

## FINDING A FEDERAL FORUM: Using the Stewart B. McKinney Homeless Assistance Act to Circumvent Federal Abstention Doctrines

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The number of homeless<sup>1</sup> people in the United States has reached an unprecedented high.<sup>2</sup> Homelessness is a national problem, and every major city in the United States has a significant

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1. Legal articles dealing with issues of homelessness tend to use one of two basic definitions. The less popular approach treats homelessness as an issue of sociological alienation—thus defining homelessness as “a condition of detachment from society characterized by the absence or attenuation of the affiliative bonds that link settled persons to a network of interconnected social structures.” Howard Bahr, *Skid Row, An Introduction to Disaffiliation* 17 (1973) [hereinafter *Skid Row*] (citing Larry Van Gelder, *The Bowery: Tragedy in the Rain*, N.Y. Herald Tribune, Dec. 15, 1966, at 29). The more prevalent approach defines homelessness in terms of lack of residence. See, e.g., Stewart B. McKinney Homeless Assistance Act, 42 U.S.C.A. § 11302(a) (West Supp. 1988); Linda Dakin, *Homelessness: The Role of The Legal Profession In Finding Solutions Through Litigation*, 21 Fam. L.Q. 93, 96 (1987); Note, *Building a House of Legal Rights: A Plea for the Homeless*, 59 St. John's L. Rev. 530, 530 (1985); Nancy K. Kaufmann, *Homelessness: A Comprehensive Policy Approach*, 17 Urb. & Soc. Change Rev. 21 (1984); Community Service Society of New York, *Private Lives/Public Spaces: Homeless Adults on the Streets of New York City* 6-7 (1981) [hereinafter *Private Lives/Public Spaces*]. This article adopts the lack of residence definition and, therefore, the term homeless as used herein should be considered to mean those individuals “whose primary nighttime residence is either in the publicly or privately operated shelters or in the streets, in doorways, train stations and bus terminals, public plazas and parks, subways, abandoned buildings, loading docks and other well-hidden sites known only to their users.” *Id.*

2. House Comm. On Banking, Finance & Urban Affairs, H. Rep. No. 100-10(I), 100th Cong., 1st Sess. 17-18, *reprinted in* 1987 U.S. Code Cong. & Admin. News 362, 362-63 [hereinafter H. Rep. No. 100-10(I)]. This report estimates that there are approximately three million homeless individuals in the United States today. *Id.* That figure is based upon data accumulated from a series of hearings held between 1982 and 1987 by the House Subcommittee on Housing and Community Development to investigate the plight of the homeless. *Id.* In adopting the three million figure, the House Committee on Banking, Finance and Urban Affairs specifically rejected the findings of a Housing and Urban Development Report which estimated the number of homeless in America to be between 250,000 and 350,000. *Id.* See Office of Policy Development and Research, Department of Housing and Urban Development, *A Report to the Secretary on the Homeless and Emergency Shelters* 19 (April 23, 1984).

number of homeless individuals, ranging in estimates from four to sixty thousand.<sup>3</sup> The state institutions created to aid the homeless in their search for shelter have failed to provide any effective, broad-reaching, short-term relief.<sup>4</sup> The legislative and executive branches of both federal<sup>5</sup> and state government bear the burden of ameliorating the problem. Because homelessness presents constitutional questions<sup>6</sup> that affect our social existence, the judiciary, particularly the federal judiciary, must also confront the issue of homelessness.<sup>7</sup>

State court attempts to resolve the problems facing the home-

3. James Langdon II & Mark Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 Colum. J. L. & Soc. Probs. 305, 310 n.27 (1985) (citing Mario Cuomo, 1933/1983—Never Again: A Report to the National Governors' Association Task Force on the Homeless, July 1983, at 16). See also *Homelessness in a Modern Urban Setting*, 10 Fordham L. Rev. 749, 749 n.3-4 (1982); *Private Lives/Public Spaces*, *supra* note 1, at 8-9.

4. See generally Langdon & Kass, *supra* note 3, at 314-19. The few cities that do provide municipal shelters for the homeless only offer nighttime, dormitory-type shelter, characterized by overcrowding and violent conditions. *Id.* at 317. A primary factor in the dangerous conditions of municipal shelters is the vast number of mentally ill who make up the homeless population. See *infra* notes 18-21 and accompanying text for a discussion of the mentally-ill homeless population.

5. The federal legislative response to homelessness, the enactment of the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified in scattered sections of titles 7, 20, 29, 40 and 42 U.S.C.A. (West Supp. 1988)), is discussed *infra* notes 42-50 and accompanying text.

6. Though the Supreme Court decided in *Dandridge v. Williams*, 397 U.S. 471 (1970), that there is no constitutional right to subsistence, application of various state laws to issues of homelessness presents equal protection and due process questions. See, e.g., *Orozco by Arroyo v. Sobol*, 674 F. Supp. 125 (S.D.N.Y. 1987) (equal protection claim); *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.) (equal protection claim), *aff'd sub nom. Cannady v. Valentin*, 768 F.2d 501 (2nd Cir. 1985).

There is considerable confusion as to the correct spelling of the first plaintiff's name in the *Canaday* case. On the first page of the district court opinion, the name appears as "Canaday." See 608 F. Supp. at 1460. The running header given by the publisher to designate this case spells the name as "Canady." See, e.g., 608 F. Supp. at 1461. On the first page of the circuit court opinion, the name is spelled "Canady." See 768 F.2d at 501. For purposes of this article, the spellings used on the first pages of the opinions will be used despite the inconsistent result.

7. See, e.g., Owen Fiss, *The Forms of Justice*, 93 Harv. L. Rev. 1, 1-2 (1979). Professor Fiss advances the theory that the Constitution establishes the structure of government, and also identifies the values that will inform and limit that structure. He writes:

All of us, both as individuals and institutional actors, play a role in [the process of giving constitutional values specific meaning and priority.] In modern society, where the state is all-pervasive, these values determine the quality of our social existence—they truly belong to the public—and as a consequence, the range of voices that give meaning to these values is as broad as the public itself. . . . Judges have no monopoly on the task of giving meaning to the public values of the Constitution, but neither is there reason for them to be silent. They too can make a contribution to the public debate and inquiry.

*Id.* The federal judiciary not only can, but must make a contribution to the public concern over the homeless. The causes of homelessness put each and every one of

less,<sup>8</sup> while laudatory in their efforts, have nevertheless resulted in piecemeal resolutions of the issues.<sup>9</sup> A judicial forum is needed which not only can decide conclusively the constitutional issues presented by the homeless, but also can implement solutions to those problems. The federal courts should be that forum. The federal judiciary has demonstrated that it has the ability to grant relief which affects, and may even restructure, state institutions so that the homeless could receive the full benefit of state and federal laws.<sup>10</sup> Up until this time, however, the federal courts have been unable or unwilling to provide a federal forum to adjudicate issues of homelessness. This inaction is due in part to federal abstention doctrines.<sup>11</sup> The existing abstention doctrines allow federal courts to abstain from deciding cases which otherwise fulfill

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us at substantial risk of someday joining the ranks of the homeless. See *infra* notes 24-40 and accompanying text.

8. While the primary difficulty facing the homeless is the lack of permanent shelter, the state of being homeless produces other problems. Inability to find employment because of the lack of a permanent address, a higher incidence of disease because of an inability to gain access to laundry and washing facilities, and difficulty in obtaining public assistance are just a few examples of the kind of subsidiary problems homelessness produces. See generally H. Rep. No. 100-10(I), *supra* note 2, at 365.

9. See, e.g., Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. 1979). In *Callahan*, Justice Andrew A. Tyler granted a motion for preliminary injunction brought by homeless men against the City of New York. The men sought an order requiring the City to provide and open shelters that furnish lodging and meals to all homeless men who apply. Justice Tyler held that, under the New York State Constitution and various provisions of New York state law, the men were entitled to board and lodging. *Id.*

The decision in *Callahan*, however, did not settle the question of the right to shelter for the remainder of New York's homeless population. Nine more years and two additional lawsuits were required to determine that the same right exists in New York for homeless women and homeless families. See *Eldredge v. Koch*, 118 Misc. 2d 163, 459 N.Y.S.2d 960 (Sup. Ct.) (women), *rev'd on other grounds*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (App. Div. 1983); *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987) (families).

10. See, e.g., Wyatt v. Stickney, 325 F. Supp. 781 (M.D. Ala.) (federal administration of state mental hospital based on constitutional right to minimum level of medical treatment), *hearings on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub nom. and remanded*, Wyatt v. Anderholt, 503 F.2d 1305 (5th Cir. 1974); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (supervision and administration of state prison based on eighth amendment rights), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971), *rev'd sub nom. after remand and remanded*, Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974), *aff'd sub nom. after remand*, Finney v. Hutto, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978).

Admittedly, the subsequent case histories of the above decisions indicate that implementation of federal judicial solutions to complex state social problems may require the extensive use of federal judicial resources. Nevertheless, the author believes that this is appropriate when a compelling social problem, such as homelessness, continues to exist.

