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A Guide to Finding a Right to Shelter for the Homeless

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A GUIDE TO FINDING A RIGHT TO SHELTER FOR THE HOMELESS

*John H. Whitfield**

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I. INTRODUCTION

In the wake of the 1988 presidential election, the homeless have yet to experience a "kinder or gentler" America. The present administration's attitude towards the homeless appears to be a continuation of its predecessor's and is best characterized by the following news reports.

What we have found in this country, and we're more aware of it now, is one problem that we've had, even in the best of times, and that is the people who are sleeping on the grates, the homeless who are homeless, you might say, by choice.

— President Ronald Reagan ¹

Early Wednesday morning, a . . . woman in her late 50's or early 60's was forced by railroad police to leave Grand Central Terminal, where, as a homeless person, she was taking refuge from the cold. That was 1:45 a.m. An hour and a half later, she was discovered dead, slumped on the sidewalk just outside of the station's doors . . . [H]er death was "cold-related." [sic]

— *New York Times*, Feb. 4, 1984 ²

Homelessness is a major problem in America. The United States Department of Housing and Urban Development (HUD) has estimated that in the year of 1984 there were between 250 and 350 thousand people homeless on any given night. ³ If one takes these figures and multiples them by the average turnover rate in shelters, one will discover that in 1984—using the figures compiled by HUD—there were between 3 and 4.2 million people homeless. ⁴ It is highly unlikely that many of these people, lacking one of the most basic and necessary physiological needs, i.e., shelter, will ever become productive in society. ⁵ And if not productive, they are a societal burden. Since there appears to be no end to this ever-increasing problem of homelessness, the burden that this country must bear will become more and more demanding. If this nation continues to ignore the homelessness issue, the burden may become too much to bear in the future, thereby foreclosing any humane way of remedying the problem.

The purpose of this article is to serve as a general guide to advocates for the homeless. It attempts to provide such advocates with the necessary information to begin the task of finding and articulating a right to shelter for the homeless. There are basically three key areas in which an advocate should con-

1. *Homelessness: Halting the Race to the Bottom*, 3 YALE L. & POL'Y REV. 551 (1985)[hereinafter *Homelessness: Halting the Race*](quoting President Ronald Reagan, *Boston Globe*, Feb. 1, 1984, at 2, col. 3).

2. *Id.* (quoting Schanberg, *Reagan's Homeless*, N.Y. Times, Feb. 4, 1984, at 23).

3. Murray, *The Homeless in the United States and in St. Louis*, 4 ST. LOUIS U. PUB. L.F. 455, 456 (1985)[hereinafter Murray, *Homeless in the United States*].

4. *Id.*

5. G. STARLING, *Managing The Public Sector* 420-27 (1982). Abraham H. Maslow, a behavioral scientist, developed what is known as "Maslow's Hierarchy of Needs." Maslow notes that before an individual can even begin the trek to self-actualization, he or she must satisfy the three basic needs, i.e., food, clothing, and shelter.

centrate his or her research. They are: (1) federal statutory enactments; (2) state constitutional provisions; and (3) state statutory enactments. However, before proceeding with an analysis of these three areas, this article will briefly examine the historical under-pinning of homelessness.

II. A BRIEF HISTORICAL OVERVIEW

A. *Who Are the Homeless?*

Homelessness first became a visible problem in American society with the collapse of the stock market and the subsequent Great Depression.⁶ At that time the homeless were known simply as hobos or those persons who lived on skid row. These persons were predominantly middle-aged white males who were chronic alcoholics.⁷ They tended to congregate in the major urban areas as opposed to the more rural areas of the country because these urban centers were touted as the promised land. Therefore, during hard times people flocked to these areas in search of jobs and new opportunities that would allow them to start anew. Notably, the common categorizations that once readily identified those men who lived on skid row as homeless are not present in the homeless population of today.

Today homeless persons form a much more heterogeneous group. In other words, the homeless population of today is so diverse that "the only common denominator is their lack of a home."⁸

The ground-swell of the homeless population is comprised of single-parent families who are involuntarily forced out of adequate shelter,⁹ recent "immigrants, migrant farm workers, battered women, people with mental health [disorders], elderly people, people who have [recently] lost [their] jobs or who have been removed from [the rolls of] public assistance, and [a variety of] other groups of poor people."¹⁰ In addition to the groups mentioned above, another group of persons who comprise a surprisingly substantial number of this nation's homeless population today is homeless children.¹¹ A recent report by the General Accounting Office found that in the city of New York alone over 10,000 homeless children live on the streets.¹²

6. Langdon & Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 308 (1985)[hereinafter Langdon & Kass].

7. *Id.*

8. Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 WASH. U.J. URB. & CONTEMP. L. 155 (1987)[hereinafter Chackes, *Sheltering the Homeless*].

9. One may envision a family that has recently moved to a new locale, where they have no relatives nor close friends, joining the ranks of the homeless because their home has been destroyed by fire or some act of God.

10. Siebert, *Homeless People: Establishing Rights to Shelter*, 4 LAW & INEQUALITY 393, 394 (1986)[hereinafter Siebert].

11. General Accounting Office, *Homelessness: A Complex Problem and the Federal Response* pp. 4-6 (1985). This report notes that "more than 20% of the homeless persons in public shelters, not to include runaways, are children." *Id.* at \$\$\$\$\$.

12. *Id.*

It is apparent that homelessness does not discriminate on the basis of sex, age, or family relations. To further substantiate this point, a study conducted by HUD found that "66% of the homeless were single men, 13% were single women, and 21% were families."¹³ The study went on to evidence that the median age of homeless persons fell within a range from the late twenties to the mid-thirties; additionally, the study noted that approximately 44% of the homeless population were racial minorities.¹⁴ The final factor of importance that was acknowledged by the HUD study was that 50% of the homeless suffered from either mental illness, alcoholism, drug abuse, or a combination thereof.¹⁵

With the homeless population as diverse as it is, one can readily realize that the causes of homelessness must be just as diverse as—if not more diverse than—the population affected by such causes. Therefore, it is appropriate before proceeding further to thoroughly analyze and develop a general understanding of what many scholars and practitioners consider to be the underlying causes of homelessness.

B. Causes of Homelessness

As previously set forth, those persons who constitute the present-day homeless population are very different in profile than the homeless of the past. Consequently, the conclusion can be logically drawn that the causes of homelessness are just as varied as the individuals who comprise such population of citizens. Although the causes of homelessness are many, they can be placed within the following broad categories: (1) the lack of adequate low-income housing and the drastic reduction of presently existing units, (2) prolonged high unemployment rates, (3) the failures of deinstitutionalization as a new way of caring for the mentally ill, and (4) cutbacks in aid to the needy.¹⁶

1. Lack of Low-Income Housing

The supply of low-income housing has failed to keep pace with the ever-increasing demand for such housing. In a number of the major urban areas of the United States, low-income housing has all but vanished due to the low unit vacancy rates and the ever-increasing urge on the part of the developers and owners to make a profit, requiring tenants to pay higher rents for such housing.¹⁷ Consequently, persons with low incomes are unable to meet the increasing

13. Murray, *supra* note 3, at 457.

14. *Id.* However, this figure should be contrasted with the percentage of racial minorities in New York City; 90% of the homeless in New York City are either Black or Hispanic. Langdon & Kass, *supra* note 6, at 308.

