poverty or homelessness.<sup>59</sup>

Moreover, government entitlement programs designed to assist the poor have failed to reach the homeless.<sup>60</sup> Studies indicate that only fifteen to thirty percent of the homeless receive any government assistance.<sup>61</sup> Even those applicants who do satisfy the federal assistance guidelines often do not receive aid because they have difficulty establishing their residency and documenting their eligibility for assistance.<sup>62</sup> For example, few homeless people receive food stamps,<sup>63</sup> and those applying have been hampered by their lack of an address.<sup>64</sup>

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57. See *Federal Response*, *supra* note 1, at 425. Between 1955 and 1980, the population of state mental hospitals declined from 559,000 to 138,000. H.R. REP. No. 47, *supra* note 1, at 4. Not all of these patients became homeless, but studies indicate that in certain cities nearly one-third of some shelters' occupants previously received treatment in state hospitals. *Federal Response*, *supra* note 1, at 426.

58. For example, a re-examination of the eligibility of Social Security Disability Insurance (SSDI) recipients caused 491,300 people to lose benefits between 1980 and 1984. See *Federal Response*, *supra* note 1, at 187 (written statement of Joseph Delfico, Associate Director, Human Resources Division, U.S. General Accounting Office). Although more than 200,000 people won reinstatement on appeal, the termination of benefits contributed to homelessness. H.R. REP. No. 47, *supra* note 1, at 6.

59. See H.R. REP. No. 47, *supra* note 1, at 6. In 1982, the poverty rate was 15% of the nation's population, the highest level in 15 years. See *id.* Between 1978 and 1982, the number of poor people increased from 24.5 to 34.4 million. The Congressional Budget Office attributed some of the increase in poverty to the federal programs cuts. *Id.*

60. H.R. REP. No. 47, *supra* note 1, at 6.

61. *Id.* at 23.

62. *Id.* at 6. In October 1986, however, Congress passed the Homeless Eligibility Clarification Act, Pub. L. No. 99-570, §§ 11001-11007, 100 Stat. 3207, 3207-167 to -170 (1986) [hereinafter Homeless Eligibility Clarification Act], which directed the Secretary of Health and Human Services to provide a method of making Supplemental Security Income (SSI), Medicaid and AFDC benefits available to eligible homeless persons who do not reside in permanent dwellings or who do not have a fixed home or mailing address. *Id.* § 11005(a), 100 Stat. 3207, 3207-169 (codified at 42 U.S.C.A. § 1383(e)(3) (West Supp. 1988)). A similar provision protects homeless veterans eligible to receive benefits. *Id.* § 11007(a)(1), 100 Stat. 3207, 3207-170 (codified at 38 U.S.C.A. § 3003(c) (West Supp. 1988)).

63. H.R. REP. No. 47, *supra* note 1, at 22. Many homeless people who live in shelters have been ineligible for food stamps because they are deemed to be "institutionalized." *Id.*; see also *infra* note 64. Moreover, a congressional survey conducted by the House Select Committee on Hunger found that only half of all homeless people eligible for food stamps were receiving them. Wash. Post., Mar. 31, 1987, at A17, col. 3.

64. Schneider, *Food Stamps Benefits and the Homeless*, 18 CLEARINGHOUSE REV. 31 (1984). A state that denies the homeless food stamps solely because they do not

Many of the homeless would probably also be eligible for Medicaid, Supplemental Security Income (SSI) and Social Security Disability Income (SSDI) but they have not received benefits because they need assistance in the application process.<sup>65</sup> Consequently, provision of statutory benefits remains sporadic, and the homeless remain disabled by their status as well as their predicament.

## B. Applying the *Frontiero* Factors to the Homeless

The homeless have also been victims of discrimination and stereotyping<sup>66</sup>—important factors inviting judicial intervention under the *Frontiero* analysis of suspect classes.<sup>67</sup>

Many localities engage in discriminatory treatment of the homeless; other municipalities actually harass them. For example, after merchants in Phoenix complained that the presence of street people detracted from business, the city adopted an "Anti-Skid Row" zoning ordinance to exclude shelters and food kitchens from the downtown area.<sup>68</sup> In addition, the city declared sleeping (or lying down) on

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possess a fixed address violates federal food stamp eligibility regulations. *See id.* at 32. A state may not deny benefits to an otherwise eligible homeless person unless the shelter at which he resides is classified as an "institution." 7 C.F.R. § 273.1(e) (1988). A homeless person is "institutionalized" only if he eats two shelter-provided meals daily for the majority of the month. Schneider, *Food Stamp Eligibility for Homeless Persons Who Reside in Shelters*, 19 CLEARINGHOUSE REV. 141, 141 (1985).

One commentator argues that a homeless person who does not consume meals at a shelter and is otherwise eligible for food stamps should clearly receive them, and even if a shelter provides meals, the applicant should qualify. *See id.* at 142.

The Homeless Eligibility Clarification Act, Pub. L. No. 99-570, §§ 11001-11002, 100 Stat. 3207, 3207-167 to -168 (1986), amended certain provisions of the Food Stamp Act of 1977, 7 U.S.C.A. §§ 2011-2030 (West Supp. 1988), to define homeless persons who live in a shelter as a "household" within the meaning of the Food Stamp Act, *see id.* § 11002(b), 100 Stat. 3207, 3207-168 (codified at 7 U.S.C.A. § 2012(i) (West Supp. 1988)), and to define "food" to include meals prepared for, and served by, a public or private nonprofit establishment or shelter. *See id.* § 11002(a), 100 Stat. 3207, 3207-167 (codified at 7 U.S.C.A. § 2012(g) (West Supp. 1988)).

65. H.R. REP. NO. 47, *supra* note 1, at 20. For example, an estimated one-third of the homeless in New York City are veterans, but according to a 1982 study, very few received any benefits and the Veterans Administration made little effort to aid them, even though many may have been eligible for medical care, pensions and the like. *Id.* at 21.

66. *See infra* notes 68-79 and accompanying text.

67. *See supra* notes 24-33 and accompanying text.

68. *See NEWSWEEK*, Jan. 2, 1984, at 26. In 1983, between 3,300 and 6,200 homeless people lived in Phoenix but the city failed to provide a single public shelter. Werner, *supra* note 51, at 14. Moreover, the city condemned its two private shelters to facilitate construction of a public plaza. *Id.* Today, the publicly-funded

public property illegal,<sup>69</sup> and it declared garbage public property so that picking through trash cans became theft.<sup>70</sup>

Hostility, or at least indifference, to the plight of the homeless exists in other cities as well. During the renovation of its downtown area, San Diego encouraged mission shelters to depart so that the renewal effort would not be "wasted."<sup>71</sup> In Seattle, merchants in the newly renovated Skid Row district attempted to have street people moved away,<sup>72</sup> and in Washington, D.C., the government built concrete covers on the heating grates to prevent the homeless from sleeping on them.<sup>73</sup> Following public protest, these covers were removed, but the initial construction demonstrated the antagonism that characterizes much of the response to homelessness.<sup>74</sup>

Much of the hostility that underlies the zoning ordinances and statutes directed against the homeless stems from a stereotype that the homeless are "bums" or "drunks" who will damage property or threaten neighborhood safety.<sup>75</sup> The present homeless population, however, consists of many families and younger people who lose housing because of economic hardships such as eviction or the loss

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shelter in downtown Phoenix compiles a nightly list of the names and social security numbers of each homeless person seeking shelter. See Lewin, *At Shelter, Homeless Monitored by Police*, N.Y. Times, Feb. 22, 1988, at A10, col. 1. The shelter then submits the list to the police who check to see if they have arrest warrants matching any of the names on the list. See *id.* As a result, approximately 12 people are arrested weekly at the shelter for minor infractions such as public drunkenness. *Id.* at A10, col. 2. The police expect the number to decline, however, as word of the arrest policy spreads. *Id.* at A10, col. 3. Thus, although beds for the homeless now exist in Phoenix, one facility has adopted a policy which gives it "all the allure of a minimum security prison," *id.* at A10, col. 1, and effectively deters some homeless from seeking available shelter.

69. Werner, *supra* note 51, at 14. The courts eventually struck this law down. *Id.*

70. *Id.*

71. *Id.*

72. See NEWSWEEK, Oct. 29, 1984, at 14.

73. See *id.*

74. Atlanta Mayor Andrew Young's reported offer to provide any homeless person in Atlanta with a bus ticket out of the city and back "home," epitomizes official callousness. Werner, *supra* note 51, at 14.

75. See NEWSWEEK, Oct. 29, 1984, at 14. For example, President Reagan stated that many of the homeless live in the streets "by choice." TIME, Feb. 4, 1985, at 21. Similarly, a reporter found that the people of Arizona believed that many of the homeless seek a warm climate in which to "sponge off the state." Feeding on this attitude, the mayor of Tucson's 1983 re-election campaign included a pledge to get "the transients the hell out of town." NEWSWEEK, Jan. 2, 1984, at 26. These attitudes reflect the prevailing ignorance of the true demographic characteristics of the homeless population. See *infra* notes 76-78 and accompanying text.

of a job.<sup>76</sup> Some of the homeless continue to work but cannot afford housing.<sup>77</sup> These people are not very different from many other working people who could easily become homeless as a result of the destruction of their home by fire, eviction from an apartment, or the loss of a job.<sup>78</sup> Thus, stereotypes of the homeless as vagrants who are not worthy of aid inhibit some state and local governments from taking action.<sup>79</sup> Such views suggest that, in an appropriate context, the judiciary should intervene on behalf of the homeless.

The doctrine of political powerlessness<sup>80</sup> provides a structured manner in which to better understand the plight of the homeless. By applying the indicia of suspect classes set forth in *Frontiero*<sup>81</sup> to the homeless, one develops a picture of a group mistreated and often misunderstood by our polity. Although the equal protection clause<sup>82</sup> may not be implicated by homeless individuals attempting to assert a right to shelter in the courts, the theoretical basis for suspect class analysis—Justice Stone's notion in *Carolene Products* of judicial responsibility<sup>83</sup>—justifies, at the very least, judicial activism in protecting the state constitutional and statutory rights of the homeless.

#### IV. Practical Bases for Judicial Intervention

Although the Supreme Court has held that there is no constitutional

76. H.R. REP. NO. 47, *supra* note 1, at 5; *see also* Wash. Post, Feb. 15, 1987, at B3, col. 3 ("dispelling the myths of the homeless" as people who simply want handouts). In New York City, 40% of the homeless people seeking shelter could not obtain a job in 1982. Werner, *supra* note 51, at 13. Unemployment is one of the leading causes of homelessness among the young. *Id.*

During the early 1980's, homelessness and unemployment both increased. The unemployment rate rose from 5.8% in 1979 to 9.5% in 1983, before falling in 1984. H.R. REP. NO. 47, *supra* note 1, at 5. In addition, during these five years people remained unemployed for longer periods of time. *Id.*

77. *See Federal Response*, *supra* note 1, at 830 (testimony of Dr. Richard Ropers, Field Studies, U.C.L.A.). In the Los Angeles study, 50% of the homeless actively sought work; 20% worked full or part-time but still were homeless. *Id.*

78. *See* Wash. Post, Feb. 15, 1987, at B3, col. 3. For example, one woman in Washington, D.C. lost her job and came home from work to find that her building had been closed because of fire code violations. She and her family went to a shelter. *Id.* Similarly, an electrical engineer lost his job because of health problems and became homeless. *Id.*

79. *See supra* notes 68-75 and accompanying text.

80. *See supra* notes 19-26, 31-49 and accompanying text.

81. *See supra* notes 27-36 and accompanying text.

82. This Article does not address an equal protection argument on behalf of the homeless, because, to date, the Supreme Court has held there is no constitutional right to shelter. *See infra* note 84 and accompanying text.

83. *See supra* notes 16-17, 37 and accompanying text.

right to adequate housing,<sup>84</sup> some lower courts have based substantive rights to shelter on state law. Although the adjudication of such "social" issues raises concerns about judicial overreaching and the type of remedy courts can devise, the judiciary has taken a more activist role in other "social" problems.<sup>85</sup> Where legal rights are at stake, courts should adjudicate the claims.<sup>86</sup> In litigation on behalf of the homeless, the statutory language in a particular jurisdiction will provide the parameters of any substantive rights. Statutory interpretation involves judicial discretion; however, requiring a state to provide shelter to fulfill its statutory duty of care is well within the courts' judicial power to interpret the law.<sup>87</sup> Accordingly, the type of judicial action advocated here is a broad interpretation of state laws to provide shelter for the homeless.

Most of the statutes on which advocates rely do not expressly mention a right to shelter, but speak in general terms of the government's duty to aid indigent persons.<sup>88</sup> Because the homeless are destitute, courts should overcome this hurdle by concluding that the homeless qualify as "needy" individuals within the meanings of these

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84. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) ("[w]e do not denigrate the importance of decent, safe and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill").

85. School segregation is the best example of a social problem that was ignored until the judiciary intervened. See *Brown v. Board of Education*, 347 U.S. 483 (1954). For the background of *Brown*, see KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN v. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (1976). The Arkansas prison litigation, in which prisoners repeatedly brought suit to improve prison conditions, provides an additional example of such judicial activism. See, e.g., *Holt v. Sarver*, 309 F. Supp. 362, 368 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

86. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[i]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded").

87. See *id.* at 177 ("[i]t is, emphatically, the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule"); see also *Sullivan v. Little Hunting Park*, 396 U.S. 229, 239 (1969) ("the existence of a statutory right implies the existence of all necessary and appropriate remedies").