11. See, e.g., Weiser v. Koch, 632 F. Supp. 1369 (S.D.N.Y. 1986); *Canaday v.*

federal subject matter jurisdiction requirements if ambiguous or uncertain issues of state law are present with the federal claims.<sup>12</sup> The recent passage of the Stewart B. McKinney Homeless Assistance Act<sup>13</sup> ["Act"] may have created a vehicle whereby federal courts could enforce the rights of the homeless.

This Article will explore how the legal community may use the Act to adjudicate issues of homelessness in the federal forum. Section I examines the basic causes of homelessness and the recently enacted federal legislation designed to alleviate the problem. Section II discusses the leading abstention doctrines used in the federal courts. Section III explores how the Act may be used to circumvent the federal abstention doctrines and to help in providing a federal forum for the homeless. Finally, Section IV concludes that federal courts should fulfill the intent of Congress and use the federal forum to adjudicate the rights of the homeless.

## I. The Homeless and the Legislation Enacted to Help Them

The problems facing the homeless, and the purposes underlying the Act, truly can be understood only by examining the individuals who make up the homeless population.

### A. Homelessness and Its Causes

Perceptions are changing regarding the identity of the individuals who make up the homeless population. The stereotype of the homeless as a group of white, alcoholic, middle-aged men, confined to discrete areas of major cities, such as "skid rows," no longer holds true.<sup>14</sup> Rather, the faces of homelessness, and the areas where those faces appear, have undergone a major transition in the last ten to fifteen years.<sup>15</sup> Today the population of homeless men in any major city is more likely to consist of minorities below

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Koch, 608 F. Supp. 1460 (S.D.N.Y.), *aff'd sub nom.* Cannady v. Valentin, 768 F.2d 501 (2d Cir. 1985).

12. For a discussion of the three abstention doctrines most commonly invoked to avoid deciding issues of homelessness, see *infra* notes 64-81, 99-108, 121-32 and accompanying text.

13. The Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified in scattered section of titles 7, 20, 29, 40 and 42 U.S.C.A. (West Supp. 1988)). Originally titled the Urgent Relief for the Homeless Act, the Act was renamed the Stewart B. McKinney Homeless Assistance Act "in honor of the dedication and work in support of homeless and disadvantaged persons put forth by Representative McKinney (R. Connecticut) who died on May 7, 1987." H.R. Conf. Rep. No. 100-174, 100th Cong., 1st Sess. 63, *reprinted in* 1987 U.S. Code Cong. & Admin. News 362, 441.

14. Langdon & Kass, *supra* note 4, at 308 n. 20. For a discussion of the disappearance of the skid row neighborhood, see *infra* note 36 and accompanying text.

15. N.Y. Times, Oct. 10, 1984, at B4, col. 3.

the age of forty.<sup>16</sup> Women and families of all races represent an ever-increasing percentage of the homeless population.<sup>17</sup>

Additionally, the homeless population as a whole contains a disproportionate number of mentally ill or mentally handicapped persons.<sup>18</sup> Although many of the homeless represent a portion of the deinstitutionalized psychiatric care community,<sup>19</sup> the number of homeless who currently manifest psychological difficulties exceeds the number of homeless deinstitutionalized mental patients.<sup>20</sup> Members of the homeless population undeniably suffer from psychological disorders at a rate which far exceeds the rest of the population.<sup>21</sup> Thus, whatever the sex, race, or age of the homeless individual, life on the streets is more than a physically taxing existence; it is a mentally harrowing experience.

Knowing who the individuals are that make up the homeless population is only the first step in understanding the problem of homelessness. To comprehend why this population has experienced such unprecedented growth,<sup>22</sup> one must also examine the causes of homelessness. Two major factors have been identified as causes of homelessness: decreases in funding to social services; and high unemployment rates, particularly in the sub-groups that make up the homeless population.<sup>23</sup>

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16. See, e.g., Langdon & Kass, *supra* note 3, at 308 n.21 (citing Human Resources Admin. of the City of New York, *Correlates of Shelter Utilization: One Day Study* (August 1984)).

17. Dakin, *supra* note 1, at 100. The presence of women and families as plaintiffs in litigation involving the homeless is perhaps the most telling indication of their increase as sub-units of the United States' homeless population. See, e.g., *Slade v. Koch*, 514 N.Y.S.2d 847 (Sup. Ct. 1987) (class of homeless pregnant women and children); *Lamboy v. Gross*, 126 A.D.2d 265, 513 N.Y.S.2d 393 (App. Div. 1987) (homeless family); *Hansen v. Department of Social Servs.*, 193 Cal. App. 3d 283, 238 Cal. Rptr. 232 (Ct. App. 1987) (homeless families); *Eldredge v. Koch*, 118 Misc. 2d 163, 459 N.Y.S.2d 960 (Sup. Ct.) (homeless women), *rev'd on other grounds* 98 A.D.2d 675, 469 N.Y.S.2d 744 (App. Div. 1983).

18. See generally A. Anthony Arce, *A Psychiatric Profile of Street People Admitted to an Emergency Shelter*, 34 *Hosp. Community Psychiatry* 812 (1983).

19. For a discussion of deinstitutionalization, see *infra* notes 25-32 and accompanying text.

20. Dakin, *supra* note 1, at 99-100.

21. The omnipresent physical dangers under which the homeless must carry on their day-to-day lives is but one of the possible underlying causes of the psychological disorders evident in the homeless population. Publicly funded shelters are often overcrowded and unsafe. See generally Langdon & Kass, *supra* note 3, at 314-17. Frequently, the homeless sleep during the day and move about at night rather than face the horrors of the public shelter system. *Id.*

22. For a discussion of the most recent statistics on the homeless which indicate an increase in the overall number of homeless individuals in the United States, see *supra* note 2.

23. See *supra* notes 14-17 and accompanying text for a discussion of the sub-groups which make up the homeless population.

The House Committee on Banking, Finance and Urban Affairs has identified the decrease in federal, state and local social service funding as one of the major causes of homelessness in the United States.<sup>24</sup> This decrease in funding has been concentrated in three areas: reduction of financial support for psychiatric care facilities, with resulting deinstitutionalization; drastically lowered public housing assistance; and more stringent requirements for receiving general assistance. The reduction of funding in all three areas has contributed to an ever-increasing homeless population.

With the introduction of new psychotropic drugs in the mid-1950s<sup>25</sup> mental hospitals began to discharge their patients en masse into society at large. This phenomenon has become known as deinstitutionalization.<sup>26</sup> While deinstitutionalization was motivated in part by liberty concerns,<sup>27</sup> fiscally conservative proponents of the process hailed it as a less expensive way to deal with the problems of the mentally ill.<sup>28</sup> In support of their position, proponents advocated the creation of numerous community-based care facilities.<sup>29</sup> These facilities, and the funds necessary to deal with the deinstitutionalized patients, never materialized.<sup>30</sup> Despite this, deinstitutionalization has continued, along with the implementation of restrictive admission policies to state psychiatric care facilities. As a result, a significant number of the homeless who are mentally ill receive no medical supervision or care.<sup>31</sup> Hence,

24. See H. Rep. No. 100-10(I), *supra* note 2, at 18-19.

25. For a discussion of the increased availability and the increased use of psychotropic drugs, see Henry Brill & Robert E. Patton, *Analysis of Population Reduction in New York State Mental Hospitals During First Four Years of Large-Scale Therapy with Psychotropic Drugs*, 116 Am. J. Psychiatry 495 (1959).

26. Peter Marcuse, *Neutralizing Homelessness*, *Socialist Rev.*, Jan. 1988, at 69, 89.

27. See, e.g., Richard Rapson, *The Right of The Mentally Ill to Receive Treatment in the Community*, 16 Colum. J.L. & Soc. Probs. 193, 200-02 (1980) (noting the judicial factors behind the trend to deinstitutionalize); Robert W. Collin & Daniel J. Barry, *Homelessness: A Post-Industrial Society Faces a Legislative Dilemma*, 20 Akron L. Rev. 409, 411 n.14 (1987).

28. See Rapson, *supra* note 27, at 200-02; Collin & Barry, *supra* note 27, at 411 n.14.

29. *Homelessness in America: Hearing Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance and Urban Affairs*, 97th Cong., 2d Sess. 23, 43 (1982) (Statement of Kim Hooper and Ellen Baxter, National Coalition for the Homeless, Community Service Society of New York).

30. The failure of community-based care facilities to materialize was caused, in part, by community resistance to the placement of the facilities. *Id.* See also H. Rep. No. 101-10(I), *supra* note 2, at 365 (stating that "The Community Mental Health Program was established to assist . . . deinstitutionalized people, but the Gramm-Latta Budget Amendments enacted in 1981 prevented the funding of this program.').