15. Murray, *supra* note 3, at 457.

16. *Id.* at 458. Additionally, apathetic attitudes and the lack of substantial governmental efforts to remedy the homeless problem serve to perpetuate the ill.

17. Langdon & Kass, *supra* note 6, at 311. In New York City alone, since 1970, 108,000 of the city's 127,000 single-room occupancy units have been converted to higher-income dwellings. *Id.* As of 1985, in St. Louis City County, 16,300 households were "on waiting lists for 6,900 occupied public housing units and 16,600 were on waiting lists for 6,000 Section 8 units." Murray, *supra* note 3, at 459.

price demands placed upon them; and as a result their ability to secure and maintain affordable, safe, sanitary, and decent housing has been greatly reduced.¹⁸

A number of additional factors has led to the drastic decline of low-income housing. Such factors include, but are not limited to: greater emphasis on downtown redevelopment, declining federal subsidies for private developers to develop low-income housing, declining federal subsidies for low-income tenants, neighborhood opposition to the development of public housing units.¹⁹ In addition, statutory requirements in a number of locales raise the standard of rental safety and habitability, increasing the cost of maintaining such property, thereby encouraging an owner to abandon the property.

The end result of the aforementioned factors leads to the same conclusion: low-income housing is disappearing at alarming rates. A prime example of such disappearance is evidenced by the enormous number of single-room occupancy housing units that have been all but eliminated in recent years.²⁰ Throughout the United States, a million units of single-room occupancy housing were destroyed or lost to redevelopment during the 1970s. Such losses represent about one half of the available single-room occupancy units. Reductions of this nature are probably going to continue throughout the decade of the 1990s with virtually no end in sight.²¹ During the period of 1978 to 1982, New York City alone lost some 32,000 single-room occupancy units, indicating the continued trend to destroy such housing of last resort.²²

2. High Unemployment Rates

The second reason often cited as a contributing cause of homelessness is unemployment. This single factor alone may account for the reason why there is a disproportionate percentage (when compared with the national population) of homeless persons who are minorities.²³

A recent study conducted in New York City suggests that as many as 40% of the homeless men seeking shelter did so because they had recently become unemployed.²⁴ If, as is currently happening, the primary focus of economic productivity continues to shift away from the traditional heavy industry sector, it is very likely that a growing number of presently employed workers will be-

18. Murray, *supra* note 3, at 459.

19. *Id.* at 458.

20. Siebert, *supra* note 10, at 395. Single-room occupancy housing is shelter of last resort for many. SRO units may be described as cheap hotels and boarding houses which are usually not fit for human habitation. *Id.*

21. *Id.*

22. *Id.*

23. Department of Commerce, *National Data Book and Guide to Sources: Statistical Abstract of the United States* 1986, 394 (1989). The unemployment rates for whites and blacks, ages 20-44, during 1987 were: white females, 7.4%; white males, 8.5%; black females, 23.3%; and black males, 20.3%.

24. Langdon & Kass, *supra* note 6, at 313. It should be noted that this figure is probably higher because the survey was limited to those persons actually seeking shelter. Many homeless persons do not seek refuge in public shelters.

come unemployed, resulting in temporary, if not chronic, homelessness.²⁵

3. Deinstitutionalization Of The Mentally Ill

The third factor that leads to homelessness is the deinstitutionalization of state psychiatric patients. The policy of deinstitutionalization is a product of the awareness era of the 1960s. As the public became aware of the traditional techniques used to treat the mentally ill and the severe drawbacks to such treatments, the public began to demand that psychiatric institutions develop more modern approaches to treating the mentally ill.²⁶ Thus, deinstitutionalization was developed, and it was designed to reduce the number of psychiatric residents in state institutions.²⁷

This process required that institutions release psychiatric patients who did not pose an immediate threat to themselves or anyone else to community recovery centers. Unfortunately, the placement of such persons in community-based homes or recovery centers never materialized on a mass scale; consequently, the persons who were deinstitutionalized were simply released onto the streets with nowhere to go and no scheduled or supervised aftercare by the state mental health institutions.²⁸ Homeless and aimless, these deinstitutionalized persons often lost touch with reality, foregoing, in many instances, the necessities for self-preservation and determination, i.e., food and shelter.²⁹

As originally envisioned, deinstitutionalization was supposed to revolutionize the treatment of mentally ill patients. However, the high expectations of deinstitutionalization have fallen short. There are primarily two reasons why deinstitutionalization has failed, and both are clearly related to the homelessness problem in general. First, mentally ill persons are politically powerless; therefore, when state and local elected officials are forced to balance the need for establishing community recovery centers vis-a-vis the self-imposed fears of the persons who live in such communities, the latter group tends to win hands down because it is politically expedient to allow such fears to take priority over the needs of the mentally ill. Second, and more problematic, there has been little or no funding to support deinstitutionalization on a mass basis.³⁰

25. *Id.*

26. Comment, *Homelessness: The Policy & The Law*, 16 URB. L. 317, 318, 320 (1984)(authored by Robert W. Collin, J.D.)(hereinafter Comment, *Homelessness: The Policy & The Law*). Deinstitutionalization was the process by which psychiatric patients who did not require intensive care were released from their institutions at alarming rates during the 1960s and 1970s. *Id.*

27. *Id.* at 318. Deinstitutionalization was the result of increasing costs for care in state mental health facilities and public recognition of the horrible conditions within some of the facilities, leading to a public outcry for change. *Id.*

28. *Id.* at 318.

29. Werner, *On the Streets: Homelessness Causes and Solutions*, 18 CLEARINGHOUSE REV. 11, 13 (1984)[hereinafter Werner, *On the Streets: Homelessness Causes and Solutions*].

30. *Homelessness: Halting the Race*, *supra* note 1, at 552-53 n.8. "Between 1955 and 1982, the number of patients in state mental institutions fell from 558,922 to 125,200. [Notably,] few community facilities were created to serve released patients." *Id.* at 552, 553 n.8.

4. Cutbacks In Aid To The Needy

Finally, substantial governmental reductions in aid to the needy have significantly contributed to the rise in the number of homeless persons in America. For many needy persons, governmental assistance is the difference between existence and nonexistence. Consequently, to greatly reduce or even proscribe altogether poverty entitlements that a person is heavily dependent upon will be detrimental to such person's well-being, not to mention the well-being of those persons depending on the primary caretaker, as is the case in the single-parent household.