88. See, e.g., CAL. WELF. & INST. CODE § 17000 (West 1980) ("[e]very county and every city and county shall relieve and support all incompetent, poor, indigent persons . . . lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means . . ."); N.Y. SOC. SERV. LAW § 62(1) (McKinney 1983) ("each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself").

statutes.<sup>89</sup> However, the nature of the remedy courts can impose and the implementation of that remedy by the executive and legislative branches of government are significant issues that may require additional judicial action contemporaneously with, or subsequent to, statutory interpretation. Courts possess broad equitable powers with which to address these issues. Attendant obstacles can be overcome by “[e]quity [which] will adapt established rules to any situation and grant relief even though a case is novel and there is no precise precedent for the relief to be granted.”<sup>90</sup> As the Supreme Court has said:

The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for . . . adjustment and reconciliation between the public interest and private needs as well as between competing private claims.<sup>91</sup>

### A. The Right to Shelter

Several state constitutions and statutes contain provisions requiring states to assist the needy.<sup>92</sup> Where case law suggests that these statutes

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89. *Cf.* *Nelson v. San Diego County Bd. of Supervisors*, 190 Cal. App. 3d 25, 30, 235 Cal. Rptr. 305, 308-09 (1987) (“[s]ection 17000 [of California’s Welfare and Institutions Code] imposes a duty on the [c]ounty to relieve and support its indigent residents; the statute does not exclude those indigent residents without addresses”).

90. *New York & Brooklyn Suburban Inv. Co. v. Leeds*, 100 Misc. 2d 1079, 1091, 420 N.Y.S.2d 639, 647 (Sup. Ct. Suffolk County 1979).

91. *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30 (1944). Courts of equity have the power “to inquire into and correct mistakes, injustice and wrong in both judicial and executive action . . . when it invades private rights.” *Johnson v. Townsley*, 80 U.S. (13 Wall.) 72, 84 (1871). The maxim that equity will not suffer a wrong to be without a remedy suggests that courts will intervene where rights are violated:

[T]he power to enforce the performance of the act must rest somewhere, or it will present a case which has often been said to involve a monstrous absurdity in a well-organized government, that there should be no remedy, although a clear and undeniable right should be shown to exist.

*Kendall v. United States*, 37 U.S. (12 Pet.) 524, 623 (1838).

92. At least eight states have constitutional provisions or statutes that courts have interpreted to impose a mandatory duty to care for the needy. *See* ALA. CONST. art. IV, § 88 (“[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor”); N.Y. CONST. art. XVII, § 1 (“aid, care and support of the needy are public concerns and shall be provided by the state”); CAL. WELF & INST. CODE § 17000 (West 1980) (“[e]very county and every city and county shall relieve and support all incompetent,



establish a mandatory duty,<sup>93</sup> the homeless have a persuasive argument to secure a right to state-provided shelter.<sup>94</sup> The seminal right-to-shelter case is *Callahan v. Carey*.<sup>95</sup> In *Callahan*, six homeless men brought suit on behalf of all the homeless men in New York City,<sup>96</sup>

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poor, indigent persons"); CONN. GEN. STAT. § 17-273(a) (Supp. 1988) ("[e]ach person . . . [without support] shall be provided for and supported at the expense of the town in which he resides"); MASS. GEN. LAWS ANN. ch. 117, § 1 (West Supp. 1987) ("commonwealth . . . shall provide assistance to residents of the commonwealth"); N.H. REV. STAT. ANN. § 165:1 (Supp. 1987) ("[w]henver a person in any town is poor and unable to support himself, he shall be relieved and maintained by . . . such town"); N.J. STAT. ANN. § 44:8-109 (West Supp. 1987) ("public policy of this [s]tate that every needy person shall, while in this [s]tate, be entitled to receive . . . public assistance"). See *infra* notes 120-28 and accompanying text for a discussion of the West Virginia decision holding that § 9-6-7 of the West Virginia Code is a mandatory provision which extends to the homeless.

Generally, the use of the word "shall" makes the provision mandatory. See *Nelson v. West Virginia Pub. Employees Ins. Bd.*, 300 S.E.2d 86, 89 (W. Va. 1982) ("well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the [l]egislature, should be afforded a mandatory connotation"); see, e.g., *City & County of San Francisco v. Superior Court*, 57 Cal. App. 3d 44, 46-47, 128 Cal. Rptr. 712, 714 (1976) ("[s]ection 17000 provides that '[e]very county and every city and county shall . . . support all . . . indigent persons' . . . [i]t is clear that section 17000 imposes . . . a mandatory duty") (emphasis in original); *Tucker v. Toia*, 43 N.Y.2d 1, 8, 371 N.E.2d 449, 452, 400 N.Y.S. 2d 728, 731 (1977) ("legislative history, as well as the mandatory language of the provision itself . . . [make] clear that section 1 of article XVII imposes upon the [s]tate an affirmative duty to aid the needy").

Additional state statutes contain similar language. See, e.g., COLO. REV. STAT. § 26-2-102 (1982) ("purpose of this article to promote the public health and welfare of the people of Colorado by providing . . . public assistance for needy individuals"); DEL. CODE ANN. tit. 31, § 501 (1985) ("purpose of this chapter [is] . . . to promote the welfare and happiness of all of the people of this [s]tate by providing public assistance to all of its needy"); ME. REV. STAT. ANN. tit. 22, § 4307(1) (Supp. 1987) ("[m]unicipalities shall provide general assistance to all eligible persons at the expense of that municipality"); MO. ANN. STAT. § 205.580 (Vernon 1983) ("[p]oor persons shall be relieved, maintained and supported by the county of which they are inhabitants"); R.I. GEN. LAWS § 40-6-2 (Supp. 1987) ("purpose of this chapter [is] to provide public assistance to residents of the state . . . who are in need and who meet the eligibility requirements"); TEX. HUM. RES. CODE ANN. § 11.002 (Vernon 1980) ("purpose of this title is to establish a program of social security to provide necessary and prompt assistance to the citizens of this state who are entitled to avail themselves of its provisions"); VT. STAT. ANN. tit. 33, § 2501 (1981) ("policy of the state [is] . . . that . . . [i]ts social welfare programs shall provide assistance and benefits to persons of the state if proven need thereof and eligible").

93. See *supra* note 92.

94. See *infra* notes 95-114, 137-46, 166-82 and accompanying text.

95. N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (Sup. Ct. N.Y. County Dec. 5, 1979), *aff'd mem.*, 118 A.D.2d 1054, 499 N.Y.S.2d 567 (1st Dep't 1986).

96. The trial judge later denied certification of the class action. The court deemed certification unnecessary because government operations were involved and any resolution of the case adverse to the government would, by stare decisis, bind the government in its dealings with the prospective class members. *Callahan*, N.Y.L.J., July 18, 1980, at 6, col. 3 (Sup. Ct. N.Y. County 1980).

claiming that the state and city had violated their right to safe and adequate shelter under the state constitution,<sup>97</sup> state statutes<sup>98</sup> and a city ordinance.<sup>99</sup> The constitutional provision in question provides:

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.<sup>100</sup>

Both the legislative history,<sup>101</sup> and case law<sup>102</sup> indicate that this section creates an affirmative governmental duty. The New York State Social Services Law more explicitly requires the public welfare districts to assist the indigent:

Subject to reimbursement in the cases hereinafter provided for, each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself.<sup>103</sup>

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97. See *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4; see also N.Y. CONST. art. XVII, § 1.

98. See *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4; see also N.Y. SOC. SERV. LAW §§ 62(1), 131(1), 131(3) (McKinney 1983).

99. See *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4; see also NEW YORK, N.Y., ADMIN. CODE ch. 24, § 604-1.0(b) (1978) (current version at § 21-114(b) (1986)). In addition, the plaintiffs asserted federal constitutional equal protection claims because they were similarly situated with other indigents who received state home relief. Plaintiff's Amended Complaint at 22, *Callahan v. Carey*, No. 79-72581 (Sup. Ct. N.Y. County 1979). Among other benefits, persons on home relief receive support for shelter. The plaintiffs, who received no aid, were typically in greater need than those on relief. *Id.*

100. N.Y. CONST. art. XVII, § 1.

101. See Plaintiff's Trial Memorandum at 39, *Callahan v. Carey*, No. 79-72581 (Sup. Ct. N.Y. County 1979) (quoting III Revised Record of the Constitutional Convention 2126 (1938)). At the 1938 Constitutional Convention, Edward F. Corsi, the Chairman of the Committee on Social Welfare, articulated the purposes of the amendment:

Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First, to remove from the area of constitutional doubt the responsibility of the [s]tate to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.

*Id.*

102. See *Tucker v. Toia*, 43 N.Y.2d 1, 8, 371 N.E.2d 449, 452, 400 N.Y.S.2d 728, 731 (1977) ("[i]t is clear that section 1 of article XVII imposes upon the [s]tate an affirmative duty to aid the needy").

103. N.Y. SOC. SERV. LAW § 62(1) (McKinney 1983). Although the statute provides for reimbursement of local districts, the duty to assist the poor is not contingent

In addition, the New York City Administrative Code specifically provides for municipal shelter.<sup>104</sup>

In *Callahan*, the New York Supreme Court granted a temporary injunction requiring the state and city defendants to provide shelter space for 750 men.<sup>105</sup> Pending the outcome of the suit, the men were to receive lodging and board.<sup>106</sup> In support of its decision, the court simply cited, without elaboration, relevant state constitutional, statutory and administrative provisions.<sup>107</sup> The parties subsequently entered into a consent judgment under which the city agreed to supply shelter to any man who sought it.<sup>108</sup> Each applicant had to qualify for New York State "home relief" or have a "physical, mental or social dysfunction" which caused him to need temporary shelter.<sup>109</sup> The consent decree also mandated specific minimum health and safety conditions at shelter facilities.<sup>110</sup>

Although the resolution of *Callahan* by consent judgment<sup>111</sup> renders the precedential value of the case uncertain,<sup>112</sup> the court's initial

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upon state reimbursement. See *Jones v. Berman*, 37 N.Y.2d 42, 55, 332 N.E.2d 303, 310, 371 N.Y.S.2d 422, 431 (1975) ("clear that county's duty to provide assistance [under Social Services Law §§ 62(1), 131(1)] is not dependent upon the receipt of equivalent money from the [s]tate"); see also N.Y. Soc. SERV. LAW § 131(1) (McKinney 1983) ("duty of social services officials . . . to provide adequately for those unable to maintain themselves").

104. The New York City Administrative Code provides:

It shall be the duty of the commissioner or of the superintendent of any municipal lodging house acting under him, to provide for any applicants for shelter who, in his judgment, may properly be received, plain and wholesome food and lodging for a night, free of charge, and also to cause such applicants to be bathed on admission and their clothing to be steamed and disinfected.

NEW YORK, N.Y., ADMIN. CODE ch. 24, § 604-1.0(b) (1978) (current version at § 21-114(b) (1986)).

105. *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (Sup. Ct. N.Y. County Dec. 5, 1979), *aff'd mem.*, 118 A.D.2d 1054, 499 N.Y.S.2d 567 (1st Dep't 1986).

106. *Id.*

107. *Id.*; see *supra* notes 97-99, 103-04 and accompanying text.

108. Final Judgment by Consent, *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. County Aug. 26, 1981).

109. *Id.* at 3.

110. See *id.* The decree required that each resident receive a bed made with clean linens and a locker for his belongings. The decree also obligated the city to provide showers and laundry services at least twice a week. Finally, the decree prohibited the staff-to-resident ratio from falling below two percent and required an attendant trained in first aid to be on duty at all times. *Id.* at 4, 8.

111. Two factors may explain why *Callahan* culminated in a consent decree. First, the court's opinion suggests that it was disposed to rule in favor of the homeless. See *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4. Agreeing to a consent decree

determinations in granting the injunction have a solid basis in the applicable statutory language.<sup>113</sup> The court stated that the plaintiffs were "entitled to board and lodging . . . and it is incumbent on those public officials responsible for caring for the needy to find such lodgings."<sup>114</sup> Given that the relevant statutory provisions placed an affirmative duty on the government to assist the poor, the court could rationally conclude that sheltering the homeless came within the parameters of those statutes.

As the problem of homelessness worsens, courts are likely to interpret statutes broadly in the belief that a judicial solution to the

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was probably politically expedient for the state and city because the government may have had to provide better housing and services if the case had gone to final judgment. Second, the extent of the homelessness problem probably influenced the government representatives. The homelessness crisis had grown to such proportions that state officials probably felt compelled, possibly by humanitarian concerns, to take some action, especially given the statutory mandate. *But see Note, Establishing a Right to Shelter for the Homeless*, 50 BROOKLYN L. REV. 939, 947 (1984) (labelling Callahan a "fluke" in which plaintiff's argument was "an imaginative strategy that worked primarily because it was employed at the right time and in the right place").

These factors may also explain why analogous cases in other jurisdictions have been settled. For example, suit was filed in Hartford, Connecticut, because the city had no public shelter for the homeless. *Lubetkin v. City Manager* (Conn. Super. Ct. filed Feb. 4, 1983), reported in Werner, *Homelessness: A Litigation Roundup*, 18 CLEARINGHOUSE REV. 1255, 1257 (1985) [hereinafter *Litigation Roundup*]. The plaintiff's theory rested on the following statutory provision:

- (a) [E]ach person who has not estate sufficient for his support, and has no relatives of sufficient ability who are obliged by law to support him, shall be provided for and supported at the expense of the town in which he resides . . . or, if he has no residence, of the town in which he becomes in need of aid.

CONN. GEN. STAT. ANN. § 17-273 (Supp. 1985). In essence, the statute required a welfare officer, after being informed by a general assistance applicant of his plight, to provide the applicant with the necessary food, shelter or medical care. *Litigation Roundup, supra*, at 1257-58. In the settlement of *Lubetkin*, the defendants agreed to comply with state law and their own regulations. *Id.*

In Philadelphia, plaintiffs sued to enforce a 1982 city ordinance which states that the city "shall provide for the establishment, operation and maintenance of emergency shelters as needed for the homeless." Today, a consent judgment obligates the city to provide shelter to any non-dangerous person who requests it. *N.Y. Times*, May 5, 1985, at 60, col. 3.

Los Angeles has also settled right to shelter cases based on similar statutory language. *See, e.g., Eisenheim v. Board of Supervisors*, No. C-27953 (Cal. App. Dep't Super. Ct. Dec. 19, 1983), reported in *Litigation Roundup, supra*, at 1259.

112. *See* Final Judgment by Consent at 2, *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. County Aug. 26, 1981) (consent decree does not constitute final adjudication "of any issue of fact or law").

113. *See supra* note 103 and accompanying text.