31. See Dakin, *supra* note 1, at 104-05.

the majority of the mentally ill homeless are not receiving the medication necessary to make their lives outside the institution a tenable reality.<sup>32</sup>

The decrease of funds in public housing assistance has also fueled the increase of homeless individuals and families. Federal housing assistance has decreased 70 percent since 1982.<sup>33</sup> Moreover, urban gentrification<sup>34</sup> has reduced the already small supply of existing low-cost housing.<sup>35</sup> The classic "skid row" hotels have disappeared, and areas which once provided adequate low-cost shelter have been redeveloped into profitable high-rent districts.<sup>36</sup> The combined effect of disappearing low-cost housing, and a lack of funding to supply replacement units has created a new class of displaced persons in the United States.<sup>37</sup>

Cutbacks in state and federal general assistance programs have also contributed to the increasing homeless population. The federal government has reduced disability benefits,<sup>38</sup> and has enacted stricter review and eligibility requirements.<sup>39</sup> As a result, fewer people qualify for general assistance, and the amount distributed to those eligible has been reduced.

Decreased funding is not the sole factor causing the increasing number of homeless. Unemployment also has contributed to the problem. While national unemployment rates have decreased over the past several years, employment rates for women and minorities, two groups highly represented among the homeless, have remained stagnant or decreased.<sup>40</sup>

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32. The unmedicated mentally ill, in addition to their attempt to function day-to-day, also must face the bureaucratic rigors of the social services system. The complexities of these systems are often enough to unnerve even those not suffering from mental impairments. As a result, there presumably are mentally ill homeless individuals who are entitled to benefits but cannot surmount the governmental system to receive them. *Id.*

33. H. Rep. No. 101-10(I), *supra* note 2, at 18.

34. "Gentrification involves the displacement of lower income groups by those of higher income in older housing, generally near city centers . . . [and] includes the conversion of . . . 'slum areas' to 'higher and better uses.' This translates to mean the displacement by the better off of poor people, often onto the streets." Marcuse, *supra* note 26, at 74.

35. Langdon & Kass, *supra* note 3, at 311 n. 33-35.

36. *Id.*

37. See, e.g., Chester Hartman, Dennis Keating, & Richard Legates, *Displacement: How to Fight It* 3 (1982).

38. See Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599 (1980).

39. Collin & Barry, *supra* note 27, at 413-14.

40. From 1978 until August 1987 the overall national employment rate has fluctuated between a low of 5.8% in 1979 and a high of 10.2% in 1983. The current, national unemployment rate is 6%. The unemployment rate for white males has never risen above 8.6% and is currently at 5.1%. The unemployment rate for

The cumulative effect of these factors is that an ever increasing percentage of the United States population has become vulnerable to homelessness. In 1987 Congress recognized that without some kind of comprehensive federal policy, homelessness would continue to escalate. In response, Congress enacted the Stewart B. McKinney Homeless Assistance Act.<sup>41</sup>

### B. The Federal Legislation

The Stewart B. McKinney Homeless Assistance Act represents a bipartisan, emergency effort on behalf of the House and the Senate<sup>42</sup> to address the pressing problem of homelessness.<sup>43</sup> The Act, by allocating \$500 million in emergency funds, represents the Congressional commitment "to save lives, [and] to provide emergency shelter and health care services to people whose lives are endangered."<sup>44</sup> The purpose of the Act is to provide funds to assist the homeless and "to use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless."<sup>45</sup>

The Act contains eight substantive titles,<sup>46</sup> each designed to deal with a specific issue of homelessness. Recognizing that the

Blacks and Hispanics, however, has never been less than 10.4% and is currently at 12.4%. U.S. Dep't of Labor Statistics, *Monthly Lab. Rev.*, Dec. 1980, at 80; Dec. 1983, at 67; Oct. 1987, at 67.

41. Pub. L. No. 100-77, 101 Stat. 482 (1987) (codified in scattered sections of titles 7, 20, 29, 40 and 42 U.S.C.A. (West Supp. 1988)).

42. H.R. 558, the bill drafted by the House to deal with the problem of homelessness was passed in lieu of S. 782, 809, 811 and 813. H. Rep. No. 101-10(1), *supra* note 2, at 362.

The Act grew out of the investigation into homelessness conducted by the House Subcommittee on Housing and Community Development from 1982 through 1987. *Id.*

43. *Id.* at 20.

44. *Id.*

45. 42 U.S.C.A. § 1130(b) (West Supp. 1988).

46. Stewart B. McKinney Homeless Assistance Act, Publ. L. No. 100-77, 101 Stat. 482 (1987) (codified in scattered sections of titles 7, 20, 29, 40 and 42 U.S.C.A. (West Supp. 1988)). The eight provisions are: creation of an interagency council on the homeless (Title II, 42 U.S.C.A. §§ 11311-11319); creation of the federal emergency management food and shelter program (Title III, 42 U.S.C.A. §§ 11331-11352); allocation of funding for housing assistance (Title IV, 42 U.S.C.A. §§ 5302, 11361-11401); provisions for use of surplus federal property (Title V, 40 U.S.C.A. § 484(j)(3)(8); 42 U.S.C.A. §§ 11411-11412); Funding for health care for the homeless (Title VI, 42 U.S.C.A. §§ 254e(2)(3), 256, 290aa-3, 290bb-12(c), 290bb-2(b), 290cc-21 to 290cc-36, 290dd to 290dd-3, 290ee to 290ee-3); establishment of education, training and community service programs for the homeless (Title VII, 20 U.S.C.A. §§ 1205(b), 1207(a); 29 U.S.C.A. §§ 1503(8)(b), 1551(e); 42 U.S.C.A. §§ 11421-11472); food assistance for the homeless (Title VIII, 7 U.S.C.A. §§ 612(e) 2012(i), 2012(s), 2014(c), 2014(e), 2014(k)(2), 2020(e)(1), 2025(a), 2025(e)(9)); and an extension of the veterans Job Training Act (Title IX, 29 U.S.C.A. § 1721).

homeless population is divided into sub-groups with differing needs,<sup>47</sup> Congress created a legislative provision to reach each branch of this population. Although structured as an emergency measure, the Act makes certain substantive changes in existing law<sup>48</sup> which will continue to impact the lives of the homeless beyond the termination of the stated dates of relief.<sup>49</sup> Thus, by going beyond the enactment of merely temporary measures, the Act differs from prior Congressional appropriations designed to aid the homeless.<sup>50</sup> In addition, Congress may have created a road which previously had been blocked by abstention doctrines.

## II. The Impact of the Major Abstention Doctrines on Litigation Efforts by the Homeless in Federal Courts

In *Cohens v. Virginia*,<sup>51</sup> Chief Justice John Marshall wrote:

It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.<sup>52</sup>

In the nineteenth and early twentieth centuries, federal courts unflinchingly obeyed Marshall's command that a federal court has "no. . .right to decline the exercise of jurisdiction which is given."<sup>53</sup>

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47. See generally H. Rep. No. 101-10(I), *supra* note 2, at 362-63. See also *supra* notes 15-24 and accompanying text for a discussion of the homeless population.

48. See, e.g., Pub. L. No. 100-77, §§ 601-603, 101 Stat. 482, 511-15 (1987) (amending Subchapter II of the Public Health Service Act, 42 U.S.C. §§ 242n to 280b-3 (1982) to provide specific funding for health care services for the homeless) (codified as amended at 42 U.S.C.A. §§ 254 e(a)(3), 256, 110301 (West Supp. 1988)); Pub. L. No. 100-77, §§ 801-809, 101 Stat. 482, 533-536 (1987) (amending § 3 of the Food Stamp Act of 1977, 7 U.S.C. § 2012 (1982) to specifically include homeless individuals within the group of eligible food stamp recipients) (codified as amended at 7 U.S.C.A. 612(c), 2012(i), 2012(s), 2014(c) 2014(e), 2014(k)(2), 2020(e)(l), 2025(a), 2025(e)(9) (West Supp. 1988).

49. See *infra* notes 167-71 and accompanying text for a discussion of how existing law is changed.

50. See, e.g., Second Supplemental Appropriations Act, Pub. L. No. 98-396, 98 Stat. 1369, 1382-83 (1984) (Federal Emergency Management Agency, Emergency Food and Shelter Program); Supplemental Appropriations Act, Pub. L. No. 98-181, 97 Stat. 1153, 1154-55 (1983) (Emergency Food Distribution and Shelter Program); Continuing Resolution, Pub. L. No. 98-181, 97 Stat. 974-75 (1983) (Food Distribution and Emergency Shelter); Emergency Job Appropriations, Pub. L. No. 98-8, 97 Stat. 13, 28 (1983).

51. 19 U.S. (6 Wheat.) 264 (1821) (Food Distribution and Emergency Shelters).

52. *Id.* at 404.

