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Homelessness: A Legal Activist Analyst of Judicial and Street Strategies

David Woodward

HOMELESSNESS: A LEGAL ACTIVIST ANALYSIS OF JUDICIAL AND STREET STRATEGIES*

*DAVID WOODWARD, ESQ.***

INTRODUCTION

In the living room of the headquarters of the Community for Creative Non-Violence (CCNV), an advocacy group for homeless people in Washington, D.C., sits an old white piano. Atop the piano are six rectangular Lucite boxes. What is inside these boxes is not pleasant: "Each contains the ashes of a street person who froze to death."[1]

This article is for the Lucite 6, for the homeless, for their advocates. Its aim is to contribute to the discussion of strategies, both judicial and non-judicial, that might be pursued to keep the line of Lucite boxes from extending further.

The article has four parts. Part I develops a total deprivation litigative theory, a theory supportive of judicial recognition and protection of not only a right to shelter for the homeless but a broad range of the basic human needs, such as subsistence income, food, education, and health care. Where absolute depriva-

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* This article, written for homeless people and their advocates, explores various judicial and street strategies for combating the nationwide problem of homelessness. Part I develops a total deprivation litigation theory applicable to potential judicial recognition not only of a right to shelter for the homeless, but of other basic human needs as well (for example, subsistence income, food, education, and health care). Part II looks at indirect judicial approaches toward a right to shelter, including those based on state welfare, mental health and sex discrimination law grounds. Part III examines non-judicial, street strategies for combating the street problem of homelessness. Part IV urges that principles of legal activism, from "legal leverage" to "guerilla law," should inform the process of selecting the most effective strategies, both judicial and extra-judicial, to be used in the search for shelter for the homeless in any community.

** Mr. Woodward is presently on leave from Legal Services, Inc. in Chambersburg, Pa. to attend George Washington University's Law Center, where he is studying for a Master of Laws with an emphasis in public interest law. Mr. Woodward has been the housing law specialist at Legal Services, Inc. since 1976, and is a member of Pennsylvania Rural Housing Coalition, the Housing Law Specialist Task Force of the Pennsylvania Legal Services Center, and the American Civil Liberties Union.

1. Boodman, *CCNV Members Go to Market; Donations and Dumpsters Serve As Sources of Food*, Wash. Post, Nov. 4, 1984, at A19, col. 1 [hereinafter cited as Boodman].

tion or total denial of a protected right or of a life essential, such as shelter, can be established, it may still be possible, even under the present Supreme Court's rules of the game, to sound affirmative constitutional overtones on behalf of homeless people specifically and the poor generally.

Part I exposes the weaknesses as well as the strengths of total deprivation analysis. Although an absolute deprivation argument may be one of the few remaining working levers to move modern courts toward constitutional protection of shelter and other economic rights, it is hardly enough. Much more is needed than a litigative theory that, while workable within its intended scope, invites misapplication by suggesting that constitutional protection of subsistence interests is to be triggered only upon a showing of complete denial.

Part II begins the search for that something more. It looks at indirect judicial avenues that might lead to some solutions to the homelessness puzzle. These "side door" approaches include the use of welfare law provisions, mental health law concepts, and sex discrimination principles to combat homelessness. Pennsylvania law is used as a focal point in Part II for illustrative purposes, primarily because it is the state law with which I am most familiar. However, the principles and strategies discussed are peculiar to no state but share mental health, welfare and sex discrimination statutory ground common to many states.

Part III looks at non-judicial, street strategies. It recognizes that the solutions, like the problem itself, may well be in the streets and the community. As Professor Sparer reminded us shortly before his death, legal rights, while necessary, are not alone sufficient.[2] Recognition by the judiciary of basic human rights, such as a right to shelter for homeless people, must be tied to social movement and vice versa.[3] Theater or media tactics are examined: from CCNV's erection of a tent city across from the White House, to its release of 100 cockroaches from a Washington, D.C. shelter in the State Department's dining room and its banquet for Congressmen of crabmeat and quiche

2. Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509 (1984).

3. For a similar orientation, *see* Law, *Economic Justice* in OUR ENDANGERED RIGHTS 134 (N. Dorsen ed., 1st ed. 1984) [hereinafter cited as Law, *Economic Justice*].

scrounged from area trash cans.[4] Beyond its analysis of often essentially theatrical ploys, Part III focuses on such nonjudicial alternatives as use of the ballot initiative and other legislative and administrative advocacy, coalition building and church involvement.

Running throughout this article is a common yardstick used to measure the relative merits of each of the strategies discussed in Parts I-III. That yardstick is built from principles of legal activism, particularly the concepts of legal leverage, legal judo, guerilla law, the likelihood of success, indirection, public interest and considerations of the ancillary advantages of legal action.[5] The meaning of these legal activism guides and their application to the strategies reviewed in Parts I-III are the focus of Part IV.

Before scrutinizing strategies, judicial and extra-judicial, for alleviating homelessness, it helps to begin at the judicial system's present starting point, the boundaries the present Supreme Court has set.

I. SUPREME COURT PARAMETERS

A. *Hands Off "Economic and Social Welfare" Law*[6]

Even within the hands-off approach the Supreme Court has taken to "economic and social welfare" law, it remains possible to extract a good but imperfect litigative model. A total deprivation analysis holds promise for extending judicial recognition of a right to shelter for the homeless, as well as protection of other basic subsistence interests.

The Supreme Court's approaches to economic rights is not an inviting one for the homeless and their advocates. Justice Brennan offers a succinct summary of the place poverty law and subsistence rights hold within the present Court's hierarchy of values: "[T]he mode of analysis employed by the Court . . . virtually immunizes social and economic legislative classifications

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4. See *infra* notes 212-32 and accompanying text.

5. These legal activism precepts are outlined by Professor John Banzhaf in his Legal Activism course at George Washington University's National Law Center (Winter 1984).

6. Part I of this article originally appeared in Woodward, *Affirmative Constitutional Overtones: Do Any Still Sound for the Person?*, HUMAN RIGHTS QUARTERLY 268-98 (1985), and is republished here with the kind permission of the Johns Hopkins University Press.

from judicial review."[7] The opening chord of this analysis was struck in *Dandridge v. Williams*:[8]

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." [Citation omitted.] "A statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it." [Citation omitted].[9]

What began as a chord has become a repeated refrain. *Dandridge*'s language, and its standard of judicial non-review of statutes have been invoked to uphold wide disparities in the treatment of Aid to Families with Dependent Children (AFDC) recipients (grants equaling 50% of need) as compared to recipients of assistance for the elderly (100% of need) and the blind (95% of need);[10] to sustain a gross differential in educational funding between property poor school districts ($356 per child) and property rich districts ($594 per child);[11] to justify termination of essential social security disability benefits without first affording the recipient a hearing;[12] to validate the denial of Supplemental Security Income (SSI) benefits of $25 per month to mentally ill indigents who live in public mental institutions;[13] to sanction elimination of "windfall" retirement benefits to certain classes of retired railroad workers;[14] to reject challenges to state work rules that disqualify from public assistance persons who left their job within 75 days of applying for assistance,[15] and that condition eligibility for assistance on compliance with state

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7. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 183 (1980) (Brennan, J., dissenting).
8. 397 U.S. 471 (1970).
9. *Id.* at 485.
10. Jefferson v. Hackney, 406 U.S. 535, 537 n.3 (1972).
11. San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 12-13 (1973).
12. Mathews v. Eldridge, 424 U.S. 319 (1976).
13. Schweiker v. Wilson, 450 U.S. 221 (1981).
14. United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980).
15. Lavine v. Milne, 424 U.S. 577 (1976).

imposed requirements applicable to those presumed to be employable;[16] and to validate a nine month duration-of-relationship test that operates to deny widows' and children's social security benefits to those unable to establish that their relationship to the deceased wage earner began at least nine months prior to the deceased's death.[17]

The list goes on but the point is clear. The minimum rationality straitjacket woven by the Supreme Court is a powerful constraint. Are there ways to loosen the strings?

B. The Total Deprivation Theory

A total deprivation model can be constructed from the Court's own building blocks of constitutional law precedent. As both commentators[18] and the Court[19] have noted, equal protection and due process raise different core questions. Equal protection asks "the distributive question" of whether the particular plaintiff and the group of which he is a member are excluded from some benefit because of poverty. Due process, on the other hand, focuses more on the individual plaintiff, avoids the wealth question, and asks where these particular facts fit within "the federal constitutional definition of the essentials of ordered liberty."[20]

A cross-cutting theory is needed, one that would address individual and group claims of exclusion under either or both traditional equal protection and due process analyses. The elemental question such a theory would ask is this: is the deprivation suffered by the individual or group total?[21] If it is, and the

16. New York State Dep't. of Social Servs. v. Dublino, 413 U.S. 405 (1973).

17. Weinberger v. Salfi, 422 U.S. 749 (1975).

18. Clune, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, 329-30 [hereinafter cited as Clune].

19. Ross v. Moffitt, 417 U.S. 600, 609 (1974).

20. Clune, *supra* note 18, at 299.

21. Professor Gary Simpson has advocated a somewhat similar, but more complex analysis, one element of which inquires into whether the disadvantage suffered is total, significant, or insignificant. The other pertinent questions a court should ask under the Simpson model are (1) whether the interest at stake is fundamental, significant or insignificant; (2) whether the government interest behind the classification between means and ends is necessary, significant, insignificant, or unlawful; and (3) whether the relationship between means and ends is necessary, significant, insignificant, or nonexistent. Simpson *A Method For Analyzing Discriminatory Effects Under The Equal Protection Clause*, 29 STAN. L. REV. 663, 678-80 (1977). With these multiple factors Professor Simp-

absolute deprivation is of a life essential interest, then the government's reasons for the complete exclusion must be very good indeed.

This formulation may sound distinctively off key to anyone who has listened to what the present Supreme Court has been saying about poverty related issues. But careful listening reveals that the total deprivation theme has been sounded even by the Burger Court.

1. The *Rodriguez* Dicta and *Plyler v. Doe*

Modern education law cases, *San Antonio School District v. Rodriguez*[22] and *Plyler v. Doe*,[23] suggest that claims of total deprivation or complete exclusion may still be persuasive. *Rodriguez* is usually read negatively by poor people's advocates. Indeed, its message to the poor is essentially negative. In its explicit rejection of the claims that education is a fundamental right and that wealth discrimination is inherently suspect,[24] *Rodriguez* reveals a Court leaning heavily against the door opened by its predecessor.

Yet *Rodriguez*, easily read as an end point to arguments that poverty and education implicate fundamental rights, can also be read as a beginning point for total exclusion analysis. *Rodriguez* leaves open the question whether minimum access to education may, under the right facts, be constitutionally compelled:

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right [speech or voting], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might

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son constructs an elaborate matrix and suggests that many of the Supreme Court's poverty law cases, including *Dandridge*, *Jefferson*, and *Valtierra*, might well have been decided as they were even under his proposed model. The strength of Professor Simpson's model lies in the attention it brings to the "magnitude of the deprivation" factor. Its weakness, however, may be in not placing enough emphasis on that factor, and thereby sanctioning many of the Supreme Court's more insensitive poverty law cases.

22. 411 U.S. 1 (1973).

23. 457 U.S. 202 (1982).

24. 411 U.S. at 18-28.

> have if a State's financing system occasioned *an absolute denial of educational opportunities to any of its children,* that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—*no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.*[25]

The right facts were not too long in coming. In *Plyler v. Doe,*[26] the Court held that a state's total exclusion of undocumented alien pupils from its school system did not further any substantial state interest and therefore denied equal protection.[27] Justice Brennan, writing for the majority, gave three reasons for applying the "intermediate scrutiny" standard of equal protection review. First, the Texas statutory scheme discriminated against children based upon the conduct of their parents (unlawful entry into the United States) over which they had no control.[28] Second, nodding to *Rodriguez* ("Public education is not a 'right' granted to individuals by the Constitution"),[29] the Court nevertheless said that education plays "a fundamental role in maintaining the fabric of our society."[30] Justice Brennan stressed that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."[31] Third, "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[32] The denial, the Court made clear, is total and permanent:

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25. *Id.* at 36-37 (emphasis added).
26. 457 U.S. 202 (1982).
27. *Id.* at 210.
28. *Id.* at 220.
29. *Id.* at 221.
30. *Id.*
31. *Id.*
32. *Id.* at 221-22.

> Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause.[33]

Justice Blackmun's concurring opinion underlines the total deprivation theme struck by Justice Brennan. Arguing that "the *Rodriguez* formulation does not settle every issue of 'fundamental rights' arising under the Equal Protection Clause,"[34] Justice Blackmun analogized the complete denial of an education to the denial of the right to vote:

> Children denied an education are placed at a permanent and insurmountable competitive disadvantage, for an uneducated child is denied even the opportunity to achieve. And when those children are members of an identifiable group, that group—through the State's action—will have been converted into a discrete underclass . . . . [C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions. [Citation omitted]. In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second class social status; the latter places him at a permanent political disadvantage.[35]

The potential scope of *Plyler* is broad. The Court's sensitivity to the reach of its opinion is reflected indirectly in Justice Powell's concurring opinion and directly in Chief Justice Burger's dissent. Justice Powell cautiously emphasized "the unique

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33. *Id.* at 222.
34. *Id.* at 232-33. (Blackmun, J., concurring).
35. *Id.* at 234.

character of the cases before us."[36] Chief Justice Burger, joined by Justices White, Rehnquist, and O'Connor, predicted that "the Court's opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results of these particular cases."[37]

Unquestionably there are special factors present in *Plyler* that are potentially limiting. The case, after all, involved children as innocent victims of actions taken by their parents which the children were virtually powerless to control. The interest in some minimal level of education was also at stake. Unable to escape the *Rodriguez* conclusion that education is not a fundamental right meriting strict scrutiny, Justice Brennan was at least able to invoke heightened scrutiny by stressing the unquestioned "importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child."[38] Finally, forming a significant part of the backdrop of *Plyler* is immigration law, an area in which both the constitution and the courts have afforded plenary power to Congress to develop "a complex scheme governing admission to our Nation and status within our borders."[39] The Court rejected the argument that the traditional deference to Congressional judgments in immigration matters shields Texas' exclusion of undocumented alien children from its schools.[40] However, the significance of the undocumented alien status issue is reflected in both Justice Brennan's argument that these children are visited with a complete deprivation for reasons wholly beyond their control,[41] and in Justice Powell's parallel contentions that these children "have been assigned a legal status due to a violation of law by their parents," that they "have been singled out for a lifelong penalty and stigma," and that "[a] legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the fourteenth amendment."[42]

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36. *Id.* at 236. (Powell, J., concurring).
37. *Id.* at 243. (Burger, C. J., dissenting).
38. *Id.* at 221.
39. *Id.* at 225.
40. *Id.*
41. *Id.* at 226.
42. *Id.* at 238-39 (Powell, J., concurring).

