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State Institutions without Walls: Chronic Homelessness for People with Mental Illness Can Be Brought to an End.

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**STATE INSTITUTIONS WITHOUT WALLS: CHRONIC
HOMELESSNESS FOR PEOPLE WITH MENTAL ILLNESS CAN
BE BROUGHT TO AN END**

THERESA CLARKE*

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I. INTRODUCTION

A former state legislator and former mayor recently wrote, “If you were to encounter my son Tim, a tall, gaunt man in ragged clothes, on a San Francisco street, you might step away from him. His clothes, his unshaven face, and his wild, curly hair stamp him as the stereotype of the chronically mentally ill street person.”¹

It is abhorrent that anyone—a child, a woman suffering domestic violence, an unaccompanied youth, or a veteran—finds himself or herself without a stable home. Challenges multiply for those with severe mental illness. Sadly, when the underlying cause of someone’s homelessness is mental illness, it is often more difficult for that person to obtain shelter, food, or other services because of his or her mental illness.²

In the last thirty years, federally funded services benefitting the homeless have expanded.³ However, services have been simultaneously diluted to the detriment of those with mental illness, particularly those with severe psychiatric disabilities. Without addressing the fundamental injustice created by a system that leads to many deserving people competing for scarce resources, chronic homelessness for those with severe mental illness will not end.

Changes over time, albeit positive, have not resulted in enough improvement for a large segment of the homeless population. Because people who experience chronic homelessness differ in meaningful ways from people who experience intermittent or episodic homelessness, programs should be redefined and reinvigorated to fully meet the varying needs of all people.

Much has been written about homelessness, mental illness, and chronic homelessness of the mentally ill; however, this Comment synthesizes the state of affairs both in policy and legal advocacy and describes how progress can be made by focusing on the interplay of the two areas. To establish such nexus, this Comment first concentrates on federal services, programs, and initiatives, then moves to issues surrounding legal advocacy. Part II provides a brief history of the rise of homelessness and current demographics of the homeless population in this country. Part III

1. Paul Gionfriddo, *My Son Is Schizophrenic. The ‘Reforms’ That I Worked for Have Worsened His Life*, WASH. POST, Oct. 15, 2012, http://articles.washingtonpost.com/2012-10-15/national/35500616_1_mental-illnesses-mental-health-large-mental-hospitals (discussing the public policy decisions that brought his son to homelessness and his views on what could be done to change the situation for those who are mentally ill and homeless).

2. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, OPENING DOORS: FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS 18 (2010), available at http://www.usich.gov/PDF/OpeningDoors_2010_FSPPreventEndHomeless.pdf (affirming that either mental illness or substance abuse can cause rejection from housing assistance).

3. See *infra* Part III.A.

focuses on federal programs: a legislative history of poverty reduction programs, problems with implementation, and recommendations to more effectively implement Title V of the Act. Part IV describes case law concerning homeless plaintiffs' constitutional rights and protections, and then provides legal recommendations to the homeless and their advocates.

Efforts should be made to establish access to housing and medical treatment as fundamental rights guaranteed by the U.S. Constitution and state constitutions.⁴ To address legal rights of people with severe mental illness who are chronically homeless, federal, state, and local governments must implement policies informed by empirical research.

Because of widespread deinstitutionalization, homelessness programs for persons with severe mental illness have been largely unsuccessful, particularly when one accounts for the fact that much is known about exactly how to combat the problem. This Comment proposes a strategy that encompasses both judicial and legislative proposals and targets people who are both severely mentally ill and chronically homeless. The proposal is two-pronged: (1) legislators should target specific strategies and existing programs for improvement, and (2) advocates—lawyers and advocacy organizations—should tackle anew efforts to assert constitutional rights and liberties of homeless individuals.

II. HISTORY AND DEMOGRAPHICS

A. *Causes of the Dramatic Increase in the Homeless Population*

For most people under forty years of age, widespread homelessness, particularly in large urban areas, may seem like a fact of life, but that has not always been the case. Although persistent homelessness for some individuals existed in colonial times,⁵ it was never as pervasive a problem as it has been since the 1980s.⁶

Since recognition of the problem in the 1980s, studies have identified many socio-economic factors that lead to homelessness.⁷ Not surpris-

4. See *infra* Part IV.A.ii.

5. Walter Leginski, *Historical and Contextual Influences on the U.S. Response to Contemporary Homelessness in TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 1-1*, at 1-2 (2007), available at <http://aspe.hhs.gov/hsp/homelessness/symposium07/leginski/report.pdf>.

6. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 10.

7. See *Urgent Relief for the Homeless Act: Hearing on H.R. 558 Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 100th Cong. 61 (1987) (statement of Rep. Barney Frank, Member, H. Comm. on Banking, Fin., & Urban Affairs) (arguing that just as significant as deinstitutionalization were the hefty cuts in federal funding and accompanying tax cuts during the Reagan Administration); see also Laura C. Bornstein, *Contextualizing Cleburne*, 41 GOLDEN GATE U. L. REV. 91, 106–11,

ingly, poverty is a leading cause.⁸ Specifically, cuts to affordable housing programs in the early 1980s resulted in increased homelessness.⁹ However, a historic change in the area of mental health beginning in the early 1960s, continuing through the early 1980s—the deinstitutionalization of hundreds of thousands with mental illness¹⁰—is often cited as a leading cause of the original increase in homelessness.¹¹

115–19 (2010) (describing the Reagan Administration cuts to entitlement programs and social services, including those affecting the mentally disabled).

8. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 10 (concluding that the data demonstrates that the recent increase in homeless families and unaccompanied youth is caused by a combination of socio-economic factors, including reduction in affordable housing, foreclosures, incomes not commensurate with the rising cost of living, underemployment, and unemployment).

9. See Mary Ellen Hombs, *Federal Policy for the Homeless*, 1 STAN. L. & POL'Y REV. 57, 62–63 (1989) (relaying statistics related to affordable housing shortages in the 1980s when discussing the slow implementation and lack of funding for the McKinney Act). Importantly, gentrification and urban renewal caused the availability of single-room occupancy housing, which housed many of the very poor in urban areas, to decrease dramatically beginning in the 1970s. INTERAGENCY COUNCIL ON THE HOMELESS, THE 1990 ANNUAL REPORT OF THE INTERAGENCY COUNCIL ON THE HOMELESS 20 (1991); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1225–26 (2003).

10. FED. TASK FORCE ON HOMELESSNESS & SEVERE MENTAL ILLNESS, OUTCASTS ON MAIN STREET: REPORT OF THE FEDERAL TASK FORCE ON HOMELESSNESS AND SEVERE MENTAL ILLNESS 16 (1992) (indicating the number of patients in state mental institutions decreased from 560,000 in 1955 to 216,000 in 1974 to 100,000 in 1989).

11. INTERAGENCY COUNCIL ON THE HOMELESS, *supra* note 9, at 22 (recognizing that the overrepresentation of mentally ill persons in the homeless population is due to deinstitutionalization); Latisha R. Brown, Note, *The McKinney Act: Revamping Programs Designed to Assist the Mentally Ill Homeless*, 33 COLUM. J.L. & SOC. PROBS. 235, 239–40 (2000) (describing how deinstitutionalization contributed to increased homelessness for the mentally ill); Ad Hoc Comm. on the Chronic Mental Patient, *Position Statement: A Call to Action for the Chronic Mental Patient*, 136:5 AM. J. PSYCHIATRY 748, 748 (1979), available at http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps1978_Chronic.pdf (pointing to deinstitutionalization as a major cause of so many mentally ill homeless while addressing the inadequacy of care for chronically mentally ill persons and the services that should be provided). Some politicians and scholars even maintain that deinstitutionalization is the sole reason for the increased prevalence of mentally ill people becoming homeless. See *Urgent Relief for the Homeless Act: Hearing on H.R. 558 Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 100th Cong. 45 (1987) (statement of Mario Cuomo, Gov. of New York) (crediting deinstitutionalization with New York's high homelessness numbers among the mental ill). Others assert that lack of affordable housing is the major cause, not deinstitutionalization. *Id.* at 60 (statement of Raymond Flynn, Mayor of Boston); cf. Rachel Rubey, Note, *There's No Place Like Home: Housing for the Most Vulnerable Individuals with Severe Mental Disabilities*, 63 OHIO ST. L.J. 1729, 1736–47 (2002) (pointing to the dearth of affordable housing and barriers to public housing and other housing managed by mental health providers as major problems for the mentally ill). To be sure, there will be debate on the primary cause of homelessness among the mentally ill. See Wes Daniels,

Up to one-third of people who are chronically homeless suffer from severe mental illness.¹² While deinstitutionalization should be considered progress with regard to the well-being of those with mental illness, by all standards both humane¹³ and economic,¹⁴ policymakers and advocates greatly underestimated what it would take to adequately support people post-deinstitutionalization.¹⁵

“Derelicts,” Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates, 45 *BUFF. L. REV.* 687, 699–700 n.68 (1997) (discussing the longstanding debate as to whether deinstitutionalization is the main cause of rise in homelessness). Admittedly, policies targeting programs toward those with mental illness and their ensuing consequences are much more complex than identifying the primary cause of such homelessness. See CHRIS KOYANAGI, KAISER COMM’N ON MEDICAID AND THE UNINSURED, *LEARNING FROM HISTORY: DEINSTITUTIONALIZATION OF PEOPLE WITH MENTAL ILLNESS AS PRECURSOR TO LONG-TERM CARE REFORM 4–14* (2007), available at <http://www.kff.org/medicaid/7684.cfm> (discussing the nuanced history of deinstitutionalization).

12. *Homelessness in America—II: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 98th Cong. 7 (1984) (statement of Rep. Stewart B. McKinney, Member, H. Comm. on Banking, Fin., & Urban Affairs) (“Of the estimated one to two million homeless in this Country, it is conservatively guessed that from 20% to 30% are former Mental patients who have been discharged from state mental hospitals.”); INTERAGENCY COUNCIL ON THE HOMELESS, *supra* note 9, at 22 (1991) (“While slightly less than two percent of the general population is severely mentally ill, studies indicate that approximately a third of the population of homeless single adults suffer from severe mental illness.”).

13. See *Homelessness in America—II: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 98th Cong. 8 (1984) (statement of Rep. Stewart B. McKinney, Member, H. Comm. on Banking, Fin., & Urban Affairs) (recognizing that deinstitutionalization and lack of community care exacerbate problems for the mentally ill that leads to homelessness); see also KOYANAGI, *supra* note 11, at 13 (identifying the failure to provide a “desirable quality of life” for many as a result of deinstitutionalization).

14. See *The Leonard Lopate Show, Pathways to Housing*, WNYC (Aug. 10, 2012), <http://www.wnyc.org/shows/lopatel/2012/aug/10/pathways-housing> (asserting that institutionalization in a psychiatric hospital is twenty times more expensive than the “Housing First” program—a model that provides people with severe mental illness a place to live with no strings attached *first* and then systems of support to treat and help ameliorate the illness or disability).