A good example of the effects of governmental reductions in aid programs may be readily evidenced by the Reagan Administration's enforcement in 1981 of the Omnibus Reconciliation Act of 1980.³¹ This action by the administration led to some 158,000 persons being dropped from the rolls of the disabled.³² All of these persons had previously been declared either physically or mentally ill, and unable to perform substantial, gainful employment of a meaningful sort. It is expected that approximately 52,666 of those persons removed from the disability rolls will never be reinstated; and for those who are placed back on the disability rolls, they may have to exhaust years of appeals and hearings to regain the disability benefits to which they once were entitled.³³ However, such reinstatement serves as little consolation for those persons removed from the rolls of the disabled struggling to survive in the here and now. Many will lose everything of material value to them while others who are truly disabled may be forced to endure serious aggravation of the injury or ailment that placed them on the disability rolls in the first place.

Having a good and firm understanding of what causes homelessness, it is also important that one develop a basic awareness of some of the problems that serve to perpetuate homelessness. Therefore, the analysis of this article will now focus on what may be the leading problem that must be overcome if the homeless issue is ever to be resolved—that is, the effects of local ordinances.

III. PROBLEMS THAT ADD INSULT TO INJURY

In addition to the aforementioned causes of homelessness, a variety of complex yet interdependent problems serve to perpetuate, if not constantly increase, the number of homeless persons in America. The following will address one

31. Langdon & Kass, *supra* note 6, at 314.

32. *Id.* All of these persons who were removed from the rolls of the disabled had been receiving Social Security Disability Insurance benefits. These persons had been evaluated and classified as either physically or mentally disabled in order to receive such benefits. Some persons whose benefits had been cut off had to find alternative means in order to maintain themselves and their families while they waited on a slow and inefficient appellate process to proceed.

On a personal note, my mother, who had experienced three back operations, had to struggle for three years before being reinstated.

33. *Id.*

category of problems that is found almost universally and which tends to perpetuate the homeless phenomenon.³⁴ These problems are categorized under the heading of local ordinances.

A. Local Ordinances

1. Vagrancy Laws

Even before this country was established as an independent sovereign state, vagrancy laws were on the books and were being enforced against the poor in England.³⁵ The British colonists, of course, brought with them a host of customs, practices, and laws to this country; unfortunately for the homeless, the colonists brought the criminal aspect of English vagrancy laws to this country when they settled here. Although vagrancy laws were originally passed to punish a person for idleness, such laws in reality served to punish an individual's status. This is evidenced by the fact that those persons who were most often found to be idle were poor persons whose resources were limited. Consequently, vagrancy laws indeed punished status and no particular criminal conduct.

Fortunately, in light of the United States Supreme Court's explicit rejection of local and/or state ordinances that impose criminal liability on the basis of one's status, courts across the board are rejecting the constitutionality of vagrancy laws.³⁶ In an effort to escape the unconstitutionality of the vagrancy laws, many states have instituted a relentless effort to punish an individual's status as a criminal act with the passage of loitering statutes.³⁷

2. Loitering Statutes

Loitering statutes—the twin evil to the vagrancy statutes—serve virtually the same function; however, the analytical approach is much more subtle. Loitering statutes provide the local police with the authority to arrest individuals whose apparent “aimlessness” provokes suspicion that such persons “are about to commit a crime” and where upon confrontation such individuals fail to produce “credible and reliable identification.”³⁸

One can reasonably conclude that those persons who may be found in viola-

34. In addition to the problems addressed within the text, a number of other problems serve to perpetuate the homeless phenomenon, i.e., social ignorance, judicial inactivity, legislative inactivity, inadequacy of existing shelters, and a lack of adequate resources, just to name a few.

35. 91 C.J.S. *Vagrancy* § 1 (1955). At common law a vagrant is defined as “a wandering, idle person; a strolling or sturdy beggar; a person who refuses to work, or goes about begging, and not merely a person who goes about from place to place in the neighborhood without any visible means of support.” *Id.*

36. Note, *Rights of the Homeless*, 59 ST. JOHN'S L. REV. 530, 538 (1985) [hereinafter Note, *Rights of the Homeless*], citing *Robinson v. California*, 370 U.S. 660, 667 (1962); *Decker v. Fillis*, 306 F. Supp. 613, 617 (D.C. Utah 1969); *Goldman v. Knecht*, 295 F. Supp. 897, 907 (D.C. Colo. 1969); *Parker v. Municipal Judge of Las Vegas*, 83 Nev. 214, 216, 427 P.2d 642, 643-44 (1967); Comment, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 782-87 (1968).

37. Black's Law Dictionary 849 (5th ed. 1979) defines “loiter” as follows: [t]o be dilatory; to be slow in movement; to stand around or move slowly about; to stand idly around; to spend time idly; to saunter; to delay; to idle; to linger; to lag behind. *Id.*

38. Note, *Rights of the Homeless*, *supra* note 36, at 539.

tion of loitering statutes probably will often be the homeless. This is a result of the tendency of homeless persons to comprise a class whose natural conduct is very likely to provoke the requisite level of suspicion as defined by most loitering statutes.³⁹ Consequently, homeless persons probably will not be held criminally liable under a loitering statute for any type of intentional conduct, which is usually the type of conduct punishable as a criminal offense; rather, homeless persons are likely to be found to have violated a loitering statute simply because of their status—homeless. It is very probable that the homeless' idleness and inability to produce sufficient identification are direct results of their financial condition which they may or may not have the ability to control.⁴⁰

Just as with vagrancy statutes, a number of loitering statutes have been held to be unconstitutional because of vagueness.⁴¹ The courts declaring loitering statutes unconstitutional have concluded that such statutes fail to give sufficient notice of the proscribed conduct to the potential offenders.⁴² In addition, such statutes seemed to create "a potential for arbitrary enforcement by law enforcement" personnel.⁴³

The final problem universally recognized as perpetuating homelessness is not another form of criminal prosecution. It is the effects of restrictive zoning in local communities.

3. Local Zoning

Community resistance to construction or development of community-based halfway houses or shelters for the homeless has been fierce. Such resistance has manifested itself in a number of different ways. Primarily, the most effective form of community resistance has come in the form of restrictive zoning ordinances or exclusionary zoning regulations.⁴⁴

The effects of such restrictive zoning ordinances have been to prevent the construction of new homeless shelters, or, if shelters are in operation, these ordinances have led to their closure for de facto violation of the newly-created zoning ordinances. For communities to react in such a way, they are creating

39. *Id.* at 540. Notably, Mississippi's statute appears to describe how loitering and/or vagrancy statutes are used to punish status and not criminal intent. *Miss. CODE ANN.* § 97-35-37(d)(1972), defines a loiterer (or vagrant) as follows:

All able-bodied persons who habitually loaf, loiter and idle in the cities, towns, and villages, or about steamboat landings or railroad stations or any other public place in the state, for the larger portion of their time, without any regular employment and without any visible means of support. An offense under . . . this section shall be made out whenever it is shown that any person has no visible means of support and only occasionally has employment at odd jobs, being for the most of the time out of employment.