2. Poverty Law Precedent Revisited

The total deprivation idea, however, cannot be so easily contained within the special facts of *Plyler*. The principle is not unique to *Plyler*. Indeed, when the absolute deprivation lens is used to examine the watershed poverty law cases of both the Burger and Warren Courts, the view proves to be remarkably clear and revealing. In cases in which the deprivation is perceived by the Court to be absolute, the litigants challenging the total exclusion have won. In cases in which the loss is viewed as partial, or the realization of the interest at stake is seen as being merely delayed and not completely foreclosed, the challengers have generally lost. The total deprivation principle implicit in *Rodriguez* and *Plyler* permeates both the Warren and Burger Courts' poverty law precedent in a wide range of areas, including criminal justice, voting, residency, access to courts and public benefits cases.

a. Criminal Justice

The formative poverty law cases involving claims by indigent defendants to access to the state criminal appellate system sketch the beginning outlines of this pattern. Underlying the Court's famous holding in *Griffin v. Illinois*[43]—that a state's denial of full appellate review of a criminal conviction solely on grounds of the defendant's inability to pay for a transcript of the trial violates due process and equal protection[44]—is the suggestion that such a denial is the equivalent of a complete deprivation of the defendant's constitutional right to a fair trial. Justice Douglas' majority opinion equates the denial of a trial transcript to indigent defendants with a law that would bar such defendants from pleading not guilty or defending if they were unable to prepay court costs.[45] Such a legal system would make the fair trial guarantee a mockery, "a worthless thing."[46] Justice Frankfurter's concurring opinion in *Griffin* draws a similar parallel. Illinois' decision to allow appellate review of constitutional claims, but foreclose review of trial errors (such as rulings on

43. 351 U.S. 12 (1955).
44. *Id.* at 18.
45. *Id.* at 17.
46. *Id.*

admissibility of evidence) in the absence of a transcript, is the same, Justice Frankfurter insisted, as requiring a $500 fee as a prerequisite to an appeal.[47] The effect is identical—shutting off the "means of appellate review for indigent defendants."[48] Like *Griffin, Douglas v. California,*[49] which established an indigent defendant's right to court appointed counsel on appeal,[50] can be read as a reflection of the Court's recognition that appellate review without the assistance of counsel is really no appellate review at all.

The post-*Griffin-Douglas* criminal fees cases pick up the deprivation theme but begin to use it as a limiting principle. Even Justice Marshall, writing for the majority in *Britt v. North Carolina,*[51] could find no equal protection violation in the state's failure to provide on appeal a free transcript of an indigent defendant's initial trial that ended in a mistrial.[52] The deprivation was not total. An alternative to a transcript existed. The trial took place in a small town in which the court reporter was on friendly terms with local attorneys and would have read back the trial record to counsel had he made the request.[53] While the *Britt* dissent raises legitimate questions about the validity of the Court's conclusion that such an informal local practice is an effective alternative to a full written transcript,[54] the Court's focus on the availability of alternatives as an escape from the reach of *Griffin* is revealing.

Douglas was similarly limited in *Ross v. Moffitt,*[55] which held that neither equal protection nor due process mandates that a state provide counsel to an indigent defendant seeking discretionary review from the state's supreme court or the United States Supreme Court, at least where counsel has been appointed for the indigent's first appeal as of right at the intermediate state appellate court level.[56] Justice Rehnquist's ration-

47. *Id.* at 22. (Frankfurter, J., concurring in judgment).
48. *Id.* at 23.
49. 372 U.S. 353 (1963).
50. *Id.* at 357-58.
51. 404 U.S. 226 (1971).
52. *Id.* at 227-30.
53. *Id.* at 229.
54. *Id.* at 234-43, (Douglas, J., dissenting).
55. 417 U.S. 600 (1974).
56. *Id.* at 616-18.

ale for not extending the *Douglas* principle beyond the first level of appellate review fits snugly within the total deprivation model. The indigent defendant seeking further review is not denied access to the criminal appellate system, Justice Rehnquist tells us, because he already had counsel at the first step of appellate review in state court, a full transcript of the trial proceedings was available at the first step, and counsel's brief and an opinion by the intermediate state appellate court were generated at that level.[57] Nothing further is required for additional appellate review. To Justice Rehnquist and the *Ross* majority, this is therefore a different case from the earlier fee cases where state procedures operated to cut off any appeal at all for an indigent unable to pay the required transcript fee.[58]

Ross makes very clear that the Court's view of the early fee cases is a narrow one. They mean not what they say but what they were meant to say, merely that a state cannot arbitrarily deny all appeal rights to indigents while affording affluent defendants avenues for appeal.

Further evidence of the importance of the total deprivation factor in criminal cases is offered by *Williams v. Illinois*.[59] Illinois kept an indigent man in jail beyond the maximum statutory term simply because of his inability to pay $5 court costs and a $500 fine.[60] The total deprivation of the defendant's liberty interest based on poverty alone was unmistakable and could not be squared with equal protection.[61]

b. Voting

The Court has shown us the positive and negative sides of the deprivation coin in contexts outside of the criminal justice system. Its poverty related voting cases are prime exhibits. Virginia's poll tax of $1.50 was struck down in *Harper v. Virginia Board of Elections*[62] because, as a prerequisite to voting in Virginia elections, it totally disenfranchised destitute citizens.[63]

57. *Id.* at 614-15.
58. *Id.* at 612.
59. 399 U.S. 235 (1970).
60. *Id.* at 236-37.
61. *Id.* at 240-42.
62. 383 U.S. 663 (1966).
63. *Id.* at 668.

Similarly, in *Bullock v. Carter*[64] the Court invalidated a Texas filing fee requirement for primary elections because it effectively barred all potential candidates unable to pay the fee.[65] And in *Kramer v. Union Free School District*,[66] a New York statute, limiting eligibility to voting in school district elections to property owners, tenants and parents with children attending school in the district, was held to violate equal protection because it was not narrowly tailored and involved "an absolute denial of the franchise."[67]

Where the denial of the right to vote is not absolute, very different consequences follow. For example, an Illinois statute making absentee ballots available to certain persons, including those absent from the country for any reason and those physically disabled and therefore unable to come to the polls, was upheld against a challenge by prisoners awaiting trial who argued that the absence of a similar statutory provision for them violated equal protection.[68] The Court was unconvinced. It could find no evidence that the state had "precluded appellants from voting."[69] Illinois may have made available alternative means of voting, such as installing special voting booths at the jail, providing guarded transportation of pretrial detainees to the polls, or granting temporary bail reductions to those defendants wishing to vote.[70] In other words, at least as the Court read it, there was "nothing in the record to show that appellants are in fact absolutely prohibited from voting by the State."[71] This, the Court later explained in *Kramer*,[72] marks the difference. Illinois in *McDonald* had simply made voting easier for some people who were unable to go to the polls; "there was no evidence that the statute absolutely prohibited anyone from exercising the franchise."[73] On the other hand, New York in *Kramer* did totally deny the right to vote itself to anyone outside the statuto-

64. 405 U.S. 134 (1972).
65. *Id.* at 144-49.
66. 395 U.S. 621 (1969).
67. *Id.* at 626 n.6.
68. McDonald v. Board of Election Comm'rs., 394 U.S. 802, at 803-4 (1969).
69. *Id.* at 808.
70. *Id.* at 808 n.6.
71. *Id.* at 808 n.7.
72. 395 U.S. 621 (1969).
73. *Id.* at 627 n.6.

rily favored classes of eligible voters.[74]

c. Residency

The Court's residency cases with poverty law ties exhibit a deprivation pattern quite similar to the voting cases. The needy plaintiffs in *Shapiro v. Thompson*[75] were precluded from receiving *any* AFDC benefits during their first year of residency.[76] Indigent newcomers to Arizona who needed medical treatment faced a comparable bar in *Memorial Hospital v. Maricopa County*.[77] There the Court invalidated, under equal protection, a state statute requiring an indigent to be a resident of the county for the previous twelve months in order to qualify for nonemergency medical care.[78] In his concurring opinion, Justice Douglas drew attention to the height of the statutory barrier. He argued that unlike *Rodriguez*, where at least theoretically "there was no legal barrier to movement to a better [property rich] district, [h]ere a one-year barrier to medical care . . . is erected around areas that have medical facilities for the poor."[79] As in *Shapiro*, the fence keeping out the poor was insurmountable, the deprivation complete.

On the other hand, where the one year residency requirement at issue is viewed as merely delaying realization of rights or satisfaction of needs deemed less important than, say, voting or medical assistance, the absence of the total deprivation factor is telling. Thus in *Sosna v. Iowa*,[80] a state's one year residency requirement for divorces was upheld.[81] Justice Rehnquist distinguished *Shapiro* and *Maricopa*, as well as *Dunn v. Blumenstein*,[82] on grounds that "Sosna's claim is not total deprivation

74. *Id.* at 630.
75. 394 U.S. 618 (1969).
76. *Id.* at 627.
77. 415 U.S. 250 (1974).
78. *Id.* at 253-70.
79. *Id.* at 271 (Douglas, J., concurring).
80. 419 U.S. 393 (1975).
81. *Id.* at 404-10.
82. 405 U.S. 330 (1972), holding Tennessee's one year durational residency requirement for voting in state elections, and its comparable three month residency rule for county elections, to be unnecessary to the furtherance of any compelling government interest and therefore violative of equal protection. Justice Marshall's majority opinion in *Dunn* is couched in the language of total deprivation. It underscores that Tennessee's law divides residents into old and new and discriminates against the latter "to the extent

. . . but only delay."[83] Justice Rehnquist reasoned that unlike those cases, and *Boddie v. Connecticut*,[84] the plaintiff in *Sosna* "was not irretrievably foreclosed from obtaining some part of what she sought."[85] Nor, one would argue, were the plaintiffs in *Shapiro, Maricopa,* and *Dunn.* They could have waited out the year to receive public assistance benefits, to get medical help and to vote. But the purpose here is not to make sense of Justice Rehnquist's distinctions, but to demonstrate that those distinctions, however illusory and inconsistent with reality, nevertheless are consistent with the pattern of total deprivation that has come to characterize the fabric of the Court's poverty law pronouncements.

d. Access To Courts

As *Sosna* suggests, the rise and fall of *Boddie* falls clearly within the same pattern. *Boddie*'s holding, that a state denies due process to indigent divorce plaintiffs by requiring payment of court costs which are beyond their means to pay,[86] rests on a dual rationale. First, relying upon precedent acknowledging freedom to marry as a basic civil right, the *Boddie* Court stressed that marriage is a basic human relationship involving interests of fundamental importance.[87] Second, it reasoned that since a state holds a monopoly on the peaceful dispute resolution mechanism, a divorce plaintiff seeking to terminate her marriage has no choice but to invoke that mechanism by going to court.[88]

That this second factor, monopoly, would come to be viewed as a rephrasing of the total deprivation element, is illustrated by the Court's subsequent literal readings of *Boddie.*[89] In *United*

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of totally denying them the opportunity to vote." *Id.* at 334-35. This flaw is basic to voting residency rules: "Durational residency requirements completely bar from voting all residents not meeting the fixed durational standards." *Id.*

83. *Sosna,* 419 U.S. at 410.

84. 401 U.S. 371 (1971), discussed *infra* text accompanying notes 86-95.

85. *Sosna,* 419 U.S. at 406.

86. Boddie v. Conn., 401 U.S. 371, 375 (1971).

87. *Id.* at 377.

88. *Id.* at 381-82.

89. Further evidence of the present Court's recasting of *Boddie* in absolute deprivation terms is found in Zablocki v. Redhail, 434 U.S. 374 (1978), in which Justice Stewart, concurring in the Court's repudiation of a Wisconsin law prohibiting those with outstanding support obligations from marrying, read *Boddie* as holding that "a person's inability to pay money demanded by the State does not justify *the total deprivation* of a

States v. Kras,[90] the bankruptcy filing fee (then $50) withstood a due process and equal protection challenge, in part because the Court saw a difference in degree in the scope of the deprivation and in the reach of the judicial monopoly.[91] Justice Blackmun felt that bankruptcy is not the exclusive means of adjusting the debtor-creditor relationship; negotiated agreements, other voluntary private arrangements, or the passage of applicable statutes of limitations were viewed by the majority as alternatives to judicial proceedings.[92] Similarly in *Ortwein v. Schwab*,[93] the Court upheld a $25 filing fee for judicial appeals from adverse welfare administrative decisions.[94] Again, the Court convinced itself that the deprivation was not total. The plaintiffs had already received the administrative hearing that *Goldberg v. Kelly*[95] mandates. Since due process does not require an appellate system in the first place,[96] the Court reasoned that due process is not infringed where the recipient has already been provided an administrative hearing to review his claim.[97]

e. Public Benefits

The public benefits cases themselves sound the total deprivation theme. *Goldberg* stands at the forefront. Without a pretermination evidentiary hearing, Justice Brennan wrote, public assistance recipients face the real possibility of completely losing "the very means by which to live," the means "to obtain essential food, clothing, housing and medical care."[98] In *Shapiro*, the plaintiffs faced exactly the same dilemma; no AFDC benefits on which to live were available during their first year of residency, a time when their need may well be greatest.[99]

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constitutionally protected liberty" (emphasis added). *Id.* at 394.