15. See Louis J. Sirico, Jr., *Homeless: An Introduction and Bibliography*, 36 *VILL. L. REV.* 1019, 1021 (1991) (noting failure to provide adequate services to former patients following deinstitutionalization); see also Katie Eyer, Comment, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness*, 28 *N.Y.U. REV. L. & SOC. CHANGE* 1, 2 (2003) (citing that the failure of states and localities to provide sufficient treatment following deinstitutionalization). As early as 1974, the American Psychiatric Association urged mental health professionals and policymakers to proceed with caution in closing too many long-term care facilities, citing the lack of capacity and funding of community mental health organizations. Comm. on Liaison with Am. Hosp. Ass’n, *Position Statement on the Need to Maintain Long-Term*

B. *Demographics of the Homeless Population*

The McKinney Act, as amended by the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, defines a homeless person, in part, as “an individual or family who lacks a fixed, regular, and adequate nighttime residence.”¹⁶ Recent data estimates there are more than 500,000 homeless people on any given night in the United States.¹⁷ Over the course of one year, 1,500,000 people were estimated to be without a place to stay for at least one night.¹⁸ Due in part to lawsuits on behalf of homeless people against the federal government regarding Census Bureau activities,¹⁹ these estimates have become more accurate over time. Even though the very nature of homelessness still makes it difficult to gather exact data,²⁰ it is undisputed that across our cities and towns,

Mental Hospital Facilities, 131:6 AM. J. PSYCHIATRY 745, 745 (1974), available at <http://www.psychiatry.org/advocacy—newsroom/position-statements>.

16. Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, Div. 2, § 1003(a), 123 Stat. 1632, 1664 (2009) (to be codified as amended at 42 U.S.C. § 11302(a)(1)). Additionally, the definition has expanded considerably since 1987 and now explicitly includes families, children, and unaccompanied youth. A segment of the definition is as follows:

- (6) Unaccompanied youth and homeless families with children and youth defined as homeless under other Federal statutes who—
 - (A) have experienced a long term period without living independently in permanent housing,
 - (B) have experienced persistent instability as measured by frequent moves over such period, and
 - (C) can be expected to continue in such status for an extended period of time because of chronic disabilities, chronic physical health or mental health conditions, substance addiction, histories of domestic violence or childhood abuse, the presence of a child or youth with a disability, or multiple barriers to employment.

Id.

17. See KRISTEN PAQUETTE ET AL., CURRENT STATISTICS ON THE PREVALENCE AND CHARACTERISTICS OF PEOPLE EXPERIENCING HOMELESSNESS IN THE UNITED STATES 1 (2011), available at http://homeless.samhsa.gov/ResourceFiles/hrc_factsheet.pdf (noting in the U.S. Department of Housing and Urban Development’s June 2010 Annual Homeless Assessment Report to Congress, 407,996 people were homeless and 109,812 people were chronically homeless on any given night in January 2010).

18. See *id.* (relating that in the U.S. Department of Housing and Urban Development’s June 2010 Annual Homeless Assessment Report to Congress, 593,150 people “accessed emergency shelter or transitional housing programs” over the course of one year, from October 2009 to September 2010).

19. See Nat’l Law Ctr. on Homelessness & Poverty v. Kantor, 91 F.3d 178, 178 (D.C. Cir. 1996) (denying the National Law Center on Homelessness and Poverty’s challenge to the Census Bureau’s count of homeless persons during the 1990 census for lack of standing).

20. See *Urgent Relief for the Homeless Act of 1987: Hearing on S. 813 Before the S. Comm. on Governmental Affairs*, 100th Cong. 28–32 (1987) (testimony of Dee Roth, Chief, Office of Program Evaluation and Research, Ohio Dep’t of Mental Health) (illus-

there are hundreds of thousands of homeless.²¹ In fact, some would argue that any person who is involuntarily homeless is one person too many.²²

People who are chronically homeless differ in important ways from people who experience intermittent or episodic homelessness. Those suffering chronic homelessness are more likely to be: single, male (67–80% as compared to about 60% of the general homeless population), suffer from a severe mental illness (30% as compared to 26% of the general homeless population and only 3–7% among those experiencing short-term homelessness), or have a co-occurring substance abuse problem (50% as compared to as low as 28% among those experiencing short-term homelessness).²³ Moreover, one study concluded that more than 60% of chronically homeless people have experienced lifetime mental illness and more than 80% have had a lifetime substance abuse problem.²⁴ Veterans are also disproportionately represented among the population of chronically homeless people,²⁵ in no small part due to post-traumatic stress disorder (PTSD).²⁶ Unsurprisingly, chronically homeless people

trating the considerable discussion and dispute concerning the actual number of homeless people during Congressional hearings of the McKinney Act and other precursory legislation in the 1980s). Some wanted to use the lack of certainty as an excuse to claim that the problem was overstated. *Id.*; see also K. Scott Mathews, Note, *Rights of the Homeless in the 1990s: What Role Will the Courts Play?*, 60 UMKC L. REV. 343, 343 (1991) (noting difficulty in counting the number of homeless individuals).

21. Compare U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 12 (reporting 643,067 people were homeless in 2009 and “[o]ver the course of the year, the AHAR reports 1,558,917 people used emergency shelters or transitional housing programs”), with PAQUETTE ET AL., *supra* note 17 (citing the U.S. Department of Housing and Urban Development’s June 2010 Annual Homeless Assessment Report to Congress, in which 407,996 people were homeless, 109,812 people were chronically homeless on a given night in January 2010, and 1,593,150 people “accessed emergency shelter or transitional housing programs” over the course of one year from October 2009 to September 2010).

22. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 4 (describing expectations of the joint roadmap for progress).

23. See PAQUETTE ET AL., *supra* note 17, at 1–6 (providing statistics on long-term and short-term homelessness); see also U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 17 (pointing out that men, people suffering from mental illnesses, and people dealing with substance abuse are associated with chronic homelessness).

24. See PAQUETTE ET AL., *supra* note 17, at (referencing data compiled by the National Survey of Homeless Assistance Providers and Clients in 1996).

25. See PAQUETTE ET AL., *supra* note 17, at 3, 14 (citing report data indicating there are about 110,000 chronically homeless, with 44,000 to 66,000 veterans experiencing chronic homelessness); see also MARY CUNNINGHAM, URBAN INSTITUTE, TARGETING CHRONICALLY HOMELESS VETERANS WITH HUD-VASH 9 (2009), available at http://www.urban.org/UploadedPDF/411991_chronically_homeless_veterans.pdf (“The [Department of Veterans Affairs] estimates that there are approximately 131,000 homeless veterans nationwide.”).

26. MARY CUNNINGHAM, URBAN INSTITUTE, TARGETING CHRONICALLY HOMELESS VETERANS WITH HUD-VASH 1 (2009), available at [http://www.urban.org/Uploaded PDF/](http://www.urban.org/UploadedPDF/)

also have more interactions with the criminal justice system.²⁷ Formerly incarcerated individuals, particularly those who were homeless prior to incarceration, are more likely to struggle with finding a place to live.²⁸

Although well intentioned, federal coordinating efforts and programs have an inadvertent, diluting effect on specific populations such as those with mental disabilities. For instance, the aging population presents a greater societal need to care for the elderly, such as providing housing. To fill this need, policymakers have established “elderly-only” programs, creating a situation where “the elderly [have been] pitted against the non-elderly disabled” in the housing market.²⁹ Additionally, as the number of homeless families and unaccompanied youth has increased over the last three decades, so have national attention and accompanying programs.³⁰ Nevertheless, severely mentally ill people who are disproportionately represented in the homeless population continue to be without sufficient support systems. These systems are addressed below.

III. FEDERAL GOVERNMENT PROGRAMS AND INITIATIVES

A. *Legislative History and Background*

Action by the federal government addressing homelessness began in the 1930s as part of President Franklin D. Roosevelt’s “New Deal,”³¹ but, even as the government recognized homelessness as a societal problem, many of the programs were aimed at the poor in general.³² For many

411991_chronically_homeless_veterans.pdf (“An overwhelming majority of these veterans is chronically homeless and suffers from high rates of mental illness and chronic and acute health problems that leave them at heightened risk of dying on the street.”).

27. See PAQUETTE ET AL., *supra* note 17, at 17 (noting that as many as fifty-four percent of homeless people have reported experiencing some sort of incarceration). This is too often due to local ordinances criminalizing behaviors such as loitering, sleeping in a public place, and panhandling. NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY ET AL., HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9–10 (2009), available at <http://www.nlchp.org/content/pubs/2009HomesNotHandcuffs2.pdf>.

28. See NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY ET AL., *supra* note 27, at 11 (“When homeless persons are arrested and charged under these ordinances, they may develop a criminal record, making it more difficult to obtain the employment and/or housing that could help them become self-sufficient.”).

29. Rubey, *supra* note 11, at 1742.

30. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 9–12 (recommending modification of programs after additional research on unaccompanied youth).

31. See Leginski, *supra* note 5, at 1–4 (stating the first federal assistance program for the homeless was established during the Great Depression).

32. See *id.* at 1–3 (noting that it was not until the twentieth century that homelessness assistance was differentiated from assistance for those with low income). It has also been argued, ironically, that some of the programs have the long-term effect of reducing affordable housing. See *id.* at 1–5 (citing a few adverse consequences of legislation regarding low-income housing).

years following the Great Depression, the public widely considered the homeless population to be comprised entirely of alcoholic men.³³ While some federal assistance existed, it was largely seen by the more fortunate as a way to take care of a “nuisance.”³⁴ Even though public sentiment (sadly) has not changed much,³⁵ the 1980s brought more attention, focus, and resources.

After the widespread deinstitutionalization of mentally ill individuals, which was a major factor in the dramatic increase in homelessness in 1980s, Congress began to hold hearings on the crisis.³⁶ Congress heard testimony from a wide variety of people, including: (then) current and former homeless people, governors, mayors; charitable organizations; state and local agency personnel; and federal agency administrators.

A central champion of the cause to fight homelessness was Congressman Stewart B. McKinney, a Republican from Connecticut.³⁷ Significantly, his original intent was to abate the problem of mentally ill homeless by targeting funding and services to these at-risk individuals, and a large portion of testimony was related to this issue.³⁸

33. *Id.* at 1-6.

34. David Bornstein, *A Plan to Make Homelessness History*, *Opinionator*, N.Y. TIMES (Dec. 20, 2010, 10:07 PM), <http://opinionator.blogs.nytimes.com/2010/12/20/a-plan-to-make-homelessness-history>.

35. *See, e.g., The Kojo Nnamdi Show, Local and National Perspectives on Homelessness*, WAMU (Jan. 24, 2011), <http://thekojoannamdishow.org/audio-player?nid=18526> (discussing ongoing challenges to abate homelessness stemming from a lack of public and political will).

36. *See generally Urgent Relief for the Homeless Act: Hearing on H.R. 558 Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 100th Cong. (1987) (debating the relief required to address and combat homelessness); *The Federal Response to the Homeless Crisis: Hearings Before a Subcomm. of the H. Comm. of Gov't Operations*, 98th Cong. (1984) (exploring needed responses to nationwide homelessness); *Homelessness in America—II: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 98th Cong. (1984) (discussing issues surrounding homelessness in America). The significance of these hearings warranted coverage in major newspapers. *See, e.g., Iver Peterson, Congress is Urged to Help Homeless*, N.Y. TIMES, Dec. 16, 1982, <http://www.nytimes.com/1982/12/16/us/congress-is-urged-to-help-homeless.html> (reporting on the Congressional hearings in 1982). These hearings continued throughout the 1980s. *See The Federal Role in Providing Services to the Mentally Ill: Hearing Before a Subcomm. of the H. Comm. of Gov't Operations*, 100th Cong. 118 (1987) (statement of Rep. Ted Wiess, Member, H. Comm. on Gov't Operations) (“In two previous hearings, and in two reports that our subcommittee has issued on the topic of the homeless, we have found homelessness to be a national problem.”).