114. *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (Sup. Ct. N.Y. County Dec. 5, 1979), *aff'd mem.*, 118 A.D.2d 1054, 499 N.Y.S.2d 567 (1st Dep't 1986).

problem is necessary. For example, in *Seide v. Prevost*,<sup>115</sup> a federal district court recognized the powerlessness of the homeless and the mentally ill. *Seide* was brought on behalf of state psychiatric patients to enjoin the operation of a shelter for the homeless on the ground that it deprived the patients of their rights to safety and treatment.<sup>116</sup> The court felt compelled to note:

[T]he poignancy of the position of these populations [the homeless and the mentally disturbed], each to a very large extent the product of the swift, conflicting currents of our society, each without a political constituency to which they can refer their suffering, each driven to resort to the courts for enforcement of constitutional and state rights to achieve humane treatment at the hands of the society. While the impropriety of judges determining social policy is frequently sounded by those with loud trumpets, nonetheless, in the context of the needs of the homeless and the mentally disturbed, it is the court that must decide the issues brought before it and seek to achieve a just result and do so promptly.<sup>117</sup>

The *Seide* court held that the homeless shelter could continue to operate.<sup>118</sup> The tone of *Seide* suggests that the court was swayed by the magnitude of the homeless crisis and by the powerlessness of the homeless to achieve redress from the legislative and executive branches of government.<sup>119</sup>

The notion that courts become frustrated by a lack of political action on behalf of a powerless group may also explain *Hodge v. Ginsberg*.<sup>120</sup> In *Hodge*, the West Virginia Supreme Court held that the state welfare department had a statutory duty<sup>121</sup> to supply emer-

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115. 536 F. Supp. 1121 (S.D.N.Y. 1982).

116. *See id.* at 1124-25.

117. *Id.* at 1125.

118. *Id.* at 1138.

119. *Cf. id.* at 1125-26 (“[t]o proceed with the necessary legal analysis without recognition of social and political issues involved would be to ignore the obvious”).

120. 303 S.E.2d 245 (W. Va. 1983).

121. At that time, the following provision governed the department:

[The Welfare Department] may develop a plan for a comprehensive system of adult protective services including social case work, . . . home care, day care, counseling, research and others. It shall offer such services as are available and appropriate in the circumstances to persons who, other than for compensation have or intend to have the actual, physical custody and control of an incapacitated adult and to such incapacitated adults or to adults who may request and be entitled to such protective services.

*Hodge*, 303 S.E.2d at 247 (quoting W. VA. CODE ANN. § 9-6-7 (Supp. 1982) (amended 1984)).

The provision has since been amended to substitute the word “shall” for “may”

gency shelter, food and medical services to the homeless.<sup>122</sup> The state argued that provision of services was discretionary under the statute.<sup>123</sup> The court ruled, however, that once the welfare department developed a system of aid, it had to offer the available services to those entitled to receive them.<sup>124</sup> Because the court found that a homeless person was an "incapacitated adult" within the meaning of the statute, it concluded that the homeless could not be denied relief offered to other incapacitated adults.<sup>125</sup>

The West Virginia court's interpretation of the statute may be criticized by those opposed to judicial intervention. In the statute, "incapacitated adult" refers to mentally or physically disabled persons, or those with another "infirmity" which constrains their ability to perform daily life-sustaining functions.<sup>126</sup> At first glance, homelessness does not appear to fall within the typical meaning of "infirmity"; however, the court reasoned that homelessness is a condition which threatens daily life functions and prevents one from maintaining reasonable health.<sup>127</sup> Accordingly, the court held that aiding the homeless was within the statutory purposes.<sup>128</sup>

The West Virginia Legislature could have rejected this interpretation when the statute was amended, one year after *Hodge* was decided.<sup>129</sup> Instead, in amending the statutory language to provide that the department "shall"—rather than "may"—develop an assistance plan,<sup>130</sup> the legislature arguably solidified the *Hodge* decision.<sup>131</sup> More importantly, the West Virginia Legislature was unsuccessful in its attempt to overrule the court. When the West Virginia House of Delegates passed a bill that attempted to overrule *Hodge* by redefining "incapacitated" so that the homeless would not automatically fall within

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in the first line. See W. VA. CODE ANN. § 9-6-7 (Supp. 1987). The West Virginia Code defines "incapacitated adult" as "any person who by reason of physical, mental or other infirmity is unable to independently carry on daily activities of life necessary to sustaining life and reasonable health." *Id.* § 9-6-1. The court concluded that the homeless were incapacitated because by reasons of the "recurring misfortunes of life," they cannot sustain daily life activities. *Hodge*, 303 S.E.2d at 250.

122. *Id.* at 251.

123. *Id.* at 250. See *supra* note 121 for text of the provision.

124. *Id.* at 251.

125. *Id.* at 250.

126. See *supra* note 121.

127. *Hodge*, 303 S.E.2d at 250.

128. *Id.* at 251.

129. See 1984 W. Va. Acts 646.

130. See *id.*; W. VA. CODE ANN. § 9-6-7 (Supp. 1987).

131. See *supra* note 92 for a discussion of the significance of the statutory usage of "shall."

the category, the state senate failed to act on the bill.<sup>132</sup> Therefore, *Hodge* remains good law.

The sequence of events in West Virginia demonstrates the significant role the judiciary can play in addressing the problem of homelessness. The West Virginia Supreme Court interpreted existing statutes broadly to provide the homeless with a right to shelter and services.<sup>133</sup> Once the court acted, the onus was on the legislature to reject the judicial solution if it disagreed with the statutory interpretation. Since the West Virginia Senate Committee did not act to amend the statute,<sup>134</sup> the majority of that house can be presumed to have acquiesced in the judicial interpretation. Therefore, the court's broad interpretation of the statute provided two distinct benefits. First, by engendering legislative debate, it contributed to public discourse regarding homelessness, and second, it provided shelter and assistance to a very vulnerable population. Other state courts can have a similarly significant impact on homelessness by requiring state and local governments to provide shelter whenever a state statutory basis for the right exists.

## B. The Remedy for Statutory Violations

After a court determines that the homeless are entitled to assistance under a state statute, the inquiry shifts to the type of remedy to be imposed for violation of the statute. Arguably, shelter is the only remedy that can provide sufficient aid within the meaning of the statute. Some states, however, seek to fulfill the statutory goals by providing monetary assistance.<sup>135</sup> In New York, homeless families<sup>136</sup> have challenged this practice.

In *McCain v. Koch*,<sup>137</sup> the city and state defendants claimed that they had no duty to house homeless families,<sup>138</sup> but only had to

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132. See *Survey of Developments in West Virginia Law: 1983*, 86 W. VA. L. REV. 479, 486 (1984) (citing H.B. 1984, 66th W. Va. Leg., 1st Sess. (1983)).

133. See *supra* notes 121-28 and accompanying text.

134. See *supra* note 132 and accompanying text.

135. See *infra* notes 137-62 and accompanying text.

136. Housing homeless families has been an especially severe problem in New York City. Because of a shortage of shelter space, many families have been forced to spend nights in city welfare offices. See N.Y. Times, Dec. 12, 1985, at B3, col. 1; see also *supra* note 6.

137. 127 Misc. 2d 23, 484 N.Y.S.2d 985 (Sup. Ct. N.Y. County 1984), *modified*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dep't 1986), *rev'd in part*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987).

138. *Id.* at 24, 484 N.Y.S.2d at 987. In response to this argument the court observed: "This, from the city whose Statue of Liberty welcomed immigrants to these shores, and proudly proclaimed: 'Send these, the homeless, tempest-tossed, to me.'" *Id.*

assist them to locate shelter for thirty days, after which time cash grants would fulfill the government's responsibility.<sup>139</sup> Pending adjudication of this issue, the court employed its equitable power to require that once the city undertook to provide emergency shelter, it was obligated to provide housing which complied with minimal standards.<sup>140</sup> The court stated that, "[i]n a civilized society, a 'shelter' which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all."<sup>141</sup>

On appeal, the appellate division granted a preliminary injunction barring the city from denying emergency shelter to homeless families because the plaintiffs had demonstrated a "strong likelihood of success on the merits of their claims."<sup>142</sup> After discussing *Callahan*, the court stated that there was "no apparent reasonable basis for the [c]ity's denial of emergency shelter to the plaintiffs."<sup>143</sup> The court recognized that the dire shortage of low-cost housing meant that the families would only receive shelter if the city provided it.<sup>144</sup>

The appellate division's reasoning in *McCain* is sound because cash grants would not fulfill the goals of the relevant provision of the state constitution.<sup>145</sup> Unless the money was sufficient for the family to obtain some type of shelter, grants would not help homeless families to get off the street. As the court stated, "[t]he public interest is better served by having them housed, than by forcing them to find shelter and food that may be beyond their means to attain."<sup>146</sup>

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139. *Id.*

140. *Id.* at 25, 484 N.Y.S.2d at 988. Although the appellate division later held that the trial court had erred in establishing minimal shelter conditions, *McCain v. Koch*, 117 A.D.2d 198, 216, 502 N.Y.S.2d 720, 731 (1st Dep't 1986), it was subsequently reversed on this issue by the court of appeals, *see* 70 N.Y.2d at 120, 511 N.E.2d at 66, 517 N.Y.S.2d at 922.

141. *McCain*, 127 Misc. 2d at 24, 484 N.Y.S.2d at 987.

142. *McCain*, 117 A.D.2d at 211, 502 N.Y.S.2d at 728. The appellate division, noting that "New York State has made the care of its needy residents a constitutional mandate," found it likely that the plaintiffs would succeed on their claim that article 17 of the state constitution requires the defendants to supply emergency shelter for homeless families. *Id.* at 215, 502 N.Y.S.2d at 730. The court of appeals' subsequent reversal of the intermediate courts' holding left this finding unaffected. *See McCain*, 70 N.Y.2d at 118, 511 N.E.2d at 65, 517 N.Y.S.2d at 921 ("right of eligible families who are not receiving emergency housing to compel defendants to furnish it is the issue in other parts of the [a]ppellate [d]ivision's order not before us on this appeal").

143. *McCain*, 117 A.D.2d at 214, 502 N.Y.S.2d at 729.

144. *Id.* at 211, 502 N.Y.S.2d at 728.

145. *See id.* at 215-16, 502 N.Y.S.2d at 730-31 ("the [c]ity's policy [of granting cash allowances] simply ignores the brutal realities of the plaintiffs' situation [and] . . . contravenes both the letter and spirit of the [s]tate's affirmative obligation to aid all its needy residents under [s]ection 1 of [a]rticle 17 of the [s]tate [c]onstitution").

146. *Id.* at 211, 502 N.Y.S.2d at 728.



One of the issues in *McCain*, the extent to which federal law required that homeless families receive emergency shelter,<sup>147</sup> was addressed in *Koster v. Webb*.<sup>148</sup> *Koster* involved an action brought in federal court under section 1983 of the Civil Rights Act<sup>149</sup> by homeless families seeking to have New York State and Nassau County officials supply them with shelter and emergency services pursuant to the federal Social Security Act,<sup>150</sup> the state Social Services Law<sup>151</sup> and the New York Constitution.<sup>152</sup> The pertinent portion of the Social Security Act was the Aid to Families with Dependent Children (AFDC) program,<sup>153</sup> which provides for emergency assistance to families.<sup>154</sup> Although the federal statute does not expressly require that shelter be supplied to eligible homeless families,<sup>155</sup> the court noted that the legislative history of the Social Security Act anticipated that shelter would be one type of emergency service supplied.<sup>156</sup> Moreover, the states that participate in the AFDC program must indicate whether they will provide shelter.<sup>157</sup> Because New York's regulations, promulgated pursuant to the federal Social Security Act, indicated that shelter would be provided in emergency situations,<sup>158</sup> the United States District Court for the Eastern District of New York reasoned that the denial of shelter violated the Act.<sup>159</sup>

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147. See *McCain v. Koch*, 127 Misc. 2d 23, 484 N.Y.S.2d 985 (Sup. Ct. N.Y. County 1984), *modified*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1st Dep't 1986), *rev'd in part*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987).

148. *Koster v. Webb*, 598 F. Supp. 1134 (E.D.N.Y. 1983). The plaintiffs also alleged that other homeless families had received "grossly substandard shelters which are a hazard to health and safety." *Id.* at 1135.

149. 42 U.S.C. § 1983 (1983).

150. 42 U.S.C. § 301 (1982). Claims under the Social Securities Act are actionable under 42 U.S.C. § 1983. See *Edelman v. Jordan*, 415 U.S. 651, 675 (1974).

151. N.Y. SOC. SERV. LAW §§ 62(1), 131(1), 131(3) (McKinney 1983).

152. N.Y. CONST. art. XVII, § 1. The plaintiffs also alleged violations of the due process and equal protection clauses of the United States Constitution. See *Koster*, 598 F. Supp. at 1136.

153. 42 U.S.C. §§ 601-610 (1985).

154. 42 U.S.C. § 606(e) (1982).

155. See *id.*

156. *Koster*, 598 F. Supp. at 1137 (citing H.R. REP. No. 544, 90th Cong., 1st Sess. 17-18 (1967)).

157. See 45 C.F.R. § 233.120(a)(4) (1987).

158. See [1988] N.Y.C.R.R. § 372.4(d).

159. *Koster*, 598 F. Supp. at 1137. The court also noted that the plaintiffs stated a valid state law claim because New York Social Service Law §§ 62(1) and 131(1) provide for the assistance of the needy as required by article XVII, § 1 of the New York Constitution and §§ 371(3) and 391(1) defines homeless and destitute children as among the needy. Therefore, state law required that services be provided. *Id.* at 1138.

No decision on the merits has been reported in *Koster*,<sup>160</sup> but the district court's initial reading of the state regulations is instructive.<sup>161</sup> When regulations assert that emergency shelter will be provided to families eligible for AFDC, a court can certainly order shelter as the appropriate remedy. One might argue that this ruling will have an adverse affect on the homeless, because states which, at present, voluntarily commit themselves to provide emergency shelter to AFDC families may change their regulations. Yet, absent a court order, families may never receive emergency shelter if agencies are not required to comply with their own regulations. The *Koster* court recognized that without court enforcement, the agency's decision to supply shelter becomes fully discretionary.