90. 409 U.S. 434 (1973).

91. *Id.* at 443-49.

92. *Id.* at 445-46.

93. 410 U.S. 656 (1973). Even as limited by *Kras* and *Ortwein*, however, *Boddie* still has force. *See, e.g.*, Little v. Streater, 453 U.S. 1 (1981) (distinguishing *Kras* and *Ortwein*, finding *Boddie* controlling holding that an indigent defendant in a paternity suit is entitled to state financed blood tests).

94. *Id.* at 658-61.

95. 397 U.S. 254 (1970) (discussed *infra*).

96. 410 U.S. at 660.

97. *Id.* at 659, *citing Goldberg*, 397 U.S. at 264, 266-71.

98. 397 U.S. at 264.

99. 394 U.S. 618, 629 (1968).

In *Dandridge v. Williams*[100] and *Jefferson v. Hackney*,[101] on the other hand, some benefits were provided to all qualified recipients. The plaintiffs' claims were not rooted in absolute deprivation but went to the fairness of the relative allocation of benefits under the applicable statutory scheme.[102] The large families in *Dandridge* asserted that their benefits were inadequate to meet their increased standard of need.[103] The AFDC recipients in *Jefferson* argued that their standard of need was not being met to the statistically comparable extent of recipients in other need-based programs.[104] In both cases, the claim was not that destitute people received no help from the state, but that the benefits paid were inadequate to meet the plaintiffs' needs.

The claims in *Mathews v. Eldridge*,[105] holding that procedural due process does not require pre-termination hearings in Social Security Disability (SSD) cases,[106] were re-shaped by the Court in the same light. "As *Goldberg* illustrates," Justice Powell began, "the degree of potential deprivation that may be created by a particular decision is a factor"[107] in determining the adequacy of state administrative proceedings. To the *Mathews* majority, the deprivation involved when SSD benefits are cut off without a hearing is somehow less than total, as opposed to the holding of total deprivation in *Goldberg*. The difference, the majority explains, is that SSD is not exclusively a need-based program, and other government assistance programs, such as food stamps and SSI, can cushion part of the blow.[108] To the dissent, the facts that following termination of benefits the Eldridge family was faced with foreclosure proceedings, had their furniture repossessed, and were forced to sleep in one bed, raised certain existential questions about the accuracy of the majority's perception.[109] But again, the thinking process, marked by a total deprivation analysis, is noteworthy at this point, rather than the

100. 397 U.S. 471 (1970).
101. 406 U.S. 535 (1972).
102. 397 U.S. at 472-73, 406 U.S. at 536-38.
103. 397 U.S. at 480-82.
104. 406 U.S. at 537-38.
105. 424 U.S. 319 (1976).
106. *Id.* at 332-49.
107. *Id.* at 341.
108. *Id.* at 342 n.27.
109. *Id.* at 349-50.

particular application of that analysis.

United States Department of Agriculture v. Moreno[110] and its companion, *United States Department of Agriculture v. Murry*,[111] round out the total deprivation analysis in the public benefits area. In *Moreno* all households containing an unrelated member, including "so-called 'hippies' and 'hippie communes'",[112] were entirely excluded from participation in the food stamp program.[113] The Court refused to sanction this wholesale exclusion of "essential federal food assistance to *all* otherwise eligibile households containing unrelated members,"[114] noting that the practical effect of the statutory bar was to withhold food purchasing power from "only those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility."[115]

In *Murry* the deprivation was also absolute. No food stamp benefits were available to any household containing a person over 18 claimed as a tax dependent by someone outside the household.[116] Again, the Court invalidated the wholesale denial of any benefits for this insular class.[117]

The *Rodriguez* dictum, that some minimal quantum of a government service or an important right (there, public education) may be constitutionally compelled in cases of complete exclusions of otherwise eligible beneficiaries,[118] as fleshed out in *Plyler*,[119] is thus properly viewed not as an aberration but as a reflection of the total deprivation theme that may be heard in

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110. 413 U.S. 528 (1973).

111. 413 U.S. 508 (1973). While *Moreno* rests on equal protection, and *Murry* on due process, both define the minimum content of rationality under the "any rational basis" (non) standard. For a more recent strengthening or reinvigoration of rationality review, *see*, City of Cleburne v. Cleburne Living Cent., 105 S. Ct. 3249 (1985), finding an equal protection violation, purportedly under rationality review, in a city's requirement of a special use permit for a proposed group home for the mentally retarded. The expansive potential of this decision for advocates for the homeless is explored in a separate article in this issue. *See* Margulies, *The Newest Equal Protection*, 3 N.Y.L.S. HUM. RTS. ANN. 359(1986) (this issue).

112. *Moreno*, 413 U.S. at 534.

113. *Id.* at 530.

114. *Id.* at 535-36.

115. *Id.* at 538.

116. *Murry*, 413 U.S. at 511-12.

117. *Id.* at 512-14.

118. *Rodriguez*, 411 U.S. at 36-37; see text accompanying note 25, *supra*.

119. See text accompanying notes 26-35, *supra*.

the Court's rather limited forays into the poverty field.

C. A Good But Imperfect Theory

A claim for affirmative injunctive relief to compel the provision of shelter for the homeless fits snugly into the total deprivation mold. It is difficult to imagine a clearer case of complete exclusion; the homeless, by definition, are totally without shelter. It is quite difficult to posit a more important right, a more basic need, than life. Witness the Lucite 6.

Advocates should nevertheless carefully consider the weaknesses and risks inherent in total deprivation analysis. Like any model, it is imperfect. Its flaws are readily identifiable.

First, like all theories seeking unity in the diversity of Supreme Court pronouncements, the total deprivation model is hardly universal; it certainly does not cover every case. For example, when applied to major housing law cases, cracks in the model are evident. True, *Lindsey v. Normet*,[120] where the Court suggested that the constitution does not guarantee minimally adequate shelter,[121] can be explained in terms of total deprivation. The plaintiff-tenants, who challenged, *inter alia*, Oregon's exclusion of implied warranty of habitability defenses from forcible entry and detainer actions,[122] were not absolutely barred. They could assert such claims in separate actions, assuming that at that point in the development of Oregon's landlord-tenant law, a landlord's breach of the implied warranty of habitability constituted a cognizable claim. Also, unlike the homeless, the tenants in *Lindsey* had some housing. Their claim was, in part, that it was inadequate due to their landlord's failure to make necessary repairs.[123] But *James v. Valtierra*,[124] where the Court sustained a California law subjecting only low-rent housing projects to local referenda voter approval,[125] is more difficult to explain under total deprivation analysis. The deprivation of affordable housing was clearly total as to those directly affected by the local referenda (rejecting proposed low income housing

120. 405 U.S. 56 (1972).
121. *Id.* at 74.
122. *Id.* at 64, 66-67 n.12.
123. *Id.* at 66.
124. 402 U.S. 137 (1971).
125. *Id.* at 140-43.

projects—about one-half of all such referenda) at the time of the lower court's decision in *James*.[126]

Second, whether the total deprivation model works depends to a significant extent upon how the interest at stake is defined. In *Griffin*, for example, the deprivation is not total if the defendant's interest is defined as access to some appellate review.[127] Under the Illinois scheme, indigent defendants could obtain review of constitutional claims without providing a trial transcript to the appellate court. Only trial errors were unreviewable without a transcript.[128] But if the interest is identified as obtaining for the indigent as adequate an appellate review as is available to the affluent, clearly the deprivation is total for the poor defendant who cannot pay a transcript fee, as in *Griffin*, or afford counsel, as in *Douglas*.

This point is highlighted in *Mayer v. Chicago*,[129] where the Court, per Justice Brennan, struck down an Illinois Supreme Court rule that provided for free transcripts only in felony appeals.[130] Justice Brennan conceded that a transcript was not a condition precedent to appeal.[131] The deprivation was not absolute (in the Rehnquist sense of stripping indigents of all rights to appeal), but the *Griffin* principle, as defined by the *Mayer* Court, is broader. It "is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."[132] In other words, "the duty of the State is to provide the indigent as adequate and effective an appellate review as that given appellants with funds."[133] When viewed in this light, an indigent non-felony defendant who is priced out of an appellate review as adequate as that enjoyed by the affluent faces complete deprivation.

The significance of interest identification can also be seen in the civil law counterparts of the criminal fee cases. There is really little room for argument in *Boddie* that the deprivation faced by an indigent prospective plaintiff unable to pay filing

126. Valtierra v. Housing Auth., 313 F. Supp. 1, 3 (N.D. Cal. 1970).
127. *Griffin*, 351 U.S. at 14-15.
128. *Id.* at 15.
129. 404 U.S. 189 (1971).
130. *Id.* at 190-99.
131. *Id.* at 194.
132. *Id.* at 196-97.
133. *Id.* at 193-94.

fees and sheriff's costs is not total. She is forever barred from access to state divorce courts and is therefore permanently locked into an intolerable marriage relationship. But the deprivation of the interests affected in the post-*Boddie* civil fee cases is equally absolute. For the indigent debtor unable to advance the bankruptcy filing fee, or even to pay it in installments as is permitted, the denial of access to the judicial forum (the only effective dispute resolution mechanism that is realistically available to the debtor) is total. He is permanently locked into the short end of the debtor-creditor relationship. And for the public assistance recipient whose claim has been denied at the administrative level and who cannot afford the judicial appellate filing fee, the interest at stake is not access to the administrative hearing process, deemed sufficient in *Ortwein*, but access to the initial, entry level of judicial review—a first day in court—to correct administrative errors in a forum independent of the administrative system.

Third, as these cases suggest, the total deprivation theory tends to mask significant regressions by the Court. *Kras* and *Ortwein* can be more readily and satisfactorily understood, if not justified, as exercises in retrenchment. The Court may well have been uncomfortable with the tremendously far-reaching implications of *Boddie*'s overtones of access to civil courts. *Kras* and *Ortwein* provided opportunities to call a halt, to try to isolate *Boddie* as an aberration,[134] just as *Rodriguez* checks the suggestion in earlier cases[135] that poverty based discriminations are inherently suspect, and just as *Ross v. Moffitt* draws the boundary line around the indigent's right to counsel on appeal.

Fourth, the total deprivation model is simplistic. It emphasizes but one of many factors that may very well be operating in the Court's analysis. It ignores, for example, the degree to which the Court at any given time will take a realistic view of poverty as beyond the individual's control or, on the other hand, will

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134. *But see* Zablocki v. Redhail, 434 U.S. 374 (1978) (discussed *supra* note 89).

135. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored") (citation omitted), and McDonald v. Board of Elections, 394 U.S. 802, 807 (1960) ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.")

take a harsher, moralistic view as expressed, for example, in Justice Blackmun's unfortunate comment in *Kras* to the effect that if the debtor really needed the bankruptcy remedy, the minimal price of a filing fee (the proportional equivalent of a "pack or two of cigarettes" per day), would be within his "able bodied reach."[136] Furthermore, the deprivation focus redirects attention from the entire host of factors that enter into the appellate process, from the relative weight to be given to the ever present fiscal interests of the state, to the degree of justification that will be demanded, to the means-ends segment of the constitutional equation, and to the often determinative question of where the burdens of proof and persuasion will be placed.

Finally, and perhaps most importantly, the deprivation model is a dangerous one if misunderstood. To focus upon the degree of deprivation suffered might be misconstrued as an argument that relief should be granted only in the clearest cases of absolute deprivation, of maximum suffering. Thus, what Professor Kramer[137] identifies as "constitutional words of harm"—words such as "deny," "infringe," and "deprive"—might be interpreted to offer lesser coverage than presently provided if they are only to be activated upon a showing of total rather than relative deprivation. Equal protection, after all, concerns differences in *relative*[138] treatment between similarly situated people.

The total deprivation principle must therefore be properly understood. It emphasizes that in those situations where a life sustaining benefit (for example, shelter) is totally denied, the government's justification must be not just at least as strong as, but more compelling than, the need denied. The principle clearly does not mean that judicial relief is to be withheld in all other contexts, especially in situations involving relative deprivations or allocations of limited public resources in ways in which all potential beneficiaries receive at least some benefits.

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136. *Kras*, 409 U.S. at 449.

137. Dean John Kramer, Georgetown University Law Center.

138. Similarly, poverty itself involves both absolute deprivation—for example, the inability to purchase an adequate, nutritious diet—and relative deprivation—having less income than others in society. Law, *Economic Justice supra* note 3, at 149. By emphasizing absolute deprivation, the total denial theory tends to divert needed attention from the other half of the poverty equation.

The strength of this model, however, lies precisely in these weaknesses. By underscoring the severity of the deprivation in terms of what the denial means to the victim's ability to survive, the total deprivation theory holds some promise for the homeless. That promise may come within reach far faster, however, through less direct judicial strategies than investing enormous time, research and litigation resources in trying to establish, directly through a test case approach, a broad based "right to shelter"—an idea that will no doubt strike many courts in these conservative times as a novel, far reaching notion best left to legislative (in)action.