37. *See NAT'L COAL. FOR THE HOMELESS, MCKINNEY-VENTO ACT: NCH FACT SHEET #18 at 1* (2006), available at <http://www.nationalhomeless.org/publications/facts/McKinney.pdf> (calling McKinney the “chief Republican sponsor” of the bill).

38. *See Homelessness in America—II: Hearing Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 98th Cong. 7-9 (1984) (statement of Rep. Stewart B. McKinney, Member, H. Comm. on Banking, Fin., & Urban

i. McKinney-Vento Homeless Assistance Act

On July 22, 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act, later titled the McKinney-Vento Homeless Assistance Act, (McKinney Act),³⁹ landmark legislation aimed at coordinating and funding initiative that reduce and eliminate homelessness.⁴⁰ When such comprehensive legislation results from numerous studies, hearings, testimony of dozens of experts, and reports from federal program administrators, one can be sure of disagreements in almost every facet. Indeed, it may be common for members of Congress to take agency administrators to task during hearings in order to grandstand. Nonetheless, it is heartening that Congress thoroughly researched this issue and passed such bold legislation when some programs and preliminary research already existed.⁴¹

Congress delved into the issue, creating the comprehensive McKinney Act. The McKinney Act included nine titles, outlines of which are still contained in the statute: Title I established programs and defined homelessness; Title II created the Interagency Council on the Homeless (still intact and active); Title III provided for the Emergency Food and Shelter program (funded by the Federal Emergency Management Administration); Title IV established housing programs administered by the Department of Housing and Urban Development (emergency shelter, supportive housing, Section 8 assistance, supplemental housing assistance

Affairs) (identifying the lack of program funding for housing as a major obstacle in dealing with homelessness).

39. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified as amended in scattered sections of 42 U.S.C.).

40. *Id.* The Act was named in honor of Rep. McKinney, who died shortly before the bill passed. NAT'L COAL. FOR THE HOMELESS, *supra* note 37.

41. See *Urgent Relief for the Homeless Act of 1987: Hearing on S. 813 Before the S. Comm. on Governmental Affairs*, 100th Cong. 13–20 (1987) (testimony of Dennis Kwiatkowski, Chairman, Emergency Food & Shelter Nat'l Bd. Program, Fed. Emergency Mgmt. Agency) (discussing FEMA programs already in place at the time); *Urgent Relief for the Homeless Act: Hearing on H.R. 558 Before the Subcomm. on Hous. & Cmty. Dev. of the H. Comm. on Banking, Fin., & Urban Affairs*, 100th Cong. 1–2 (1987) (statements of Rep. Henry B. Gonzalez, Chairman, H. Subcomm. on Hous. & Cmty. Dev.) (recognizing meager programming already existed). It is also noteworthy, considering his proclaimed penchant for reducing the size of the federal government, that President Ronald Reagan signed the McKinney Act into law. See Tim Grasser, Note, *Title V of the Stewart B. McKinney Homeless Assistance Act: Local Communities Often Blinded by the Right*, 83 WASH. U. L.Q. 1905, 1908 (2005) (noting that the Reagan administration saw homelessness as primarily a local issue and that President Reagan “reluctantly” signed the bill into law). *But see* Kevin Fagan, *Amid Tributes, Activists Lament Reagan's Failure on Homelessness*, S.F. CHRON., June 10, 2004, <http://www.commondreams.org/headlines04/0610-03.htm> (reporting that despite signing the McKinney Act, the Reagan Administration also approved budgets that severely cut funding for the Department of Health and Human Services).

for the homeless); Title V established a mechanism by which homeless assistance organizations could apply for surplus federal property; Title VI authorized health services programs to be administered by the Department of Health and Human Services (including community mental health demonstration projects); Title VII created education and job training programs to be administered by the Departments of Education, Health and Human Services, and Labor; Title VIII amended the existing food stamp program to target services for homeless individuals; and Title IX extended the Veterans' Job Training Act.⁴²

Over the past twenty-five years, the McKinney Act has been amended several times,⁴³ partially in response to lawsuits related to lack of implementation.⁴⁴ Specifically related to assistance for people with mental illness, the Community Mental Health Services program was amended and renamed in 1990⁴⁵ and some mental health services were consolidated in 1992.⁴⁶

42. 42 U.S.C. §§ 11301–11435; see also *McKinney-Vento Act*, U.S. Dep't of Hous. & Urban Dev., HUD, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/homeless/lawsandregs/mckv (last visited Sept. 28, 2012) (summarizing each of the nine titles).

43. See NAT'L COAL. FOR THE HOMELESS, *supra* note 37, at 3 (noting that the McKinney Act has evolved over the last two decades, with amendments in 1988, 1990, 1992, and 1994). In 2000, President Clinton renamed the law "The McKinney-Vento Homeless Assistance Act" in honor of Representative Bruce Vento, another champion of the legislation and its programs. *Id.*

44. See, e.g., *Nat'l Coal. for the Homeless v. U.S. Veterans' Admin.*, 695 F. Supp. 1226, 1234 (D.D.C. 1988) (enjoining government from selling property until it complied with the McKinney Act); *Lee v. Pierce*, 698 F. Supp. 332, 332, 344 (D.D.C. 1988) (denying injunction on disposal of homes other than for use by homeless people). In a particularly egregious example, mothers of homeless children sued the District of Columbia for, among other requirements, failing to comply with the provisions of the McKinney Act providing for transportation to and from school. *Lampkin v. D. C.*, 886 F. Supp. 56, 58 (D.D.C. 1995). On remand from the D.C. Court of Appeals, the district court ordered the District of Columbia to comply, finding it had violated the McKinney Act. *Id.* Subsequently, the District of Columbia moved to vacate the order after dropping out of the McKinney program the same month the plaintiffs were granted the injunction. *Id.* Plaintiffs' answer first claimed that the District was required to participate in the program. *Id.* Second, they charged that the injunction order must be upheld to enforce remediation of past wrongs. *Id.* at 59. The district court ruled against the plaintiffs, stating in part, "Whatever harms may be inflicted upon homeless children by the District's action, the court cannot as a legal matter find that the process of enacting the emergency legislation violated [the District of Columbia's rule regarding emergency legislation]." *Id.* at 61, 63.

45. NAT'L COAL. FOR THE HOMELESS, *supra* note 37, at 3.

46. See *Information Sheet July 1992*, INTERAGENCY COUNCIL ON THE HOMELESS, Aug. 1992, at 3 (noting that in 1992 a new agency called the "Substance Abuse and Mental Health Services Administration" was organized with the goal of more specific attention on the needs of the mentally ill and increased coordination at the federal level).

The latest change came in 2009 with the passage of The Homeless Emergency and Rapid Transition to Housing (HEARTH) Act,⁴⁷ which reauthorized and amended the McKinney Act. According to the Department of Housing and Urban Development's Homeless Assistance, the Act's "substantial changes" included the following:

- A consolidation of HUD's competitive grant programs;
- The creation of a Rural Housing Stability Program;
- A change in HUD's definition of homelessness and chronic homelessness;
- A simplified match requirement;
- An increase in prevention resources; and,
- An increase in the emphasis on performance.⁴⁸

The National Coalition for the Homeless characterized the changes somewhat differently: "Among the concerns . . . are" that it creates a class of people ineligible for HUD services, it "[w]eakens [c]ommunity [d]ecision-[m]aking," it puts "[r]estrictions on [e]ligible [a]ctivities," and it raises "[p]rivacy [c]oncerns."⁴⁹

ii. Other Federal Programs

As comprehensive as the McKinney Act is, there are other programs that provide assistance to and/or protect the rights of people who are homeless.⁵⁰ For example, in anticipation of a large number of military base closures, Congress passed the Base Closure Community Redevelop-

47. Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009, Pub. L. No. 111-22, Div. 2, §§ 1001-1505, 123 Stat. 1632, 1663-1702 (codified as amended in scattered sections of 42 U.S.C.).

48. *Homeless Assistance, Dep't of Hous. & Urban Dev.*, HUD, http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/homeless (last visited June 15, 2013).

49. NAT'L COAL. FOR THE HOMELESS, NCH PUBLIC POLICY RECOMMENDATIONS: HUD MCKINNEY-VENTO PROGRAMS 1 (2010), <http://www.nationalhomeless.org/factsheets/PPR/2010/6%20-%20HMV%206-10-10.pdf> (listing the concerns of the National Coalition for the Homeless in response to the 2009 amendment of the McKinney Act).

50. *See, e.g.*, Fair Housing Act, 42 U.S.C. §§ 3601-3619 (2006) (codifying federal anti-discrimination laws in housing for the disabled); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2006) (outlining federal anti-discrimination laws aimed at protecting citizens with disabilities from discrimination, including the homeless); *see generally* Alicia Hancock Apfel, Comment, *Cast Adrift: Homeless Mentally Ill, Alcoholic and Drug Addicted*, 44 CATH. U. L. REV. 551 (1995) (discussing the how the Fair Housing Act and Americans with Disabilities Act intersect with the supports and services needed by the homeless mentally ill).

ment and Homeless Assistance Act of 1994.⁵¹ The law removed all such future surplus property from under Title V of the McKinney Act and required it be managed by the Department of Defense.⁵²

Additionally, with the Supreme Court upholding most of the Patient Protection and Affordable Care Act (PPACA) in June 2012,⁵³ Medicaid is one program to follow closely. Currently, many people who are homeless and qualify for Medicaid do not utilize the program as much as they could.⁵⁴ Looking forward, as many more people under the PPACA will be eligible for Medicaid, “it will be important to address the barriers they face to enrolling in coverage and accessing needed care.”⁵⁵

B. *After Decades, Why Have We Not Solved the Problem?*

i. Implementation, Funding, & Lack of Focus

Two overarching factors are responsible for the fact that chronic homelessness has not ended in the United States. First, federal initiatives and programs are spread too thin to adequately address the problem of chronic homelessness. This problem manifests itself in poor implementation and lack of focus. Second, because neither housing nor treatment for severe mental illness is a fundamental right or liberty guaranteed by the U.S. Constitution,⁵⁶ the crisis continues to be inadequately addressed and real solutions to the problem remain elusive.

A third, less important factor influencing the slow progress toward ending chronic homelessness is a lack of understanding among policymakers and legal advocates as to who the chronically homeless are, and how they

51. Base Closure Community Redevelopment and Homeless Assistance Act of 1994, Pub. L. No. 103-421, 108 Stat. 4346 (codified as amended in scattered sections of 10 U.S.C. and 42 U.S.C.).

52. *Id.*; NAT’L COAL. FOR THE HOMELESS, *supra* note 37, at 3.

53. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. ___, 132 S. Ct. 2566, 2576, 2608 (2012) (upholding the so-called “individual mandate” of the Patient Protection and Affordable Care Act).

54. See THE KAISER COMM’N ON MEDICAID AND THE UNINSURED, MEDICAID COVERAGE AND CARE FOR THE HOMELESS POPULATION: KEY LESSONS TO CONSIDER FOR THE 2014 MEDICAID EXPANSION 2 (2012), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8355-es.pdf> (indicating that lower Medicaid enrollment among the homeless population stems from disinterest in and distrust of public services and from hurdles they face in completing the enrollment process).