In sum, the *Koster* and *McCain* analyses should be a successful avenue of litigation for homeless families in jurisdictions where emergency shelter is part of the AFDC program.<sup>162</sup> Adequate shelter is a better remedy than providing money because it is more likely to help the homeless and fulfill statutory purposes.

### C. Implementation of the Right to Shelter

Because state and local governments have not complied with consent decrees and judicial rulings, courts have to remain involved in the shelter problem even after the initial resolution of cases. For example, the *Callahan* decree required constant monitoring and court enforcement even though the standards were quite explicit.<sup>163</sup> The conditions in women's shelters compelled homeless women to invoke the city's

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160. In September 1985, the district court certified a plaintiffs class. *Koster v. Perales*, 108 F.R.D. 46 (E.D.N.Y. 1985). The court divided the class into two subclasses, one encompassing "[n]eedy families with children in Nassau County who are eligible for and in need of emergency shelter" and a second similarly worded subclass encompassing those families that received unsafe shelter. *Id.* at 47.

161. The precedential value of the decision, however, has been questioned in dictum by the opinion's author. See *Canaday v. Koch*, 598 F. Supp. 1139, 1151 (E.D.N.Y. 1984) ("[t]his court's construction of the New York statutes [in *Koster*] does not alter the fact that the issue is as yet undecided by New York courts"). Similarly, another court has questioned whether federal courts should address this issue, given the discretion accorded to the states in connection with the administration of AFDC benefits. See *Canaday v. Koch*, 608 F. Supp. 1460, 1471-72 (S.D.N.Y.) (invoking *Colorado River* abstention), *aff'd sub nom.* *Canaday v. Valentin*, 768 F.2d 501 (2d Cir. 1985).

162. See, e.g., N.J. ADMIN. CODE tit. 10, § 82-510(c) (1984).

163. Collin, *supra* note 50, at 328. The guidelines set forth in the *Callahan* decree are "burdensome for both the courts and the plaintiffs . . . . Even when blatant violations by the city were uncovered, these had to be brought to court again and again." *Id.*

constitutional obligation to provide shelter facilities for women that complied with the *Callahan* standards for men's shelters.<sup>164</sup> The city delayed providing necessary additional shelter when the number of homeless persons increased.<sup>165</sup> Separate court action was necessary to make the city comply with health and safety standards for shelters.<sup>166</sup> In 1982, the city even attempted to lower the court-mandated shelter conditions, but the trial court that heard the subsequent action for an injunction labelled the city's position a "cruel and unacceptable hoax" to play on the homeless.<sup>167</sup>

Similar litigation has been necessary in other jurisdictions to implement judicial remedies. In California, a state welfare statute established that localities have an affirmative obligation to care for the needy,<sup>168</sup> but Los Angeles County's shelter relief program required applicants to produce identification before receiving aid.<sup>169</sup> Since many homeless had lost their identification papers while living on the streets, the requirement precluded them from receiving shelter.<sup>170</sup> In *Eisenhiem v. Board of Supervisors*,<sup>171</sup> the California Superior Court issued a temporary restraining order prohibiting the county from requiring that shelter applicants present identification and ordering the government to provide immediate relief.<sup>172</sup> The parties incorporated these terms into a stipulation of settlement subject to court approval.<sup>173</sup>

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164. *Eldredge v. Koch*, 98 A.D.2d 675, 676, 469 N.Y.S.2d 744, 745 (1983) (homeless women constitutionally entitled to treatment equal to that guaranteed homeless men).

165. See N.Y. Times, Dec. 5, 1985, at A1, col. 4 (describing New York City's failure to prepare sufficient shelter for winter).

166. COALITION FOR THE HOMELESS, REPORT ON LAWSUITS INVOLVING THE COALITION I (1985).

167. *Id.*

168. CAL. WELF. & INST. CODE § 17000 (West 1980). The provision obligates local governments in the following manner:

[E]very city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions.

*Id.*

169. *Litigation Roundup*, *supra* note 111, at 1259. Even if the homeless person had identification, the program typically took longer than a week to provide relief.

*Id.*

170. *Id.*

171. No. C-27953 (Cal. App. Dep't Super. Ct. Dec. 19, 1983), *cited in Litigation Roundup*, *supra* note 111, at 1259.

172. *Litigation Roundup*, *supra* note 111, at 1259.

173. *Id.*; see also L.A. Herald Examiner, June 13, 1984, at A1, col. 5. In *Maticka v. Atlantic City*, No. L8306-84E (N.J. Super. Ct. Nov. 30, 1984), *reported in Case Development*, 18 CLEARINGHOUSE REV. 1341 (1985), the New Jersey Superior Court

Further litigation in Los Angeles addressed the adequacy of government-provided shelter. In *Ross v. Board of Supervisors*,<sup>174</sup> a "consortium of legal services and public interest groups"<sup>175</sup> brought suit on behalf of homeless people who received eight-dollar checks in lieu of shelter.<sup>176</sup> The plaintiffs contended that eight dollars would not secure housing at any of the "welfare hotels" in the county.<sup>177</sup> The trial court enjoined the Board of Supervisors from employing this practice unless a sufficient amount of shelter was actually available for eight dollars.<sup>178</sup> The litigation caused the county to end this practice.<sup>179</sup>

After finding that a statutory right to shelter exists in a particular jurisdiction, a court is well within its power to enforce that right and to oversee its implementation.<sup>180</sup> As long ago as *Marbury v. Madison*,<sup>181</sup> the Supreme Court stated that, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>182</sup> Moreover, "one of the first duties of government is to afford that protection."<sup>183</sup> Although the implementation of shelter programs does not require the broad structural injunctions used in school desegregation and prison cases,<sup>184</sup> courts constantly monitor shelter conditions. This

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stated that the state welfare agency's policy requiring homeless and destitute persons to have a permanent address to qualify for aid was "charitably described as a run around." *Id.* The court remanded the case to the state welfare agency so that municipalities could provide "public assistance" to the homeless, but it failed to address the issue of shelter specifically. *See id.*

174. No. 37,590 (Cal. App. Dep't Super. Ct. filed June 11, 1984), cited in *Litigation Roundup*, *supra* note 111, at 1258.

175. *Id.*

176. *Litigation Roundup*, *supra* note 111, at 1258. In Los Angeles, the welfare department supplies shelter through a "voucher" system. The department refers homeless people to hotels that have agreed to house them on a deferred payment basis from the county. Once the voucher hotels had been filled to capacity, subsequent applicants were given an eight-dollar check with which to purchase shelter. *Id.*

177. *Id.* A study indicated that only seven hotels in Los Angeles County, with a total of 627 rooms, rented rooms for eight dollars per night. Over a three-day period, these hotels had only four vacancies. *Id.*

178. L.A. Times, Aug. 3, 1984, (Metro), at 1, col. 1.

179. *See id.*

180. *See supra* note 87 and accompanying text; *see also* *Los Angeles County v. Frisbie*, 19 Cal. 2d 634, 636, 122 P.2d 526, 529 (1942) ("[i]t is the [mandatory] duty of every county in this state to relieve and support all indigent persons lawfully resident [herein]").

181. 5 U.S. (1 Cranch) 137 (1803).

182. *Id.* at 162.

183. *Marbury*, 5 U.S. (1 Cranch) at 162-63.

184. *See, e.g., Brown v. Board of Education*, 349 U.S. 294 (1955). In *Brown*,

continuous stream of enforcement actions illustrates the powerlessness of the homeless populations. Even after entering into consent decrees to supply shelter pursuant to a statute, many states and cities still fail to provide decent, habitable shelter.<sup>185</sup> This official hostility, however, is not the only obstacle to housing the homeless.

In some communities, strident protest by homeowners has accompanied the placement of shelters,<sup>186</sup> while other neighborhoods have brought legal action to enjoin the operation of shelters.<sup>187</sup> In *BAM Historic District Association v. Koch*,<sup>188</sup> a neighborhood association sought to enjoin New York City from establishing a shelter. The association argued that the city deprived homeowners of property and liberty interests by failing to give notice of the proposed opening

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the Supreme Court ordered the district courts to monitor desegregation until its earlier decision prohibiting racial segregation in public schools had been fully implemented:

[T]he courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

*Id.* at 300-01.

185. See *supra* notes 163-67 and accompanying text.

186. In the Anacostia section of Washington, D.C., residents protested vehemently when the federal government opened a shelter without consulting the community. Wash. Post, Oct. 1, 1985, at D1, col. 2. They later held a rally and presented petitions at the White House. Wash. Post, Nov. 5, 1985, at C3, col. 1.

Community protest against implementation of shelter programs resembles resistance to court-ordered desegregation. The analogy to desegregation is not perfect, but the similarities merit attention. Striking among these is the hostility of communities toward the establishment of homeless shelters in their neighborhoods. Fear of declining property values, rather than prejudice against homeless people, allegedly produces much of this antagonism. Nonetheless, the same arguments were made to justify restrictive covenants that kept blacks from living in white neighborhoods. See *Barrows v. Jackson*, 346 U.S. 249 (1953). Like the attitudes of many whites toward blacks from the 1950's to 1970's, current views of the homeless reflect stereotypical notions.

187. *Litigation Roundup*, *supra* note 111, at 1262. Municipalities often invoke zoning ordinances to prevent the operation of shelters.

188. 723 F.2d 233 (2d Cir. 1983).

of the shelter in the community.<sup>189</sup> Although the association framed its arguments in due process terms, the Second Circuit recognized that the homeowners' underlying concern was declining property values resulting from the establishment of the shelter.<sup>190</sup> The court held that there was no taking of the plaintiff's property and that the community had no colorable liberty interest in preventing the establishment of a shelter.<sup>191</sup> The circuit court affirmed the district court's denial of the injunction because the neighborhood produced no evidence demonstrating that the shelter would detract from the community. Moreover, the court reasoned that the closing of the facility would be detrimental to the public interest, given the need for shelters for the homeless.<sup>192</sup>

One New Jersey community made a similar attempt to force the closing of a church-run shelter by enforcing a local zoning ordinance that restricted the use of a lot to "other uses customarily incident to the principal use."<sup>193</sup> In *St. John's Evangelical Lutheran Church v. City of Hoboken*, the New Jersey Superior Court ruled that enforcement of the ordinance would conflict with the church's first amendment exercise of religion; therefore, the ordinance had to yield.<sup>194</sup> The first amendment was implicated because housing the homeless was a traditional church function.<sup>195</sup> In addition, the court emphasized the harm that would result if the shelter was closed. Since the local governments relied on the churches to shelter the homeless, the public interest mandated that the churches be permitted to continue this practice.<sup>196</sup>

Although these cases suggest different rationales for upholding the placement of shelters, the magnitude of the social problem of homelessness has been a recurring theme in the courts' opinions. *BAM Historic District* and *St. John's* emphasized that homelessness was

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189. *Id.* at 235.

190. *Id.* at 237 (governmental action resulting in decline of property value does not "deprive a person of property within the meaning of the [f]ourteenth [a]mendment").

191. *Id.*

192. *Id.* at 236. The association also alleged that the city deliberately located shelters in neighborhoods that had a disproportionate number of minorities, thereby denying these communities equal protection. *Id.* at 235. The circuit court did not reach this issue, see *id.* at 236, and no decision on the merits of this claim has been reported.

193. *St. John's Evangelical Lutheran Church v. City of Hoboken*, 195 N.J. Super. 414, 418, 479 A.2d 935, 937 (Law Div. 1983).

194. *Id.* at 422, 479 A.2d at 939.

195. *Id.* at 421, 479 A.2d at 939.

196. *Id.*

too serious a problem to allow other factors to interfere with innovative local approaches aimed at addressing homelessness. Courts will do much to protect the rights of the homeless, and this judicial action extends to derivative rights such as protecting shelters against restrictive zoning ordinances which discriminate against the homeless.<sup>197</sup>

Because of the willingness of some courts to fill the void created by political inaction or ineffectiveness, the homeless now have an avenue through which to obtain shelter. Under the circumstances, judicial intervention is appropriate. As the *Seide* court noted, "[d]espite the intricacy of the social issues involved . . . it is better to have a court resolution than none at all."<sup>198</sup> Although the conventional wisdom is that the judiciary lacks competence to decide "social" issues, this view is offset by the traditional protection courts provide to those lacking political power.<sup>199</sup> Where a jurisdiction has a statute or constitutional provision concerning care for the needy, courts have a duty to interpret those statutes.<sup>200</sup> In this situation, courts should not refrain from deciding "social" questions such as the right to shelter. This judicial intervention is limited in scope; it does not require a court to develop rights out of whole cloth.

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197. Cf. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). In *Cleburne*, the Supreme Court struck down a zoning requirement that rested on an "irrational prejudice" against the mentally ill who lived in the facility at issue. *Id.* at 450. Refusing to hold that the mentally ill constitute a suspect class, the Court nonetheless found that the zoning requirement failed the rational basis test because it was based on prejudice. *Id.* Because so few laws are invalidated for violating the rationality test, the Court appears to have applied heightened scrutiny in *Cleburne*, without labelling it as such.

Decisions such as *BAM Historic District* and *St. John's* serve an additional societal interest. The establishment of small community shelters promotes community interests by removing the homeless from neighborhood streets. See *Federal Response*, *supra* note 1, at 711 (testimony of Robert Hayes, counsel, Coalition for the Homeless); see also Schonfeld, "Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded, 16 FORDHAM URB. L.J. 1 (1988). This is in the community's interest because many people find the presence of homeless people aesthetically or emotionally displeasing.

The establishment of community shelters may foster additional societal interests. Creation of small shelters in neighborhoods, as opposed to huge shelters in downtown areas, may increase interaction between the homeless and local residents. Through this interaction, the misconception and stereotypes about the homeless may break down. See ELY, *supra* note 44, at 157-61. In this way, communities can address part of the *Frontiero* concern with discrimination and stereotyping. Moreover, as local constituents become increasingly knowledgeable about the homeless, legislators may be more likely to heed the call for aid to the homeless.

198. *Seide v. Prevost*, 536 F. Supp. 1121 (S.D.N.Y. 1982).