II. INDIRECT JUDICIAL STRATEGIES

Indirect judicial strategies—including those grounded in state law governing welfare, mental health and sex discrimination—offer additional footholds to the homeless in their search for shelter. As discussed more fully in Part IV,[139] one of the core precepts of legal activism is that indirect, roundabout, creative approaches to a problem may often prove more effective than a direct assault. This principle of indirection holds a lesson for those seeking shelter for the homeless. Rather than a frontal attack via a "right to shelter" test case, side door approaches may provide easier access to the same house. Even a brief look at the nut to be cracked suggests that a sledgehammer approach may be neither wise nor necessary.

The "homeless" are not an homogenous group. They suffer differing, individualized hardships. In the rural, orchard dotted, south central Pennsylvania county in which I practice poverty law, people in need of emergency shelter include migrant farmworkers who arrive before area work camps open, or are awaiting their first paychecks to pay security deposits or advance rent; the children and spouses of migrant workers who find themselves excluded by the policy of some area fruit growers to house only the worker and not his family; homeless women excluded from a small (12 bed) area shelter and from church mission shelters in adjacent counties which house only men; transients; county prison residents who upon release are faced with no place to live; tenants facing expiration of their

139. Text accompanying notes 267-91.

leases with no alternative, affordable housing in sight; tenants evicted, often through self-help means (for example, utility shut-offs or padlocking), who have nowhere to go; individuals between 18 and 45 who rely on state financed public assistance benfits as their sole source of income, who are classified as "able bodied" and therefore only "transitionally needy" under a 1982 legislative purge of the state's welfare rolls,[140] who are then terminated from public assistance after 90 days, and have no money to pay rent to keep the only shelter they have; people suffering from mental or emotional problems; and those who rely exclusively upon other government benefit programs (for example, Social Security Disability), whose benefits are delayed or terminated.

This rough profile of the homeless population is somewhat different from that of the street people who sleep on the steam grates of downtown Los Angeles or Washington, D.C. Yet common denominators begin to emerge as an advocate studies the rural and urban homeless profiles. Significant subgroups within the homeless population begin to take shape. The mentally ill are one. Statistics from New York are illustrative. Since 1968, New York has discharged 65,000 patients out of a total 89,000 people residing in state psychiatric hospitals. An estimated 47,000 mentally ill people live in New York City alone. Of these, only 424 now reside in halfway houses.[141] Many of the rest are on the streets, homeless.

Women and children are becoming another significant subgroup of the homeless population, as are those who exist on government benefit programs. A 1982 Baltimore study, for example, disclosed that the city's homeless included adults between 20 and 29 (42%), families with children (23%), General Assistance recipients (25%), AFDC recipients (20%), SSI recipients (10%),

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140. *See* Pa. Welfare Reform Act, Pub. L. 231, No. 75, § 10 (April 8, 1982). General welfare recipients can be classified as transitionally needy by the Pa. Department of Public Welfare under this statute, qualifying for only ninety days worth of general assistance. This was applied to recipients currently receiving year-long assistance. *See* Ream v. Dept. of Public Welfare, 93 Pa. Commw. 190, 500 A.2d 1274 (1985); Chatham v. Dept. Pub. Welfare, 90 Pa. Commw. 44, 494 A.2d 18 (1985); Knier v. Dept. Pub. Welfare, 84 Pa. Commw. 609, 480 A.2d 369 (1984); Fisher v. Dept. Pub. Welfare, 82 Pa. Commw. 116, 475 A.2d 873 (1984) (plaintiffs challenging the classification).

141. Werner, *On the Streets: Homelessness Causes and Solutions*, CLEARINGHOUSE REV., May 1984, at 13.

and those without any income (25%).[142]

These insights into who the homeless are invite court strategies tailored to the needs of particular homeless individuals and subgroups.

A. State Mental Health Law

State mental health law is a potential source of support for the shelter and health needs of the mentally ill homeless. *Klostermann v. Cuomo*[143] well illustrates this potential. The *Klostermann* plaintiffs were former residents of state mental health institutions who found themselves homeless after being discharged from institutional placement to a "least restrictive environment."[144] In their cases, because of inadequate funding for community facilities, the least restrictive alternative turned out to be the streets of New York City. The plaintiffs in a consolidated case, *Joanne S. v. Carey*,[145] were 11 patients in a New York psychiatric hospital who were ready to be released but could not be because they lacked adequate residential placements.[146] At the time their complaint was filed in August 1982, they had been waiting as long as one year for shelter to become available in the community.[147]

Both sets of plaintiffs sued the state on both constitutional[148] (the right to treatment, including aftercare in the least restrictive environment and freedom from personal harm, as protected by the fifth, eighth and fourteenth amendments) and state statutory grounds (New York's Mental Hygiene Law).[149] Generally, these mentally ill individuals demanded a community placement that would guarantee continued treatment and adequate housing. Specifically, as the New York Court of Appeals described their claims, "[p]laintiffs contend that they are entitled to appropriate residential placement, supervision, and care,

142. *Homelessness in America: Hearing Before the House Subcommittee on Housing and Community Development*, 97th Cong., 2d Sess. 632 (1982).

143. 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984).

144. *Id.* at 531, 463 N.E.2d at 591, 475 N.Y.S.2d at 250.

145. 61 N.Y.2d at 534, 463 N.E.2d at 592, 475 N.Y.S.2d at 251.

146. *Id.*

147. *Id.*

148. *Id.* at 532, 463 N.E.2d at 591, 475 N.Y.S.2d at 250.

149. N.Y. MENTAL HYG. LAW § 29.15(f)-(h) (McKinney 1978).

including follow-ups to verify that their placement remains appropriate."[150]

The state law ground for plaintiffs' claim of entitlement was New York's mental health statute, which requires that a written service plan be prepared for patients prior to discharge into the community.[151] These individual service plans must include an identification of the patient's needs for supervision and aftercare, and a "specific recommendation of the type of residence in which the patient is to live."[152] Additionally, the statute requires the director of the state treatment facility to prepare, implement and monitor a comprehensive oversight program.[153] This individualized program is meant "to determine whether the residence in which such client or patient is living is adequate and appropriate for the needs of such patient; to verify that such patient is receiving the services specified [in the written service plan], and . . . to take steps to assure the provision of any additional services."[154]

The lower court in *Klostermann* rejected these claims as nonjusticiable, reasoning that mandamus would entangle the court in endless supervision of a series of continuous acts[155] and, besides, the statutory duty is one involving discretion and judgment, making mandamus inappropriate.[156] The New York Court of Appeals, unpersuaded by this orthodox judicial response, reversed.[157] Without reaching the merits, the court conceded that "[g]enerally, the manner by which the State addresses complex societal and governmental issues is a subject left to the discretion of the legislative and executive branches;"[158] however, these cases, the appellate court insisted, are different. Because plantiffs "assert that the [l]egislature has mandated certain programs and that the executive branch has failed to deliver the services [the courts are] . . . [t]he appropriate forum to deter-

150. *Klostermann*, 61 N.Y.2d at 531, 463 N.E.2d at 591, 475 N.Y.S.2d at 250.
151. N.Y. MENTAL HYG. LAW § 29.15(f) (McKinney 1978).
152. N.Y. MENTAL HYG. LAW § 29.15(g) (McKinney 1978).
153. N.Y. MENTAL HYG. LAW § 29.15(h)1, 2, 3 (McKinney 1978).
154. N.Y. MENTAL HYG. LAW § 29.15(h) (McKinney 1978).
155. *Klostermann*, 61 N.Y.2d at 533, 463 N.E.2d at 592, 475 N.Y.S.2d at 251.
156. *Id.* at 534, 463 N.E.2d at 592, 475 N.Y.S.2d at 251.
157. *Id.* at 541, 463 N.E.2d at 596, 475 N.Y.S.2d at 255.
158. *Id.* at 535-36, 463 N.E.2d at 593, 475 N.Y.S.2d at 252.

mine the respective rights and obligations of the parties."[159] Essentially, plaintiffs were saying that they were not receiving services, including shelter, that state law said they should as necessary components of continuing mental health treatment.

Advocates should consider whether a similar state law claim can be advanced on behalf of the mentally ill homeless in their communities. Pennsylvania law, for example, while not as specific as its New York counterpart, offers some leverage. Pennsylvania's Mental Health and Mental Retardation Act of 1966[160] imposes on the state the power and duty "to assure within the State the availability and equitable provision of adequate mental health and mental retardation services for all persons who need them, regardless of religion, race . . . residence, or economic or social status."[161] Counties, in turn, have the responsibility for establishing mental health programs "for the prevention of mental disability, and for the diagnosis, care, treatment [and] rehabilitation" of the mentaly ill.[162] Included among the services within "the duty of local authorities in cooperation with the department [of public welfare] to insure" are "[a]ftercare services for persons released from [s]tate and [c]ounty facilities."[163] Aftercare services are defined broadly as services designed to assist the individual in maintaining himself as a member of society, and specifically include halfway houses.[164] Finally, Pennsylvania's mental health law gives counties the power to provide to the mentally ill "[a]ny other service or program designed to prevent mental disability or the necessity of admitting or committing the mentally disabled to a facility."[165]

Significantly, the Pennsylvania Supreme Court has said that the state's statutory commitment to the mentally ill is mandatory, not optional and is not conditional on the availabil-

159. *Klostermann*, 61 N.Y.2d at 536, 463 N.E.2d at 593-94, 475 N.Y.S.2d at 252-53.

160. Mental Health and Mental Retardation Act of 1966, PA. STAT. ANN. tit. 50, §§ 4104-4704 (Purdon 1969).

161. PA. STAT. ANN. tit. 50, § 4201(1) (Purdon 1969).

162. PA. STAT. ANN. tit. 50, § 4301(a) (Purdon 1969).

163. PA. STAT. ANN. tit. 50, § 4301(d)(6) (Purdon 1969). *See also*, Mental Health Procedures Act, PA. STAT. ANN. tit. 50, § 7116 (Purdon 1969), which requires county mental health programs to "receive referrals from [s]tate-operated facilities" and to assume responsibility "for the treatment needs of county residents discharged from institutions pursuant to" the Act.

164. PA. STAT. ANN. tit. 50, § 4102 (Purdon 1969).

165. PA. STAT. ANN. tit. 50, § 4301(e)(3) (Purdon 1969).

ity of funding. *In re Schmidt*[166] involved a skirmish between the state and one of its counties over which was responsible for providing an appropriate placement suited to the individual needs of a severely retarded adult, who required more supervision than was available at the state facility located in the county.[167] The county had no existing alternative facility that would meet the plaintiff's need for extensive supervision. The Pennsylvania Supreme Court ruled that the state had ultimate placement responsibility under its statutory duty to provide mental health services to all in need of them, including plaintiff.[168] "The state will not be allowed to ignore that responsibility," the court insisted, "by stating that an appropriate facility is not immediately available."[169]

While fixing ultimate responsibility for plaintiff's case with the state, the *Schmidt* court also rejected the county's position that its statutory power to establish "additional services and programs" designed to prevent institutionalization only required it to provide interim care until the state arranged a long-term placement.[170] The Pennsylvania Supreme Court read the statutory grant of authority to establish preventive programs as "more than a mere grant of power to be used at the county's option."[171] Rather, "the legislative scheme was designed to require the county to provide those supportive services where they would eliminate the necessity of institutionalization, even where those services would be required on a long term basis."[172]

Providing shelter to the mentally ill homeless might well fit within the broad definition of "aftercare services" contained in Pennsylvania's mental health law statute.[173] Shelter is essential to "maintaining" the individual as a functioning member of society—indeed, as a functioning individual at all. Under the *Schmidt* rationale, the lack of a shelter in the community should not be an acceptable defense. The state and the county must respond to the mental health needs of the individual, once those

166. 494 Pa. 86, 429 A.2d 631 (1981).
167. *Id.* at 90-91, 429 A.2d at 633.
168. *Id.* at 98, 429 A.2d at 637.
169. *Id.*
170. *Id.* at 94-95, 429 A.2d at 635-36.
171. *Id.*
172. *Id.* at 95, 429 A.2d at 635-36.
173. PA. STAT. ANN. tit. 50, § 4301(d)(6) (Purdon 1969).

needs are established.

Additionally, the statutory power of Pennsylvania counties to set up programs designed to prevent institutionalization of the mentally ill provides local advocates with an important negotiating tool. Even if a lawsuit to compel the state or county to provide a shelter for the mentally ill homeless might not ultimately succeed—perhaps for lack of sufficient specificity in the above statutory language—the argument that state statutory power exists to provide shelter to this significant segment of the homeless population should not be overlooked in a community's shelter campaign. It is helpful to remember that *Klostermann* and *Schmidt* are merely two judicial manifestations of the broader contemporary social trend toward community based placements for the mentally ill. As the New York Court of Appeals noted in *Klostermann,* the plaintiffs were or were about to be "discharged as part of the [s]tate's policy to release patients to less restrictive, community-based residences."[174] Similarly, the Pennsylvania Supreme Court in *Schmidt* stressed that state statutory law was firmly behind "the concept of normalization and the adoption of the doctrine of least restrictive alternative."[175]

State statutory provisions such as those utilized in *Klostermann* and *Schmidt* should therefore be linked with this broader movement toward de-institutionalization and least restrictive placements by advocates seeking community shelters for the mentally ill homeless. This linkage is particularly important where it can be established that the state's failure to fund community based placements for the mentally ill is a contributing factor in the homelessness equation.

B. State Welfare Law

State welfare law may provide a basis for sheltering the homeless. Precedent from West Virginia and New York is illustrative of the very few[176] examples of the use of state welfare

174. *Klostermann,* 61 N.Y.2d at 531, 463 N.E.2d at 591, 475 N.Y.S.2d at 250.

175. *Schmidt,* 494 Pa. at 98, 429 A.2d at 637.

176. Another example of the affirmative use of state public assistance law on behalf of the homeless is Matickla v. Atlantic City, No. L-8306084E (N.J. Super. Ct. Law Div. Feb. 16, 1984) (restraining order for emergency shelter and immediate assistance). There, the Public Advocate of New Jersey represented homeless individuals in Atlantic City in

laws to compel government provision of shelter for homeless people who, almost universally, are indigent. The lesson of these cases is instructive.