55. *Id.* at 1.

56. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 18 (1981) (finding no constitutional support for a congressional mandate that states provide mental health treatment); see *infra* Part IV.A.ii.; see also Brown, *supra* note 11, at 246–47 (citing the non-existence of a “right under the Constitution to receive treatment and housing”).

differ from those who are episodically homeless or homeless “only” once or twice.⁵⁷

Tough issues and problems with expensive solutions tend to lose favor with the public. Interest wanes and focus shifts on to the next “hot topic” or on to issues that seem easier to solve. Ordinary citizens lose sight of the difficult issues and established goals and targets. For example, a ten-year strategic plan to end homelessness was created in 2010 after more than two decades of concerted efforts to manage and ostensibly end homelessness (including previous ten-year plans working toward ending homelessness).⁵⁸ While homelessness is waning, it is far from ending.⁵⁹

Nonetheless, the 2012 amendment to the strategic plan has as a goal of “finishing the job of ending chronic homelessness by 2015.”⁶⁰ Additionally, social scientists and legal scholars have been prolific in their writing about homelessness; policymakers have established many programs, and a multitude of research studies, symposia, national meetings, and events have been conducted.⁶¹ Furthermore, almost all states have interagency councils on homelessness (modeled after the U.S. Interagency Council on Homelessness), and more than 300 localities have created ten-year plans to end homelessness.⁶²

It is clear that well-intentioned policymakers and advocates are attempting to address every possible issue at once, with comprehensiveness being the predominant concern. While comprehensive solutions are admirable in the abstract and necessary in long-term strategizing, policymakers should consider collateral consequences. For example,

57. *See supra* Part II.B.

58. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 4, 10. This is not unique to the societal problem of homelessness. Education reformers have researched, advocated, and implemented their way through decades of five- or ten-year strategic plans to “solve” problems in education. *See, e.g.*, Robert L. Hampel, et al., *History and Educational Reform*, 36 HIST. OF EDUC. Q. 473, 473 (1996) (discussing Larry Cuban and David Tyack’s 1995 book entitled *Tinkering Toward Utopia: A Century Of Public School Reform* that evaluates the effect of piecemeal reform in education).

59. *See* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 13 (discussing statistics on the modest reduction in chronic homelessness from 2006 to 2010).

60. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 5.

61. *See, e.g.*, DEP’T OF HOUS. & URBAN DEV. & DEP’T OF HEALTH & HUMAN SERVS., TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH i–ii (Deborah Dennis et al. eds., 2007), available at aspe.hhs.gov/hsp/homelessness/symposium07/report.pdf (including numerous articles on issues relating to homelessness and homeless individuals).

62. HOWARD CNTY. DEP’T OF CITIZEN SERV., PLAN TO END HOMELESSNESS 20 (2010), available at <http://bridges2hs.org/documents/PEH11-22-10-FinaltoBPSS.pdf> (“The U.S. Interagency Council on Homelessness (USICH) has asked communities throughout the country to join a national movement to develop 10-year Plans to End Homelessness, and more than 300 have responded.”).

comprehensive reform often has a diluting effect on worthwhile goals and accompanying programs. It can also lead to unfocused litigation. Moreover, advocates for the homeless are limited by the fact that there is no constitutional right to housing and no suspect or quasi-suspect class protection for the homeless or severely mentally ill under the Equal Protection clause of the Fourteenth Amendment. As a result, lawyers must put forth several arguments, hoping one of them works to either protect the client from a criminal conviction or to seek fundamental liberties in terms of access to services.

While funding for homeless assistance increased under the McKinney Act,⁶³ it did not increase at its intended rate.⁶⁴ In fact, Congress funded less than three-quarters of the amount authorized for McKinney Act programs in 1987 and 1988,⁶⁵ and the Act was not fully funded until after 1990.⁶⁶ Subsequently, funding for some of its programs increased and gained focus, while other programs' funding was reduced or excised.⁶⁷ Largely during the first years of the twenty-first century, overall funding decreased by about one-third.⁶⁸

ii. Problems With a Program-Only Remedy

Solutions that rely only on one, or even many, of the federal programs funding services for people who are homeless have inherent hurdles and limitations. First, it is dangerous to count on political will to last as long as the problem will take to solve. Federal policy, programs, and attention

63. See, e.g., INTERAGENCY COUNCIL ON THE HOMELESS, *supra* note 9, at 2 (reporting that appropriations for McKinney Act programs increased from just over \$500 million to just over \$700 million between 1989 and 1990, with funds to housing programs growing by the largest proportion). The proposed budget for Fiscal Year 1992 provided for another increase of thirteen percent. *FY 1992 Budget for Targeted Homeless Assistance Programs*, INTERAGENCY COUNCIL ON HOMELESS, July–Aug. 1991, at 1. There was also an increase by thirteen percent for Fiscal Year 1993, including \$21.4 million for ACCESS, a program to provide services to those “who are homeless and have a severe mental illness.” *Over \$1.1 Billion Appropriated for Programs to Help Homeless People*, INTERAGENCY COUNCIL ON HOMELESS, Jan.–Feb. 1993, at 1.

64. In addition to more direct implementation challenges, it was also difficult to steer the funding to organizations involved in the fight against homelessness. *HUD's Proposed Regulations Denying Funds to Religious Groups for Sheltering the Homeless: Hearing Before the Subcomm. on Emp't & Hous. of the H. Comm. on Gov't Operations*, 100th Cong. (1987) (statement of Rep. John Lantos, Chairman, Subcomm. on Emp't & Hous. of the H. Comm. on Gov't Operations) (describing how proposed HUD rules would prevent funding from going to church-run homeless programs).

65. NAT'L COAL. FOR THE HOMELESS, *supra* note 37, at 6.

66. *Ending Homelessness: Policy Problems*, INTERAGENCY COUNCIL ON HOMELESS, Jan. 1991, at 1.

67. NAT'L COAL. FOR THE HOMELESS, *supra* note 37, at 6.

68. *Id.*

change with each new administration. Public willpower can be even more fleeting, also leading to quick-changing policies. Second and related, programs are tied to funding; funding is tied to the economy. It is well documented that homelessness increases during times of economic depression or recession.⁶⁹ Third, with scores of federal programs across several agencies, albeit largely coordinated thanks to the Interagency Council on the Homeless and the McKinney Act, the risk of focusing on programmatic fixes becomes bifurcated as: (1) it is easier for one group to be pitted against another; and (2) numerous problems with implementation may occur.

Thanks in part to the above-discussed issues, the McKinney Act was slow to take hold.⁷⁰ Unfortunately, the tremendous amount of attention Congress afforded the crisis of homelessness, especially those with severe mental illness, in the early 1980s did not translate into swift action. Agency after agency failed to fully comply or comply at all.⁷¹ Lawsuits were necessary to force the federal government to implement the law.⁷² The lackadaisical implementation of Title V, the surplus property portion of the law, was particularly appalling, with evidence agencies purposely sold property designated under Title V for homeless organizations to pri-

69. See INTERAGENCY COUNCIL ON THE HOMELESS, *supra* note 9, at 18 (indicating a link between recessions and homelessness rates). The report elaborates:

Primarily because of the 1980 and 1981-82 recessions, the percentage of people living below the poverty line, which had been more-or-less stable since 1969, increased from 11.7% . . . in 1979 to a peak of 15.2% . . . in 1983. . . . Although only a miniscule portion of the people and families living below the U.S. poverty line ever become homeless, with the increase in overall poverty from 1979 to 1983 came an even more rapid increase in various segments of the poor population most at risk of homelessness.

Id. at 1.

70. See *Interagency Council on the Homeless to Become White House Group*, INTERAGENCY COUNCIL ON THE HOMELESS, Nov. 1993, at 1 (reporting that, in fact, six years after the enactment of the McKinney Act, Congress discontinued funding the Interagency Council on the Homeless). While the Clinton Administration placed the Council under its wing and while HUD Secretary Cisneros announced that attention to the problem of homelessness was “HUD’s number one priority,” congressional abandonment was not a strong indication of support. *Id.*

71. Hombs, *supra* note 9, at 59–60.

72. See, e.g., Daniels, *supra* note 11, at 694 (indicating one of the most prominent advocates in suits pursuing implementation of the McKinney Act is the National Law Center on Homelessness and Poverty); Hombs, *supra* note 9, at 57 (claiming the National Coalition for the Homeless to have been integral to the enforcement of some pieces of the McKinney Act by federal agencies); Brown, *supra* note 11, at 248–49 (noting that plaintiffs in *National Coalition for the Homeless v. United States Veterans’ Administration* sought injunctive relief to force a federal agency to comply with a portion on the McKinney Act).

vate individuals and businesses.⁷³ Further, there is evidence that HUD and the Department of Education did not comply with certain timelines established by regulations in the McKinney Act.⁷⁴

Federal programs experienced similar difficulty in forcing implementation and participation. For example, severely mentally ill people have extreme difficulty in the private housing market, despite language barring discrimination to access in the Fair Housing Act, the Americans with Disabilities Act, and the Rehabilitation Act of 1973.⁷⁵

For these reasons, it is evident that a strategy focusing only on programs and program implementation would soon become bogged down in the often murky, bureaucratic waters of federal programs. On the other hand, a strategy that combines the most promising model, targeting the neediest population, with a legal strategy seeking establishment of greater rights for this population has a greater chance of success. Part C will discuss how Title V of the McKinney Act, if revamped, can provide necessary resources to address one part of this Comment's position—to first provide housing.⁷⁶

C. Programmatic Remedies: First Prong of Strategy

The proposal is two-pronged: (1) legislators should target specific strategies and existing programs for improvement, and (2) advocates—lawyers and advocacy organizations—should lead new efforts asserting

73. Nat'l Coal. for the Homeless v. U.S. Veterans' Admin., 695 F. Supp. 1226, 1227 (D.D.C. 1988); see Hombs, *supra* note 9, at 57, 60 (1989) (highlighting the “strongly-worded opinion” of the court in *National Coalition for the Homeless v. U.S. Veterans' Administration* admonishing the government agency's policies and actions).

74. See Hombs, *supra* note 9, at 60 (“HUD . . . failed to meet a statutory deadline to release supplemental emergency shelter funds . . . [and] the Department of Education failed to implement a program to educate homeless children, risking the loss of the children's entire school year.”).

75. See Rubey, *supra* note 11, at 1737–47 (2002) (examining barriers to private and public housing for those with severe mental disabilities).

76. Wherever there are societal problems, there are people whose “solution” is to “allow” individuals to solve the problem according to how it is displayed in each particular community. Solutions with a locale-only focus that target one community, one state's laws, or one city's ordinances are certainly worthwhile. Some states, and many counties and cities, have been encouraged (and others likely have been shamed) by the work of others and have implemented laws to protect their homeless citizens. Yet others continue to create laws that criminalize behaviors of people who are homeless. NAT'L LAW CTR. ON HOMELESSNESS ET AL., *supra* note 27. Even a few states have enumerated rights in their constitutions such as a right to shelter and a right to mental health services. See *infra* Part IV.A.ii. However, if the goal is to propose a solution that will end chronic homelessness in the United States, strategies that seek to do so one community at a time are inefficient. These issues are largely beyond the scope of this Comment.

constitutional rights and liberties of homeless individuals. This section concerns the first prong.