Id. Since Mississippi's vagrancy statute apparently includes indigence as an element of the crime, it is likely not to stand up in the face of a constitutional challenge.

40. Note, *Rights of the Homeless*, *supra* note 36, at 540.

41. *Id.* at 539, (citing *United States ex rel. Newsome v. Malcom*, 492 F.2d 1166, 1174 (2d Cir. 1974), *aff'd sub nom. Lefkowitz v. Newsome*, 420 U.S. 283 (1975)).

42. *Malcom*, 492 F.2d at 1174.

43. Note, *Rights of the Homeless*, *supra* note 36, at 540.

44. Comment, *Homelessness: The Policy & The Law*, *supra* note 26, at 312.

what some authors have termed a "race to the bottom."⁴⁵

At this point one should have a good understanding of the causes of homelessness and the problems that serve to perpetuate the homeless phenomenon. The remainder of this article will focus on using the state and/or federal judiciary as a means to help alleviate the homeless problem.⁴⁶ This section will not be a case law analysis of the problem. On the contrary, the remaining section will attempt to serve as a guide to practitioners and advocates, providing them with the necessary information to arm themselves with the knowledge to begin their research in order to establish and articulate to a court of law a right to decent and safe shelter.

IV. FINDING A RIGHT TO SHELTER WITHIN THE FEDERAL CONSTITUTION

At the outset it is important to note that efforts to establish a right to shelter based on provisions of the Federal Constitution have not proven successful. The United States Supreme Court has explicitly refused to find the existence of a right to shelter in the Constitution.⁴⁷ Nevertheless, several arguments have

45. *Homelessness: Halting the Race*, *supra* note 1, at 555. The authors observe:

The fear that a community will become a magnet for homeless people creates an incentive for it to maintain shelter facilities that are minimal both in number and quality. Deficient state programs are perceived not only as a disincentive for homeless people from neighboring areas to enter the locale, but also as a method of 'encouraging' resident homeless people to leave the area in search of better facilities. States, therefore, compete to have the least attractive provisions in an effort to minimize their populations of homeless people.

Id. at 556.

46. It is worth noting at this point that the homeless' problems will not be completely solved through litigation. The problem is much more complicated. Nevertheless, the judicial process does provide advocates with a viable avenue with which to begin to better the lives of the millions of persons who are homeless; and, hopefully, along the way the American citizenry will become aware of the crisis at hand.

47. See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972). The Court noted that "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document [the Constitution] any constitutional guarantee of access to dwellings . . ." *Id.*

However, this writer would suggest that the creation of a right to shelter is not inconsistent with the Constitution since there are inferences to such effect found within the Constitution, i.e., third, fourth, fifth, and fourteenth amendments.

Both the third and fourth amendments to the United States Constitution recognize the sanctity and importance of being secure within a house. Thus, one can reasonably conclude that by placing certain explicit protections concerning one's house or housing in the Constitution that the founding fathers thought it important to afford the citizens such protections. If the military could occupy private houses at will, this would displace the occupants, leaving them without shelter. Likewise, if one's house was subject to constant searches, the inconvenience of such searches would probably have the same affect and force the occupants out of their shelters. If financially able, the occupants would probably relocate; if not, they would probably be forced to live on the streets.

The fifth and fourteenth amendments guarantee to each citizen that he/she will not be deprived of life, liberty, or property without due process of law. In simplistic terms, one is deprived of life and liberty if one does not have safe and adequate shelter. Thus, one must ask if the fifth and fourteenth amendments to the Constitution create a "positive" obligation on the part of the State to provide the minimal necessities to fulfill the mandate of the given amendments.

Finally, the fourteenth amendment's equal protection clause affords a homeless person a right of action when the State provides some individuals with shelter but not others. The equal protection argument will be discussed and developed further in the following passages. Furthermore, the fourteenth amendment's due process clause provides homeless persons with certain procedural rights, i.e., right to pre-closing notice, when the government attempts to close a shelter.

been suggested in an attempt to establish a right to shelter under the Constitution pursuant to the third, fourth, fifth, and fourteenth amendments.⁴⁸ Each of these amendments explicitly protects an individual's right in property and prohibits any deprivation thereof without just compensation.⁴⁹ Finding support for a right to shelter in one of the aforementioned amendments is furthered when one considers that the Constitution is a living instrument which is flexible and not rigid.⁵⁰ Put another way, because of the Constitution's flexibility, it permits the creation of new constitutional rights as the needs and demands of society may require. The need for the recognition of a right to shelter is ever-present.

Perhaps the most convincing argument for the creation of a right to shelter for the homeless was explained in the dissenting opinions of Justices Brennan and Marshall in *San Antonio School District v. Rodriguez*.⁵¹ In short, they argued that a non-fundamental constitutional right should be implied to fall within the scope of the Constitution if the exercise of a recognized fundamental right functionally depends on such non-fundamental right.⁵² Applying this rationale to the homeless context, one may argue that, since a person's fundamental right to vote usually requires that he or she have a bona fide residence, the practical effect of the government failing to provide the homeless with adequate shelters is to deny them the opportunity to exercise their fundamental right to vote. Therefore, one may conclude—using the dissenting opinions of Justices Brennan and Marshall—that a non-fundamental right to shelter is implied in the Constitution from the express constitutional provision granting one the right to vote.⁵³ The aforementioned argument has never been accepted; consequently, an advocate asserting such an argument in an attempt to establish a recognized constitutional right to shelter should not hang his or her hat on this argument alone.⁵⁴

48. Steinberg, *Adequate Housing for All: Myth or Reality?*, 37 U. PITT. L. REV. 63, 68 (1975).

49. Note, *Rights of the Homeless*, *supra* note 36, at 553.

50. *Id.* (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 415 (1819)).

51. 411 U.S. 1, 62-63 (1973)(Brennan, J., dissenting); *id.* at 102-03 (Marshall, J., dissenting); Note, *Rights of the Homeless*, *supra* note 36, at 553-54.

52. *Rodriguez*, 411 U.S. at 62-63, 102-03.

53. Note, *Rights of the Homeless*, *supra* note 36, at 553-54. Some governmental entities, most notably the District of Columbia, have passed new residency requirements to allow the homeless to register a park bench, telephone booth, gateway, etc., as one's residence, thereby eliminating any infringement upon one's right to vote. However, the locales that have taken such steps are few in number; and such restrictions may prove to be helpful in establishing a right to shelter under the Constitution in those areas where a *bona fide* residence is mandatory before one can register to vote.

Another fundamental right that may allow an advocate to boot-strap a right of shelter is the recognized right of family integrity and the right to make family decisions. Apparently, such rights cannot be exercised without adequate housing.