The plaintiffs in *Hodge v. Ginsberg*[177] were persons who had no shelter and who, as the West Virginia Supreme Court of Appeals phrased it, "therefore [were] forced to spend their days and nights on public streets, alleys, riverbanks, and other various outdoor locations."[178] They sued in mandamus on constitutional and state statutory grounds, seeking an order directing the state welfare department to provide them with emergency shelter, food and medical care.[179] They won.

They won because they successfully invoked state welfare code provisions requiring the state to provide protective services to "incapacitated adults," defined as "any person who by reason of physical, mental or other infirmity is unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health."[180] Homeless persons, the court reasoned,

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their suit for injunctive relief requiring the city to provide safe, suitable emergency shelter. Plaintiffs invoked both the state constitutional provision recognizing the "natural and inalienable rights" of persons to enjoy life, liberty, property and happiness (N.J. CONST. art. 1), and the state public assistance statute and regulations affording indigents a right to immediate assistance, arguably including emergency shelter. The state Superior Court granted preliminary injunctive relief on the asserted public assistance law grounds. *See also* Lubetkin v. City Manager, No. 0280505 (Conn. Super. Ct. filed Feb. 4, 1984), a class action on behalf of homeless Hartford residents seeking to compel the city to provide plaintiffs with emergency food and shelter pursuant to state welfare laws. A yet more recent example is Rodgers v. Gibson, No. L.17401-84 (N.J. Super. Ct. Law Div. filed Sept. 6, 1985) (reported in 19 Clearinghouse Review No. 8,892 (Dec. 1985)). This is an action by the New Jersey Public Advocate on behalf of homeless people in Newark for failure by the city to shelter the homeless. The suit invokes the state's constitution, state general assistance laws, and state law protections for mentally handicapped citizens.

For an excellent summary of litigation efforts to address homelessness, based not only on public assistance but a variety of grounds, *see, Homelessness: A Litigation Roundup*, 14 HOUSING L. BULL. 1 (November/December 1984).

177. 303 S.E.2d 245 (W. Va. 1983). Note that intervening plaintiffs in *Hodge* include a local association for retarded citizens, highlighting the linkage to the mental health and mental retardation communities, and a local coalition seeking emergency shelter for the homeless, illustrating the effectiveness of broad based, community organizing. *Amicus* in *Hodge* included an organization which provided daily meals to the indigent and a Catholic "worker house of hospitality" which provided overnight shelter.

178. *Id.* at 247.

179. *Id.* at 245.

180. W. VA. CODE § 9-6-1(4)(1984).

fit squarely within that definition;[181] consequently, the court ordered the state welfare department "to provide emergency shelter, food and medical care" to plaintiffs and those similarly situated, pursuant to the welfare code and implementing regulations.[182]

In doing so, the West Virginia Supreme Court pointed to an important link between statutory entitlements and the constitutional guarantee of due process: "Inherent in the republican form of government established by our State Constitution is a concept of due process that insures that the people receive the benefit of legislative enactments."[183] This is precisely the theme struck in *Klostermann v. Cuomo,* reviewed above in the discussion on state mental health law.[184] The message is an important one for the homeless and their advocates. The idea is simple. Once the legislature sets up a statutory scheme of services, and especially when the details of that scheme are fleshed out in implementing administrative regulations, individuals are entitled to receive those services.

Callahan v. Carey[185] further illustrates the potential of state welfare law in addressing the needs of the homeless. The *Callahan* plaintiffs, homeless men in New York City, obtained preliminary injunctive relief in state court requiring the city to provide an additional 750 shelter beds. The court recognized a right to shelter for the homeless.[186] Plaintiffs relied in part on state welfare law provisions imposing on the state the responsibility "to provide adequately for those unable to maintain themselves,"[187] and obligating New York City to assume responsibility "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."[188]

In their brief, plaintiffs argued that these statutory duties were mandatory, not optional, and required the state to provide

181. 303 S.E.2d at 250.
182. *Id.* at 251.
183. *Id.* at 247, (quoting Cooper v. Gwinn, 298 S.E.2d 781 (W. Va. 1981)).
184. *See* text accompanying notes 143-59, *supra.*
185. Callahan v. Carey, No. 42582/79 (N.Y. Sup. Ct. Dec. 10, 1979) (reported in N.Y.L.J., Dec. 11, 1979, at 10, col. 4).
186. *Id.*
187. N.Y. Soc. Serv. Law § 131(1) (McKinney 1983).
188. N.Y. Soc. Serv. Law § 62(1) (McKinney 1983).

New York City's homeless "the most basic life-sustaining assistance, namely shelter, in a minimally decent fashion."[189] The trial court cited these state welfare law provisions as the basis, in part,[190] for its decision that "the Bowery derelicts are entitled to board and lodging" and that the state and city defendants must therefore "provide at least 750 beds (and board for 750 men) for the helpless and hopeless men of the Bowery."[191] (A subsequent order extending the relief to homeless women is noted below in the discussion of prohibitions on sex discrimination as a tool for combating homelessness).[192]

Hodge and *Callahan* are obvious clues to advocates to look for at least partial answers to the homelessness problem in state public assistance legislation. In Pennsylvania, that search proves revealing. The legislative intent of the state's Public Welfare Code is typically broad: "to promote the welfare and happiness of all the people of the [c]ommonwealth, by providing public assistance to all of its needy and distressed."[193] "Assistance" is defined to include "money, services, goods, [and] *shelter* . . . for needy persons who reside in Pennsylvania . . . . *and for needy, homeless or transient persons.*"[194] Implementing regulations provide a maximum grant of $100, available no more than once in a twelve month period, to homeless persons, but require that the homelessness be caused by an "emergency," and condition eligibility on a showing that the individual has "obtained or committed himself . . . to new living accommodations" (that is, has located a permanent residence).[195] The intent is to provide

189. Plaintiff's Trial Memorandum at 36, *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4.

190. In its footnote containing "[t]he legal authorities for the decision," (*Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 5), the *Callahan* court also cited N.Y. CONST. art. XVII, § 1, which requires the State to provide for the "aid, care and support of the needy in such a manner and by such means, as the legislature may from time to time determine"; Jones v. Berman, 37 N.Y.2d 42, 32 N.E.2d 303, 371 N.Y.S.2d 422 (1975) which held that the constitutional mandate to provide for the needy is not conditional on reimbursement from the state; and N.Y.C. ADMIN. CODE tit. A, § 604.1.0(b) (1978), which requires the city to provide "plain and wholesome food and lodging for one night, free of charge" to shelter applicants who, in the city's judgment , "may be properly received."

191. *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 5.

192. *See* note 199 *infra* and accompanying text.

193. PA. STAT. ANN. tit. 62, § 401 (Purdon, 1968).

194. PA. STAT. ANN. tit. 62, § 402 (Purdon 1968) (emphasis added).

195. 55 PA. ADMIN. CODE § 289.4(a)(2)(iii)(B) (Shepard's 1982).

help in paying the first month's rent or a security deposit required at a new residence.[196] Those without alternative shelter, by definition homeless, nevertheless would not qualify absent a showing that they have found shelter.

This "Catch-22" and the restrictive implementing regulations that create it, as well as the miserly amount of the state's emergency, one-time shelter grant for the homeless, raise interesting, challengeable issues. The state welfare department's implementing regulations raise serious questions of consistency not only with the general intent of the welfare statute expressed above, but with the parallel, more exacting statutory requirement that the Department of Public Welfare "*shall* . . . take measures *not* inconsistent with the purposes of this article; and when other funds or facilities . . . are inadequate or unavailable to provide for special needs of individuals eligible for assistance; and to relieve suffering and distress arising from handicaps and infirmities."[197]

Under the *Klostermann* (mental health law) and *Hodge* and *Callahan* (welfare law) concept that people are entitled to receive the benefits of legislation, these Pennsylvania Welfare Code provisions may well provide advocates with legal pegs on which to hang a right to emergency shelter for the indigent homeless. Also, like the state's mental health law provisions empowering government to establish additional programs for those with designated needs, these welfare law counterparts offer advocates additional negotiating leverage, as well as focal points for media and community attention in the gap between what the state or municipality could be doing and what it is doing to shelter the homeless.

C. State Sex Discrimination Laws

State laws barring sex discrimination in housing offer an additional weapon to combat homelessness by sheltering homeless women. As mentioned in the preceding discussion on welfare law as a basis for seeking shelter for the homeless, the original order in *Callahan v. Carey* mandated that the government defendants provide an additional 750 beds for "the helpless and hopeless

196. *Id.*

197. PA. STAT. ANN. tit. 62, § 408(a) (Purdon 1968) (emphasis added).

men of the Bowery."[198] The relief was subsequently extended to include homeless women.[199] The New York court had apparently overlooked a significant component of the contemporary homeless scene. Advocates should not.

Like state mental health and welfare law, state statutes prohibiting discrimination on grounds of sex add to the arsenal in the fight against homelessness. A look at Pennsylvania law again suggests the potential force of this state statutory ammunition.

The Pennsylvania Human Relations Act[200] prohibits discrimination in certain housing on grounds, *inter alia*, of sex. In this sense, its coverage is coextensive with federal law.[201] However, as is true in relying upon state mental health and welfare statutes, a close reading of the statutory scheme is a must.

Pennsylvania's anti-discrimination statute applies to "commercial housing," defined as "housing accommodations held or offered for sale or rent . . . ."[202] Unless rent is charged, or an inventive argument demonstrating compliance with traditional lease formation requirements is developed, community shelters would seem to be beyond the reach of "commercial housing." Such a conclusion might, of course, be fatal. Pennsylvania courts have made it clear that neither they nor the administering agency (the Pennsylvania Human Relations Commission) have the authority to protect against discrimination in private, non-commercial housing.[203]

Continued reading of the statute, however, opens up a back

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198. *Callahan*, N.Y.L.J., Dec. 11, 1979, at 10, col. 5.

199. *See* Eldredge v. Koch, 118 Misc.2d 163, 459 N.Y.S.2d 960 (Sup. Ct. N.Y. Co. 1983), *rev'd* 98 A.D.2d 675, 469 N.Y.S.2d 744. While the appellate court agreed that "homeless women are constitutionally entitled to treatment equal to that accorded homeless men," it found that "the record disclose[d] factual issues as to whether that right had been violated, and accordingly reverse[d]" the lower court's grant of summary judgment. 98 A.D.2d at 675, 469 N.Y.S.2d at 745.

200. PA. STAT. ANN. tit. 43, §§ 951-63 (Purdon 1964).

201. Fair Housing Act of 1968, 42 U.S.C. § 3601-31 (1982).

202. PA. STAT. ANN. tit. 43, § 954(j) (Purdon 1964). This definition of commercial housing is more restrictive than earlier versions of this section, which defined "housing accommodations" broadly to include any building used as a residence or sleeping place for one or more persons. This earlier version would more easily accommodate shelters for homeless.

203. *See* Pennsylvania Human Relations Comm'n v. Borough of Bendersville, 24 Pa. Commw. 503, 357 A.2d 236 (1976).

door for the homeless. Gender-based discrimination is forbidden not only in commercial housing, but also in places of "public accommodation."[204] This term embraces "any place which is open to, accepts or solicits the patronage of the general public, including . . . inns, taverns, roadhouses, hotels, motels, whether conducted for the entertainment of transient guests or for the accommodation of those seeking health . . . ."[205] The New York court in *Callahan* may have referred to the street residents of the Bowery as "destitute and homeless alcoholics, addicts, mentally impaired derelicts, flotsam and jetsam,"[206] but the homeless, by whatever name, must be conceded to be members of the "general public" within Pennsylvania law's "public accommodation" provision. As such, the women among them are entitled to the protection of the statutory ban on sex discrimination in places of public accommodation.

That protection is important. As discussed at the beginning of Part II,[207] one of the contributing causes of homelessness in the rural area in which I work is the exclusion of women from area mission shelters. The Human Relations Act would appear to offer homeless women a key to opening such shelters.

The fact that some of these existing shelters are church operated or at least church affiliated, however, constitutes a separate lock that must be opened. Pennsylvania's anti-discrimination statute specifically exempts from coverage religious, charitable or fraternal organizations:

> Nothing in this . . . section shall bar any religious or denominational institution . . . which is operated, supervised, or controlled by or in connection with a religious organization or any bona fide private or fraternal organization from giving preference to persons of the same religion or denomination . . . or from making such selection as is calculated by such organization to promote the religious principles or the aims . . . for which it is established . . . .[208]

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204. PA. STAT. ANN. tit. 43 § 954(1) (Purdon 1964).
205. *Id.*
206. *Callahan*, N.Y.L.J., Dec. 11, 1979 at 10, col. 4.
207. See text accompanying note 140, *supra.*
208. PA. STAT. ANN. tit. 43 § 955(i)(2) (Purdon 1964).

Churches today may nevertheless have difficulty keeping women out of shelters under this exemption of bona fide religious organizations. Presumably, the language "persons of the same religion or denomination" does not automatically bar women; most denominations are heterogeneous. Similarly, "promoting the aims of the organization" should not suffice either as a justification for excluding women from area shelters; the mission of a homeless shelter is to shelter homeless people, and even the law now recognizes women as a subset of the class of people. Furthermore, as discussed more fully in Part III,[209] an essential historical part of the church tradition has been providing sanctuary to those in need. It would be difficult today to attempt to delimit that tradition by extending sanctuary only to men.