53. *Id.* The federal courts' habitual assumption of jurisdiction of a case when

Beginning in the middle of twentieth century, however, the Supreme Court began to recognize the existence of certain, exceptional circumstances, which permit a federal court to abstain from hearing and deciding cases that fall within its jurisdiction.<sup>54</sup> One of these judicially created doctrines, known as abstention, allows a federal court to derogate a litigant's supposed absolute right to a federal forum for claims involving questions governed by federal subject matter jurisdiction.<sup>55</sup>

All forms of abstention in the federal courts can be characterized by a common factor: the presence of ambiguous or uncertain issues of state law.<sup>56</sup> Over the years the Supreme Court has developed specific doctrines<sup>57</sup> to deal with unique issues of concurrent

federal subject matter jurisdiction existed was premised, in part, on the theory that Congress conferred an absolute right to a federal forum in providing for federal subject matter jurisdiction. David Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 Tulane L. Rev. 651, 653, (1985) (citing *McClellan v. Carland*, 217 U.S. 268, 282 (1910) (a federal court has "no authority" to abdicate its jurisdiction because of the presence of a pending state action)).

54. See, e.g., *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (a federal court may dismiss a properly filed case under the doctrine of *forum non conveniens*). The doctrine of *forum non conveniens* allows a federal court to exercise its discretion and dismiss a case when another existing federal, state or foreign court possesses the power to hear the case, or when the case has been brought in an inconvenient forum without good reason. In addition, dismissal is proper when various considerations of public policy demand a change of forum. See generally Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380 (1947). The doctrine of *forum non conveniens* has been replaced by 28 U.S.C. § 1404(a) (1982).

55. Sonenshein, *supra* note 53, at 654. A court may use abstention to dismiss a proceeding outright, or to stay it until resolution of the pending state action. Under the workings of *res judicata* and collateral estoppel, however, a stay or dismissal will accomplish the same purpose—"the prior and ultimate adjudication of the concurrent claims by the state court. . ." *Id.* at 671.

56. Martin Redish, *Federal Jurisdiction: Tensions in the Allocation of Judicial Power* 233 (1980). For a discussion of the three most common forms of federal abstention, see *infra* notes 64-81, 99-108, 121-32 and accompanying text.

57. See *Colorado River Water Conservation Dist. v. United States*, 426 U.S. 912 (1976); *Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1942); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1940). *Younger* abstention, which counsels against a federal court enjoining a pending state criminal action absent bad faith, harassment or prosecution under a patently invalid state statute, is not discussed in this article. For a discussion of *Younger* abstention see Note, *Implications of the Younger Cases for the Availability of Federal Equitable Relief When No State Prosecution is Pending*, 72 Colum. L. Rev. 874 (1972).

The United States Court of Appeals for the District of Columbia Circuit refused to apply *Younger* abstention in a case involving a protest of President Reagan's homeless policies. See *Juluke v. Hodel*, 811 F.2d 1553 (D.C. Cir. 1987). Because *Juluke* was a civil action to enjoin enforcement of the regulations which prohibited the demonstration, the *Juluke* court refused to apply *Younger* abstention. The *Juluke* court specified that *Younger* abstention was a mandatory rule and would only be applied in a federal actions seeking to enjoin a state criminal prosecution. Thus the potentially drastic effect of "denying a litigant a federal forum to pursue an otherwise legitimate constitutional claim" was prevented. *Id.* at 1556.

jurisdiction.<sup>58</sup>

The present abstention doctrines have served, in part, as a basis for denying a federal forum to those seeking to litigate the rights of the homeless.<sup>59</sup> Those courts using the abstention doctrines to circumvent issues of homelessness, have created a precedent denying the homeless a federal forum, even when federal questions are involved.

### A. *The Federal Abstention Doctrines*

To date, the federal courts have invoked three specific forms of abstention in litigation involving the homeless: *Pullman* abstention,<sup>60</sup> *Burford* abstention,<sup>61</sup> and *Colorado River* abstention.<sup>62</sup> While each doctrine requires the existence of a specific set of circumstances to justify its use, at least two federal courts, when faced with litigation involving the homeless, have found that the proper factual and legal criteria calling for abstention were present.<sup>63</sup> Accordingly, understanding both the background of each relevant federal abstention doctrine and how that doctrine has been applied to litigation efforts involving the homeless is necessary in order to prevent their application in the future.

#### 1. *Pullman* Abstention

In *Railroad Comm'n of Texas v. Pullman*,<sup>64</sup> the Supreme Court faced a fourteenth amendment equal protection and due process challenge to an allegedly discriminatory order of the Texas

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58. See Sonenshein, *supra* note 53, at 656. Professor Sonenshein states that: [I]t may no longer be appropriate to speak of "the abstention doctrine." In fact, it appears "that it is more precise to refer to 'abstention doctrines,' since there are several distinguishable lines of cases, involving different factual situations, different procedural consequences, different policy considerations, and different arguments for and against their validity."

*Id.* (quoting 17 Charles Wright, Arthur Miller, and Edwin Cooper, *Federal Practice & Procedure* § 4241, at 446 (1978)).

59. See, e.g., *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.) (*Burford* and *Colorado River* abstention), *aff'd sub nom. Cannady v. Valentin*, 768 F.2d 501 (2d Cir. 1985); *Weiser v. Koch*, 632 F. Supp. 1369 (S.D.N.Y. 1986) (*Pullman* abstention).

60. See *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1940). For a discussion of *Pullman* abstention, see *infra* notes 64-81 and accompanying text.

61. See *Burford v. Sun Oil Co.*, 319 U.S. 315 (1942). For a discussion of *Burford* abstention, see *infra* notes 99-108 and accompanying text.

62. See *Colorado River Water Conservation Dist. v. United States*, 426 U.S. 912 (1976). For a discussion of *Colorado River* abstention, see *infra* notes 121-32 and accompanying text.

63. See *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.) (*Burford* and *Colorado River* abstention), *aff'd sub nom. Cannady v. Valentin*, 768 F.2d 501 (2d Cir. 1985); *Weiser v. Koch*, 632 F. Supp. 1369 (S.D.N.Y. 1986) (*Pullman* abstention).

64. 312 U.S. 496 (1940).

Railroad Commission.<sup>65</sup> The district court had not reached the federal issues involved, but instead decided that the applicable state statute<sup>66</sup> did not authorize the order.<sup>67</sup>

The Supreme Court, while finding that the Pullman car porters had advanced a substantial constitutional claim, believed that the case touched on a "sensitive area of social policy" which it should avoid if possible.<sup>68</sup> In support of its decision the Court said:

In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication.<sup>69</sup>

By declining to reach the constitutional question because of an existing, unsettled question of state law, the Court established a two-part test which was to serve as the basis for the *Pullman* abstention doctrine. Specifically, *Pullman* abstention first requires that there be an uncertain question of state law. Second, the state law question must be susceptible to a construction that either would eliminate the necessity of reaching a decision on the federal

65. *Id.* at 497-98. The order required that all sleeping cars on trains be under the control of a Pullman conductor. *Id.* At that time in Texas, conductors were white and porters were black. *Id.* at 497. The Pullman Company, the Pullman conductors, and the railroads all objected to the order. *Id.* at 498.

66. The statute at issue provided that:

Power and authority are hereby conferred upon the Railroad Commission of Texas over all railroads, and suburban, belt and terminal railroads, and over all public wharves, docks, piers, elevators, warehouses, sheds, tracks and other property used in connection therewith in this State, and over all persons, associations and corporations, private or municipal, owning or operating such railroad, wharf, dock, pier, elevator, warehouse, shed, track, or other property to fix, and it is hereby made the duty of the said Commission to adopt all necessary rates, charges and regulations, to govern and regulate such railroads, persons, associations and corporations, and to correct abuses and prevent unjust discrimination in the rates, charges and tolls of such railroads, persons, associations and corporations, and to fix division of rates, charges and regulations between railroads and other utilities and common carriers where a division is proper and correct, and to prevent any and all other abuses in the conduct of their business and to do and perform such other duties and details in connection therewith as may be provided by law.

Tex. Rev. Civ. Stat. Ann. art. 6445 (Vernon 1926).

67. *Pullman*, 312 U.S. at 498-99. The Supreme Court concluded that the language of the statute was "far from clear" and that the district court's interpretation of the statute was based on mere speculation as to how the Texas courts would interpret their own statute. *Id.* at 498-500.

68. *Id.* at 498. The Court felt it should avoid deciding issues of racial discrimination if it could. *Id.* at 499-500.

69. *Id.* at 500.

issue, or would moot the decision of the federal issue.<sup>70</sup>

*Pullman* abstention, as the first clear authorization for the federal courts to abdicate their given jurisdiction<sup>71</sup> was only to be used in exceptional and extraordinary circumstances.<sup>72</sup> Various circuit courts of appeal, however, have altered both the test to be used when applying *Pullman* abstention and the circumstances in which it may be used.<sup>73</sup> The United States Courts of Appeals for the Second,<sup>74</sup> Third,<sup>75</sup> Ninth,<sup>76</sup> and Tenth Circuits<sup>77</sup> have all added additional prongs to the original *Pullman* analysis. In the Fifth Circuit, only one of three factors need be apparent for a federal district court to abdicate its jurisdiction.<sup>78</sup> The remaining cir-

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70. *Id.*

71. The Court attempted to clarify the *Pullman* doctrine in *Baggett v. Bullitt*, 377 U.S. 360 (1964). In *Baggett*, the Court found that *Pullman* abstention is not appropriate when there is only an unclear question of state law. *Id.* at 375. Rather, certain "triggering" circumstances must exist. *Id.* at 375. Those special circumstances, however, are essentially the same as those established by the *Pullman* Court—the existence of an unclear question of state law whose construction might moot or limit the federal question. *Id.* at 375-78.