199. See *supra* notes 60-83 and accompanying text.

200. See *supra* notes 84-88 and accompanying text.

Once a right to shelter exists, continuing enforcement of that right is justified through the court's equitable powers.<sup>201</sup> The homeless are particularly vulnerable; for a court to respond to the needs of the homeless in equity is consistent with the historical use of the chancellor's power, which extended to the protection of minorities and other vulnerable persons.<sup>202</sup> In short, courts are the proper institution to interpret individual rights and to ensure that those rights are protected.

### V. Recommendations

Litigation on behalf of the homeless has been essential in securing a right to shelter; however, this approach has limitations. Not all jurisdictions have the requisite statutory language or appropriate city ordinances providing for care to the needy, and courts in jurisdictions with such statutes may interpret this language to be permissive rather than obligatory.<sup>203</sup> More importantly, litigation can only achieve lim-

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201. See *supra* notes 89-91 and accompanying text.

202. Equity jurisdiction was a delegation of *parens patriae* power to the chancellor to intervene in cases in which people could not protect themselves. United States courts inherited this jurisdiction. See *In re Connor*, 254 Mo. 65, 162 S.W. 252 (1913). Equity remains "alert to afford protection to the infants and to the aged, to the mentally incompetent, to the victims of deception and to the rights of minorities." *Zaveski v. Kish*, 138 N.J. Eq. 61, 62, 46 A.2d 665, 665 (1946). Extending equity power to protect the homeless by way of injunctive relief for shelter comports with traditional notions of equity because the homeless are among the most vulnerable class of people in society.

203. Washington, D.C. now has a statute that explicitly provides for overnight shelter. See D.C. CODE ANN. §§ 3-601 to -607 (Supp. 1987). The District of Columbia Right to Overnight Shelter Initiative of 1984 (Initiative 17) received 72% of the votes in the 1984 election. See *Wash. Post*, Nov. 7, 1984, at A41, col. 2. The ballot initiative established that "all persons . . . shall have the right to adequate overnight shelter." D.C. CODE ANN. § 3-601 (Supp. 1987). Adequate shelter was defined as "that which to a reasonable degree maintains, protects and supports human health, is accessible, safe and sanitary, and has an atmosphere of reasonable dignity." *Id.*

Although the electorate approved Initiative 17, the District of Columbia successfully challenged the law as an improper appropriations measure. See *Wash. Post*, Dec. 28, 1985, at A1, col. 5. A trial court's ruling in favor of the city, however, was reversed on appeal. *Board of Elections & Ethics v. District of Columbia*, 520 A.2d 671 (D.C. 1986). This episode represents an additional example of government's avoiding responsibility for the homeless. In a 1979 policy statement, District of Columbia Mayor Marion Barry, Jr. had stated that "shelter is a basic human right" and that "anyone who requests, or is in apparent need of shelter is entitled to it." *Williams v. Barry*, 490 F. Supp. 941, 942-43 (D.D.C. 1980), *aff'd in part, vacated in part*, 708 F.2d 789 (D.C. Cir. 1983). Despite this earlier statement, Barry allowed the city to challenge Initiative 17. Evidently, the Mayor does not want this "right"



ited results. Although essential, a right to emergency shelter is not a sufficient solution to the problem of homelessness. Litigation can treat the symptoms of homelessness; legislation must address the causes of the problem.

### A. The Limitations of Litigation

In jurisdictions lacking statutory language establishing a right to shelter, the homeless are unlikely to secure shelter through the courts. An early litigation effort proposed that, once provided, government shelter became an entitlement that could not be terminated without due process protection.<sup>204</sup> This approach is a weak strategy because it requires that shelter be provided by the government before any constitutional rights attach. Moreover, due process does not require the government to continue to provide shelter; the beneficiary merely receives some type of procedural protection before the government eliminates the benefit.<sup>205</sup>

Homeless plaintiffs raised the entitlement-to-shelter argument in *Williams v. Barry*, which involved the District of Columbia's intention to close a shelter that it had voluntarily opened and maintained.<sup>206</sup> The federal district court stated that although the city government had the authority to eliminate the shelter's funding,<sup>207</sup> the city had to provide procedural safeguards before doing so because the city's previous actions had "fostered [an] expectation of continued shelter services."<sup>208</sup>

Among the city's actions deemed significant by the court was a two-and-one-half year old policy of sheltering the homeless. The mayor had articulated this policy in his official policy statement, and created an official Commission on Homelessness.<sup>209</sup> In addition, the city published notices of the opening of shelters.<sup>210</sup> Taken in sum,

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to bind government.

At present, government aid remains discretionary in many places, but other ballot initiatives have been undertaken. See U.S.A. Today, Feb. 13, 1985, at 2A, col. 1 (describing potential ballot initiative in St. Louis).

204. *Williams v. Barry*, 490 F. Supp. 941 (D.D.C. 1980), *aff'd in part, vacated in part*, 708 F.2d 789 (D.C. Cir. 1983).

205. *Id.* at 947 ("[c]ity of Washington . . . enjoys an unquestioned right to cut off . . . funds" to the homeless).

206. *Id.* at 943.

207. *Id.* at 944 ("[w]hatever the humanitarian or emotional considerations, the government assumes no obligation to house or feed indigent people").

208. *Id.* at 947.

209. *Id.* at 946.

210. *Id.*

these actions constituted "the consistent, positive action . . . necessary to find an entitlement in the absence of a statute."<sup>211</sup>

The Supreme Court adopted the concept of entitlement to public benefits in *Goldberg v. Kelly*,<sup>212</sup> where it held that the procedural due process protection of a hearing was required before the benefits of certain welfare recipients could be terminated because the benefits were essential to obtain survival needs.<sup>213</sup> The *Williams* court suggested that the rationale of *Goldberg* was even more applicable to the property interest in shelter because *Goldberg* merely dealt with the "means" used to obtain essential needs, while *Williams* involved shelter, one of those essential needs. That is, homeless men in *Williams* who relied on the shelter would be deprived of an essential need, not merely the means to obtain it, if the shelter closed.<sup>214</sup>

Despite an extensive discussion of entitlements, the initial opinion in *Williams* did not consider the type of procedural protections that were necessary.<sup>215</sup> In a later memorandum opinion, the district court determined that due process would be satisfied by "particularized notice detailing the reasons for the proposed closing and a reasonable opportunity to prepare and submit written responses to the proposal."<sup>216</sup> The shelter residents did not receive an oral hearing or a written explanation for the closure because the case did not "involve individual adjudicatory determinations, but instead involve[d] a more broad-based legislative policy inquiry."<sup>217</sup>

Given the district court's earlier emphasis on the great reliance that the homeless placed on government shelter, one would have expected the court to require an oral hearing before allowing the government to close the facility. However, judicial enforcement of a right, which lacks a statutory or constitutional basis and which would require the government to allocate resources, raises separation of powers questions. Although courts should enforce rights established

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211. *Id.* at 947. The theory of entitlements in public benefits was originally proposed in Reich, *The New Property*, 73 YALE L. J. 733 (1964).

212. 397 U.S. 254 (1970).

213. *Id.* at 264-65.

214. *Williams v. Barry*, 490 F. Supp. 941, 945-46 (D.D.C. 1980), *aff'd in part, vacated in part*, 708 F.2d 789 (D.C. Cir. 1983).

215. The court stated, "[t]he necessary procedures in the instant case need be decided, if necessary, after a full briefing and hearing on the merits. It is nonetheless clear that some form of pre-termination notice and hearing should be provided." *Id.* at 947 n.2 (citing *Goldberg*, 397 U.S. at 270).

216. *Williams v. Barry*, 708 F.2d 789, 790-91 (D.C. Cir. 1983) (citing unpublished memorandum opinion No. 80-1104 (D.D.C. June 8, 1982)) [hereinafter *Williams II*].

217. *Id.*

by statute even if such action will require the legislature to spend additional funds, rights that do not have a statutory basis produce greater tension between legislative and adjudicative functions. This causes many courts to abstain from a policy-making role.

When the district court ruling was appealed in *Williams*, the Court of Appeals for the District of Columbia held that, because of the "legislative nature of the proposed termination of services," the homeless plaintiffs had received sufficient procedural protection.<sup>218</sup> This is consistent with *Goldberg* because the two cases involve different types of government decisions. In *Goldberg*, the administrative agency determined that certain individuals were no longer eligible for AFDC benefits.<sup>219</sup> Since this decision was similar to an individual adjudication, one would expect an oral hearing to be provided. *Williams* did not involve a determination that some of the homeless individuals would be denied shelter. Rather, the government made a "legislative" decision to close the shelter altogether.<sup>220</sup>

The court of appeals' opinion in *Williams* bodes ill for the entitlement-to-shelter theory. In dicta, the court stated that it doubted that the homeless men's property interest at issue was an entitlement<sup>221</sup> requiring due process protection. Although the homeless rely greatly on government shelter, absent a statute, courts hesitate to infringe on the legislative prerogative to determine social policy and allocate resources.<sup>222</sup> Arguably, such deference is misplaced in entitlement cases where the political branches have established a policy of shelter

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218. *Williams II*, 708 F.2d at 791.

219. *Goldberg*, 397 U.S. at 256.

220. *Williams*, 490 F. Supp. at 943.

221. Another case in the District of Columbia stated that homeless families who resided at a city operated shelter had "a colorable claim to an entitlement to some minimal form of shelter" that could not be terminated without procedural protections. *Caton v. Barry*, 500 F. Supp. 45, 48 (D.D.C. 1980). However, *Caton* reached judgment before *Williams II* and the *Caton* court explicitly relied on the district court's initial ruling in *Williams. Id.*

Even though the *Caton* court concluded that the plaintiff families might have a property interest in continued shelter, this entitlement did not "encompass the right to any specific level of services . . . or the right to be lodged in a particular neighborhood." *Id.* at 53. Consequently, the city was permitted to transfer the homeless families to another shelter without furnishing a hearing. *Id.*

222. A concurring opinion rejected the entitlement claim:

No one has plausibly maintained that there is a constitutional or other legal right to city provided shelter. There being no substantive constraints on the decision whether to close the shelters, that decision is a wholly political one and under no circumstances that I can imagine can there be a constitutional right to have that political judgment set about and circumscribed by procedural requirements.

*Williams II*, 708 F.2d at 793 (Bork, J., concurring).

through a "mutually explicit understanding."<sup>223</sup> Courts can look to the evidence surrounding the transaction as a guide to determine: (1) if a policy has been established; and (2) whether a hearing should be required because of the reliance interest of the beneficiaries. This does not necessarily involve the judiciary in an allocation of resources or a determination of social policy because the right to a hearing does not guarantee a right to shelter.<sup>224</sup> Moreover, an oral hearing provides an additional benefit by affording the homeless an opportunity to express their views in a public forum. Because the courts provide the only genuine opportunity the homeless have to influence the policies that affect their lives,<sup>225</sup> the judiciary should be receptive to requests for entitlement hearings.

Because the entitlement theory is unlikely to prevail despite the reliance the homeless place on shelter, the most effective method for obtaining shelter remains the statutory provisions regarding care for the needy. The limits of this approach in jurisdictions without a statutory right to shelter, however, accentuates the need for legislation to address homelessness.

## B. The Need for Legislation

Major federal legislation is necessary to address the causes of homelessness because the problem is a national one.<sup>226</sup> In the absence of federal leadership, some states and localities have taken the legislative initiative,<sup>227</sup> but they simply do not have the financial capabilities to solve the problem.<sup>228</sup>

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223. *Williams*, 490 F. Supp. at 947 (quoting *Perry v. Sinderman*, 408 U.S. 593, 601 (1972)).

224. Compare *Goldberg v. Kelley*, 397 U.S. 254 (1970) (right to hearing before termination of welfare benefits) with *Williams v. Barry*, 490 F. Supp. 941 (D.D.C. 1980), *aff'd in part, vacated in part*, 708 F.2d 789 (D.C. Cir. 1983) (termination of shelter subject to procedural due process).

225. At the time of *Williams*, the homeless were not even allowed to vote in Washington, D.C. See *Silas*, *supra* note 50, at 37.

226. H.R. REP. NO. 47, *supra* note 1, at 26 ("[b]ecause homelessness is a national problem, the committee believes that the [f]ederal [g]overnment must take the leading role in providing emergency aid to the homeless, and in seeking methods to prevent such mass poverty").

227. See, e.g., N.Y. SOC. SERV. LAW §§ 41-44 (McKinney Supp. 1988); N.J. STAT. ANN. §§ 52:27D-280 to -287 (West Supp. 1985); CAL. HEALTH & SAFETY CODE §§ 50000-500003.3 (West Supp. 1986).

228. H.R. REP. NO. 47, *supra* note 1, at 26 ("[t]he remedies for homelessness are clearly beyond the capacity of any single local government, community or [s]tate").

### 1. State and Municipal Responses

Some states have taken greater steps than others toward meeting the needs of the homeless. For example, the Massachusetts Legislature has embarked on a policy of sheltering the homeless without being ordered to do so by the judiciary.<sup>229</sup> More importantly, some states have passed legislation aimed at preventing homelessness. New York has provided financial assistance to build and rehabilitate long-term housing for the homeless,<sup>230</sup> and New Jersey has allocated funds for temporary rental assistance to the homeless and those facing eviction.<sup>231</sup> This legislation looks beyond emergency shelter attempts to eliminate homelessness as a major social problem. Unfortunately, states do not have the resources to undertake independent solutions, and when one state enacts progressive legislation, a danger exists that homeless people will migrate to that state to receive aid.<sup>232</sup>

As the homeless crisis has mushroomed, some municipal governments have responded by adopting outreach programs to transport the homeless to shelters and by enacting controversial emergency hospitalization policies under which homeless people are involuntarily removed from the streets for psychiatric evaluations.<sup>233</sup> Although these programs provide immediate shelter, they are not long-term solutions to homelessness. Moreover, the emergency hospitalization policies bring the treatment needs of the mentally ill homeless into conflict with their interests in personal liberty.<sup>234</sup>

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229. Alter, *Homelessness in America*, NEWSWEEK, Jan. 2, 1984, at 20, 26; see also MASS. GEN. LAWS ANN. ch. 117, § 5A (West 1985). Since 1983, Massachusetts spent \$903 million on its housing programs. Matthews, *What Can Be Done?*, NEWSWEEK, Mar. 21, 1988, at 57-58 [hereinafter *What Can Be Done?*].