Advocates will rightly ponder whether a court can be persuaded to look behind a church's invocation of the blanket statutory exemption and engage even in the minimally detailed analysis sketched here. The first amendment exists and, after all, is first. But even if a lawsuit were ultimately to founder on the rocks of the religious exemption, the statutory basis for sailing the challenge is clear. As already seen in the earlier review of state mental health and welfare law handles, and as further explored in the next part, this statutory anchor provides a useful base for negotiation and consciousness-raising via media and public attention. Few modern churches, with their denominational and community involvement roots running wide and deep, would welcome a public defense of an exclusionary policy barring homeless women from shelters. Again, more than the merits of judicial action should be weighed in deciding upon the appropriate legal action to pursue on behalf of a community's homeless. Principles that should inform the process of selecting effective strategies are explored further in Part IV.[210] But a change in strategic focus, from judicial to nonjudicial approaches, is helpful before considering and applying those principles.

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209. See text accompanying note 258, *infra*.

210. See text accompanying notes 267-69, *infra*.

III. EXTRA-JUDICIAL, STREET STRATEGIES

A. Civil Disobedience and Media Theater

Extra-judicial, street strategies can open alternative, back alleys leading to shelter for the homeless. Tactics based on civil disobedience and media theater can be effective.

This is surely one of the important lessons to be learned from a review of the tactics used by the Community for Creative Non-Violence (CCNV), a loosely organized, communally oriented collection of individuals advocating on behalf of Washington, D.C.'s homeless.[211] In fact, CCNV's strategems read like a textbook on a street advocacy trio the Washington Post refers to as "civil disobedience, a flair for guerilla theater and a shrewd sense of timing and targets."[212] A few examples will serve to demonstrate the effectiveness of this potent combination of street strategies.

In 1982 CCNV was trying to persuade a liberal supermarket chain to donate unsaleable food to the homeless. To dramatize the point that such discarded items were nevertheless edible, and to attract the attention of influential decision makers, CCNV served crabmeat quiche and fresh boysenberry shortcake to a banquet assembly of 30 congressmen. These delicacies were prepared from food salvaged from the trash dumpsters of area supermarkets.[213]

CCNV received not just national but international media attention by setting up "Reaganville," a city of tents raised in a park directly across from the White House. When the Supreme Court rejected CCNV's claim that sleeping in the park was protected first amendment expression,[214] CCNV did not retreat. It just changed tactics. It left the tents but stopped sleeping in them, leaving the empty tents as a symbol of the administration's "empty promises" to the homeless.[215]

To focus public attention on the deteriorating, unhealthy condition of area shelters, CCNV activists took 100 cockroaches

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211. The Community for Creative Non-Violence (CCNV) is located at 1345 Euclid St. N.W., Washington, D.C. 20009.

212. Boodman, *supra* note 1, at A1, col. 5, continued at A19, col. 1.

213. *Id.* at A20, col. 3.

214. Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984).

215. Boodman, *supra* note 1, at A19, col. 1.

caught in CCNV's communal house and released them in the State Department Dining Room.[216] A similar tactic was used in response to threats by the Reagan administration to evict the homeless from a dilapidated local shelter. CCNV, in an election year, counter-threatened by promising a protest march on the White House. Federal officials dropped the eviction effort; the President himself ordered that the shelter was to remain open.[217] As discussed below, that order was short lived.[218]

The most dramatic and dangerous of CCNV's exploits, however, was the hunger strike of its leader, Mitch Snyder, who refused to eat until the Reagan administration committed itself to renovating a Washington, D.C. shelter. Forty-nine days into his fast and sixty pounds lighter, Mr. Snyder began to see movement in the political process. The chairman of the federal Task Force on Food and Shelter[219] visited the shelter and urged a bedridden Mitch Snyder to eat. He refused. The Speaker of the House, as well as the chairman of a House committee that had held hearings on homelessness the previous winter,[220] asked the administration for a speedy allocation of renovation funds. The Speaker also telegrammed the Secretary of Health and Human Services (HHS), requesting her personal intervention. The Vice President's wife interceded. And, literally on his deathbed, Mr. Snyder received the federal commitment to repair the shelter that he had demanded. The President directed HHS to take the necesary measures to transform the shelter into a "model facility."[221]

The transformation has yet to occur. Subsequent, post-election developments have led to a stalemate. HHS developed plans for renovating the CCNV operated shelter, Mr. Snyder criticized them as falling short of the "model facility" pledge, and HHS withdrew from its renovation commitment. It decided instead to provide $2.7 million to assist local governments and other shelter providers in setting up alternative shelters, and or-

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216. *Id.* at A19, col. 1.

217. *Id.*

218. See text accompanying note 222, *infra.*

219. *Victory,* Wash. Post, Nov. 6, 1984, at A20, col. 1 (editorial) [hereinafter cited as Mitch Snyder's Victory].

220. *Id.*

221. *Id.*

dered that the CCNV shelter be closed.[222] Residents of the CCNV shelter then sued the President and HHS's Secretary in an attempt to enforce the government's commitment to renovate the shelter.[223] The district court upheld HHS's decision to close the shelter, reasoning that it was not arbitrary and capricious for the government to choose relocation rather than renovation.[224] The court of appeals affirmed the district court's holding that the decision to close rather than renovate the shelter was not arbitrary or capricious.[225] However, it affirmed the district court's order only to the extent that it required the agency to locate substitute shelter facilities for the shelter residents.[226] Any requirement beyond that, to develop "plans to eliminate homelessness in the Nation's Capital," was reversed as beyond the present dispute before the court.[227]

While judicial relief is pursued, Mr. Snyder's special form of brinkmanship continues. Warning that some shelter residents will physically resist eviction, Mr. Snyder explains that "[w]e're not going to just give up the building."[228] According to the Washington Post, "[t]he Second Street [CCNV] shelter has been fortified since late August [1985] against a federal takeover," because "CCNV intends to face down its adversary," although Mr. Snyder "keeps details of his plan to himself."[229]

The parrying goes on. So long as it does, CCNV keeps winning even while losing; public attention remains focused on a problem that shows no signs of disappearing.

The hunger strike is only one example of personal risk-taking by Mitch Snyder and other CCNV activists. On a wintry night in February, 1980, Mr. Snyder and other colleagues entered two major Washington churches in an effort to open them to the homeless. Asked to leave, they refused and were arrested,

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222. Brisbane, *Homeless Caught in Conflict; Some Balk at Move to D.C. Shelter*, Wash. Post, Nov. 13, 1985, at A10, col. 1 [hereinafter cited as Brisbane].

223. Robbins v. Reagan, 616 F. Supp. 1259 (D.D.C. 1985).

224. *Id.* at 1276-79.

225. Robbins v. Reagan, 780 F.2d 37, 53 (D.C. Cir. 1985).

226. *Id.* at 51.

227. *Id.*

228. Brisbane, *supra* note 222.

229. *Id. See also Residents are Said to Fortify Capital Shelter for the Homeless*, N.Y. Times, Nov. 8, 1985, at A25, col. 3.

charged and convicted of unlawful entry.[230] Their "necessity" defense[231] was rejected by the courts in part because their actions in opening and entering the churches' doors were taken to focus public attention on the homelessness issue and not, as legal doctrine requires, as a last resort to avoid immediate harm to homeless individuals.[232] Although their legal defense failed, their exercise in raising public awareness via civil disobedience succeeded.

B. Community Organizing

Community organizing centered on legislative and administrative advocacy is both a useful and necessary counterpart to guerilla theater and civil disobedience techniques that focus public attention on the plight of the homeless.

CCNV's success has not been limited to elevating public consciousness of the existence and needs of the homeless. It has also demonstrated the effectiveness—indeed, the necessity—of translating media attention into political change. Two examples will suffice. CCNV recently spearheaded a community organizing effort that placed 32,000 signatures on a Washington, D.C. ballot initiative that would guarantee a night of free shelter for the District's homeless.[233] On November 6, 1984, the shelter referendum was approved by Washington, D.C. voters.[234]

In initially winning the war, CCNV also won an important skirmish along the way. Early in its voter registration drive, it

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230. Griffin v. United States, 447 A.2d 776, 777 (D.C. 1982), *cert. denied*, 461 U.S. 907.

231. "In essence, the necessity defense exonerates persons who commit a crime under the 'pressure of circumstances,' if the harm that would have resulted from compliance with the law would have significantly exceeded the harm actually resulting from the defendants' breach of the law." *Griffin*, 447 A.2d at 777.

232. *Id.* at 778.

233. Boodman, *supra* note 1, at A19, col. 1.

234. *See What To Do About the Shelter Vote*, Wash. Post, Nov. 9, 1984 at A26, col. 1 (editorial). The Washington D.C. shelter referendum was struck down in District of Columbia v. Board of Elections and Ethics, Civ. No. 12280-84, (D.C. Super. Ct., filed Oct. 11, 1984) on grounds that it violated a local enabling statute authorizing intiatives and referenda except those appropriating funds. On appeal, *see* Board of Elections & Ethics v. District of Columbia, No. 85-1029 & 85-1043 (D.C. Ct. App. May 20, 1986) (reported in 509 A.2d *withdrawn* (1986)). *See also* D.C. CODE ANN. §§ 3-601 *et seq.* (1985).

In New York City, a homeless referendum was not allowed on the ballot because the funding mechanism put forward required state legislative approval. Adams v. Cuevas, No. 16838/86, 506 N.Y.S.2d 614 (Sup. Ct. N.Y. Co. 1986).

urged several homeless men to register to vote. The city registrar rejected their application on grounds that steam grates do not qualify as residences under the local voting ordinance.[235] CCNV appealed and won.[236]

CCNV's experience in securing legislation favorable to the homeless is not unique. Declaring that "[t]he people of New York State will be measured by the degree of compassion we exhibit on the least fortunate,"[237] Governor Mario M. Cuomo in March, 1983, proposed a bill, passed by the New York legislature the following month, appropriating $12.5 million in the first of a four year, $50 million effort to assist New York's homeless.[238] The statute provides state funding to municipalities and non-profit organizations to renovate or construct housing for the homeless.[239]

A related attempt to seek legislative relief for the homeless, on a small scale, comes from a small Pennsylvania community coalition for the homeless. The Pennsylvania legislature recently passed a resolution decrying the lot of the homeless and, following the traditional legislative pattern, established a committee to study the problem and propose legislative solutions.[240] The special committee formed by the resolution, in turn, contacted local county commissioners and other heads of municipal government, requesting their input. The local coalition for the homeless, of which I am a member, submitted a response[241] answering the committee's "who, what and where" questions and accepting its invitation to recommend how "state government [can] assist in addressing the problem of homelessness."[242]

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235. N.Y. Times, Aug. 29, 1984 at B6, col. 4.

236. *Id.* A California case has similarly upheld the right of homeless persons to register to vote, listing a city park as their domicile. Collier v. Menzel, 176 Cal. App.3d 24 (1985).

237. Press Release, March 7, 1983, introducing the Homeless Assistance and Shelter Establishment Program, enacted by the New York legislature as N.Y. Soc. Serv. Law §§ 41-44 (McKinney 1983 & Supp. 1986), and signed by Gov. Cuomo on Apr. 19, 1983.

238. N.Y. Soc. Serv. Law §41 (McKinney 1983 & Supp. 1986).

239. N.Y. Soc. Serv. Law § 43 (McKinney 1983 & Supp. 1986).

240. H.R. 249 (June 26, 1984).

241. Recommendations of the Franklin County Coalition for the Homeless (Oct. 1, 1984) (recommending legislative remedies to homelessness, to the Special Committee on H.R. 249 of the Pennsylvania House of Representatives).

242. Letter from the Pennsylvania House of Representatives' Special Committee on H.R. 249 to county commissioners (Aug. 30, 1984).

The coalition's response goes beyond proposals for adequate statewide funding for homeless shelters. It also recommends legislation aimed at several of the contributing causes of homelessness. It seeks appropriations for community placements for mentally ill individuals coupled with state legislation superseding local zoning ordinances which operate to exclude group homes for the mentally ill from residential areas; continuation of the state imposed moratorium on Social Security Disability terminations; repeal of state legislation cutting off public assistance to needy single individuals after 90 days of benefits; legislation mandating that employers of migrant farmworkers provide adequate housing to both workers and their families; a statutory prohibition of self-help evictions; and legislation, patterned after Washington, D.C.'s shelter referendum, recognizing on a statewide basis a right to overnight shelter for the homeless.[243]

The Pennsylvania legislature on December 11, 1985 adopted a much more limited yet important response to statewide requests to address both the long and short term needs of Pennsylvania's homeless.[244] Governor Thornburgh signed legislation providing $5.5 million for transitional (bridge) and single room occupancy (SRO) housing facilities for homeless or potentially homeless individuals and families.[245]

These recommendations from a homeless advocacy group located in a small, rural Pennsylvania community, together with similar submissions from around the state, illustrate one of two points worth remembering about community based efforts on behalf of the homeless. The first is that the homelessness issue can provide a focal point for organizing efforts directed to broader yet related economic rights concerns. The second is the importance of establishing church involvement as an integral part of any coalition, community based strategy.

C. Church Involvement

The significant judicial, moral and political value of church involvement in community based efforts to shelter the homeless

243. Recommendations of the Franklin County Coalition for the Homeless (Oct. 1, 1984), at 6-9.

244. H.B. 1353 (Dec. 11, 1985); Public Opinion (Chambersburg, Pa.), Dec. 13, 1985 at 15; Philadelphia Inquirer, Dec. 15, 1985 at 6-H.