With homelessness, there is a manageable problem with an identifiable class of persons, there is research that provides the best solutions, and in Title V of the McKinney Act, there are resources that fit the problem and the solution. If Title V of the McKinney Act is strengthened and focused, it has the potential to be touted as a federal program truly working for the people it is meant to serve.

Specifically, this Comment suggests the following legislative and executive recommendations: (1) channel funds toward the type of housing that truly supports those who need it; (2) require agencies to produce timely data about available properties, including more *relevant* information that will help identify specific types of property (e.g., land, buildings that could be converted into homes or apartments) sought by local organizations; and (3) streamline the application process by allowing local governments to directly apply on behalf of organizations serving the targeted population of chronically homeless people with severe mental illness and by allowing expedited approval of applications by local governments.

i. Channel Funds Toward the Type of Housing that Truly Supports Those in Need

Rather than making all federal surplus property in the country available to any homeless services organization, Title V should have a process that matches categories of persons with suitable housing (i.e., particularly suitable housing for homeless persons suffering from mental illness).⁷⁷ The U.S. Interagency Council on Homelessness admits one of the challenges in administering programs is that neighborhood residents and businesses impede homeless organizations in obtaining area property for permanent housing because they do not want the homeless population nearby.⁷⁸

In 1987, Congress commendably identified that surplus property held by the federal government could be put to good use instead of being left idle.⁷⁹ While there could be, and are, many worthy potential recipients of

77. See Bornstein, *supra* note 34 (highlighting the “vulnerability index”—a way to rank homeless people by their risk of death—used by some organizations to prioritize their work).

78. *Federal Surplus Real Property*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, http://www.usich.gov/funding_programs/programs/federal_surplus_real_property1 (last visited July 9, 2013) (citing “NIMBY” (Not in My Back Yard) advocacy as a leading cause of housing providers to withdraw surplus usage applications).

79. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, § 501, 101 Stat. 482, 509–10 (1987) (codified as amended at 42 U.S.C. § 11411(2006)). This may speak to U.S. law favoring use of property over disuse (e.g., adverse possession). See generally

such land, it is difficult to think of a group more in need of this property than those without a place to call home. However, when one considers the bureaucratic resources needed to implement this portion of the McKinney Act, the lengthy and frequently fruitless process,⁸⁰ and unnecessary competition among homeless organizations and other local organizations and city governments,⁸¹ it is clear that an alternate response is required.

Because surplus property could be used as permanent housing for chronically homeless people with severe mental illness, it would be optimally cost-effective to develop better front-end processes. Namely, rather than homeless organizations scouring the Federal Register for available “suitable” surplus property,⁸² local mental health professionals should partner with local offices of federal agencies in order to proactively identify prospective property that would suit the specific needs of chronically homeless people with severe mental illness.

ii. Require Production of Relevant and Useful Information

The McKinney Act requires canvassing federal agencies for federal surplus property by the Department of Housing and Urban Development (HUD).⁸³ Over time, little has been done to revamp antiquated procedures. In fact, the official form agencies submit to HUD has not changed since 1989.⁸⁴ The form only requires agencies to provide general property suitability information.⁸⁵ Further, neither HUD, nor any other ad-

JOHN E. CRIBBET ET AL., *PROPERTY: CASES AND MATERIALS* 168–91 (9th ed. 2008) (explaining the concepts and underlying policies of adverse possession).

80. See NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *UNUSED BUT STILL USEFUL: ACQUIRING FEDERAL PROPERTY TO SERVE HOMELESS PEOPLE*, at v (2004), available at http://www.nlchp.org/content/pubs/Unused_But_Still_Useful.pdf (indicating that between 1988 and 2003 only ninety-one total properties had been transferred to providers serving the homeless).

81. See Grasser, *supra* note 40, at 1922–23 (proposing a requirement that organizations utilizing federal surplus property under Title V collaborate with local government and other community organizations to determine the best use of property). Title V is perceived as restricting local efforts to build and/or revitalize the community by allowing homeless organizations to “unilaterally bring community development efforts to a screeching halt.” Grasser, *supra* note 40, at 1922–23.

82. See 42 U.S.C. §§ 11411(a)–(c) (2006) (requiring the publication of suitable surplus government property in the Federal Register).

83. *Id.* § 11411(a).

84. See generally DEP’T OF HOUS. & URBAN DEV., *TITLE V PROPERTY SURVEY: FEDERAL PROPERTY INFORMATION CHECKLIST* (1989), http://portal.hud.gov/hudportal/documents/huddoc?id=OC_13004.pdf (revealing the generalized housing suitability questionnaire provided to agencies).

85. See generally *id.* (requiring only six pages of information on the property be provided).

ministrative agency, nor Congress, provides oversight to ensure agencies comply with Title V.⁸⁶ Additionally, when considering inclusion of military bases, the list of property in any given edition of the Federal Register is highly inadequate.

For example, in one edition, property in Texas was described as “6 Buildings[,] Medina Trng. Annex[,] Lackland AFB TX . . . Off-site removal only; 2,418 sf. for each; igloos; secured area; prior approval needed to access; deteriorated conditions; needs extensive repairs.”⁸⁷ The majority of “suitable” properties in that same edition included those with asbestos or other such descriptions of disrepair.⁸⁸ Even the Interagency Council on Homelessness website lists similar barriers.⁸⁹

With a better process that can identify, highlight, and make available actual housing, rather than a huge swath of land better suited for large-scale development, to people with severe housing needs, the program will serve its intended purpose. A simple solution would require, in part, creating a more detailed and *updated* form for agencies to submit. More forcefully, there also ought to be better oversight of federal agencies.⁹⁰ By combining two other pieces of this legislative/executive recommendation with collaboration among local offices of federal agencies and local mental health and homeless organizations, requiring production of relevant information will “have some legs.”

iii. Streamline the Application Process

If the federal government’s goal truly is to reduce and eventually end chronic homelessness, it must do everything in its power to make that

86. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 80, at vi (“The suitability determinations are entirely subjective, and HUD is unable to monitor agency responses to property surveys. Agencies may thus withhold properties by taking an overly-narrow view of the criteria for suitability in filling out their HUD surveys.”).

87. Federal Property Suitable as Facilities to Assist the Homeless, 77 Fed. Reg. 62249, 62251 (Oct. 12, 2012).

88. *Id.*

89. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 78. The Council further explains:

[Many properties] are not actually practical for homeless assistance because they are in remote areas or have other limitations that make them unattractive to homeless providers. About 95 percent of the properties are military, most of which are located on bases that are not convenient to people experiencing homelessness. Nearly all buildings that are available need renovation and providers often do not have sufficient funds to make the needed repairs.

Id.

90. See NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 80, at 23 (recommending HUD be given “the resources to monitor agency responses and ensure that the agencies provide HUD accurate designations”).

happen.⁹¹ Currently, the application process can be opaque and is fraught with typical bureaucratic red tape.⁹² HUD collects the information from the other federal agencies, while the Department of Health and Human Services (HHS) receives and reviews applications from homeless services organizations regarding those properties.⁹³ While there are positive outcomes for those benefiting from properties deeded or leased through Title V,⁹⁴ the complicated application process and various restrictions, both large and small, result in conveyance of only a small fraction of available properties.⁹⁵ In addition to the process being overly burdensome to nonprofit homeless organizations, there are continuing threats to the program from within the government.⁹⁶

91. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 2, at 5 (reiterating the goal of eradicating chronic homelessness by 2015).

92. See 45 C.F.R. § 12a.9 (2002) (detailing the application process); see also U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 78 (“Under Title V, the process for identifying properties, determining suitability, determining availability by landholding agencies, and leasing or deeding surplus properties involves at least three federal agencies and can appear quite confusing and cumbersome to homeless providers.”). Admittedly, thorough processes and regulations have their places in government bureaucracies. A government must assure its citizens that tax dollars are used to fund programs fairly, systematically, reliably, and with little room for fraud. Still, it is not difficult to think of examples of government processes run amok.

93. 42 U.S.C. §§ 11411(a), (e) (2006).

94. See NAT’L LAW CIR. ON HOMELESSNESS & POVERTY, TITLE V FACT SHEET (2011), available at <http://www.nlchp.org/content/pubs/TitleVFactSheetApril2011.pdf> (providing examples of success stories from around the country regarding converting Title V properties for homeless services). For example, an organization applied for surplus property in Topeka, Kansas and uses the acquired building to provide services to people with mental illness who are homeless, but not to provide actual housing to those individuals. *Id.*

95. See NAT’L LAW CIR. ON HOMELESSNESS & POVERTY, *supra* note 80, at v (asserting that only “a fraction of the property that has been listed as suitable and available under the program, and an even smaller fraction of all of the federal government’s thousands of pieces of unused property is used to benefit the homeless”). Furthermore,

According to a 2004 Republican Study Committee fact sheet, 5.1 million acres of federal land are classified as “vacant with no definable purpose.” While there are no estimates of the total number of federal buildings that are vacant or unused, the Government Accountability Office has estimated that the federal government spends billions of dollars to maintain properties that are not needed.

Id.

96. See Catherine Ho, *OMB Seeks to Dismiss Lawsuit that Says Agency Withheld Information About Unused Federal Buildings*, *Capital Business Blog*, WASH. POST (Aug. 7, 2012, 4:33 PM), http://www.washingtonpost.com/blogs/capital-business/post/omb-seeks-to-dismiss-lawsuit-that-says-agency-withheld-information-about-unused-federal-buildings/2012/08/07/c59fe826-e0ae-11e1-a19c-fca365396c8_blog.html (reporting a lawsuit in which the Office of Management and Budget was accused of “improperly withholding information about unused federal buildings that could be used to house services for the homeless”); Catherine Ho, *OMB Sued for not Disclosing Full Records on Federal Buildings that Could be Used for Homeless Services*, *Capital Business Blog*, WASH. POST (June 21, 2012,

One way to improve the effectiveness of this program is to allow and encourage local governments to apply directly for property on behalf of, and in collaboration with, organizations serving the targeted population of chronically homeless people with severe mental illnesses. Rather than working against, or in competition with, homeless organizations, local governments can coordinate with these entities to have a better chance for successfully obtaining property that will be suitable and beneficial.⁹⁷

Additionally, the federal government could provide incentives to local governments collaborating with homeless organizations that apply for surplus property under Title V by expediting the approval process. While this could afford an advantage to local government applicants over homeless organizations working on their own, the benefits outweigh this potential disadvantage to homeless organizations because collaboration increases both the chance and speed of approval.

It is true the federal government could earn revenue from the sale of surplus property. While the ability to gain non-taxed revenue is appealing, it is very costly for the government to support so many chronically homeless people, particularly those who require ongoing medical treatment.⁹⁸ It would be a more efficient use of resources to increase the availability of permanent housing for those who have the most difficulty obtaining it.

7:53 PM), http://www.washingtonpost.com/blogs/capital-business/post/omb-sued-for-not-disclosing-full-records-on-federal-buildings-that-could-be-used-for-homeless-services/2012/06/21/gJQANE2kt V_blog.html (describing the same lawsuit).

97. See Grasser, *supra* note 40, at 1921–24 (detailing a proposal for optimal collaboration between service organizations and local agencies).