54. Even if such a right is recognized, the federal courts will probably abstain from hearing the case because of comity. See *Weiser v. Koch*, 632 F. Supp. 1369, 1377-78 (S.D.N.Y. 1986). The court applied the *Pullman* abstention doctrine and avoided passing judgment on allegations by homeless persons that their ejection from the municipal shelter system was violative of their due process rights under the Federal Constitution. The court also noted that *Burford*-type abstention and *Colorado River* would serve to justify abstaining in such a case. *Id.* at 1377, 1387; *Burford v. Sun Oil Co.*, 319 U.S. 315 (1947); *Colorado River Conservation Dist. v. United States*, 424 U.S. 800 (1975).

Nevertheless, advocates may find that the equal protection and the due process clauses of the Constitution are indeed helpful in asserting a right to shelter where a city or state is presently providing such services and it wishes to limit access or close such facilities altogether. A good example of how the equal protection clause of the fourteenth amendment may be used to guarantee a right to shelter to certain persons is found in *Eldredge v. Koch*.⁵⁵ In *Koch*, after New York City entered into a consent decree stating that it had a duty to provide homeless men with adequate shelter, a group of homeless women successfully sued the city demanding equal treatment under the law. The court stated that "homeless women are constitutionally entitled to treatment equal to that accorded to homeless men" ⁵⁶ Consequently, pursuant to the equal protection clause of the Constitution, the city of New York was forced to provide shelters not only for its homeless men but also for its homeless women.

Use of the due process clause has been effective in limiting the government's apparent cart blanche power to close existing shelters. In *Williams v. Barry*⁵⁷ the federal district court held that the plaintiffs who resided in existing shelters possessed more than a mere expectation interest that such services would continue; the plaintiffs' interest in the existing shelters had risen to the level of an entitlement which could not be denied without procedural due process of law.⁵⁸

Although the federal judiciary has not found a constitutional right to shelter, one should not lose hope. Advocates must continue to use the avenues available to them under the Federal Constitution, demanding equal treatment of the homeless and ensuring that procedural safeguards be adhered to when governmental entities attempt or propose to close existing shelters. Furthermore, a right to shelter, although not presently recognized as a fundamental right, may indeed become a reality.

V. FEDERAL STATUTES

A. 42 U.S.C. § 1983

Advocates on behalf of the homeless have been somewhat successful in articulating a right to shelter when such claims have been brought pursuant to one or more federal statutory provisions involving various categorical assistance programs that are supported by federal funds.⁵⁹ The backbone of such claims is 42 U.S.C. § 1983, which provides:

55. 118 Misc. 2d 163, 459 N.Y.S.2d 960 (N.Y. Sup. Ct.), *rev'd on other grounds*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983).

56. *Id.* 98 A.D.2d at 676, 469 N.Y.S.2d at 745.

57. 490 F. Supp. 941 (D.C. 1980), *aff'd in part, vac'd in part*, 708 F.2d 789 (D.C. Cir. 1983).

58. *Williams*, 490 F. Supp. at 946-47. It should be noted that, although the court held that due process was required, the level of required due process was minimal, i.e., that notice of the closing be given prior to such closing and that there be ample time to allow written responses. *Williams*, 708 F.2d at 791.

59. Siebert, *supra* note 10, at 398.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.⁶⁰

Thus, if an advocate can present an argument showing that homeless persons are being denied certain substantive rights in violation of a federal statutory enactment, the advocate may properly invoke federal question jurisdiction. Section 1983 serves as a procedural vehicle, ensuring federal question jurisdiction pursuant to 28 U.S.C. § 1331 or, more specifically, 28 U.S.C. § 1343. Since § 1983 and §§ 1331 and 1343 are means by which a claim of a right to shelter may properly be filed in federal court, the one element that is missing is a statutory provision conferring such a right. What statutory provisions can be used to establish a substantive statutory right to shelter for the homeless?

B. Social Security Act (AFDC)

The Social Security Act, specifically, the Aid to Families with Dependent Children (AFDC) provisions, explicitly establishes a right to shelter for a limited segment of the homeless population under very definite conditions.⁶¹ This Act gives participating states the option whether they will provide emergency assistance—which includes shelter—under the Act to those families who are eligible to receive such assistance pursuant to 42 U.S.C. § 606(e). Consequently, the Social Security Act serves to provide families with dependent children a right to emergency shelter, if, and only if, the state has opted to provide such assistance under the Act.⁶²

The most impressive case articulating a right to shelter pursuant to the Social Security Act is *Koster v. Webb*.⁶³ “The plaintiffs were AFDC families who had been evicted from their [New York City] apartments.”⁶⁴ Upon considering the defendants’ motion to dismiss the plaintiffs’ cause of action, which asserted a statutory right to shelter under the Social Security Act, the court held that the state’s Emergency Assistance Plan (a plan that all states opting to provide such assistance under the Act must develop) included “securing family shelter” and failure to provide such shelter to eligible families constituted a violation of the Social Security Act, actionable under 42 U.S.C. § 1983.⁶⁵

Since the state in *Koster* opted to provide emergency assistance in accordance

60. 42 U.S.C. § 1983 (1982).

61. 42 U.S.C. § 606(e)(1) (1982). It is important to note that shelter as described in this provision is only temporary shelter for up to thirty days. *Id.*

62. 45 C.F.R. § 233.120(a) (1989).

63. 598 F. Supp. 1134 (E.D.N.Y. 1983).

64. *Id.* at 1135.

65. *Id.* at 1138. The court also held on to hold that the plaintiffs were also entitled to a written determination of their request for emergency assistance should their request be denied. *Id.*

with the Social Security Act, the state was obligated to provide AFDC families with temporary shelter.⁶⁶ Accordingly, an advocate for homeless persons, specifically AFDC families, should look to his or her state's administrative code to determine whether the state in question has obligated itself to provide AFDC families with emergency assistance as set forth in 42 U.S.C. § 606(e). If the state has opted to provide such assistance, then those persons eligible to receive benefits under the AFDC provisions of the Social Security Act are entitled to adequate emergency shelter as a matter of right.

C. Adoption Assistance Under The Child Welfare Act of 1980

In addition to the Social Security Act examined above, the Child Welfare Act of 1980 also provides a right to shelter for a small, yet ever-increasing, segment of the homeless population.⁶⁷ As previously noted, an increasing percentage of the homeless population is homeless families.⁶⁸ Consequently, as the number of homeless families continues to increase, so will the number of children who are placed into foster homes either voluntarily or involuntarily because of the families' homeless status. Thus, such families are placed in a most difficult situation which is best exemplified by a quote taken from a report by The Homeless Task Force, *Homelessness in America*, which merits quoting at length:

Parents find themselves compelled to choose between two intolerable alternatives: to cooperate with the local child welfare agency whose personnel often suggest foster care under those circumstances, relinquishing their children to voluntary foster care for an undetermined period until they can secure decent housing; or to risk involuntary foster care placement of their children based on charges of neglect stemming from their families' poverty—their homelessness or lack of adequate shelter.⁶⁹

Placing a homeless parent or parents in such a position—having to decide whether to part with their children voluntarily or involuntarily—leads to a misuse of the foster care system. The primary reason for such criticism is that once the children are placed in a foster home the parents are forced to fend for themselves. This appears to be contrary to the high value we, as Americans, place on maintaining the family unit. The long-term psychological damage that the children may suffer as a result of the family separation may be devastating.