230. N.Y. SOC. SERV. LAW § 43 (McKinney Supp. 1988).

231. N.J. STAT. ANN. § 52:27D-286 (West 1986).

232. Werner, *supra* note 51, at 15.

233. New York City's "cold weather" policy permits the police to drive the homeless to shelters on cold nights. The city's "Project Help" sends psychiatrists and social workers into the streets to monitor the health of the homeless. See N.Y. Times, Nov. 15, 1985, at B5, col. 5. The newest aspect of the city's policy for treating the homeless is an expansion of "Project Help." See N.Y. Times, Sept. 14, 1987, at B1, col. 1. The new plan, which began in October 1987, provides that "homeless people 'in danger of serious harm within the reasonably foreseeable future' will be taken to Bellevue Hospital for a 15-day examination." N.Y. Times, Aug. 29, 1987, at A1, col. 1.

234. See N.Y. Times, Aug. 29, 1987, at A1, col. 3. New York City Mayor Edward I. Koch's policy of involuntary hospitalization was "criticized by civil libertarians" who feared the New York policy will allow commitment of people "against their will." *Id.*; see also N.Y. Times, Dec. 7, 1985, at 29, col. 1. State action taken to protect an endangered or incompetent individual is the essence of civil commitment. Two rationales justify such action: (1) the police power of the

Like many jurisdictions, New York has a statute that authorizes extra-judicial confinement when a police officer believes a mentally ill person may harm himself or others.<sup>235</sup> Based on this statute, New York City developed its "cold weather" policy<sup>236</sup> which allows the police to round up homeless people and transport them to hospitals for evaluation. For the original policy to take effect, the temperature had to fall below five degrees Fahrenheit.<sup>237</sup> The articulated rationale for the policy was that the cold "automatically creates the necessary presumption that . . . that person is in danger of dying."<sup>238</sup> In anticipation of the winter of 1985-86, the threshold temperature was raised to thirty-two degrees, allowing the police to intervene earlier.<sup>239</sup>

The most recent of the city's policies to remove Manhattan's homeless from the streets began in late October 1987.<sup>240</sup> The plan

state to prevent harm to others, and (2) the *parens patriae* power of the state to safeguard incompetents in general. See *O'Connor v. Donaldson*, 493 F.2d 507, 520 (5th Cir. 1974), *vacated and remanded*, 422 U.S. 563 (1975).

New York City's policies have received much criticism. The Coalition for the Homeless stated that the policy would be unnecessary if shelters were safe and humane, and the New York Civil Liberties Union believes the policy subverts state law. *N.Y. Times*, Nov. 14, 1985, at B11, col. 2.

235. N.Y. MENTAL HYG. LAW § 9.41 (Consol. 1979). Washington, D.C., has a similar statute. D.C. CODE ANN. § 21-521 (1985). A police officer can hospitalize a potentially dangerous person for diagnosis and emergency treatment without providing the procedural safeguards that accompany civil commitment. *Id.*

236. The policy was first adopted in Philadelphia. *N.Y. Times*, Jan. 23, 1985, at B8, col. 1.

237. *Id.* at A1, col. 2. The "effective temperature" incorporated the windchill factor. *Id.*

238. *Id.* (statement of Mayor Koch). On the first night of the policy's operation, two people were hospitalized. One, a middle-aged alcoholic, was released the next day. The other was given medical care. *N.Y. Times*, Jan. 24, 1985, at B3, col. 6. Reports from one night in 1985 indicated that fifty people were hospitalized. See *Wash. Post*, Dec. 28, 1985, at A6, cols. 3-4.

239. *N.Y. Times*, Nov. 14, 1985, at A1, col. 3. The city policy interprets § 9.41 broadly. The statute allows a police officer to "take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to himself or others." N.Y. MENTAL HYG. LAW § 9.41 (Consol. 1979). In effect, city officials decided that the statute embraces self-neglect. *N.Y. Times*, Nov. 14, 1985, at B11, col. 2. This conclusion is arguable, especially given the statute's description of the conduct that police must observe before they can intervene. The statute requires that the person make "threats of or attempts at suicide or serious bodily harm" or engage in "other conduct demonstrating that he is dangerous to himself." N.Y. MENTAL HYG. LAW § 9.41 (Consol. 1979). For the current detentions to satisfy the statutory requirements, street-dwelling homelessness during cold weather must constitute "conduct" manifesting danger to oneself. In light of allegations that shelters are unsafe, see *N.Y. Times*, Nov. 14, 1985, at B11, col. 1.; see also *N.Y. Times*, July 18, 1985, at A1, col. 2, the decision of many homeless to sleep in the streets may be a rational choice between two evils.

240. *N.Y. Times*, Oct. 29, 1987, at A1, col. 1.

provides for mentally ill homeless people "in danger of serious harm" to be "taken to Bellevue Hospital for a [fifteen]-day examination."<sup>241</sup> Critics of the program have focused their attention on the due process aspects of involuntary commitment.<sup>242</sup> The case of Joyce Brown<sup>243</sup> illustrates the tension between providing treatment for the homeless and respecting their rights as individuals.<sup>244</sup> Joyce Brown was the first person picked up and involuntarily hospitalized under the new city program.<sup>245</sup> She had "lived for nearly a year on the sidewalk in front of a hot-air vent on Second Avenue near [Sixty-fifth] Street."<sup>246</sup> On behalf of Ms. Brown, attorneys from the New York Civil Liberties Union immediately challenged the constitutionality of the program's involuntary commitment provision.<sup>247</sup> The trial court ordered Ms. Brown's release. On appeal, however, the ruling was overturned.<sup>248</sup>

In the abstract, the city's "cold weather" policy is justifiable in that it attempts to treat people and prevent deaths such as the one

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241. N.Y. Times, Aug. 29, 1987, at A1, col. 1. The new program provides for "four vans, each with a psychiatrist, a social worker and a nurse" to travel around the city and "remove severely mentally ill homeless people from Manhattan streets [and] parks." N.Y. Times., Oct. 29, 1987, at A1, col. 1. The team brings these individuals to the emergency room at Bellevue Hospital where "they are advised of their legal rights," offered legal assistance and examined by the medical staff. N.Y. Times, Sept. 14, 1987, at B1, col. 2. The staff makes "a quick medical assessment," and then bathes and delouses the patient. *Id.* The patient's "psychiatric needs are evaluated." *Id.* "If a patient requires hospitalization, the staff first seeks to convince the patient to be admitted voluntarily. . . . If the patient refuses, the emergency room doctor may . . . overrule the decision" and hold the patient for 48 hours. *Id.* After committing the patient the staff moves him "from the Bellevue psychiatric emergency room to [a] new ward where special teams of social workers and counsellors [will] find [a place] for [him] in [a] state [program] within an average of three weeks." *Id.*; see also N.Y. Times, Oct. 29, 1987, at A1, col. 1.

242. N.Y. Times, Oct. 29, 1987, at A1, col. 1. "Norman Siegel, executive director of the New York Civil Liberties Union said he was beginning . . . to meet with the homeless people at Grand Central Terminal, Pennsylvania Station and the Port Authority Bus Terminal to inform [them] of their rights." *Id.* at B9, col. 2; see also N.Y. Times, Aug. 29, 1987, at A1, col. 3.

243. Ms. Brown uses two aliases: Ann Smith and Billy Boggs. N.Y. Times, Nov. 14, 1987, at B29, col. 5.

244. For a discussion of the Joyce Brown controversy, see generally N.Y. Times, Nov. 14, 1987, at B29, col. 5; N.Y. Times, Nov. 14, 1987, at B30, col. 1; N.Y. Times, Nov. 13, 1987, at A1, col. 1; N.Y. Times, Nov. 3, 1987, at B2, col. 1.

245. N.Y. Times, Oct. 29, 1987, at A1, col. 1.

246. N.Y. Times, Nov. 13, 1987, at A1, col. 1. City officials reported that Ms. Brown "sometimes harangued passersby, burned and tore up money, and soiled herself." N.Y. Times, Nov. 14, 1987, at 30, col. 1.

247. N.Y. Times, Nov. 13, 1987, at A1, col. 1.

248. N.Y. Times, Nov. 14, 1987, at B29, col. 1. Ms. Brown subsequently appealed, but because she had been released her appeal was rendered moot. See *Boggs v. N.Y.C. Health & Hosps. Corp.*, 70 N.Y.2d 972, 520 N.E.2d 515, 525 N.Y.S.2d 796 (1988).

that befell an alley-dweller in 1982. In that case, a woman had lived in a cardboard box and refused assistance. She eventually died of hypothermia before the city could secure a court order to remove her to a shelter.<sup>249</sup> Such episodes heighten both public and government concern for the homeless and lead to the development of emergency proposals such as the one applied to Ms. Brown, which allows the government to intervene earlier.<sup>250</sup>

Nevertheless, New York City's current policies are clearly problematic. Nothing in the policies guarantees that the city will not round up the homeless repeatedly for evaluation, thereby depriving them of due process.<sup>251</sup> In addition, this policy will not solve the problems of the homeless mentally ill. Periodic hospitalization cannot provide the necessary long-term care that many of the homeless mentally ill require.<sup>252</sup> Moreover, enforcement of these policies may result in harassment of the homeless<sup>253</sup> just as anti-vagrancy statutes were used in the past to clear the streets of "undesirables."<sup>254</sup>

Finally, despite articulated good intentions, the underlying motive of the city's policies may be to divert attention from the issues.<sup>255</sup> Studies suggest that one-third of the homeless are mentally ill,<sup>256</sup> but

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249. N.Y. Times, Dec. 8, 1985, at E6, col. 3.

250. After two men froze to death in Washington, D.C., in 1985, residents urged Mayor Barry to adopt the New York policy. Wash. Post, Dec. 28, 1985, at A1, col. 5. Barry opposed forcible removal of the homeless. Instead, officials attempted to persuade the homeless to enter shelters. Wash. Post, Jan. 4, 1986, at A8, col. 4.

251. U.S. CONST. amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty or property without due process of law"). The city policy provides for a lawyer and a hearing before a judge whenever a detained homeless person is admitted to the hospital. See N.Y. Times, Nov. 14, 1985, at B11, col. 5.

252. See N.Y. Times, Nov. 22, 1985, at B4, col. 4.

253. N.Y. Times, Nov. 14, 1985, at B11, col. 5. During the first week of the 32 degree policy in 1985, a 59-year-old woman was one of 13 people hospitalized. She was handcuffed and taken from the neighborhood in which she had lived for two years. Having already survived two winters in the streets, she was released the next day. *Id.*

254. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-62 (1972). Concern about the potential for discriminatory treatment is not merely a hypothetical consideration. In 1981, Mayor Koch proposed a policy to detain the homeless for 72 hours so that they could be fed, bathed and given medication. N.Y. Times, Mar. 27, 1981, at B3, col. 3. While the ultimate goals of this policy might be beneficial, the forcible detention of the homeless, absent any exigent circumstances, clearly violates their due process rights.

255. N.Y. Times, Dec. 7, 1985, at B31, col. 2.

256. *Federal Response*, *supra* note 1, at 424, 638 (report by Gov. Cuomo). In New York City, one-third of the shelter residents are reportedly mentally ill, and the majority of these are former psychiatric patients. N.Y. Times, Nov. 14, 1985, at B10, col. 5. *But see* H.R. REP. No. 47, *supra* note 1, at 4 (50 percent of homeless may suffer from mental illness).



New York City's policy only addresses the small percentage of this subgroup of the homeless who refuse to seek shelter. By focusing on the mentally ill, the city perpetuates the stereotype that the homeless are insane, while creating the perception that it is addressing the problem. By categorizing the homeless as insane, no fundamental economic dislocations need to be examined, and society can salve its conscience by attributing the problem to pathology rather than poverty.<sup>257</sup> Furthermore, there may be an ulterior motive behind New York City's hospitalization policy. The New York City policy may shift responsibility for some of the homeless to the state. In September 1985, New York State agreed to take psychiatric patients into state hospitals when city hospitals were full.<sup>258</sup> This agreement, coupled with the city policy, could result in mentally ill homeless persons returning to state institutions. As long as the city's policy is used on an emergency basis and due process protections accompany long-term confinement,<sup>259</sup> some of the chronic mentally ill homeless might benefit from treatment. Yet, even within the confines of this policy there are problems because current hospital facilities are insufficient to provide for the homeless mentally ill,<sup>260</sup> and community care, which is usually more appropriate and less expensive than hospitalization, is not a feature of the policy.<sup>261</sup>

Clearly, the city's current policies are not a solution to homelessness or to the problems of the mentally ill homeless.<sup>262</sup> Confining the homeless for periodic psychiatric treatment and then releasing them back to the streets does not alleviate the causes of homelessness. If the city improved the condition of shelters instead, many more people would utilize them.<sup>263</sup> For some of those currently on the streets,

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257. *Federal Response*, *supra* note 1, at 424.

258. N.Y. Times, Nov. 22, 1985, at B4, col. 4.

259. The New York Mental Hygiene Law provides for a hearing if requested by the patient admitted for immediate care. N.Y. MENTAL HYG. LAW § 9.39(a) (McKinney Supp. 1986). Although Bellevue can only hold the patient for fifteen days, greater process ought to accompany this confinement.

260. *See supra* note 56 and accompanying text.

261. *See Federal Response*, *supra* note 1, at 227 (Nassau Action Coalition Report). Treatment at a state institution in New York costs \$44,500 annually per patient. A Community Mental Health Center (CMHC) with clinical, rehabilitative and medical services costs \$27,000 per patient. A patient who does not receive community support goes through the hospital system an average of four times a year. *Id.*

262. N.Y. Times, Nov. 22, 1985, at B4, col. 4. The director of the psychiatric emergency services at Bellevue Hospital stated that because of the shortage of care facilities, the emergency hospitalization policy "will not go very far to meet long-term needs of the homeless mentally ill." *Id.*

263. N.Y. Times, Nov. 10, 1985, at 52, col. 1; N.Y. Times, Nov. 16, 1985, at 29, col. 1.

long-term residential care is necessary. Focusing on the few mentally ill people who refuse shelter diverts attention from the inadequacy of the political response to homelessness, and ignores the need for government to address the economic causes of the crisis. Aid for the mentally ill homeless must be a component of a more extensive policy aimed at alleviating homelessness generally.