72. *See, e.g., County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (doctrine of abstention grants extraordinary and narrow exception to duty of district court to adjudicate controversy properly before it).

73. *See generally* Note, *Pullman Abstention: Reconsidering the Boundaries*, 59 Temple L.Q. 1243 (1986) [hereinafter *Pullman Abstention*].

74. *See McRedmond v. Wilson*, 533 F.2d 757, 761 (2d Cir. 1976). *Pullman* abstention can only be invoked in the Second Circuit when: (1) there is an unsettled question of state law; (2) the federal question can be adjudicated only after an interpretation of that state law; and (3) the state law must be susceptible to an interpretation which would avoid or modify the federal constitutional issue. *Id.* The Second Circuit also considers formally recognized policy considerations. The circuit believes that *Pullman* abstention should only be granted when abstention will avoid state-federal friction and when assumption of jurisdiction will require an unnecessary resolution of constitutional issues. *See, e.g., Winters v. Lavine*, 574 F.2d 46, 49 (2d Cir. 1978). These policy considerations reflect the Supreme Court's concern that abstention should not be harshly applied in cases involving civil rights and first amendment issues, but are not limited specifically to those instances.

75. *See, e.g., D'Iorio v. County of Delaware*, 592 F.2d 681, 685-86 (3d Cir. 1978) (using three-part test to invoke *Pullman* abstention), *rev'd on other grounds, Kershner v. Mazurkiewicz*, 670 F.2d 440 (3d Cir. 1978). Unlike the Second Circuit, the Third Circuit requires as the third determinative factor that it be apparent that an erroneous determination of state law by a federal court would be disruptive to important state policies. *Id.* The Third Circuit has also added an economic harm factor to its determination. *See United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356 (3d Cir. 1986).

76. *See, e.g., Canton v. Spokane School Dist. No. 81*, 498 F.2d 840, 845 (9th Cir. 1974) (using same three-part test as Third Circuit). The Ninth Circuit also appears to consider whether a state law, though settled, contains unclear or complicated procedural aspects. *See Pearl Inv. Co. v. City & County of San Francisco*, 774 F.2d 1460 (9th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986).

77. *See, e.g., Vinyard v. King*, 655 F.2d 1016, 1018 (10th Cir. 1981) (using three-part test used in Third and Ninth Circuits).

78. *See, e.g., Stephens by Stephens v. Bowie County*, 724 F.2d 434, 435 (5th Cir. 1984); *Mireles v. Crosby County*, 724 F.2d 431, 433 (5th Cir. 1984); *Pietzsch v. Mat-*

cuits,<sup>79</sup> have developed tests that adhere more closely to the original *Pullman* standards established by the Supreme Court.<sup>80</sup>

Whatever the test used, *Pullman* abstention remains a vital doctrine. While its motive of avoiding state-federal conflicts is valid, its inconsistent application throughout the federal circuits is just cause for seeking to circumvent its application.<sup>81</sup>

The decision in *Weiser v. Koch*<sup>82</sup> is an example of the impact that *Pullman* has on the homeless and demonstrates how the courts have used *Pullman* abstention to avoid addressing issues of homelessness. In *Weiser*, former and present occupants of New York City's municipal shelter system asked the United States District Court for the Southern District of New York for damages, as well as declaratory and injunctive relief against the shelters' operators.<sup>83</sup> After determining that the parties lacked standing,<sup>84</sup> and that it would not assume pendent jurisdiction,<sup>85</sup> the district court addressed abstention.

The *Weiser* court considered the three major abstention doctrines, and then turned specifically to *Pullman* abstention.<sup>86</sup> The court stated that to invoke *Pullman* abstention:

[T]he state law [must] be unclear or the issue of state law [must] be uncertain, that resolution of the federal issue [must] depend upon the interpretation to be given to the state law,

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tox, 719 F.2d 129, 131 (5th Cir. 1983); *High Oil' Times, Inc. v. Busbee*, 621 F.2d 135, 139 (5th Cir. 1980). There must be either (1) a difficult or obscure question of state law; (2) the decision of the state law question must eliminate or narrow the scope of the federal issue; or (3) the potential must exist for state-federal friction or confusion with a state program or scheme. By requiring only one of the above factors to be present in order to invoke *Pullman* abstention, the Fifth Circuit has misunderstood and broadened the doctrine far beyond the boundaries originally intended by the Supreme Court.

79. The First, Fourth, Sixth, Seventh, Eighth and Eleventh Circuits.

80. See, e.g., *George v. Parratt*, 602 F.2d 818 (8th Cir. 1979) (five-factor test); *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993, 998 (1st Cir. 1983). These circuits tend to use a case-by-case analysis, a method suggested by the Supreme Court. See *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

81. See *Pullman Abstention*, *supra* note 73, at 1262-65 for a proposal to modify the doctrine.

82. 632 F. Supp. 1369 (S.D.N.Y. 1986).

83. *Id.* at 1370-71.

84. *Id.* at 1373-74. The court found that the former and present shelter members lacked standing to obtain injunctive or declaratory relief based on allegations that they were subject to eviction without due process of law. The shelter members did not allege, nor was it likely, that they would be faced with the imminent possibility of being evicted from a municipal shelter without adequate due process protection. *Id.*

85. *Id.* at 1376-77. The *Weiser* court found that pendent jurisdiction should not be exercised. The court declined jurisdiction to avoid a needless decision of state law and to promote justice between the parties. Furthermore, it found state issues to predominate. *Id.*

86. *Id.* at 1378-79.

and that the state law [must] be susceptible of an interpretation that would avoid or modify the constitutional issue.<sup>87</sup>

After a lengthy examination of the relevant case law,<sup>88</sup> the court concluded that the state law regarding shelter for the homeless was "extremely unclear."<sup>89</sup> Accordingly, it held that the first prong of the Second Circuit's *Pullman* test, that the state law be uncertain, was satisfied.<sup>90</sup> Further, the court found that resolution of the federal issues presented depended on the interpretation given to the state law.<sup>91</sup> The plaintiffs would have a protectible property interest only if the New York Constitution or a state statute created "a mutually explicit understanding that shelter would be provided."<sup>92</sup> The *Weiser* court also found that resolution of plaintiffs' procedural due process claim required a determination that New York law entitles the plaintiffs to shelter.<sup>93</sup> The court determined that New York law was susceptible to the interpretation that no right to shelter exists, and thus a federal court finding of a due process violation could become moot.<sup>94</sup> Lastly, the court stated that because the unsettled issue would soon be decided in a case then pending in state court,<sup>95</sup> abstention would not create piecemeal litigation.<sup>96</sup> The *Weiser* court thus concluded that *Pull-*

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87. *Id.* at 1379 (citing *McRedmond v. Wilson*, 533 F.2d 757, 761 (2d Cir. 1976)).

88. The New York courts, state and federal, have seen the majority of the litigation involving the homeless. See, e.g., *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.), *aff'd sub nom. Cannady v. Valentin*, 768 F.2d 501 (2d Cir. 1985); *Lamboy v. Gross*, 129 Misc. 2d 564, 493 N.Y.S.2d 709 (Sup. Ct. 1985); *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987). This is partly attributable to the concentration of the homeless population in New York City. See *supra* notes 14-23 and accompanying text for a discussion of the homeless population. New York's constitution which provides specifically for aid to the needy, is also responsible for the amount of litigation in New York courts involving the provision of housing to the homeless. See N.Y. Const. art. XVII, § 1.

89. *Weiser*, 632 F. Supp. at 1379. The *Weiser* court concluded that the cumulative effect of decisions in previous cases left unclear the question of whether a right to shelter exists in New York. *Id.* at 1379-82.

90. *Id.* at 1379. See *supra* note 74 for a discussion of the Second Circuit's three-pronged *Pullman* test.

91. *Id.* at 1382. This finding satisfied the second prong of the *Pullman* test used by the Second Circuit. See *supra* note 74.

92. *Id.*

93. *Id.* at 1382-83.

94. *Id.* at 1383. This determination of potential mootness met the third prong of the Second Circuit's *Pullman* test. See *supra* note 74.

95. *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987). *McCain*, which involved the right of homeless families to shelter, was ultimately resolved in favor of the homeless. The *McCain* court did not reach the issue of whether the New York State Constitution requires the state to provide shelter to the homeless. Rather, the court found that it had the power to issue a temporary injunction requiring New York City to provide housing that meets minimum standards for families who already had received government housing but had been evicted. *Id.* at 109-10, 511 N.E.2d at 65-66, 517 N.Y.S.2d at 921-22.