Nevertheless, advocates may successfully challenge such abusive use of the

66. 42 U.S.C. § 606(e)(1) (1982).

67. 42 U.S.C. § 670 (1982).

68. Murray, *supra* note 3, at 457.

69. The Homeless Task Force, *Homelessness in America*, p. 62 (1986)[hereinafter The Homeless Task Force, *Homelessness in America*]. A copy of the report and other related materials may be obtained by contacting the National Clearinghouse for Legal Services, Inc., 407 S. Dearborn, Suite 400, Chicago, Illinois 60605, (312) 939-3830. Clearinghouse No. 40,999.

foster care system by relying on the Child Welfare Act of 1980.⁷⁰ This Act makes it clear that eligibility for federal reimbursement of foster care payments is expressly conditioned on the participating states making "reasonable efforts" to provide the necessary services that will prevent the need for removing children from their homes and unnecessarily separating them from their families.⁷¹ The Child Welfare Act of 1980 exemplifies the fundamental belief that the family unit is one of this Nation's most precious resources.

Based on the tenets of the Child Welfare Act of 1980, an advocate can intelligently articulate a well-grounded argument that families with dependent children, who may not be eligible for benefits under the Social Security Act, are entitled to government-sponsored housing, should such families ever become homeless. This conclusion is based on two propositions. First, the "reasonable efforts" language of the Act implicitly requires that local welfare agencies do their best not to separate families. Second, many state legislatures have enacted state statutes and/or administrative regulations to comply with the federal requirements of the Child Welfare Act of 1980, thereby ensuring reimbursement under the Act. These states have adopted, as their own policies, the policies set forth in the Child Welfare Act of 1980.⁷²

D. National Housing Act of 1937—42 U.S.C. § 1441

As a final federal statutory argument, one may attempt to imply a right to shelter from the provisions of the National Housing Act of 1937. In light of the *Wright* decision,⁷³ an advocate may be able successfully to establish a right to shelter under the National Housing Act, or the Stewart B. McKinney Homeless Assistance Act. One must be able, however, to point to a specific provision of the Act creating such substantive federal right to shelter.⁷⁴

The National Housing Act is consistent with the two aforementioned federal enactments; however, the NHA appears to ensure that all Americans, not just

70. 42 U.S.C. § 670 (1982).

71. *Id.*; The Homeless Task Force, *Homelessness in America*, *supra* note 69, at 63. The "reasonable efforts" language requires that the welfare agencies provide services which include housing services. *Id.*

72. The Homeless Task Force, *Homelessness in America*, *supra* note 69, at 63.

73. *Wright v. City of Roanoke Redev. and Hous. Auth.*, 479 U.S. 418 (1987).

74. In *Wright*, the United States Supreme Court held that low-income tenants living in a public housing complex maintained an "implied right of action" to sue the housing authority for violating the Brooke Amendment to the National Housing Act of 1937. *Id.* at 418. This decision was significant in that there was no express language in the National Housing Act of 1937 or the Brooke Amendment vesting in public housing tenants a cause of action for violations of the same.

Wright opens the door—ever so slightly—for advocates for the homeless to argue that a similar "implied right of action" vested in the homeless when Congress passed the Stewart B. McKinney Homeless Assistance Act of 1987, 42 U.S.C. § 11301. Thus, this "implied right of action" could result in a governmental entity having to provide housing and medical assistance to the homeless once the entity voluntarily accepts federal funds pursuant to the McKinney Act. Notably, a suit pursuant to the McKinney Act would be one forcing compliance, not establishing a right to shelter per se. Nevertheless, as previously stated, once the government opens a shelter, equal protection and due process rights attach, and a temporary shelter may become a permanent shelter.

a limited segment, are entitled to safe and decent shelter. The congressional mandate as set forth in the NHA provides the following:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization *as soon as feasible* of the goal of a decent home and a suitable living environment *for every American family*, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.⁷⁵

Although the NHA can be read as an act conferring federal rights upon all Americans which entitle them to shelter, the courts have not agreed. The language within the NHA has been interpreted as containing broad statements of policy, not substantive provisions creating new federal rights.⁷⁶

In addition, the NHA appears to have at least two explicit limitations within its text. The first may be found in the "as soon as feasible" language of the Act. This language has been interpreted to provide no definite time frame for achieving the goals set forth in the Act. Ambiguous language such as this gives credibility to the argument that the NHA is merely policy statements and nothing else. The second limitation may be inferred from the "for every American family" language of the Act. Such language appears to make "family," which usually connotes two or more persons who are related, and not individuals, the Act's intended beneficiaries. If such an interpretation is correct, a successful claim based on the NHA may have no more effect than the Child Welfare Act of 1980 or the Social Security Act in securing shelter for the homeless.

Notwithstanding the apparent bleakness of establishing a right to housing under the guise of the NHA, one must not be too pessimistic. In *Wright* the court found one specific provision that was interpreted as conferring substantive rights upon tenants of public housing. As noted earlier, there is language within the NHA which appears to create a right to safe, decent, and sanitary housing. Although the language is ambiguous, one can make a strong argument that the NHA and its subsequent amendments create a federal statutory right—if not expressly, at least by implication—that may be considered a right, privilege, or immunity enforceable within the meaning of section 1983.⁷⁷ Therefore, it behooves legal advocates to be diligent in their analysis of the entire NHA, or any other statute thought to create a right to shelter.

The focus of this article will now shift to an examination of state constitu-

75. 42 U.S.C. § 1441 (1982)(emphasis added).

76. See *Perry v. Hous. Auth. of Charleston*, 664 F.2d 1210 (4th Cir. 1981); *Cedar-Riverside Assoc. v. City of Minneapolis*, 606 F.2d 254 (8th Cir. 1979); *Hernandez v. Pierce*, 512 F. Supp. 1154 (S.D.N.Y. 1981).