98. See, e.g., Dennis P. Culhane et al., *Accountability, Cost-Effectiveness, and Program Performance: Progress Since 1998*, in TOWARD UNDERSTANDING HOMELESSNESS: THE 2007 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH 12-1, at 12-4 to 12-8 (2007), available at <http://aspe.hhs.gov/hsp/homelessness/symposium07/culhane/report.pdf> (evaluating studies on the costs of homelessness); *FAQs About Supportive Housing Research: Is Supportive Housing Cost Effective?*, CORP. FOR SUPPORTIVE HOUS., <http://www.csh.org/wp-content/uploads/2011/11/Cost-Effectiveness-FAQ.pdf> (last visited July 6, 2013) (accounting for the economic benefits of supportive housing by “decreas[ing] use of homeless shelters, hospitals, emergency rooms, jails and prisons”); Malcolm Gladwell, *Million-Dollar Murray*, NEW YORKER, Feb. 13, 2006, at 96, 101 (pointing out that there are vast amounts of money spent addressing homelessness and that much less could be spent if targeted at those experiencing chronic homelessness); Bornstein, *supra* note 34 (claiming that “[p]roviding supportive housing in Los Angeles is [forty] percent cheaper than leaving people on the streets”).

IV. FUNDAMENTAL LIBERTIES AND CONSTITUTIONAL PROTECTIONS

A. *Litigation Schemes and Case Law*

To protect the rights of people who are homeless, legal advocates work within two distinct but often overlapping frameworks: (1) constitutional challenges to state and local laws criminalizing behaviors of people who are homeless,⁹⁹ and (2) attempts to seek protected class status under the Equal Protection clause of the Fourteenth Amendment and efforts to obtain affirmative rights, such as privacy, housing, and medical care.¹⁰⁰

i. Criminalization of Homelessness

For decades, states and local governments have enacted legislation disproportionately affecting the homeless by rendering sleeping in public, loitering, standing, congregating, or seemingly existing in public a criminal offense.¹⁰¹ Constitutional challenges to these types of laws fall into a variety of schemes.

Some laws have been held to violate the Due Process clause of the Fourteenth Amendment for being too vague.¹⁰² Historically, these ordinances included those that made vagrancy an offense.¹⁰³ Others have

99. See *infra* Part IV.A.i.

100. See *infra* Part IV.A.ii.

101. See NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY ET AL., *supra* note 27 (detailing laws that are enforced disproportionately on the homeless population).

102. See, e.g., *Chicago v. Morales*, 527 U.S. 41, 45–46, 51 (1999) (finding a Chicago, Illinois ordinance prohibiting loitering unconstitutionally vague); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156, 162 (1972) (finding a Jacksonville, Florida anti-vagrancy ordinance unconstitutionally vague); *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1063 (S.D.N.Y. 1995) (holding an Amtrak policy ejecting people appearing to be homeless as unconstitutionally vague). *But see* *Hershey v. City of Clearwater*, 834 F.2d 937, 938–39 (11th Cir. 1987) (upholding a Clearwater, Florida ordinance prohibiting anyone to lodge or sleep in a motor vehicle after excising the “or sleep in” language).

103. See *Papachristou*, 405 U.S. at 162, 171. The Jacksonville ordinance made vagrancy a crime and defined vagrants as:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children *shall be deemed vagrants* and, upon conviction in the Municipal Court.

Id. at 171 n.1 (emphasis added).

been held invalid not for vagueness, but for over breadth, as the laws regulated conduct that would ordinarily be allowed in public places.¹⁰⁴

Plaintiffs have also succeeded by asserting other constitutional rights. For example, First Amendment claims against city and state laws prohibiting begging and panhandling have been held to violate the right to freedom of expression.¹⁰⁵ These cases tend to turn on whether the law proscribes conduct generally (e.g., city-wide prohibitions or prohibitions that restrict too broad a category of speech).¹⁰⁶

For instance, the U.S. Court of Appeals for the Second Circuit affirmed a lower court's holding that an anti-begging ordinance, enforced by the New York City Police Department, violated the First Amendment because there was no compelling state interest in prohibiting loitering for the purpose of asking for charity.¹⁰⁷ The total prohibition further bolstered the plaintiffs' claim because even if there was a compelling interest, it was not sufficiently narrowly tailored to achieve that interest.¹⁰⁸ Begging for oneself was considered to be no different than soliciting for charitable organizations, which has been protected under the First Amendment.¹⁰⁹

Other common claims involve suits against law enforcement for illegal searches and seizures under the Fourth Amendment.¹¹⁰ Cities typically

104. *See, e.g., Sawyer v. Sandstrom*, 615 F.2d 311, 318 (5th Cir. 1980) (holding a Dade County loitering ordinance constitutionally overbroad); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1577 (S.D. Fla. 1992) (holding a city ordinance outlawing, *inter alia*, congregating in public places unconstitutionally overbroad).

105. *See, e.g., Loper v. New York City Police Dep't*, 999 F.2d 699, 702, 706 (2nd Cir. 1993) (holding a New York City statute restricting the solicitation of money in public places is not aligned with the requirements of the First Amendment); *Blair v. Shanahan*, 775 F. Supp. 1315, 1317–18 (N.D. Cal. 1991) (ruling that the California anti-begging statute was unconstitutional as a violation of the First Amendment freedom of expression), *vacated on other grounds*, 919 F. Supp. 1361 (N.D. Cal. 1996); *Benefit v. City of Cambridge*, 679 N.E.2d 184, 190 (Mass. 1997) (holding that a Massachusetts anti-panhandling statute violated plaintiff's First Amendment right to freedom of expression).

106. *See Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956–57 (11th Cir. 1999) (reasoning that the city's regulation of begging at a city beach was narrowly tailored to address the particular interests cited).

107. *Loper*, 999 F.2d at 705–06.

108. *Id.* (deciding total prohibition “does not leave open alternative channels of communication by which beggars can convey their messages of indigency”).

109. *Id.* at 704.

110. *See, e.g., Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004) (finding plaintiffs would likely succeed on their Fourth Amendment claim); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1555 (S.D. Fla. 1992) (asserting “that the City's seizures of plaintiffs' property lack probable cause, are unreasonable and violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution”); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2855 (2013) (affirming an injunction against the city

perform the function of keeping public areas such as parks, streets, and sidewalks clean. In so doing, law enforcement officials sometimes conduct “sweeps” of areas where homeless people tend to gather, which can involve removing or destroying personal property.¹¹¹

Following a well-known and oft-cited case involving all of these potential constitutional challenges, *Pottinger v. City of Miami*,¹¹² legal advocates can see how these challenges are incorporated and interact in conjunction with others. *Pottinger* involved a class action lawsuit by homeless persons who claimed the city of Miami, Florida violated their First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth Amendment rights under the U.S. Constitution.¹¹³ The district court ruled in favor of the plaintiffs on several grounds, holding the city’s policy of arresting people for standing, sleeping, and congregating in public places was overbroad, violated their Eighth Amendment protection against cruel and unusual punishment, and unconstitutionally restricted their right to travel.¹¹⁴ The court also held the plaintiffs’ Fourth Amendment protection against illegal taking and destruction of property was violated.¹¹⁵ The court further mandated the parties meet to establish designated “safe zones” within which homeless individuals could perform harmless and life-sustaining functions without fear of arrest.¹¹⁶

of Los Angeles from unlawfully seizing or destroying property of homeless people). The Ninth Circuit concluded:

The City has . . . asked us to declare that the unattended property of homeless persons is uniquely beyond the reach of the Constitution, so that the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society. Because even the most basic reading of our Constitution prohibits such a result, the City’s appeal is [denied].

Id.

111. NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY ET AL., *supra* note 27, at 10 (“Sweeps of city areas in which homeless persons are living to drive them out of those areas, frequently resulting in the destruction of individuals’ personal property such as important personal documents and medication.”); *see also* Mike Carter & Drew DeSilver, *Dozens Protest Homeless Sweeps with City Hall Camp-out*, SEATTLE TIMES, June 9, 2008, http://seattletimes.com/html/localnews/2004466035_homeless09m.html (reporting on protests in response to the city clean-out of several homeless camps in Seattle, Washington). In April 2008, the mayor of Seattle “signed an order allowing the city to expel camp inhabitants with 72 hours’ notice [with] an offer to help them obtain city services, including shelter and drug and alcohol treatment. Belongings left behind are to be stored at a warehouse and discarded after 60 days if not claimed.” *Id.*

112. *Pottinger*, 810 F. Supp. at 1551.

113. *Id.* at 1555.

114. *Id.* at 1555, 1583.

115. *Id.* at 1583–84.

116. *Id.* at 1584. The city appealed to the Eleventh Circuit, which remanded the case in 1994 for limited purposes due to changing facts, including that the city did not establish the required safe zones and that more homelessness housing assistance had been imple-

Advocates have also invoked the Eighth Amendment's cruel and unusual punishment clause, which imposes three limitations on the criminal process: (1) it restricts the types of punishment that can be inflicted, (2) the punishment cannot be grossly disproportionate to the offense's severity, and (3) it substantively limits what may be considered a crime and punished as such.¹¹⁷ Claims often turn on whether the statute in question seeks to punish conduct that is involuntary.¹¹⁸

In *Lehr v. City of Sacramento*,¹¹⁹ a case involving an Eighth Amendment challenge by a homeless plaintiff, the court held the anti-camping ordinance did not violate the Eighth Amendment because it did not punish people simply for being homeless—it permissibly punished people for their conduct.¹²⁰ The ordinance's stated purpose was to protect the rights of others who want to use these public spaces, to reduce public health problems, and to maintain the cleanliness of public spaces.¹²¹ Thus, there was no evidence showing that the law was enacted to target the status of homelessness.

Conversely, in *Jones v. City of Los Angeles*,¹²² homeless plaintiffs filed for injunctive relief against the city for violating their Eighth Amendment rights by criminalizing all sitting, standing, lying down, and sleeping on city streets.¹²³ The U.S. Court of Appeals for the Ninth Circuit—tellingly citing the McKinney Act by defining homelessness in the first paragraph of its opinion—expressed that the law could not be upheld because it

mented. *Pottinger v. City of Miami*, 40 F.3d 1155, 1156–1157 (11th Cir. 1994). Two years later, the Eleventh Circuit ruled that the case should be settled. *Pottinger v. City of Miami*, 76 F.3d 1154, 1154 (11th Cir. 1996).

117. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

118. See Shirley D. Howell, *Please Don't Feed the Homeless: Pottinger Revisited*, 3 MOD. AM. 15, 16 (2007) (discussing the question: “Is a public action ‘voluntary’ when the homeless defendant must perform it to survive, and he has no private place in which to perform the action?”).

119. *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009).

120. *Id.* at 1231, 1234. The court includes a lengthy and detailed analysis of the issues in three important Eighth Amendment cases: *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (holding that it cannot be a crime to be a drug addict); *Powell v. Texas*, 392 U.S. 514, 532 (1968) (upholding the constitutionality of a law outlawing public intoxication rather than chronic alcoholism); and *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006) (concluding that it is unconstitutional to criminalize sitting, standing, lying down, or sleeping in public as applied against homeless people), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

121. *Lehr*, 624 F. Supp. 2d at 1225.

122. *Jones*, 444 F.3d at 1118. The opinion was vacated because the parties settled out of court. *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

123. *Jones*, 444 F.3d at 1125, 1138.

punished conduct that was “an unavoidable consequence of being human and homeless.”¹²⁴

ii. Affirmative Rights and Fundamental Liberties

Attorneys also employ an alternative avenue in advocating for the homeless—asserting affirmative rights, such as the rights to privacy, emergency shelter, permanent housing, and health care. This type of litigation is often focused on a sub-population of the homeless: those who are chronically homeless or severely mentally ill.