96. *Weiser*, 632 F. Supp. at 1383.

man abstention was appropriate.<sup>97</sup> The court, however, did not dismiss the action outright, but instead stayed its proceedings until resolution of the shelter issue in the state court action.<sup>98</sup>

## 2. *Burford* Abstention

In *Burford v. Sun Oil Co.*,<sup>99</sup> the Supreme Court was confronted with a dispute involving questions of both federal and state law. A Texas oil producer sought to enjoin the execution of an order granting a neighboring leaseholder a permit to drill new wells.<sup>100</sup> Unlike *Pullman*, *Burford* did not require construction of an unclear state statute.<sup>101</sup> Rather, the Court was faced with a case where the state already had extensive administrative procedures in place. Thus a decision by the Court was seen as likely to disrupt state policy and to yield inconsistent and erroneous results.<sup>102</sup> Although the *Burford* Court created a new basis for courts to abstain from exercising their given jurisdiction, it failed to enunciate a clear standard for when such abstention is appropriate.<sup>103</sup>

The lower courts have been hindered by the Supreme Court's failure to enunciate a clear standard for *Burford* abstention. Across the circuits, inconsistent decisions have been issued in cases involving, inter alia, disruption of state policies,<sup>104</sup> the supposed availability of an exclusive state judicial remedy,<sup>105</sup> and the exist-

97. *Id.* at 1383-84.

98. *Id.* at 1384, 1387.

99. 319 U.S. 315 (1943).

100. *Id.* at 317.

101. Texas law on the regulation of oil drilling was far from unsettled. Because of the problems involved in allocating oil rights, the state had established a special review system for orders of the Texas Railroad Commission, the body politic governing oil production. *Id.* at 325-27. The Texas state courts were given exclusive jurisdiction to review the Commission's orders and had developed expertise in the area of oil regulation because of the large number of disputes over Commission orders. *Id.*

102. *Id.* at 326-27.

103. The difficulties caused by the Court's failure to enunciate a clear standard for when *Burford* abstention is appropriate can be seen in later Supreme Court decisions. See, e.g., *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951). In *Alabama Pub. Serv. Comm'n*, the Court seemed to broaden the instances where application of *Burford* abstention is appropriate. The Court set a far less stringent standard for abstention than it had in *Burford* and merely used the justification that the issue was a matter of local concern. *Id.* at 349-50.

104. Compare *Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, (10th Cir. 1974) and *Simmons v. Jones*, 478 F.2d 321, (5th Cir. 1973), modified *per curiam*, 519 F.2d 52 (5th Cir. 1975) (abstention without reference to potential disruption of state policies) with *AFA Distrib. Co. v. Pearl Brewing Co.*, 470 F.2d 1210 (4th Cir. 1973) (requiring showing of potential disruption before ordering abstention).

105. Compare *Kelly Servs., Inc., v. Johnson*, 542 F.2d 31 (7th Cir. 1976) (error not to have abstained in light of availability of exclusive state indicial remedy) with

ence of enacted regulations by local governments.<sup>106</sup> This confusion may be partially attributable to the Supreme Court's failure to consistently require the presence of a state law claim.<sup>107</sup> The inconsistencies in the application of the policy underlying *Burford* allow federal judges to abstain without censure, resulting in deferential of decisions on important social issues, including homelessness.<sup>108</sup> Accordingly, like *Pullman* abstention, there is good reason to avoid *Burford* abstention if possible.

*Canaday v. Koch*<sup>109</sup> illustrates the impact *Burford* abstention has had on litigation efforts by the homeless. In *Canaday*, a group of homeless mothers claiming to have been denied access to emergency shelter operated by the New York City Human Resources Administration ("HRA") sought to represent "all homeless families in New York City that have been, are being, or will be denied emergency shelter by [the HRA]."<sup>110</sup> Plaintiffs asked the District Court for the Southern District of New York to grant them and members of their class declaratory<sup>111</sup> and injunctive<sup>112</sup> relief. The court, however, denied any form of the requested relief. Instead,

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*Santa Fe Land Improvement Co. v. City of Chula Vista*, 596 F.2d 838 (9th Cir. 1979) (*Burford* abstention inappropriate because subject matter of action not highly complex or unique).

106. Compare *City of Monroe v. United Gas Corp.*, 253 F.2d 377 (5th Cir. 1958) (abstaining in case of local rather than statewide regulation) with *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1042 (9th Cir. 1976) (correct to retain jurisdiction over federal claims asserted by plaintiff pending resolution of state issue in state court).

107. The circuits may be confused over the need for a state law claim because in *McNeese v. Board of Educ.*, 373 U.S. 668 (1963), the Court refused to abstain where the case presented no issue of state law, a decision inconsistent with a prior holding. See *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341 (1951) (abstention though federal due process challenge was only claim presented).

108. See, e.g., *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.), *aff'd sub nom. Canaday v. Valentin*, 768 F.2d 501 (2d Cir. 1985).

109. *Id.*

110. 608 F. Supp. at 1463.

111. Plaintiffs sought a declaration that failure to provide emergency housing to homeless families violated state and federal constitutional, statutory and regulatory law. *Id.* Single homeless men in New York had obtained, through a consent decree with the City and State of New York, the right to emergency housing. See *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. August 26, 1981). Homeless women in New York have obtained that same right. See *Eldredge v. Koch*, 118 Misc. 2d 163, 459 N.Y.S. 2d 960 (Sup. Ct.), *rev'd on other grounds*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (App. Div. 1983).

112. Plaintiffs also asked the court for an injunction requiring the HRA "to provide lawful emergency housing to meet the needs of plaintiffs." *Canaday*, 608 F. Supp. at 1463. This request was supported by three arguments. The first argument rested on "the maze of federal and state statutes and regulations governing emergency aid to needy families with children." *Id.* The second and third arguments for emergency housing were based on New York common law, article XVII, § 1 of the New York State Constitution, and numerous provisions of the New York Social Services Law. *Id.*

the district court abstained from deciding the case, pending resolution of a parallel state action.<sup>113</sup> The state action, brought by fourteen named homeless plaintiffs, sought an injunction ordering suitable emergency housing for homeless families and children.<sup>114</sup> While the *Canaday* court ultimately abstained on *Colorado River* grounds,<sup>115</sup> it also found that *Burford* warranted abstention.<sup>116</sup>

The *Canaday* court defined the *Burford* doctrine as a "brand of abstention [which] permits federal courts to exercise their discretion to refrain from interfering with state policymaking and enforcement efforts in complex areas which are primarily of state concern and prerogative."<sup>117</sup> In determining that *Burford* abstention applied, the district court considered the clarity of the state law, the importance of the subject matter of the action to the state or political subdivision, and the manner the state had chosen to deal with the problem presented.<sup>118</sup> The court then concluded that the problem of New York City's homeless was one of predominantly local concern, unsuited to federal remedy,<sup>119</sup> which,

113. *Id.* at 1475.

114. See *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987). For a discussion of the ultimate holding in *McCain*, see *supra* note 95.

115. For a discussion of *Colorado River* abstention and its application to litigation involving the homeless, see *infra* notes 121-44 and accompanying text.

116. *Canaday*, 608 F. Supp. at 1468-72.

117. *Id.* at 1468.

118. *Id.* at 1468-69.

119. *Id.* at 1470. Judge Leisure, the author of the *Canaday* district court opinion, stated that:

This Court has no particular expertise in structuring welfare programs, or allocating scarce resources among competing needs. Nor is it on familiar terms with the state and local political and procedural apparatus which could come under its receivership were it to proceed with deciding this case. Nor does it have the familiarity with state law that is indispensable to adequate decision of this wrenching problem. For the federal court to thrust itself into this area and dictate to state and local officials its view of the proper way to discharge their official duties can hardly be conducive to harmonious federalism.