77. See *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). The primary indicator of whether a substantive right has been created is the legislative history of the particular act. A careful reading of the NHA's legislative history suggests that the statute was more than words of precatory purpose. This conclusion is further buttressed by the many amendments to the NHA subsequent to its initial passage.

tions and state statutory provisions as a means of establishing a right to shelter for the homeless. Such claims have proven successful for a number of reasons that will be discussed in the following materials.⁷⁸

VI. USING STATE COURTS TO ESTABLISH A RIGHT TO SHELTER

A. State Constitutions As A Basis for Relief

A review of the fifty states' constitutions reveals that the majority of them do not contain an explicit constitutional right for poor persons to receive governmental aid.⁷⁹ Consequently, in such states poor persons cannot establish a state constitutional right to shelter.⁸⁰ Nevertheless, there are approximately nineteen states whose constitutions contain provisions asserting that one is entitled to governmental relief for basic subsistence if one is in need and is a citizen of such state.⁸¹ Of these nineteen states, six have constitutions which contain unambiguous language placing a positive obligation on the governmental entity to provide aid to the needy.⁸² *Callahan v. Carey*⁸³ is the best example of a plaintiff articulating a right to shelter based on a state constitutional provision.

In *Callahan* the New York State Supreme Court held, *inter alia*, that the state's constitution placed an affirmative duty on both the state and the city to provide not only shelter to the homeless but also food.⁸⁴ This holding was a major defeat for the state because it had vigorously opposed assumption of such duties;

78. With the onslaught of conservative Reagan appointees, it may be wise to proceed with such claims in the state courts in the future. Many civil rights type cases are being dismissed in the federal courts by such appointees for failure to establish a prima facie cause of action. These claims are being dismissed as a matter of law, placing such plaintiffs at a disadvantage since many do not possess the funds necessary to appeal such decisions.

79. Langdon & Kass, *supra* note 6, at 332.

80. *Id.*

The equal protection argument based on the state constitution's provision may be stronger than a similar federal claim . . . in those states where statutes contain statements proclaiming that the purpose of public assistance is to alleviate poverty or where constitutions contain clauses relating to aid to the poor. The existence of such language might require the state to have a stronger rational interest in order to justify leaving its homeless population in abject poverty.

Id.

81. *Id.* at 362. These states are: Alabama, Colorado, Georgia, Hawaii, Idaho, Kansas, Mississippi, Montana, Indiana, Nevada, New York, New Jersey, North Carolina, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming.

The New York State Constitution provides an example of the language contained within the constitutions of the above-listed states: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1.

82. Langdon & Kass, *supra* note 6, at 333. The six states are: Montana, Texas, Alabama, Oklahoma, Kansas, and New York. *Id.* at 333-34.

83. *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct., December 5, 1979); Clearinghouse No. 28, 485; see *supra* note 69. This was a class action on behalf of homeless men in New York City. They claimed that the city had a duty to provide them with shelter. In August of 1981, a settlement was reached including a consent decree requiring the city to provide its homeless men with adequate, safe shelter.

84. Chackes, *supra* note 8, at 176; Homelessness Task Force, *supra* note 69, at 4-5.

nevertheless, the case settled and, thereafter, the parties entered into a consent decree.⁸⁵

An individual's state constitution may indeed provide an advocate with the necessities to establish a right to shelter for the homeless. One should not overlook one's state constitution because states frequently update or rewrite their constitutions. Consequently, the possibility always exists that one of the updated provisions may contain precatory language that, when coupled with another constitutional or statutory provision, may establish a right to shelter. As previously noted, advocates for the homeless must be creative; accordingly, such advocates may find the basis for developing such creative arguments in the expressed or implied language of their state's constitution.⁸⁶

The interplay and interdependency between a state's constitution and relevant state statutory laws are vital to establishing a right to shelter. In those cases articulating a right to shelter, plaintiffs have found an important state statutory provision to rely on. At this time, let us examine a few relevant state statutes.⁸⁷

B. State Statutory Provisions

A comprehensive survey of state statutes clearly sets forth two categories of laws in which an obligation requiring a government to provide shelter for the homeless can be found: (1) general assistance statutes and (2) adult protective services statutes.⁸⁸

The general assistance type statutes are on the books in nearly every state.⁸⁹ These programs are administered at either the state or the local governmental levels, and such programs are designed specifically to provide necessary subsistence to poor persons who for whatever reason are ineligible for the various aid programs sponsored by the federal government.⁹⁰ Categorically speaking, the reasons why advocates for the homeless have chosen to use general assistance statutes in their efforts to establish a right to shelter is two-fold: (1) general assistance statutes usually contain unambiguous language setting forth

85. Comment, *Homelessness: The Policy & The Law*, *supra* note 26, at 328. The actual success of the preliminary injunction is not clear. Many would say that the city has failed to comply with the injunction issued in *Callahan* because the decree containing many provisions of the injunction has had to be brought before the court time and time again for enforcement.

86. For a recent analysis of which sections of the states' constitutions may provide such language, see Langdon & Kass, *supra* note 6, at 362-65.

Although this article stresses the need for creative lawyering, one must be cautioned to avoid violating Rule 11 of the Federal Rules of Civil Procedure or its state counterpart.

87. For a recent analysis of state statutory provisions and their related citations, see *id.* at 366-92.

88. Langdon & Kass, *supra* note 6, at 324. In addition, an advocate can use the mental health laws of a given state to establish a right to housing for those homeless persons who may suffer from a mental illness; this group may comprise as much as 50% of the homeless population.

89. Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975). This article examines the historical basis of general assistance statutes and predates them to the sixteenth century.

90. This group will probably include the disabled, AFDC families, the elderly, children, and the recently unemployed.

the government's duty to the needy,⁹¹ and (2) since the government is obliged to provide relief to its poor, such a classification would include across-the-board relief to the poorest of poor, that is, the homeless.

When an advocate begins to examine the general assistance statutes, he or she should not look for language expressly identifying shelter as one of the many forms of relief under the statute. Usually, the general assistance statutes will be written in general terms, obligating a governmental entity to provide its poor population with whatever support is necessary and appropriate. Therefore, a careful reading of such statutes is of utmost importance because such language will only imply a right to shelter.

Adult Protective Services statutes are the other type of state statutory provisions that have been used successfully to argue a right to shelter for the homeless. The purpose of the Adult Protective Services laws has been aptly stated by the Maine legislature as follows:

[M]any adult citizens of the State, because of incapacitation, are unable to manage their own affairs or to protect themselves from abuse, neglect, exploitation or physical danger. Often these persons cannot find others able or willing to render assistance. The legislature intends, through this Act, to establish a program of protective services designed to fill this need and to assure its availability to all incapacitated and dependent adults who are faced with abuse, neglect, exploitation or physical danger.⁹²

At first blush one might think that the Adult Protective Services laws are not as broad as the general assistance statutes previously mentioned because of the language denoting the statutes' applicability to incapacitated adults. This term has been defined to mean "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"⁹³

Notably, in the case of *Hodge v. Ginsberg*,⁹⁴ the Supreme Court of West Virginia interpreted the definition of "incapacitated adults," zeroing in on the phrase "other infirmity," to include within the reach of the definition "the recurring

91. Langdon & Kass, *supra* note 6, at 325. The California County Aid and Relief statute is an example of the type of mandatory language that may be found in poor-relief statutes:

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

Id. (quoting CAL. WELF. & INST. CODE § 17,000 (West 1980)).