245. *Id.*

should not be overlooked. The judicial advantages of church involvement in the struggle for shelter for the homeless is exemplified by *St. John's Evangelical Lutheran Church v. Hoboken.*[246] There, the church operated a shelter for the homeless in the church's basement, providing meals and lodging for between 30 and 50 individuals per night.[247] The church is located within the city of Hoboken and is therefore subject to its zoning laws. The municipality attempted to shut down the shelter by enforcing its zoning ordinance, which permitted as accessory uses only such "other uses customarily incident to principal uses and on the same lot."[248] The church argued that sheltering the homeless qualified as an accessory use to a church.[249]

In granting a preliminary injunction preventing the municipality from enforcing its zoning ordinance so as to close the shelter, the Superior Court of New Jersey skipped over the issue of how the local ordinance was to be construed and moved on to higher ground.[250] It raised the "important issue as to the breadth of religious freedom when confronted with the zoning authority of local government."[251] The court decided the church-state issue in the church's favor. The zoning power, the court insisted, cannot be used to preclude a church from exercising its religious function in providing sanctuary for the homeless.[252] Such use of the zoning power contravenes the first amendment's free exercise clause.[253]

Hoboken vividly illustrates the significant buffer role a

246. 195 N.J. Super. 414, 479 A.2d 935 (1983).

247. *Hoboken,* 195 N.J. Super. at 417, 479 A.2d at 937.

248. *Hoboken,* 195 N.J. Super. at 417, 479 A.2d at 937, (quoting Hoboken, N.J., Zoning Ordinance S. 4.5203). For another more recent success in resisting the use of municipal zoning powers to exclude shelters for the homeless, *see,* S.C.O.P.E., Inc. v. Zoning Bd. of Adjustment, No. L-053018-84 P.W. (N.J. Super. Ct. Sept. 11, 1985), reported in 19 CLEARINGHOUSE REV. 892 (Dec. 1985), where a New Jersey court reversed a local zoning board's denial of a use variance to an agency to operate an emergency shelter. The court found that the proposed shelter would serve the important public policy of caring for the homeless; consequently, it must be considered an "inherently beneficial use" under state zoning law precedent. *See also,* City of Cleburne v. Cleburne Living Cent., 105 S. Ct. 3249 (1985) (city's requirement of a special use permit for a proposed group home for the mentally retarded violates equal protection).

249. *Hoboken,* 195 N.J. Super. at 417, 479 A.2d at 937.

250. *Id.* at 417-18, 479 A.2d at 937.

251. *Id.* at 417, 479 A.2d at 937.

252. *Id.* at 420, 479 A.2d at 938.

253. *Id.*

church can play. Sheltering the homeless, at least when done publicly, is often not the most popular exercise in social justice that can be undertaken in many communities. Perhaps nothing illustrates this better than the Army's efforts, such as they were, to spend an $8 million Congressional appropriation by making surplus military space available to local municipalities and nonprofit organizations for use as emergency shelters. Ultimately, only about $1 million was allocated for its intended use for shelters. The rest went to ordinary maintenance needs of the military. The Army's explanation, not wholly untenable, was that many municipalities rejected the federal offer because they simply did not want a shelter in their communities. As a councilman and vice mayor of a middle class California suburb explained, "We were concerned about becoming a magnet for homeless people from the entire area."[254]

As such sentiments gain strength within a community, and as the homeless become more and more visible to the public, the result can be municipal action like that taken in *Hoboken*. The insulating qualities of the first amendment saved the church's shelter there. The fact that the shelter was run out of a church's basement may also have been a factor in the court's lenient approach to application of local health and safety requirements. While the court noted that the shelter "must comply with appropriate health and safety laws and regulations, including reasonable occupancy requirements,"[255] it also cautioned the city that "the church should not have to meet health and safety requirements imposed upon a commercial establishment such as a hotel,"[256] and that "the laws and regulations should be interpreted in a reasonable and common sense manner bearing in mind that overly strict enforcement might force the shelter to close."[257]

Hoboken also illuminates the persuasive moral influence

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254. Wash. Post, Oct. 25, 1984, at A23, col. 3. As additional reasons for rejecting the military's shelter overture, other city officials and nonprofit organizations cited the failure of the federal government to extend additional financial assistance to help pay shelter utility and other operating costs, the fact that military facilities are often located in remote, isolated areas outside the reach of available transportation, and poor communication and inadequate outreach by the Army in promoting its shelter program. *Id.*

255. *Hoboken*, 195 N.J. Super. at 421, 479 A.2d at 939.

256. *Id.*

257. *Id.*

that accompanies church participation in the quest to alleviate homelessness. The case well demonstrates that providing shelter to those in need is not new to the church's mission. Plaintiffs submitted an affidavit from the church's reverend. It makes for more than historical reading:

> The concept of sanctuary has been a strong element of religious tradition from Moses to the New Testament. Sheltering the homeless and caring for the poor has consistently been a church function, carried out for centuries by religious persons. It is among the basic mandates in the Judeo-Christian heritage . . . . Sanctuary became such a strong religious tradition it was recognized in Roman, medieval, and English common law. During the middle ages every church was a potential sanctuary . . . . After the passage of the Fugitive Slave Act, churches . . . became stations along the Underground Railroad providing food and shelter for escaping slaves. More recently churches and synagogues throughout this country have opened their doors to the homeless and oppressed.[258]

Community advocates have not hesitated to open their doors to the church, recognizing that doing so opens many more doors. A dramatic example comes from Norristown, Pennsylvania, where Nobel Peace Prize recipient Mother Teresa was invited to attend the dedication of a local shelter. She came. So did Cardinal John Krol. Local government officials, who had just passed "the most up-to-date zoning ordinance" in the county to contain the spread of such shelters, reacted predictably to the shelters:

> We really don't know what services they will provide. We're fearing, I guess you would say, that this is another attempt to set up a shelter for the homeless and disadvantaged.[259]

The reaction of the town fathers to the religious leaders' arrival was more subdued, however: "Hearing that heavy-weights like Mother Teresa and Cardinal Krol are coming in, we're wonder-

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258. *Id.*

259. Franklin County Opinion, Oct. 24, 1984, at p.1.

ing what might happen."[260] The local parish pastor, of course, put it more positively, remarking that their arrival "isn't a controversy, it is a blessing."[261]

Arranging for Mother Teresa's attendance and blessing is obviously neither easy nor realistically possible. But neither is it necessary. The point is first to recognize the powerful contribution the established church[262] can offer in building grass roots community support for the homeless, and second to realize that the *Hoboken* and Mother Teresa examples are not isolated incidents of religious concern for the poor. Witness the pastoral letter of the National Conference of Catholic Bishops, which has been aptly characterized as the beginning of "a public campaign to make a moral issue. . .out of the condition of the poor in this country and abroad."[263]

The bishops are surely right in making the plight of the poor a moral issue. Advocates should not miss this moral dimension of homelessness, for it offers a powerful handle. As counsel for the National Coalition for the Homeless testified before the House Subcommittee on Housing and Community Development in 1982:

> The homeless living and dying on the streets of our cities are a standing challenge to the moral legitimacy of this nation. Right now the homeless are the shame of America.[264]

Such moral outcries can lead to, and lay the groundwork for, additional legislative responses. On signing state legislation to fund renovation and construction of housing for the homeless,[265] Governor Cuomo echoed the moral message he first sounded in his state-of-the-state speech, in which he referred to society's

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260. *Id.*

261. *Id.*

262. Of course, "the established church" is in many respects as fictitious as "the homeless" if either is conceived as an homogeneous entity. Deep ideological, "left-middle-right" divisions mark "the church community" just as they do any calling. Such splits highlight the need for advocates to be sensitive to and educated on the level of active commitment to social justice concerns demonstrated by local community churches.

263. Wash. Post, Nov. 8, 1984, at A6, col. 1.

264. *Homeless in America: Hearing Before the House Subcomm. on Housing and Community Development*, 97th Cong., 2d Sess. 60 (1982).

265. N.Y. Soc. Serv. law § 41-44 (McKinney 1983 & Supp. 1986).

treatment of the homeless as "a test of our commitment to the ideals of justice, fairness, and human dignity."[266]

Besides providing useful judicial and moral support, church involvement in local community coalitions on behalf of the homeless offers distinct political advantages. The church is often and understandably a highly respected, credible institution in most localities. Enlisting the participation of its representatives in coalition advocacy efforts to shelter the homeless—from sending or signing correspondence to elected representatives, to meeting with local government officials, to educating the community on the needs of the homeless, to generating financial and volunteer personnel support for the operation of a shelter, to pressing for long term housing solutions for low-income people generally—adds an impeccable presence and a persuasive voice to the homeless and those speaking on their behalf. And it is an institutional voice that is often listened to by decision makers.

IV. The Lessons of Legal Activism

A. *Legal Activism Principles*

Principles of legal activism provide a useful yardstick of effectiveness and should be used in deciding upon the appropriate action to pursue in attempting to shelter the homeless. Indeed, legal activism precepts form a useful lens through which to examine the relative merits of contemplated action on behalf of the homeless.

In his course entitled "Legal Activism" at George Washington University's National Law Center, Professor John Banzhaf outlines several key principles of legal activism. Roughly stated,[267] they include the following basic public interest law advocacy concepts:

1. *Legal leverage:* choosing the course of action holding the maximum potential to move a powerful opponent toward the desired goal. Leverage involves two components: (a) *input,* or the amount of time, effort and resources, as well as the distribu-

266. *Governor's Approval Memorandum: Homeless Housing Assistance Program,* 1983 N.Y. St. Legis. Ann. 46.

267. The description in the text of these principles of legal activism reflects my understanding gleaned from seminar discussions and should not be interpreted as a direct statement of Professor Banzhaf's views.

tion and magnitude of the various burdens of proof or persuasion that will be necessary in taking the action, versus (b) *output*, or the resulting impact or effect of the action taken (whether the action results in individual or group advantage, or widespread benefit to a significant segment of the public). Generally speaking, the lower the input and the higher the output, the greater the legal leverage.

2. *Chance of success:* selecting that action having at least a reasonable likelihood of succeeding.

3. *Indirection:*[268] recognizing that round-about, indirect, creative and out-of-the-ordinary actions may be more effective in securing desired results than frontal, direct approaches.

4. *Legal judo:* transforming apparent disadvantages in your own position or contemplated action into real disadvantages for the more powerful opposition. An example would be the use of the delay aspect of litigation to augment negotiating strength with an opponent facing time and financial pressure (*e.g.*, one who is losing more and more investment or development opportunities as time passes).

5. *Guerilla law:* staging multiple assaults from different directions on the targeted problem. Example: combining a petition for rulemaking before the appropriate administrative agency with an administrative complaint, a legislative hearing, and/or litigation.

6. *Ancillary advantages of legal action:* realizing that the extent to which such benefits as discovery and publicity, for example, attend various legal actions, while not alone determinative, should nevertheless be considered in a strategy selection process.

7. *Appeal:* anticipating the level or intensity of interest on the part of the media, the public and the appropriate decision makers that can be expected to be generated both by the issue addressed and the legal action method(s) selected.

To these selected[269] principles of legal activism might be

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268. This is my label for the concept outlined in the text.

269. Other legal activism considerations governing strategy selection include the extent to which specialized expertise will be needed to implement the desired action and the availability of such expert assistance; the quality and accessibility of particular data that will be necessary to support the position advanced; and the availability of other organizations or individuals with experience and knowledge in the area who might be

added the traditional advocacy caveat of "know thy turf"—that is, be as knowledgeable as possible of the forum (*e.g.*, legislative, court, agency, political constituency, neighborhood, town council, etc.) chosen to implement the chosen strategy.

These legal activist guides are far more easily stated than applied; nevertheless, when applied to the range of strategies available in the quest for shelter for the homeless they serve as filters, separating the effective from the ineffective strategems, and thereby help concentrate limited time, resources and energy on the "doable" rather than the conceivable.

B. Judicial Approaches

Judicial approaches to homelessness do not score well on the legal activism test, although the less direct litigative strategies fare better than the frontal, right to shelter, test case method.

Scrutinized under the lens of legal activism, litigation seeking to establish a broad based right to shelter premised on the total deprivation analysis developed in Part I[270] reveals far more minuses than pluses. Such a major test case approach is hardly highly leveraged. Admittedly, the potential output of such litigation would be great. The benefits of judicial recognition of a right to shelter would extend far beyond the homeless. But the necessary input, the investment of resources at the trial and appellate stages, of such a litigative effort is both tremendous and disproportionate, particularly when the second principle of legal activism is considered.

The determinative factor in weighing the total deprivation litigative strategy is, of course, the likelihood of success of such an approach. The chances of success within the present judicial system are not good. This is 1986, not 1968. The Rehnquist Court now sits, not the Warren Court.[271] The tone, the judicial perspective on government's role in redressing economic ine-

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able to provide essential resources and contacts.

270. See text accompanying notes 18-138, *supra*.

271. Changes in the Court that occurred during President Reagan's second term hardly bode well for poverty law generally and the shelter interests of the homeless specifically. For an analysis of the 167 judicial appointments made by President Reagan during his first term, *see* Cohodas, *Reagan Seen Gaining Control of Entire Federal Judiciary*, 42 CONG. Q. 3075 (No. 49, Dec. 8, 1984).

qualities, is not favorable.

That this is true requires little insight. The Burger Court made rather clear its view that government does not have any responsibility to alleviate inequalities not of its own creation. For example, in *Maher v. Roe*[272] the Court flatly declared that the constitution "imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of indigents."[273] In explaining this conclusion, Justice Powell said that "[t]he indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the [state's] regulation."[274] Justice Stewart echoed the same point in another abortion public funding case, *Harris v. McCrae*.[275]

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272. 432 U.S. 464 (1977).

273. *Id.* at 469.

274. *Id.* at 474.

275. In *McRae*, Justice Stewart tells us:

> [I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices. The reason was explained in *Maher*: although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.

Harris v. McRae, 448 U.S. 297, 316 (1980) (citing Maher v. Roe, 432 U.S. 464 (1977)).