*Id.*

The author of this article, while recognizing the veracity of Judge Leisure's dicta, disagrees with his viewpoint that federal courts are not the forum for resolving issues of homelessness. The federal courts *have* become involved in the administration of state programs and institutions, and *have* told state officials how to discharge their duties. See, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala.) (state mental hospital), *hearings on standards ordered*, 334 F. Supp. 1341 (M.D. Ala. 1971), *enforced*, 344 F. Supp. 373 (M.D. Ala.), 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd in part, rev'd in part sub. nom. and remanded*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969) (state prison), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971), *rev'd sub nom. after remand and remanded*, *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194 (8th Cir. 1974), *aff'd sub nom. after remand*, *Finney v. Hutto*, 548 F.2d 740 (8th Cir. 1977), *aff'd*, 437 U.S. 678 (1978). Although federal court involvement often requires ongoing judicial participation and supervision, as the extensive subsequent histories of the above cases indicate, such judicial activism can be appropriate when the proper circumstances

therefore, should be left in the hands of the state decisionmakers.<sup>120</sup>

### 3. *Colorado River* Abstention

The Supreme Court created a third abstention doctrine in *Colorado River Water Conservation Dist. v. United States*.<sup>121</sup> There the Court decided for the first time that a federal court may dismiss a claim within its subject matter jurisdiction if the claim is being simultaneously litigated in state court.<sup>122</sup> In *Colorado River*, the United States sought a determination of its rights over certain waters in one of the Colorado Water Divisions.<sup>123</sup> After the initiation of the federal suit, one of the water users named as a defendant brought an action in a Colorado state court.<sup>124</sup> Prior to bringing its action in federal court, the United States also had filed three actions in state court, seeking a determination of rights in other waters of the Colorado Water Divisions.<sup>125</sup> When some of

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arise. The problems facing the homeless present a situation calling for such judicial activism. The widespread incidence of homelessness stems from a myriad of social problems. See *supra* notes 14-40 and accompanying text. The individual agencies which should be assisting the homeless have been unable, acting alone, to eradicate the problem. Thus, a comprehensive program must be established to aid the homeless. Given the general failure of the states to ameliorate the situation, federal courts, acting in conjunction with Congress, should take the initiative to remedy the problem of homelessness. Cf. *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (federal court ordering racial desegregation of state school system despite existence of complex state administration and inherent problems of federal court enforcement and supervision), *enforced*, 349 U.S. 294 (1955). Commentators on institutional litigation, in which courts are asked to oversee the operation of large public institutions, agree that federal judges should become involved in areas of complex state administration, particularly if constitutional issues are at stake. See generally Michael Combs, *The Federal Judiciary and Northern School Desegregation: Judicial Management in Perspective*, 13 J. L. & Educ. 345 (1984); Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 Harv. L. Rev. 465 (1980); Fiss, *supra* note 7. These commentators point out that remedying social ills is more important than the "harmonious federalism" that Judge Leisure strives for.

120. *Canaday*, 608 F. Supp. at 1469. Judge Leisure further found that the federal statutory bases of plaintiff's claims were intertwined with issues of state law. Plaintiffs brought their action under Aid to Families with Dependent Children (AFDC), 42 U.S.C. §§ 601-678 (1982). The Judge stated that as long as state officials were complying with the mandatory conditions imposed by Congress, the federal court should not "interject [itself] amidst the complications of state welfare administration unless expressly so directed by Congress." *Canaday*, 608 F. Supp. at 1472 (quoting *Black v. Beame*, 550 F.2d 815, 818 (2d Cir. 1977)).

121. 424 U.S. 800 (1976).

122. *Id.* at 817-18.

123. *Id.* at 805. Under the Colorado Water Right Determination and Administration Act of 1969 the State of Colorado is divided into seven water districts. Colo. Rev. Stat. Ann. §§ 37-92-101 to -602 (1974).

124. *Colorado River*, 424 U.S. at 806.

125. *Id.*

the defendants in the federal action brought a motion to dismiss for lack of subject matter jurisdiction, the district court, without deciding the jurisdictional question, dismissed the federal action on the grounds that the abstention doctrine required it to defer to parallel state proceedings.<sup>126</sup>

The Tenth Circuit disagreed with the district court, but the Supreme Court reversed and upheld the district court's decision, expressly creating a new abstention doctrine.<sup>127</sup> This doctrine, however, is not based on considerations of proper constitutional adjudication and regard for federal-state relations, as are the *Burford* and *Pullman* abstention doctrines.<sup>128</sup> Rather, *Colorado River* is premised on the consideration of "wise judicial administration."<sup>129</sup> While recognizing the "virtually unflagging obligation of the federal courts to exercise the jurisdiction given them",<sup>130</sup> the Court nevertheless found that when "exceptional circumstances" exist,<sup>131</sup> dismissal of a federal action because of concurrent state proceedings should be allowed.<sup>132</sup>

Although some lower courts have taken *Colorado River* at its word and applied the doctrine narrowly,<sup>133</sup> other courts have used the exception to clear their dockets, abstaining on a mere showing that an exercise of jurisdiction would be duplicative in light of a state court action.<sup>134</sup> The inconsistent statements of the Supreme

126. *Id.*

127. *Id.* at 817.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 818. The *Colorado River* Court found that the following factors warrant the exercise of discretionary abstention in favor of concurrent state action: state control over the *res* of the dispute; extreme inconvenience of the federal forum; avoidance of piecemeal litigation; and the state tribunal being the first to obtain jurisdiction. *Id.*

The Court later seemed to broaden application of *Colorado River* abstention to those cases merely involving the possibility of duplicative litigation. See *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (Rehnquist, J., plurality opinion). The Court has since retreated from that position, however, and has reaffirmed *Colorado River* abstention as "an extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it . . . [which] can be justified . . . only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest." *Moses Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 14 (1983).

132. *Colorado River*, 424 U.S. at 818.

133. See, e.g., *Turf Paradise Club, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.) (refusing to abstain), *cert. denied*, 456 U.S. 1011 (1982); *Gentron Corp. v. H.C. Johnson Agencies*, 79 F.R.D. 415 (E.D. Wis. 1978) (refusing to abstain even though an existing state court action was capable of resolving all issues presented).

134. See, e.g., *Atchison v. Nelson*, 460 F. Supp. 1102 (D. Wyo. 1978) (duplication enough to warrant abstention); *E.C. Ernst, Inc. v. Potlatch Corp.*, 462 F. Supp. 694 (S.D.N.Y. 1978) (abstaining in favor of state court action which would adjudicate

Court<sup>135</sup> regarding the application of *Colorado River* abstention have left the lower courts in disarray as to the applicability of the doctrine.

The result of the confusion can be seen in Judge Leisure's opinion in *Canaday*. Judge Leisure, after considering *Burford* abstention,<sup>136</sup> ultimately held that the case warranted *Colorado River* abstention.<sup>137</sup> Leisure assessed the progress of the concurrent state litigation,<sup>138</sup> whether resolution of the conflict would result in piecemeal litigation, the ability of the state court to give complete and comprehensive relief, and the source of the law which would resolve the dispute.<sup>139</sup> He found that all of these factors pointed to abstention.<sup>140</sup> The Court of Appeals for the Second Circuit affirmed the decision.<sup>141</sup>

Examination of *Canaday* and *Weiser*<sup>142</sup> show how the *Pullman*, *Burford* and *Colorado River* abstention doctrines impose obstacles that hinder litigation efforts on behalf of the homeless. While any plaintiff litigating an unresolved state issue in federal court faces possible invocation of one of the abstention doctrines, legal efforts on behalf of the homeless are particularly vulnerable to delays in resolution. Because of the vast growth of the homeless population in recent years,<sup>143</sup> and because clogged state courts are unable to issue clear pronouncements of law, the issues facing the homeless are more likely to be unresolved at the state level. Accordingly, without a message from the other branches of government, the federal judiciary could continue to use the abstention doctrines to avoid deciding issues of homelessness. That message may have been issued in the form of the Stewart B. McKinney Homeless Assistance Act.<sup>144</sup>

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the entire controversy); *Private Medical Care Found., Inc. v. Califano*, 451 F. Supp. 450 (W.D. Okla. 1977) (deference to state court proceedings in declaratory judgment action).

135. For a discussion of the changing Supreme Court policy on *Colorado River* abstention, see *supra* note 131.

136. For a discussion of *Burford* abstention and its applicability to litigation involving the homeless, see *supra* notes 99-120 and accompanying text.

137. *Canaday v. Koch*, 608 F. Supp. 1460, 1475 (S.D.N.Y.), *aff'd sub nom. Canaday v. Valentin*, 768 F.2d 501 (2d Cir. 1985).

138. The concurrent state case was *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987). See *supra* note 95 for a discussion of the holding in *McCain*.

139. *Canaday*, 608 F. Supp. at 1473-75.

140. *Id.*

141. See *Cannady v. Valentin*, 768 F.2d 501 (2d Cir. 1985).

142. *Weiser v. Koch*, 632 F. Supp. 1369 (S.D.N.Y. 1986). See *supra* notes 82-98 and accompanying text for a discussion of the *Weiser* decision.

143. See *supra* note 2 and accompanying text.

144. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat.

### III. Using the Stewart B. McKinney Homeless Assistance Act to Circumvent Federal Abstention Doctrines

The enactment of the Stewart B. McKinney Homeless Assistance Act ["Act"]<sup>145</sup> may present an opportunity for the homeless to evade the limitations imposed by the major federal abstention doctrines. While not all litigation efforts on behalf of the homeless which present issues of concurrent jurisdiction can avoid the application of abstention doctrines, careful utilization of various provisions of the Act may bring the homeless greater success in obtaining a federal forum to adjudicate their rights.