## 2. Federal Response

### a. Background

Even though homelessness is a national problem,<sup>264</sup> the federal government has only recently enacted legislation aimed at addressing the causes of this social crisis.<sup>265</sup> Prior to June 1987, the federal government had done little to aid the homeless.<sup>266</sup> Until 1987, the only national program created for the sole purpose of assisting the homeless was the Federal Emergency Management Agency's Emergency Food and Shelter Program (FEMA).<sup>267</sup> One of the major problems with FEMA was that it operated on a temporary basis and was dependent on yearly congressional budgeting.<sup>268</sup> More importantly, the level of funding for the program was inadequate. From fiscal years 1983 through 1985, Congress appropriated \$210 million for the FEMA emergency food and shelter services.<sup>269</sup> Unfortunately, "funding of \$70 million a year falls drastically short" of what is necessary to address homelessness.<sup>270</sup> As a point of comparison, New York

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264. H.R. REP. NO. 47, *supra* note 1, at 26.

265. See Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified at 42 U.S.C.A. §§ 11301-11505) [hereinafter McKinney Act].

266. H.R. REP. NO. 47, *supra* note 1, at 14 ("[t]he few federal programs available to aid the homeless have been disappointing, or have simply been too small to have a significant impact in alleviating the plight of the homeless").

267. *Id.* at 20, 29. The other federal program created solely to help the homeless, the Federal Task Force on Homelessness of the Department of Health and Human Services (HHS Task Force) has had little impact. *Id.* In 1984, the HHS Task Force had no formal budget. In 1985, the program allocated 84% of its \$325,000 budget estimate to staff salaries and 16% for administrative costs. In other words, the budget failed to appropriate any money for direct assistance to the homeless. *Id.* at 15.

The United States Code also permits the military to make its installations available as shelters. See 10 U.S.C.A. § 2546(a)(1) (West Supp. 1988). This program, however, has produced little aid. H.R. REP. NO. 47, *supra* note 1, at 29-30.

268. H.R. REP. NO. 47, *supra* note 1, at 20.

269. *Id.* at 19. FEMA distributed funds to states and municipalities as well as providers of private shelter. *Id.* These entities could have used the funds only to purchase food and to supplement services or existing programs. *Id.*

270. *Id.*

City targeted \$217 million of its fiscal year 1985 budget to homeless services, more than three times the average federal spending nationwide.<sup>271</sup>

Other than FEMA, the federal government relied on the medical, supplemental and compensatory entitlement programs of the Social Security Administration (SSA) to assist the homeless.<sup>272</sup> These entitlement programs have been insufficient.<sup>273</sup> Many homeless individuals are ineligible for various programs,<sup>274</sup> and those who receive entitlements have difficulty retaining them.<sup>275</sup> In short, "[t]he existing [f]ederal programs which could provide assistance have not reached the majority of homeless Americans."<sup>276</sup>

During the first seven years of this decade, as the number of homeless persons was growing, the Reagan Administration failed to respond to the crisis. The Administration's attitude toward the problem was that "[t]he primary responsibility in helping the homeless lies with local government and private and/or philanthropic organizations. . . . This approach reflects President Reagan's emphasis on community initiative and responsibility in partnership with federal technical and material assistance."<sup>277</sup> The Reagan Administration's "approach" ignores the reality of the problem. Because homelessness is a national problem, "the federal government must take the leading role in providing emergency aid to the homeless, and in seeking methods to prevent such mass poverty in the wealthiest country in the world."<sup>278</sup> State and local governments do not have the capacity

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271. *Id.*

272. *Cf. id.* at 20 ("[p]erhaps the most important programs that potentially could provide assistance to the homeless are the medical, supplemental and compensatory entitlement programs of the SSA").

273. *Id.* at 18, 20.

274. *Id.* at 20-21. Many homeless people do not receive benefits because they lack fixed addresses to which benefits can be mailed. Nor do they have support services necessary to help them establish eligibility and residency. *Id.* at 20. In 1986, Congress attempted to rectify problems created by the homeless person's failure to have an address. See Homeless Eligibility Clarification Act, *supra* note 62. Although the Homeless Eligibility Clarification Act eliminates an obstacle, many homeless individuals are simply "ineligible for certain forms of assistance such as SSDI, which is only available to those with work histories, . . . Medicare, which is targeted only to aged or disabled workers and Medicaid, which is often contingent upon eligibility for AFDC or SSI." H.R. REP. No. 47, *supra* note 1, at 21.

275. H.R. REP. No. 47, *supra* note 1, at 21.

276. *Id.* at 23.

277. *Id.* at 15 (quoting HHS Task Force, Shelter and Feeding the Homeless, a resource guide for communities); see also *Between the Cracks*, *supra* note 52, at 80 (HHS Task Force emphasizing local nature of homelessness problem).

278. H.R. REP. No. 47, *supra* note 1, at 26.

to remedy homelessness; only the federal government has the requisite resources.<sup>279</sup>

In addition to adopting an erroneous philosophical approach to the homeless crisis, the Reagan Administration has neglected the homeless by failing to provide the "technical and material" assistance of which it spoke. In 1985, the House of Representatives Committee on Government Operations criticized the federal government's response to homelessness as "inadequate, disorganized and ineffective."<sup>280</sup> The Committee concluded that greater federal action was necessary. "At a minimum, any national policies concerning the homeless must address low income housing, the chronically mentally ill, medical aid, transitional services and emergency food and shelter services."<sup>281</sup>

The House Committee recommended several national policies. First, the President should declare homelessness a national emergency and should direct all agencies to focus on expediting assistance to the homeless.<sup>282</sup> Second, agencies administering benefit programs should undertake outreach efforts, relax eligibility requirements and expedite the application process for the homeless.<sup>283</sup> Third, HUD-assisted housing programs should be expanded.<sup>284</sup> Fourth, Community Mental Health Center model programs should be developed by the National Institute of Mental Health, and local governments should be urged to establish such centers with available block grants.<sup>285</sup> Fifth, the Federal Emergency Management Agency's Emergency Food and Shelter Program (FEMA) should be expanded.<sup>286</sup> Sixth, the Department of Defense should contact local governments to offer its vacant military installations as shelters, and should supply surplus food to the homeless.<sup>287</sup> Seventh, the Public Health Service should provide medical care to the homeless.<sup>288</sup> Finally, Congress should fund shelter demonstration projects, complete with medical and psychiatric care and job counseling.<sup>289</sup>

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279. *Id.*

280. *Id.* at 14.

281. *Id.* at 27.

282. *Id.* at 28.

283. *Id.*

284. *Id.* at 28-29.

285. *Id.* at 29.

286. *Id.*

287. *Id.* at 29-30.

288. *Id.* at 30.

289. *Id.*

*b. Stewart B. McKinney Homeless Assistance Act*

In the face of executive branch inaction and growing societal recognition of the homeless crisis,<sup>290</sup> Congress seized a leadership role in addressing the problem. In June 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act (McKinney Act or the Act).<sup>291</sup> Incorporated into the McKinney Act are many of the recommendations made by the House Committee on Government Operations. Title II of the Act established an Interagency Council on the Homeless (Council), comprised of cabinet officers, executive department heads and others.<sup>292</sup> The basic duties of the Council include, *inter alia*, the provision of professional and technical assistance to states, local governments, and other public and private nonprofit organizations to coordinate and maximize existing resources to assist the homeless, and to encourage the development of innovative programs to address homelessness.<sup>293</sup> The Council is also charged with monitoring and evaluating assistance programs and recommending any improvements that may be necessary.<sup>294</sup>

Title III of the McKinney Act established an Emergency Food and Shelter Program<sup>295</sup> to provide grants to local governments and private nonprofit organizations which are the direct suppliers of emergency food and shelter to the homeless.<sup>296</sup> Congress authorized the appropriation of \$15 million for fiscal year 1987 and \$124 million for fiscal year 1988 to accomplish the emergency purposes of title III of the Act.<sup>297</sup>

Title IV of the Act provides for housing assistance in the form of grants from the Department of Housing and Urban Development (HUD) to state and local governments and to private nonprofit

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290. To dramatize the plight of the homeless, many congressmen and celebrities participated in the "Grate American Sleep-Out" in Washington, D.C., in March 1987. House Majority Whip Tony Coelho (D.-Cal.) and actor Martin Sheen, among others, slept on heating grates overnight to attract public attention to the problems of the homeless. Wash. Post, Mar. 4, 1987, at B1, col. 2. Prior to the Sleep-Out, on May 25, 1986, activists staged "Hands Across America" to combat homelessness. During this attempt to call public attention to homelessness, Americans formed a human chain across the country. See N.Y. Times, May 26, 1986, at 1, col. 2.

291. McKinney Act, *supra* note 265.

292. *Id.* §§ 201-202, 101 Stat. 482, 486 (codified at 42 U.S.C.A. §§ 11311-11312). The Interagency Council replaces the HHS Task Force. *Id.* § 206, 101 Stat. 482, 489 (codified at 42 U.S.C.A. § 11316).

293. *Id.* § 203, 101 Stat. 482, 487 (codified at 42 U.S.C.A. § 11313).

294. *Id.*

295. *Id.* § 301, 101 Stat. 482, 489 (codified at 42 U.S.C.A. § 11311).

296. *Id.* § 311, 101 Stat. 482, 492 (codified at 42 U.S.C.A. § 11311).

297. *Id.* § 322, 101 Stat. 482, 493 (codified at 42 U.S.C.A. § 11352).

organizations that aid the homeless.<sup>298</sup> These funds may be used for renovation, rehabilitation or conversion of buildings into emergency shelters; for shelter maintenance, operation insurance, utilities and furnishings; and for the provision of essential services at shelters.<sup>299</sup> To receive these funds, the supplier must supplement the federal assistance with an equal amount of funds.<sup>300</sup>

Additional funds were authorized to be appropriated under title IV for the Supportive Housing Demonstration Program. These grants shall be provided to programs that develop innovative housing for homeless families with children; deinstitutionalized homeless individuals; and homeless people with mental and physical disabilities.<sup>301</sup> "Supportive housing" includes both "transitional housing," which facilitates the movement of homeless individuals into independent living, and permanent community-based housing for handicapped homeless individuals.<sup>302</sup> Equal matching funds must be supplied by any recipient who uses federal funds to acquire or rehabilitate a building for the purposes of providing supportive services;<sup>303</sup> however, HUD may provide up to seventy-five percent of the annual operating expenses of transitional housing.<sup>304</sup> Regarding permanent housing for handicapped citizens, each state must supplement the federal funds with an equal amount of state and local funds.<sup>305</sup> All of the non-federal funds must be used for the acquisition or rehabilitation of permanent housing for the handicapped, and not more than fifty percent of the funds may be from the local government.<sup>306</sup>

To carry out the purposes of title IV housing assistance, Congress authorized appropriations of \$100 million for fiscal year 1987 and \$120 million for fiscal year 1988 for the emergency shelter program.<sup>307</sup>

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298. *Id.* § 412, 101 Stat. 482, 496 (codified at 42 U.S.C.A. § 11372).

299. *Id.* § 414, 101 Stat. 482, 497 (codified at 42 U.S.C.A. § 11374). Shelters may only use the funds to provide services related to employment, health, drug abuse or education if the local government has not provided such services during any part of the preceding 12-month period and the local government does not use more than 15% of the federal funds for these services. *Id.*

300. *Id.* § 415, 101 Stat. 482, 497 (codified at 42 U.S.C.A. § 11375).

301. *Id.* § 421, 101 Stat. 482, 498-99 (codified at 42 U.S.C.A. § 11381).

302. *Id.* § 422(12), 101 Stat. 482, 500 (codified at 42 U.S.C.A. § 11382).

303. *Id.* § 425(a), 101 Stat. 482, 503 (codified at 42 U.S.C.A. § 11385).

304. *Id.* § 423(a)(3), 101 Stat. 482, 501 (codified at 42 U.S.C.A. § 11383).

305. *Id.* § 425(b)(1), 101 Stat. 482, 503 (codified at 42 U.S.C.A. § 11385).

306. *Id.* HUD may waive the requirements of this section if the state can demonstrate an inability to provide an equal amount of funds due to severe financial hardship and the local government agrees to contribute funds from non-federal sources equal to the amount of the contribution waived for the state. *Id.* § 425(b)(2), 101 Stat. 482, 503 (codified at 42 U.S.C.A. § 11385(b)(2)).

307. *Id.* § 417, 101 Stat. 482, 498 (codified at 42 U.S.C.A. § 11377).

For those years, Congress appropriated \$80 million and \$100 million respectively for supportive housing.<sup>308</sup>

Other major features of the McKinney Act include provisions establishing grants from the Department of Health and Human Services to health care providers who care for the homeless,<sup>309</sup> and to states to establish community mental health services for the chronically mentally ill homeless.<sup>310</sup> The McKinney Act also establishes that the Secretary of Labor shall make grants to states, local public agencies, private organizations or businesses that conduct education and job training for the homeless.<sup>311</sup> Additional titles of the Act address food assistance for the homeless,<sup>312</sup> provisions for homeless veterans,<sup>313</sup> and use of surplus federal property to assist the homeless.<sup>314</sup>

### c. Criticism of McKinney

The McKinney Act attempts to identify and address many of the needs of the various segments of the homeless population. The Act represents an improvement from the seven years of federal inaction that preceded it. The Act has significant shortcomings, however, which can be classified into two broad sets of concerns. For convenience, these categories will be labelled policy and operational criticisms. The first category of criticisms focuses on the policies that were included or excluded from the Act's coverage. The second category focuses on problems inherent in the operation or implementation of the Act.

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308. *Id.* § 428, 101 Stat. 482, 504 (codified at 42 U.S.C.A. § 11383). This title provides for additional assistance in the form of non-interest bearing advances and grants for facilities to aid the homeless. *See id.* §§ 431-444, 101 Stat. 482, 504-08 (codified at 42 U.S.C.A. §§ 11391-11394). Moreover, this title authorizes a \$35 million increase in the budget for housing assistance pursuant to § 8(e)(2) of the United States Housing Act of 1937, 42 U.S.C. § 1437f (1982). *See* McKinney Act, *supra* note 265, § 441, 101 Stat. 482, 508 (codified at 42 U.S.C.A. § 11401).