This restrictive approach to government's responsibilities to reduce inequalities is not confined to the abortion controversy. Even in the area of protected First Amendment freedoms, the present Court has not been sympathetic to arguments that the denial of government funding curtails speech by virtually outpricing the means of expression for some organizations. For example, in Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983), the Court upheld the IRS denial of tax-exempt status to a citizen lobbying organization on grounds that Congress is not compelled by the First Amendment to subsidize the petitioner's lobbying activities with public funds. The Court was quite clear on what it thought of the petitioner's claim that its freedom of speech was effectively penalized by the denial of tax-exempt status:

> This Court has never held that Congress must grant a benefit such as TWR claims here to a person who wishes to exercise a constitutional right . . . . We again reject the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."

Regan, 461 U.S. at 545-46, *quoting* Cammarano v. United States, 358 U.S. 498, 515 (1959) (Douglas, J., concurring).

See also, Youngberg v. Romeo, 457 U.S. 307 (1982), a case in which the Court, in considering for the first time the substantive rights of involuntarily committed mentally retarded persons, advanced as an "established principle" the proposition that "[a]s a general matter, a State is under no constitutional duty to provide substantive services for those within its border." *Youngberg*, 457 U.S. at 317.

Advocates may counter with arguments that past precedent surely reflects a more positive view of affirmative government obligations. The message of *Brown v. Board of Education*[276] is, at its core, wholly affirmative; it commands integration in public education, compelling states to create racially mixed schools.[277] Similarly, the reapportionment, criminal justice, and franchise decisions discussed earlier in Part I(B)[278] all carry affirmative overtones. All reflect judicial commands that government redress inequalities, even those not of its making.[279]

Yet the likelihood that such counter-arguments would work to correct the Court's current refusal even to glance sidelong at affirmative government duties to the poor is simply not high enough to justify launching a Don Quixote campaign for a right to shelter on the present judiciary's turf.[280]

The chances of success increase significantly, however, when judicial tactics shift from a major, front door, constitutional siege to minor, side door statutory penetrations. Litigative theo-

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276. 347 U.S. 483 (1954).

277. The Burger Court itself has agreed that *Brown* carries affirmative overtones. In its 1979 decisions upholding broad desegregation remedies, the Court stressed that affected school districts, since *Brown*, have been under a continuing "affirmative duty to disestablish the dual school system." Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 (1979). *See also,* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526 (1979); Green v. County School Bd., 391 U.S. 430, 437-38 (1968) (where school systems were clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which "racial discrimination would be eliminated root and branch").

278. *See* text accompanying notes 18-119, *supra.*

279. For example, Reynolds v. Sims, 377 U.S. 533 (1964), makes clear that state legislatures must provide for equality in voting through reapportionment and if they do not, courts will. Similarly, Griffin v. Illinois, 351 U.S. 12 (1956), suggests that states may have to act (provide transcripts or their equivalents to redress inequities arguably not caused by the state (the indigent defendant's inability to pay for the transcript)). Gideon v. Wainwright, 372 U.S. 335 (1963), carries a similar affirmative command in its requirement that states fund the cost of providing counsel to indigents charged with serious offenses. Likewise, Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), commands states to extend absolute equality, at least to the franchise, to poor and rich alike. For a similar reading of these cases, *see* Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91 (1966).

280. Lower federal courts may offer a more inviting forum, especially in view of the 262 judicial appointments made by former President Carter. Yet, the limits of *stare decisis* and the risk of higher appeals within the federal system pose serious institutional limits and certainly counsel caution. Additionally, the federal bench is changing significantly. In his first term alone, President Reagan appointed 167 judges (130 of which were district court judgeships), relying primarily upon the selection criteria of "judicial restraint." *See* Cohodas, *supra* note 271, at 3075-76.

ries based on state statutory protections for the mentally ill and the indigent, and state prohibitions on gender-based barriers to housing are far more inviting, in large part because they focus on specific statutory entitlements and do not require a reluctant judiciary to venture into unmarked terrain. Also, the perception of the claim asserted shifts to more familiar judicial grounds. Rather than seeming to be leading a vanguard regiment in a battle for a new fundamental right, plaintiffs invoking these state law grounds appear merely to be asking for the delivery of services and benefits the legislature has already said they are entitled to receive. Thus, the homeless plaintiffs in *Klostermann* and *Hodge* were simply requesting judicial enforcement of legislatively mandated benefits (aftercare mental health care, including individualized plans for adequate housing, and emergency public assistance for incapacitated adults, including emergency shelter) that the executive branch had failed to provide to the intended beneficiaries.

Besides scoring higher on the likelihood of success criteria, these state statutory judicial approaches also better satisfy several other legal activism guidelines. As just suggested, they heed the principle of indirection. They embody less direct judicial means to essentially the same pot of gold at the end of the total deprivation rainbow, recognition of a right to shelter for the homeless, or at least those homeless individuals within the coverage of the relevant statutory scheme. Furthermore, these side door judicial entries are more highly leveraged. The input associated with tailoring emergency shelter claims to specific statutory provisions is significantly less than the time and resource investments necessary to litigate a broad-based constitutional law shelter claim. The output, while not as comprehensive as the constitutional claim, is nevertheless substantial. All similarly situated homeless people within the statutory coverage will benefit, either by virtue of class action relief, subsequent individual enforcement of established precedent, or, one would hope, administrative compliance at the local level.

Additionally, these statutory approaches offer several ancillary advantages. They provide pegs on which to hang local media attention. They allow opportunities for continuing media coverage and public awareness as discovery proceeds. Also, they serve as vehicles to seek shelter for the homeless through the

more prompt means of negotiation and of translating the moral dimension, the public concern, into a concrete community response (*e.g.*, an emergency shelter).

C. Street Strategies

Street strategies, especially when combined with litigation based on state statutory grounds, hold the greatest promise, despite their inherent risks, of addressing the shelter needs of the homeless through a realistic legal activism approach.

There is something to be said for cockroaches, for serving dumpster crabmeat quiche to congressmen, for entering churches on cold February nights and for erecting empty tents on public fora grounds. While several of these actions are illegal, and therefore technically beyond the legitimate scope of "legal activism,"[281] their demonstrated effectiveness from a legal activist perspective is difficult to deny.

These are highly leveraged actions. Input is small. Output is large. Publicity is not merely an ancillary benefit but a primary objective. The chances of realizing that objective, especially in the media saturated urban environment that constitutes CCNV's turf (the nation's capital), are far better than reasonable. Furthermore, these strategies are the very embodiment of the indirection principle, as they are multi-pronged, creative attacks upon a problem high in public-moral appeal.

Yet these street oriented, guerilla theater tactics are not without their own inherent risks. Several of those risks are worth considering. First, these tactics simply may not work. Mitch Snyder's hunger strike did, at least in achieving short term goals. The timing was right; it took place, not coincidentally, at the close of an election year in which one of the challenger's major themes was fairness and concern for the disadvantaged. Yet the government's withdrawal from its "model shelter" commitment, its diversion of funding to other Washington, D.C. shelters, and its threatened eviction of CCNV, make claims to lasting success, defined as going beyond generating visibility for the

281. For example, the release of cockroaches in the State Dining Room, and the entry onto church property proved unlawful. As such, in fairness to Professor Banzhaf, such unlawful activities are outside the scope of "legal activism," necessarily defined as *legal* action toward desired social change.

homelessness issue, dubious.

Additionally, the same tactic by the same person in the same city, but six years earlier, failed. In 1978, CCNV demanded that a liberal, Washington, D.C. church commit a substantial part of its building fund to efforts to help the poor.[282] Mr. Snyder began a hunger strike to press the demand. The results: "[a] psychiatrist tried to have him committed, the church flatly rejected his demands and Snyder, hospitalized near death, ended his fast."[283] That was a learning time. The lesson was hard but worth remembering: "you can't destroy your base as you're trying to build it."[284]

Second, such street strategies carry the power to alienate friends and foes alike. As an illustration, consider the Washington Post's editorial response to "Mitch Snyder's [hunger strike] Victory":

> Mitch Snyder is a zealot. It is characteristic of zealots that they go too far. They push issues to a point where they make the public and people in high places feel that they are being pressured—as, in fact, they are.[285]

It is tempting to respond that pressure in the political process is as American as Thanksgiving. But it is also worth noting the implicit message in the Post's editorial. Dramatic tactics with high media and moral appeal may disserve the cause that forms the objective of those tactics if carried to the point of alienating both the public and the decision makers.

Third, a related risk of media saturated, guerilla theater ploys is the danger that the drama of single acts may divert attention from the play itself. A different but related example illuminates this risk, as well as the corollary danger that street strategies that are inviting to advocates may be far less captivating to those on the streets themselves.

There is a respectable body of constitutional law doctrine

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282. Boodman, *supra* note 1, at A20, col. 1.

283. *Id.*

284. *Id.*, quoting a former priest previously associated with CCNV in its formative years.

285. Mitch Snyder's Victory, *supra* note 137, at A20, col. 1. In fairness to the Post, its editorial was generally favorable to the cause (action on behalf of the homeless), promoted by Mr. Snyder's zeal.

built around the notion that vagrancy and loitering are vulnerable to due process attack on grounds that their usual vagueness encourages arbitrary, discriminatory enforcement.[286] In reaching this conclusion in *Papachristou v. City of Jacksonville*,[287] for example, Justice Douglas noted that "[p]ersons 'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay," that such wanderings "are historically part of the amenities of life as we have known them" and "have been in part responsible for giving our people the feeling of creativity."[288] Indeed, Justice Douglas' opinion in *Papachristou* reads almost like an ode to homelessness, although of an obviously different type.

Advocates with a keen eye to public consciousness raising via media hype might conceivably turn the selective enforcement doctrine on its head by demanding that vagrancy and loitering statutes or local ordinances, common in many states[289] and municipalities,[290] be uniformly enforced by the appropriate police departments.[291] The intended results, of course, would be

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286. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Lawson v. Kolender, 658 F.2d 1362 (9th Cir. 1981), *aff'd*, 461 U.S. 352 (1983).

287. 405 U.S. 156 (1972).

288. *Papachristou*, 405 U.S. at 164.

289. In Pennsylvania, for example, it is a misdemeanor of the third degree to loiter maliciously or prowl around a dwelling at night. 18 PA. CONS. STAT. ANN. § 5506 (Purdon 1983). The statute has been upheld against a due process vagueness challenge and has been construed to apply to nocturnal prowling not just around a dwelling but in the vicinity or neighborhood as well. Commonwealth v. Duncan, 456 Pa. 495, 31 A.2d 917 (1974). *See also*, Commonwealth v. Williams, 185 Pa. Super. 312, 137 A.2d 903 (1958), and Commonwealth v. Belz, 295 Pa. Super. 183, 441 A.2d 410 (1982).

290. In the municipality in which I reside, for example, local ordinances make it unlawful for a minor to "loiter or remain in public streets or other public places" during designated nighttime hours, and for any person to "linger" more than 10 minutes on a municipal or private parking lot at certain hours "for a purpose unconnected with lawful activity related to the use and purpose for which such parking lots were established." CODE OF ORDINANCES OF THE BOROUGH OF CHAMBERSBURG, Ch. VI, Parts 1 and 5 respectively (1981).

291. Justice Douglas, of course, would probably turn somersaults in his grave if word of such uses of his homage to the free life could reach him. The real life point, however, is whether the homeless should be placed in the position of turning over their steam grates for jail cells.

An incidental point, one of strategy selection, implicates the know-thy-turf principle. Demanding such an exchange in a liberal, urban environment might well prove effective in evoking the intended public outcry for more humane alternatives—from a sophisticated public sensitive to civil liberties concerns. In a more conservative, Bible-belt, rural community deeply devoted to the work ethic, however, the public response might

warm, overnight shelter (albeit in jail) and perhaps at least one meal, for the homeless. Better, advocates might argue, than frostbite in February.

To the homeless individual, on the other hand, the trade-off between the steam grate, the bus depot, a local park or the back seat of a car for a criminal record may or may not be as clearcut and attractive. The real issue, then, becomes less what strategy to employ than who is to choose the strategies. The necessity of maintaining the bond, the communicative link, between advocates and clientele is nowhere more important.

Fourth and finally, guerilla theater without more remains guerilla theater. It is in this very weakness, however, that signs of the strength of street strategies are most apparent. When linked with the litigative approaches outlined earlier, particularly those rooted in state statutory law grounds, and when coupled with community coalition efforts toward building grass roots support for the homeless, particularly those involving church representatives as active participants, street solutions to a street problem make a great deal more than street sense.

CONCLUSION

Homelessness must be eliminated or at the very least alleviated. Common agreement exists on that moral premise. This article has been addressed to the tactical means to that unassailable end.

Confronting the dragon head-on with a total deprivation litigative lance thrown, with the best of white knight intentions, to penetrate to a core right to shelter is potent stuff. The benefits of such a dragon feast—the establishment of a constitutional right to shelter and the ripple effects such judicial recognition of the vital role of housing would have on other subsistence interests, such as food, medical care, even education—are indeed awesome to behold. But the present judiciary's scales are very, very tough. Such frontal attacks may be better saved for other courts, say poverty-sensitive state courts, or other times, say 2084, rather than the belt-tightening 1980s.

Flank attacks, especially those coming from state statutory

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prove to be just the reverse. Jail might be perceived as the proper alternative to those who "fail to help themselves" (and make a public spectacle of their "failure").

ambushes (*e.g.*, mental health, public assistance and sex discrimination law thickets), offer a far better chance of slaying the beast by targeting more exposed points of vulnerability.

Street-based strategies, including media theater sallies, coordinated with legislative and administrative advocacy and community coalition building, heavily seasoned with activist church involvement, are an absolutely essential addition to the modern arsenal. Cockroaches and TV cameras work better against contemporary dragons than lances and suits of mail.

Dragon slaying metaphors aside, it is this combination of judicial and street strategies that holds the greatest promise of keeping the number of the Lucite 6 from growing—the best chance of keeping the line of boxed human ashes from extending over the edge of the white piano.