It may be of interest to some to know that 42 states have mandatory general assistance programs. This number includes, among others, Illinois, Indiana, Mississippi, and Wisconsin.

92. ME. REV. STAT. ANN. tit. XXII, § 3471 (Supp. 1989).

93. W. VA. CODE § 9-6-1(4) (Supp. 1984).

94. 303 S.E.2d 245 (W. Va. 1983). This was a class action filed on behalf of homeless persons. The suit charged that the state was obligated to provide homeless persons with shelter, food, and adequate medical care. *Id.*

misfortunes of life" which often leads to a state of homelessness.⁹⁵ The *Hodge* court went on to hold that pursuant to the Adult Protective Services Act the state was indeed obligated to provide its homeless population with basic subsistence, i.e., shelter, food, and medical care.⁹⁶ The significance of the *Hodge* decision is that the court presented a well-reasoned opinion articulating a right to shelter under West Virginia's Adult Protective Services Act. Although the decision is not binding on other state courts, it serves as persuasive authority for the thirty-one states that have enacted Adult Protective Services Acts similar to the West Virginia Act.⁹⁷

If one of the more conservative states decides not to give such a liberal interpretation to its Adult Protective Services Act's language, then the Act's overall effectiveness may be decreased, but it should still provide advocates with the necessary authority to secure shelter for those persons who are at least physically or mentally incapacitated. As previously mentioned, this segment of homeless persons, i.e., those persons who are physically and/or mentally incapacitated, may comprise as much as fifty percent of the homeless population.

As an advocate asserting a right to shelter under a state's Adult Protective Services Act, one must be aware of the fact that some persons may wish to remain on the streets. Thus, a decision such as *Hodge* may present other civil liberties problems. Namely, does an individual have the right to choose to be homeless? Carried to its extreme, the Adult Protective Services Act, as applied in *Hodge*, would place an affirmative duty on the government to go out and actually "round-up" those persons whom the Act seeks to protect. This may be accomplished by voluntary or involuntary means. Consequently, one must thoroughly examine the situation before proceeding with a claim based on an Adult Protective Services Act.

Finally, if attempting to establish a right to housing, one may decide to go beyond domestic law. In this context, in addition to making the aforementioned arguments, one may find support for establishing a right to shelter in international law.

VII. ARTICULATING A RIGHT TO SHELTER BASED ON INTERNATIONAL LAW

There is probably no better articulation of a right to shelter than that found in the Universal Declaration of Human Rights.⁹⁸ Article 25 of this convention states:

95. *Id.* at 249-50.

96. *Id.* at 251.

97. Langdon & Kass, *supra* note 6, at 328.

98. B. WESTON, R. FALK & A. D'AMATO, BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 161, 163 (1980); *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.⁹⁹

Although the Universal Declaration of Human Rights is not considered a binding convention, it is authoritative in this context because it is a valid source of international law.¹⁰⁰

The United States Supreme Court has noted that international law is part and parcel of United States domestic law. It would, therefore, be helpful to fully articulate this relationship to a domestic trier of fact who may not be aware of the role international law plays in our domestic courts.¹⁰¹

To further the recognition of a right to shelter, one needs to turn to Article 16 of the European Social Charter.¹⁰² Article 16 states:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of security, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.¹⁰³

Since the European Social Charter is a convention binding on the Contracting States, it falls squarely within Article 38(1) of the Statute of the International Court of Justice. Therefore, it serves as highly persuasive authority for establishing a right to shelter. It can be argued that both the Universal Declaration of Human Rights and the European Social Charter have risen to the level of customary international law which is, next to binding conventions, the most authoritative source of international law.

Although attractive, the use of international law in domestic courts is not without its problems. It is a rare occurrence for a sovereign state to admit that it is violating international law. And for a domestic court to find a right to shelter based on the aforementioned principles of international law, it would have to find that the government—be it state or national—is in violation of recognized principles of international human rights because it has failed to provide shelter

99. *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

100. Statute of the International Court of Justice, June 26, 1945, art. 38(1). The following categories of materials are considered authoritative: (a) international conventions; (b) international customs; (c) general principles of law recognized by civilized nations; and (d) teachings of publicists.

101. U.S. CONST. art. III, § 2. As early as 1900, the United States Supreme Court stated that "[i]nternational [l]aw is part of our [domestic] law"; consequently, International Law must be ascertained and applied by United States courts "as often as questions of rights depending upon it are duly presented for their [U.S. courts'] determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

102. *European Social Charter*. Done at Turin, Oct. 18, 1961. Entered into force, Feb. 26, 1965; WESTON, FALK & D'AMATO, *supra* note 98, at 178, 184.

103. WESTON, FALK & D'AMATO, *supra* note 98, at 178, 184.

for its subjects. Furthermore, it appears clear that the supremacy clause of the United States Constitution would subordinate international law to the Constitution when the subject matter of debate is within the domestic sphere, i.e., expressly set forth in the Constitution. However, the converse is also true; that is, if the person asserting a right to housing or shelter can find a domestic or an international tribunal with jurisdiction to adjudicate such cases. Therefore, one can conclude that, since there is no recognized right to shelter delineated within the Federal Constitution, the question of shelter has not been preempted and is not relegated solely to the domestic sphere or laws. Consequently, one should be permitted to present such a claim based on international law, and international law in this context should not be subordinate to any domestic laws that exist.

VIII. CONCLUSION

Many homeless people will continue to live on the streets until the government provides them with a viable alternative. As advocates, we must rely heavily on state constitutions and state statutory provisions if we are to be successful in our attempt to establish a right to shelter. Use of federal statutory and constitutional arguments are helpful, but one's primary focus should remain on the state level because the state laws have proven to be unambiguous in creating a right to shelter, unlike the federal laws. Therefore, one's time and energies will be better spent analyzing state law.

Because the homelessness problem is multi-dimensional, litigation will not totally eradicate the problem. However, litigation may help serve to educate the American citizenry as a whole. Once enlightened, society will perhaps demand that the homelessness issue be squarely addressed.

The first amendment to the Constitution guarantees to all Americans freedom of religion, freedom of speech, freedom of the press, the right to peaceably assemble, and the right to petition the Government for redress of grievances. We pride ourselves on such tenets and hold out to the world that the United States Constitution is the greatest document of its kind because it protects basic civil liberties and human rights. Nevertheless, it is ironic that the very things most Americans believe are most important to their development and well being, i.e., food, shelter, clothing, and medical care, are not guaranteed within our Constitution. Are not such necessities basic to human survival? Are not such necessities fundamental human rights? Should they not be recognized as guaranteed civil rights?