309. *See id.* § 601, 101 Stat. 482, 511 (codified at 42 U.S.C.A. § 256).

310. *See id.* § 611, 101 Stat. 482, 516 (codified at 42 U.S.C.A. § 290cc-21).

311. *Id.* § 731, 101 Stat. 482, 528 (codified at 42 U.S.C.A. § 11441).

312. *See id.* §§ 801-814, 101 Stat. 482, 489-93 (codified at 42 U.S.C.A. §§ 11331-11352); *see also supra* note 62 (regarding Homeless Eligibility Clarification Act).

313. *See* McKinney Act, *supra* note 265, § 901, 101 Stat. 482, 538 (codified at 29 U.S.C.A. § 1721). In February 1987, Congress transferred additional funds to FEMA to provide funds for community-based psychiatric residential treatment for chronically mentally ill homeless veterans. *See* Act of Feb. 12, 1987, Pub. L. No. 100-6, 101 Stat. 92, 92-94 (codified at 38 U.S.C. 620(c)).

314. McKinney Act, *supra* note 265, § 501, 101 Stat. 482, 509 (codified at 42 U.S.C.A. § 11411).

*i. Policy Concerns*

The major policy shortcoming of the McKinney Act is that it does not establish a national right to overnight shelter. This is an essential element of any program aimed at alleviating homelessness; the immediate physical needs of this population must be addressed first. In the absence of a right to shelter, the homeless must rely on the discretion of state and local governments, or they must seek private charity. At the very least, decent overnight shelter should be a statutory—if not fundamental—right.<sup>315</sup>

Moreover, there are significant adverse consequences of Congress' failure to establish a right to shelter as part of the McKinney Act. First, the McKinney Act may have no impact in states or localities that do not accept any obligation to house the homeless.<sup>316</sup> The McKinney Act only provides grants to shelter providers who apply for funds; it does not establish local shelters, nor does it mandate that local shelters exist. Accordingly, no uniform policy regarding homelessness will apply nationwide,<sup>317</sup> and states and localities that provide shelter will still be concerned about doing more than their "fair share."<sup>318</sup>

Second, this problem is exacerbated by the McKinney Act's funding mechanism. Title IV, the housing assistance provision of the Act, which authorizes appropriations for various types of shelter and housing programs, requires states and localities to supplement the federal funds with an equal amount of matching funds.<sup>319</sup> A similar

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315. A recent national poll indicated that a "substantial majority" of Americans believe that the government should provide each citizen with food and shelter. See *What Can Be Done?*, *supra* note 229, at 57.

316. See *supra* notes 68-79 and accompanying text regarding hostile attitudes toward the homeless.

317. Great Britain has enacted national legislation on the homeless. See Housing (Homeless Persons) Act, 1977 (Housing Act). Parliament passed this act because local authorities had ignored ministerial directives to house the homeless. See Robson & Watchman, *The Homeless Persons' Obstacle Race*: 2, 1981 J. SOC. WELFARE L. 65, 70. Although the homeless only receive limited protection under the Housing Act, *id.* at 81, the program is a uniform, national undertaking. Four categories of "priority need" homeless are entitled to permanent accommodations. These categories include pregnant women, homeless people with dependent children, those who are homeless as a result of fire or other emergency, and the aged, mentally ill or physically disabled homeless. Robson & Watchman, *The Homeless Persons' Obstacle Race* (pt. 1), 1981 J. SOC. WELFARE L. 1, 7-8. Although the Housing Act does not eliminate the problems that cause homelessness, *id.* at 1, it attempts to alleviate some of the resulting hardship.

318. See Werner, *supra* note 51, at 15.

319. McKinney Act, *supra* note 265, § 415, 101 Stat. 482, 497 (codified at 42 U.S.C.A. § 11385).



matching requirement exists with respect to funds for transitional housing and for permanent housing for handicapped homeless individuals.<sup>320</sup> Thus, title IV of the Act, which authorizes the most funding and encourages the development of several necessary housing programs, also requires states and localities to contribute a greater percentage of the funds than for any other program. Because of the importance of these types of programs in attempting to develop long-term solutions to homelessness, a more flexible funding mechanism, which places more responsibility on the federal government is necessary.<sup>321</sup>

This funding arrangement is problematic for the same reasons that the failure to establish a right to overnight shelter is a problem. State and local governments that do not already house the homeless are unlikely to apply for grants because they will not want to provide matching funds.<sup>322</sup> Even if state or local governments are not predisposed against sheltering the homeless, they may not have the resources to contribute equal matching funds. Therefore, homeless people in many cities will not receive the benefit of the most important provisions of the McKinney Act which attempt to address the long-term housing problems.

A third policy shortcoming of the McKinney Act is that it does not establish a right to shelter for homeless families with dependent children. The statute encourages the creation of model programs to shelter homeless families with children,<sup>323</sup> but does not mandate that

320. *Id.* § 425, 101 Stat. 482, 503 (codified at 42 U.S.C.A. § 11385).

321. The statute contains a better provision establishing matching funds for job training programs. Section 735 provides:

(a) PAYMENTS- The Secretary shall pay to each applicant having an application approved under section 733 the [f]ederal share of the cost of activities described in the application.

(b) FEDERAL SHARE-

(1)(A) The [f]ederal share for each fiscal year shall be not less than 50 percent nor more than 90 percent.

(b) The [f]ederal share shall be determined by the Secretary for each recipient under this subtitle based upon the ability of the recipient to meet the non-[f]ederal share of the cost of the program for which assistance is sought.

(2) The non-[f]ederal share of payments under this subtitle may be in cash or in kind fairly evaluated, including plant equipment or services.

(c) LIMITATION- The Secretary may not make grants in any [s]tate in an aggregate in excess of 15 percent of the amount appropriated to carry out this subtitle in each fiscal year.

*Id.* § 735, 101 Stat. 482, 529-30 (codified at 42 U.S.C.A. § 11445).

322. See *supra* notes 68-79 and accompanying text.

323. See McKinney Act, *supra* note 265, § 421, 101 Stat. 482, 498-99 (codified at 42 U.S.C.A. § 11381).

shelter be provided. While the creation of a national right to shelter for homeless adults may be a controversial policy, establishing a right to shelter for dependent children is a qualitatively different proposition. Children, more so than adults, are vulnerable. They cannot be expected to adjust to life on the streets, nor do they have the means to achieve economic independence and acquire housing. Even if children and their families manage to survive, the consequences of living on the streets are likely to be devastating. Moreover, homeless families may constitute the beginning of a self-perpetuating underclass of homeless individuals.

Given these concerns, a right to shelter for homeless families should have been part of the McKinney Act. Unlike the situation that exists with homeless adults, the machinery for implementing such a program is already in place. The regulations implementing the AFDC program<sup>324</sup> require participating states to elect whether they will provide shelter to homeless families as one of their emergency services.<sup>325</sup> Sheltering homeless children should not be a discretionary activity under AFDC because the statutory purpose of the program is to "encourag[e] the care of dependent children in their own homes or in the homes of relatives."<sup>326</sup> In light of the increase in the number of homeless families, a major target of any program aimed at the causes of homelessness must be this population.

## ii. Operational Concerns

In addition to the fundamental policy objections, there are several operational problems associated with the McKinney Act. The most obvious operational criticism of the Act is that it only authorizes amounts of funds that *may* be appropriated.<sup>327</sup> In fact, Congress did not deliver all the funds authorized by the Act.<sup>328</sup> It appropriated approximately \$700 million over two fiscal years.<sup>329</sup> Although this is a large sum in the abstract, it is not sufficient to address the problem.<sup>330</sup> For example, New York City alone will spend \$500 million

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324. 42 U.S.C.A. § 601 (West Supp. 1987).

325. See 45 C.F.R. § 233.120(a)(4) (1986); see also *supra* notes 147-62 and accompanying text.

326. 42 U.S.C.A. § 601 (West 1983).

327. See *supra* notes 297-314 and accompanying text.

328. See *What Can Be Done?*, *supra* note 229, at 57-58 ("[w]hat the legislative branch offered with one hand, it then throttled back with the other").

329. *Id.*

330. *Id.* One study indicated that 7.5 million new housing units would be needed by the year 2000 to prevent low income people from becoming homeless in continuing large numbers. This program would cost approximately \$300 billion. *Id.*

in housing this year, but its needs are estimated at two and one-half times that amount.<sup>331</sup>

The failure to appropriate McKinney Act funds demonstrates an additional problem with the Act. Like the Federal Emergency Management Agency's Emergency Food and Shelter Program criticized in the House Committee on Government Operations Report in 1985,<sup>332</sup> there is no continuity of funding source,<sup>333</sup> because the McKinney Act depends on annual budgeting and appropriation. The McKinney Act authorized appropriations for two fiscal years; however, the homeless crisis is likely to continue well into the foreseeable future.<sup>334</sup>

Likewise, the duration of some of the substantive provisions of the Act is troubling. For example, the Interagency Council on the Homeless will cease to exist in three years,<sup>335</sup> and the job training program terminates on October 1, 1990.<sup>336</sup> This suggests that Congress is looking for a "quick fix" by throwing money at the problem for the short term. Unfortunately, the statistics regarding the homeless<sup>337</sup> depict a severe socio-economic dislocation. Absent a long term commitment to this social crisis, the problems which result in homelessness will continue to exist.<sup>338</sup>

In sum, the problems associated with the operation and implementation of the McKinney Act, coupled with the basic policy shortcomings, depict fundamental flaws in the congressional approach. While the Act is better than anything the federal government has accomplished to date, it remains inadequate. Bolder steps are required, both at the policy-formulating stage and in the program-implementing process.

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331. *Id.*

332. See H.R. REP. NO. 47, *supra* note 1, at 20; see also *supra* notes 267-71 and accompanying text.

333. See *What Can Be Done?*, *supra* note 229, at 58. The federal budget deficit complicates the dynamic associated with the funding process. See *id.* With fewer funds to be divided among government programs, the homeless are unlikely to receive the necessary funding. As a society, we should make a greater, long term commitment of resources to this problem, but the McKinney Act fails in this respect.

334. H.R. REP. NO. 47, *supra* note 1, at 29.

335. McKinney Act, *supra* note 265, § 209, 101 Stat. 482, 489 (codified at 42 U.S.C.A. § 11319).

336. *Id.* § 741, 101 Stat. 482, 532 (codified at 42 U.S.C.A. § 11450).

337. See *supra* notes 2-7 and accompanying text; see also *What Can Be Done?*, *supra* note 229, at 58 ("the homeless signify that the country is fraying badly along its economic and social hems").

338. In addition, the Reagan Administration's antipathy toward social spending legislation suggests that the executive branch will not eagerly implement the programs that are available. *What Can Be Done?*, *supra* note 229, at 58. ("[t]o show his displeasure with the [McKinney Act], Ronald Reagan signed it at night, eliminating the bright media glow that signals life around Washington").

## VI. Conclusion

During the first seven years of the 1980's, the homeless crisis has grown to epidemic proportions. At the same time, the costs associated with the problem have escalated. These costs are not merely those associated with providing shelter. The more important costs are less easily quantifiable. These costs range from the physical, psychological and economic impoverishment suffered by each homeless individual, to the psychological costs experienced by citizens who are not homeless, but who are disturbed by the problem.<sup>339</sup>

Beyond individual costs, there are enormous costs to society. The failure to deal with this potential underclass of homeless families will inflict psychological injury to the national consciousness. As Robert Hayes, the foremost legal advocate for the homeless has observed, "[t]he homeless living and dying on the streets of our cities are a standing challenge to the moral legitimacy of this [n]ation." In short, "right now, the homeless are the shame of America."<sup>340</sup>

In light of the magnitude of the homeless crisis, comprehensive national solutions are necessary. Yet, for much of this decade, the federal government has failed to act. In the interim, homeless advocates have pursued judicial remedies to assist their clients. To a large extent, these advocates have been successful; some courts have enforced the rights of the homeless, requiring states and localities to supply emergency shelter and services. Judicial resolution of these issues is appropriate because the homeless form the prototypical powerless group. As the victims of discrimination and stereotyping, separated from the social network and lacking any economic power, the homeless cannot influence the social policy that affects their lives. The judicial intervention advocated by this Article is not judicial creation of social policy; rather, it is a broad interpretation of statutes passed by the legislature. Thus, the type of judicial decisions approved and encouraged here are usually limited to ordering the executive branch to comply with the legislative policy by providing safe, emergency shelter. While important, this is necessarily a stopgap measure.

Long term solutions to the causes of homelessness must derive from the political process. Although the McKinney Act is better than any federal action undertaken thus far, it has significant shortcomings.

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339. See *id.* at 56. A recent poll indicated that eight out of ten Americans are "embarrassed" by homelessness. *Id.* The poll also ranked homelessness as the most important problem facing the nation after the federal budget deficit. *Id.*

340. *Homelessness in America*, *supra* note 3, at 60 (testimony of Robert Hayes, National Coalition for the Homeless).

Because of the Act's policy and operational flaws, this legislation is unlikely to provide sufficient assistance to many people in the homeless population.<sup>341</sup> In particular, the McKinney Act errs in failing to establish a federal right to shelter. A right to decent, overnight shelter must be the cornerstone of any comprehensive approach to the homeless crisis. Without this right, no uniform national policy will develop because the provision of shelter will remain discretionary with state and local governments.

Once the right is established, judicial action to enforce this federal right will become possible in all states, and a regime of rational, principled decision-making will be available to the homeless regardless of the peculiarities of the laws in particular jurisdictions. The homeless are still waiting for society to adopt this principled, comprehensive approach. In the meantime, our society continues to warehouse the homeless at night, so they do not die on the street, while ignoring them during the day.

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341. *Cf.* H.R. REP. NO. 47, *supra* note 1, at 20 ("the entitlement programs do not work for many homeless persons") (quoting HHS report to the President, Aug. 15, 1984).