*Johnson v. City of Dallas*¹²⁵ illustrates some of the relevant due process and equal protection arguments.¹²⁶ In *Johnson*, a group of homeless individuals filed suit against the city of Dallas, Texas, claiming various ordinances violated their due process and equal protection rights and that these ordinances should be evaluated under strict scrutiny because of the plaintiffs’ asserted status as a suspect class.¹²⁷ While the court swiftly dismissed contention that the homeless are a suspect class,¹²⁸ discussion of whether quasi-suspect class status could be afforded is lengthy.¹²⁹ Analyzing the reasoning of the landmark Supreme Court case of *City of*

124. *Id.* at 1138.

125. *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev’d in part, vacated in part*, 61 F.3d 442 (5th Cir. 1995), *vacated in part, remanded*, 168 F.3d 487 (5th Cir. 1999) (per curiam). The district court held in favor of the plaintiffs’ Eighth Amendment claims concerning the city’s ordinance prohibiting sleeping in public, which the Court of Appeals for the Fifth Circuit remanded in 1995, instructing the District Court to dismiss the Eighth Amendment claim. The district court later dismissed all claims based on the Fifth Circuit’s opinion. Since the Fifth Circuit had only ruled that the Eighth Amendment claim, not the remaining claims, be dismissed, it issued a *per curiam* opinion in 1999 vacating the district court’s complete dismissal. *Johnson v. City of Dallas*, 168 F.3d 487 (5th Cir. 1999). However, the district court originally ruled unfavorably in regard to the remaining claims, making the issue somewhat moot. *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev’d in part, vacated in part*, 61 F.3d 442, 359 (5th Cir. 1995), *vacated in part, remanded*, 168 F.3d 487 (5th Cir. 1999) (per curiam).

126. Strict scrutiny is applied where a law limits a fundamental right or affects a suspect class of people. The law will be upheld if it is necessary to promote a compelling or overriding interest. 16A AM. JUR. 2D *Constitutional Law* § 403 (2012). Where a law affects a quasi-suspect class of people, heightened scrutiny applies. The law will be upheld if it “serve[s] important governmental objectives and [is] substantially related to the achievement of those objectives.” 16B AM. JUR. 2D *Constitutional Law* § 861 (2012). In all other cases, the law will be upheld if it is rationally related to any conceivable legitimate end of government. *Id.* at § 900.

127. *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev’d in part, vacated in part*, 61 F.3d 442 (5th Cir. 1995), *vacated in part, remanded*, 168 F.3d 487 (5th Cir. 1999) (per curiam).

128. *Id.* at 355.

129. *Id.* at 355–57.

*Cleburne v. Cleburne Living Center*¹³⁰ and applying it to the facts of *Johnson*, the court concluded there was a stronger case for the class of persons in *Cleburne*, the intellectually disabled, to be designated as quasi-suspect than the homeless.¹³¹ Therefore, there was no level of suspect categorization afforded to homeless people. Accordingly, the Dallas ordinances were determined to be rationally related to the city's legitimate interests and therefore upheld as constitutional.¹³²

Fundamental liberties arguments such as privacy rights are faced with similar results. Limited in scope, substantive due process liberty interests have typically been asserted in matters relating to one's own body, marriage, procreation, contraception, and family.¹³³ Further, "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decision making in this uncharted area are scarce and open-ended."¹³⁴

Challenges to the right to shelter, both emergency shelter and more permanent housing, have been arduous under this framework.¹³⁵ Cases with federal constitutional claims for more permanent housing often fail in federal courts. This may be due to the Supreme Court's ruling in 1972 against low-income tenants seeking a constitutional right to decent shelter.¹³⁶

On the other hand, plaintiffs have had more success in claiming that the right to shelter is provided under state constitutional guarantees and laws.¹³⁷ For example, New York law requires a discharge plan hospitals must follow when discharging mentally ill patient, including provisions

130. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

131. *Johnson*, 860 F. Supp. at 357.

132. *Id.* at 357–58, 359.

133. *Id.* at 344.

134. *Collins v. City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992).

135. *See, e.g., Koster v. Webb*, 598 F. Supp. 1134, 1136 (E.D.N.Y. 1983) ("It is also clear that 42 U.S.C. § 1983 may be used by plaintiffs to enforce their purported right to emergency shelter under the Social Security Act."). Outside the realm of litigation involving homeless people under federal, state, or local laws, some scholars have argued that housing should be a human right, framed in terms of international human rights doctrine. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, Art. 25(1), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (extolling that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing" among other basics for living).

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

137. *See, e.g., Callahan v. Carey*, 909 N.E.2d 1229, 1230 (N.Y. 2009) (detailing a consent decree requiring New York City to provide "shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in [the state]; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter."); *Hodge v. Ginsberg*, 303 S.E.2d 245, 247 (W. Va. 1983) (compelling the state to provide adult protective services to incapaciti-

for housing.¹³⁸ However, another section of the same statute includes a long list of services the state must provide, and housing is not among them.¹³⁹ Moreover, the statute explicitly states that it creates no entitlements for any individual to receive such mandated support.¹⁴⁰ This illustrates the limited success of such claims, even in state courts.¹⁴¹

Likewise, right-to-treatment litigation is not as successful in federal courts as in state courts.¹⁴² Similar to the right to shelter, these claims encounter similar constitutional problems. Either courts determine that the law was intended only to be a policy statement or that mentally ill people have such rights, particularly treatment, only as long as there are enough funds in the community.¹⁴³ In other words, should other services demand local or state funds, communities are not judicially required to enforce the state or local laws if there are not enough funds. Further, how each court frames the issue may prove more dispositive than how the individual statutes are worded.¹⁴⁴

B. *Problems With a Rights-Only Remedy*

Proponents of establishing homeless persons, chronically homeless persons, intellectually disabled persons, or severely mentally ill persons as suspect classes with protections under the Equal Protection clause of the Fourteenth Amendment of the U.S. Constitution have not succeeded.¹⁴⁵ Neither the disabled nor the poor are a suspect class.¹⁴⁶ Based on these

tated adults pursuant to state act); see Daniels, *supra* note 11, at 692–93 (discussing successes in other jurisdictions regarding shelter rights).

138. N.Y. MENTAL HYG. LAW §§ 29.15(g)–(h) (McKinney 2013); see Eyer, *supra* note 15, at 11–55 (discussing provisions and case law included in mental health statutes).

139. N.Y. MENTAL HYG. LAW § 41.47(b) (McKinney 2013).

140. *Id.* § 41.47(l).

141. See Hafetz, *supra* note 9, at 1232 (warning of the more limited success of right-to-shelter claims in more recent years).

142. See Brown, *supra* note 11, at 246–47 (“Because the Supreme Court has ruled that there is no right under the Constitution to receive treatment and housing, the development of a right to services in the community rests significantly on the creation and enforcement of state constitutional provisions and statutory entitlements.”); Eyer, *supra* note 15, at 11 (discussing the history of right-to-treatment litigation in federal courts and arguing that state courts are better venues for plaintiffs).

143. Eyer, *supra* note 15, at 13–14.

144. *Id.* at 21.

145. See, e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) (holding that a Texas city’s zoning ordinance regarding group homes for the “mentally retarded” did not violate the equal protection clause because the group was not considered a quasi-suspect class).

146. 16B AM. JUR. 2D, *supra* note 126, at § 900; see, e.g., *Harris v. McRae*, 448 U.S. 297, 326 (1980) (holding a federal law allowing states to refuse to fund poor women’s medically necessary abortions with Medicaid funding did not violate the equal protection clause).

prior rulings, it is unlikely, but not impossible, the Supreme Court will overturn the cases so holding. Moreover, the type of equal protection sought is that which would establish laws or policies that *benefit* the class of persons the laws or policies address: “benign discrimination.”¹⁴⁷ This category is the “most controversial and divisive issue before the Court under the Equal Protection clause.”¹⁴⁸ This does not mean advocates should not continue to pursue arguments favoring quasi-suspect status for chronically homeless people with severe mental illnesses. This status would require courts to apply heightened scrutiny, which would require the state to show the “statutory classification [is] substantially related to an important governmental objective.”¹⁴⁹

As previously discussed, rights-based litigation has generally revolved around two frameworks: as protection against anti-homeless laws and ordinances, and as affirmative rights under the Equal Protection clause of the Fourteenth Amendment. Advocates have experienced limited success in defending homeless individuals arrested for crimes such as vagrancy, loitering, panhandling, and sleeping in public. Actions challenging these laws under the cruel and unusual punishment prohibition of the Eighth Amendment, as well as those violating the illegal search and search and seizure protection of the Fourth Amendment, have been slightly more successful.

Proponents of establishing fundamental due process rights to basic human needs have sound legal and moral bases, but the result is often not fiscally practicable. For example, a court may well determine that citizens in its jurisdiction have a fundamental right to health care (or shelter, or affordable housing, or treatment for severe mental illness), but the court does not hold the purse strings. What has happened in practice, in part because of how courts have framed the issues, is that a right exists as long as there is funding to uphold that right.¹⁵⁰ This is not to say that advocates should not pursue this strategy on behalf of clients. Advocates must

because it did not “purposefully operat[e] to the detriment of a suspect class”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (holding the Texas education funding system did not “operate to the peculiar disadvantage of any suspect class”); *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (holding a Maryland regulation placing an absolute limit on the amount of aid provided to a family under the federal Aid to Families with Dependent Children program does not violate the equal protection clause).

147. See JONATHAN D. VARAT ET AL., *CONSTITUTIONAL LAW: CASES AND MATERIALS* 507, 575 (13th ed. 2009) (portraying “benign discrimination” as “the use of gender and racial classifications for the purpose of aiding women or minority groups”).

148. *Id.*

149. 16B AM. JUR. 2D, *supra* note 126, at § 861.

150. See, e.g., *Johnson v. Dixon*, 786 F. Supp. 1, 7 (D.D.C. 1991) (holding the District of Columbia could close shelters due to lack of funding without violating homeless persons’ due process rights).

simply be cognizant that there are real limitations on the effect of such actions.

C. *Constitutional Remedies: Second Prong of Strategy*

Because current jurisprudence doesn't consider the homeless a suspect class under the Equal Protection clause, laws and ordinances criminalizing conduct frequently exhibited by the homeless will continue to be afforded the lowest level of scrutiny. In other words, courts must only determine whether there is a rational basis for the law. Although uncertain, it is possible that in the future enough will be known about severe mental illnesses that afflicted people will be deemed a suspect or quasi-suspect class. Legal advocates should continue to fight for quasi-suspect or suspect class status of chronically homeless people with severe mental illnesses.¹⁵¹

The terms "mental illness" and "psychiatric disability" are sometimes used interchangeably; but, a psychiatric disability is the consequence of a mental illness. A disability is a loss of ability and can fluctuate over time. Not all people with a mental illness have a disability. This is an important distinction, as the Supreme Court has held that persons with *disabilities* are not a suspect class for purposes of the Equal Protection clause.¹⁵² In addition, mentally ill people are distinguished from mentally disabled people when involuntary commitment to a psychiatric hospital is at issue; the burden of proof is higher with those with mental illness.¹⁵³

Thus, an Equal Protection window may be slightly opened for advocates making this argument. It is probable that research will yield evidence about mental illness that will allow us to more fully understand the characteristics of and treatment for severe mental illnesses. Armed with more knowledge, it is possible federal courts will change direction, and hold that people with certain identifiable (severe) mental illnesses will gain suspect classification.¹⁵⁴

151. Howell, *supra* note 118, at 18 (advocating for suspect classification of homeless people); Jennifer E. Watson, Note, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 509 (2003) (arguing that the homeless should be a suspect class for purposes of equal protection).

152. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) (finding no heightened protection for the mentally impaired).

153. 16B AM. JUR. 2D, *supra* note 126, at § 900.

154. See Stephanie Proctor Miller, Comment, *Keeping the Promise: The ADA and Employment Discrimination on the Basis of Psychiatric Disability*, 85 CAL. L. REV. 701, 719 (1997) (arguing that certain severe mental illness diagnoses should present a prima facie showing of disability for purposes of meeting eligibility requirements under the Americans with Disabilities Act).

Therefore, advocates must not stop challenging these laws on Fourth Amendment, Eighth Amendment, and Equal Protection or Due Process grounds, because there is no shortage of opportunity¹⁵⁵ and because these challenges have accomplished some level of success.¹⁵⁶ Successful litigation has an impact not only on the plaintiffs themselves (and future potential plaintiffs in that jurisdiction), but also on policy and implementation on a larger scale. In Miami, for example, the *Pottinger* victory not only forced the city to act, but also sparked the private, non-profit sector to mobilize as well.¹⁵⁷ The impact reaches even further when cities look to one another for ideas to combat homelessness.¹⁵⁸

Continued work towards securing or expanding the legal rights of the homeless population will likely have continued positive effects in the future, with the ultimate goal of ensuring a heightened form or constitutional protection for the chronically homeless.

155. See NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY ET AL., *supra* note 27, at 8 (reporting between 2009 and 2011, prohibitions on panhandling, begging, loitering, and camping increased by 7% to 10% in 188 cities surveyed); see also Randal C. Archibold, *Las Vegas Makes It Illegal to Feed Homeless in Parks*, N.Y. TIMES, July 28, 2006, <http://www.nytimes.com/2006/07/28/us/28homeless.html> (reporting on a Las Vegas ordinance that explicitly made it illegal to feed the homeless outside public assistance); *New Clearwater Laws Criminalize, Perpetuate Homelessness, Press Releases and Advisories*, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY (Sept. 2012), http://www.nlchp.org/view_release.cfm?PRID=152 (reporting on a Clearwater, Florida ordinance that prohibits "sitting or lying down on public sidewalks, boardwalks, piers, docks, and entryways to public buildings in certain downtown and tourist areas and on 'lodging' outdoors"); Arjun Sethi, *Column: Don't Treat America's Homeless as Criminals*, USA TODAY (Feb. 14, 2012, 4:43 PM), <http://usatoday30.usatoday.com/news/opinion/forum/story/2012-02-14/homelessness-poverty-criminalize/53094736/1> (reporting from a survey of 234 cities that approximately one-fifth have passed ordinances prohibiting sleeping, loitering, and/or begging city-wide); Malia Wollan, *Free Speech is One Thing, Vagrants, Another*, N.Y. TIMES, Oct. 19, 2012, <http://www.nytimes.com/2012/10/20/us/berkeley-targeting-homeless-proposes-ban-on-sidewalk-sitting.html?pagewanted=all> (reporting on a Berkeley, California ballot proposal that would "ban sitting and lying on commercial sidewalks from 7 a.m. to 10 p.m.").

156. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* Advocacy Manual 1–Advocacy Manual 151 (2011), available at <http://www.nlchp.org/content/pubs/11.14.11%20Criminalization%20Report%20&%20Advocacy%20Manual,%20FINAL1.pdf> (providing a veritable "how-to" on litigating on behalf of homeless individuals who have been charged with crimes aimed at their conduct).

157. Howell, *supra* note 118, at 18–19 (describing *Pottinger's* impact beyond the courtroom).

158. See Shelton Green, *City of Miami Helps Austin Find Homeless Solutions*, KVUE.COM, <http://www.kvue.com/news/City-of-Miami-helps-Austin-find-Homeless-solutions-175342251.html> (last updated Oct. 23, 2012, 7:23 AM) (reporting city officials in Austin, Texas invited a Miami organization to share how the city of Miami has reduced its homeless population from about 8,000 in 1992 to only approximately 800 in 2012).

V. CONCLUSION

“Bias against the mentally ill is one of the last invisible and socially acceptable forms of discrimination, perpetuated by our use of uncritically accepted ‘common sense’ and stereotype-based reasoning about mental illness in response to all types of decisions in everyday life.”¹⁵⁹ Bias against the mentally ill can be seen every day in how easily we overlook the needy on the streets, as well as how easily state and federal legislators overlook the chronically homeless who suffer from mental illnesses.

We know what is needed to end chronic homelessness for those with severe mental illness—housing and treatment—and we know what works—a model that provides a permanent home followed by treatment.¹⁶⁰ A strategy that includes the most promising model and federal policy that targets the neediest population, with a legal approach seeking to establish greater rights for this population has the best chance of success.

The combined legal difficulties result in homeless individuals with severe mental illnesses *still* lacking the necessary resources. Because chronically homeless and intermittently homeless are comprised of different populations of people with different characteristics, the respective laws and programs should be redefined and reinvigorated so as to fully meet the varying needs. We need a solution that is both broad (one that hones advocacy issues while also improves programmatic issues), and one that is targeted (one that focuses on people who are severely mentally ill and chronically homeless). Such a strategy will allow us to end homelessness swiftly and systematically.

Some parts of the McKinney Act are working well.¹⁶¹ We can see the benefit of directing attention and resources to particular challenges

159. Miller, *supra* note 154, at 702–03.

160. *See Home at Last?: A Radical New Approach to Helping the Homeless* (PBS television broadcast Feb. 2, 2007), available at <http://www.pbs.org/now/shows/305/video.html> (depicting the realities of living with a homelessness and mental illness without sufficient support). In this broadcast, we see the consequences of a paucity of affordable housing and also the results of having a limited view of the meaning of affordable housing (i.e., that it is somehow “okay” for affordable housing for this population to be limited to shelters and half-way houses). *Id.*

161. *See HUD Reports Slight Decline in Homelessness in 2012, Media Center: Press Releases*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Dec. 10, 2012), http://www.usich.gov/media_center/press_releases/hud_reports_slight_decline_in_homelessness_in_2012 (indicating the number and proportion of homeless veterans has decreased significantly during the past few years, thanks to targeted efforts); *The Daily Circuit: Is America on Track to End Veteran Homelessness?*, (MPR News radio broadcast Oct. 31, 2012), available at <http://minnesota.publicradio.org/display/web/2012/10/31/daily-circuit-homeless-veterans> (reporting successful results from President Obama and the Secretary of Veterans Affairs’ initiative to end homelessness among veterans).

within the broader homelessness crisis. It behooves us to learn from this type of evidence in order to improve other portions of the Act. Title V is ripe for such improvement. The current process is cumbersome, confusing, inefficient, and ineffective. Revamped efforts to match suitable property with chronically homeless people suffering from severe mental illness will channel funds toward the type of housing that truly supports those who need it. Improving the way federal agencies identify and report surplus property under Title V will more effectively make available appropriate housing to people with severe housing needs thus better serving the Act's intended audience. Strategically broadening the application process by allowing local governments to apply directly for housing to benefit the homeless, and providing incentives to local governments to do so, will improve and streamline the application process. A more efficient and effective process will likely increase the number of successful Title V applications and approval rates.

Improving programs and program implementation is not the only way we can end chronic homelessness for people with severe mental illness. Advocates must seek to improve state and local laws by continuing the fight to protect the rights of those who remain homeless. Plaintiffs have had success under several constitutional schemes. Namely, anti-loitering and vagrancy laws have been held unconstitutional under the Due Process clause as void for vagueness or over breadth. Under the Fourth Amendment's illegal search and seizure protection, other homeless individuals have successfully challenged law enforcement agencies that have arrested them and destroyed their personal property. Those challenging state and local laws under the Eighth Amendment's cruel and unusual punishment clause have also been fruitful.

In addition to challenging laws criminalizing homelessness, we must also strive to protect fundamental liberties of those with severe mental illness. While the mentally disabled are not a suspect or quasi-suspect class of persons requiring strict scrutiny or heightened scrutiny under the Fourteenth Amendment's Equal Protection clause, advocates must continue to seek justice for those whose illness causes extreme difficulty in obtaining and maintaining housing. Further, while there is no constitutionally protected right to housing or right to mental health care or treatment, as we continue to learn more about mental illness and its often-debilitating consequences, the more likely it is that there may one day be protected class status affording greater Equal Protection safeguards.

By concentrating efforts on the homeless population that costs the most—the mentally ill homeless, funds will be freed up to more properly address other issues associated with homelessness. It will arm advocates with tools they can use to succeed on behalf of clients. It will allow organizations to be more effective. It will allow people who consume these services to be more engaged in decision-making, policy-setting, and re-

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search efforts. Most importantly, a strategy that will end chronic homelessness for people with severe mental illness will allow them to lead more fulfilling lives, engaged as citizens.



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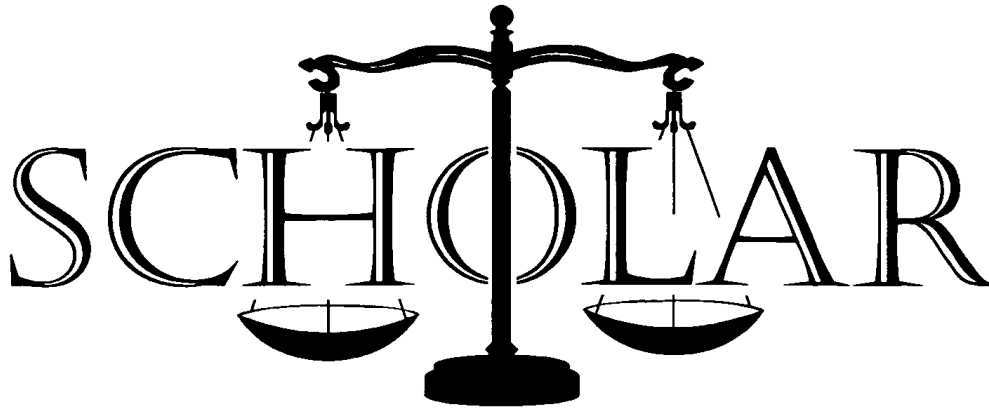
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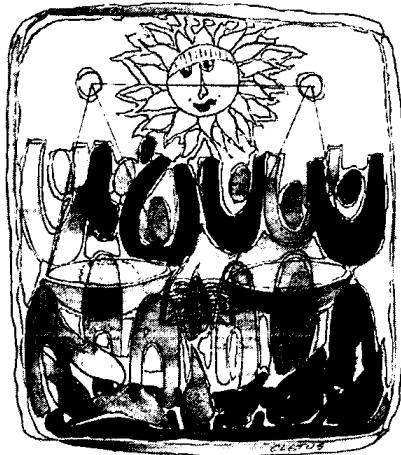
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THE HONORABLE XAVIER
RODRIGUEZ
JENNIFER ROSENBLATT
LESLIE J.A. SACHANOWICZ
CATHY SHEEHAN
PATRICIA F. SITCHLER
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JON C. WOOD
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KAREN LEE ZACHRY