#### A. Circumventing Pullman Abstention

The *Pullman* doctrine allows a federal court to abstain from exercising subject matter jurisdiction when an unsettled question of state law exists, and resolution of the state law question might moot the federal court's determination.<sup>146</sup> Currently only the constitutions of New York and Montana expressly provide for aid to the needy.<sup>147</sup> While the broad language in other state constitutions could give rise to rights for the homeless,<sup>148</sup> no state's judicial system including New York's and Montana's has definitively stated that its constitution requires the state to provide shelter for its citizens.<sup>149</sup> Thus, federal litigation involving the homeless' right to shelter in any state will likely invoke the *Pullman* doctrine.

Application of the Stewart B. McKinney Homeless Assistance Act may be a way to avoid the invocation of *Pullman* abstention in cases presenting the appropriate factors. Subtitle B of Title IV of the Act allocates \$100,000,000 for fiscal year 1987, and \$120,000,000 for fiscal year 1988 for the implementation of an emergency shelter program for the homeless.<sup>150</sup> Under the terms of the statute, the allocated funds may be used to renovate, rehabilitate, or con-

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482 (1987) (codified in scattered sections of titles 7, 20, 29, 40 and 42 U.S.C.A. (West Supp. 1988)).

145. *Id.*

146. See *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496, 500-01 (1941). See *supra* notes 64-81 and accompanying text for a discussion of *Pullman* abstention.

147. See N.Y. Const. art. XVII, § 1; Mont. Const. art. XII § 3(3).

148. See Langdon & Kass, *supra* note 3, at 362-90 for an examination of the constitutions and relevant state statutes of the fifty states.

149. See, e.g., *McCain v. Koch*, 70 N.Y.2d 109, 511 N.E.2d 62, 517 N.Y.S.2d 918 (1987) (court refused to address the issue of whether New York State Constitution affords a right to shelter to homeless citizens). See *supra* note 95 for a discussion of the *McCain* holding.

150. See 42 U.S.C.A. § 11377 (West Supp. 1988). Metropolitan cities, urban counties and states (for distribution to local governments) are eligible to receive the funds available. 42 U.S.C.A. § 11373(a) (West Supp. 1988).

vert buildings for emergency shelter, to provide essential services (including employment, health, drug abuse and education services), or for maintenance operations (other than staffing), insurance, utilities, and furnishings for the shelters.<sup>151</sup> No state recipient under Subtitle B of Title IV may receive any funds unless it "supplement[s] the assistance provided under this subtitle with an equal amount of funds from sources other than this subtitle."<sup>152</sup>

Those seeking access to federal courts could argue that the states or municipalities which accept these federal funds no longer have an unclear question of state law regarding services for the homeless. Having accepted the federal funds specifically to provide shelter, and having provided matching monies out of their own coffers, the participating states or municipalities have explicitly acknowledged their obligation to provide shelter for the homeless. If this argument is accepted, then *Pullman* abstention cannot be invoked by federal courts sitting in those states, and one means of denying the homeless a federal forum has been overcome.

A recent case from the Southern District of New York may support the proposition that the Act may be used to circumvent *Pullman* abstention. In *Orozco by Arroyo v. Sobol*,<sup>153</sup> which involved the educational rights of a homeless school child,<sup>154</sup> the district court looked to the Act for guidance as to what constitutes residency.<sup>155</sup> In a decision prior to the *Orozco* case,<sup>156</sup> the Second Circuit had invoked *Pullman* abstention because it found that the question of state residency requirements was unresolved under New York law. The eagerness of the *Orozco* court to look at provisions of the Act to determine residency suggests that the Act may be the authority to which courts can turn to avoid invoking *Pullman* abstention.

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151. 42 U.S.C.A. § 11374(a) (West Supp. 1988). The funds allocated under the Act for these supportive services can be used only if (1) such services have not been provided by the local government during any part of the immediately preceding 12 month period, and (2) not more than 15 percent of the total amount used by the locality is expended on such services. *Id.*

152. 42 U.S.C.A. § 11375(a) (West Supp. 1988).

153. 674 F. Supp. 125 (S.D.N.Y. 1987).

154. The plaintiff in the case was a school aged child whose primary residence was in a welfare hotel in Yonkers, New York. *Id.* at 126.

155. *Id.* at 126 n. 1. The court referred to a section of the Act which defines a homeless individual as "an individual who has a primary nighttime residence that is a supervised publicly or privately operated shelter designed to provide temporary living accommodations." Pub. L. No. 100-77, § 103(a), 101 Stat. 482, 485 (1987) (codified at 42 U.S.C.A. § 11302(a) (West. Supp. 1988)). The court found the district where the welfare hotel was located to be the school district responsible for educating the homeless child. *Orozco*, 674 F. Supp. at 126.

156. *Catlin v. Ambach*, 820 F.2d 588 (2d Cir. 1987).

### B. Bypassing Burford Abstention

The *Burford* doctrine advocates abstention when assumption of federal jurisdiction would interfere with state administrative proceedings.<sup>157</sup> *Burford* abstention could be applied in those states which have specific administrative agencies in place to deal with the homeless, or whose administrative agencies provide "requisite social services" whose benefits impact the lives of the homeless.<sup>158</sup>

In order to receive funds under Title III<sup>159</sup> of the Act, <sup>160</sup> however, states and cities must establish a local board to determine how program funds will be allocated.<sup>161</sup> These local boards are unlike other federally funded state agencies.<sup>162</sup> Other agencies generally are given almost free reign in the determination of which emergency programs will receive funding.<sup>163</sup> Conversely, the local boards created under the Act, working under the supervision of the Emergency Food and Shelter National Board ("National Board"),<sup>164</sup> may only use the funds allocated for limited and specific purposes.<sup>165</sup> While prior legislation allocating federal funds to state agencies adopted a "hands-off" policy of allowing

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157. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 (1943). For a discussion of the *Burford* abstention doctrine, see *supra* notes 99-108 and accompanying text.

158. See, e.g., *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.), *aff'd sub nom.* *Canaday v. Valentin*, 768 F.2d 501 (2d Cir. 1985). States are free, absent more restrictive language, to determine the emergencies, and establish the programs on which they spend funds received from the federal government for Aid to Families with Dependent Children and Emergency Assistance. *Canaday*, 608 F. Supp. at 1472 (citing *Blum v. Bacon*, 457 U.S. 132, 140 (1982)).

159. Title III is the Federal Emergency Management Food and Shelter Program. Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, §§ 301-321, 101 Stat. 482, 489-93 (1987) (codified at 42 U.S.C.A. §§ 11331-11351 (West Supp. 1988)).

160. Congress has allocated \$15,000,000 for fiscal year 1987 and \$124,000,000 for fiscal year 1988 to carry out Title III. See 42 U.S.C.A. § 11352 (West Supp. 1988).

161. 42 U.S.C.A. § 11332 (West Supp. 1988). The board is to be composed of the mayor or other appropriate heads of government and local members of the United Way of America, the Salvation Army, the National Council of Churches of Christ in the U.S.A., Catholic Charities U.S.A., the Council of Jewish Federations, Inc., and the American Red Cross. 42 U.S.C.A. § 11331(b) (West Supp. 1988).

162. See, e.g., 42 U.S.C. §§ 601-602 (Supp. III 1985) (outlining broad requirements applicable to state agencies administering Aid to Families with Dependent Children (AFDC) programs).

163. See *id.* State AFDC agencies "have considerable latitude in allocating their AFDC resources." *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 414 (1973).

164. Title III establishes the National board and specifies that its duties include supervision and support of the local boards. See 42 U.S.C.A. §§ 11331-11346 (West Supp. 1988).

165. 42 U.S.C.A. § 11343 (West Supp. 1988). Under the direct supervision of the National Board, local boards must use their allocated funds to supplement efforts to provide shelter, food, and supportive services for homeless individuals, facilitate access for homeless individuals to other services and benefits, and conduct minimum rehabilitation of existing shelter or feeding facilities. *Id.*

the states to determine how best the funds are to be distributed and the agencies are to operate,<sup>166</sup> the Stewart B. McKinney Homeless Assistance Act evinces a congressional purpose beyond the mere provision of monetary assistance to the states. The local boards created under the Act are not autonomous state agencies, but rather a necessary extension of the National Board established to implement the provisions of the Act.

Additionally, the Act amended Title V of the Public Health Service Act, thus imposing further federal supervision of state agencies which benefit the homeless and establishing a block grant program under Subtitle B of Title VI for services to homeless individuals with chronic mental illness.<sup>167</sup> Under this new program, no state is eligible to receive any funds allocated for fiscal year 1987 or 1988<sup>168</sup> unless it agrees that the funds will be used for providing community mental health services to homeless individuals who exhibit a chronic condition of mental illness.<sup>169</sup> Further, the state has to agree that the projects and services receiving amounts under Title VI of the Act will provide the following for the benefit of the homeless persons covered by the Act: (a) outreach services to both the chronically mentally ill homeless, or to those facing a significant probability of becoming homeless; (b) diagnostic, crisis intervention, habilitation, rehabilitation, and community mental health services for the above described persons; (c) training for individuals who provide the above services; (d) referral services to appropriate medical and hospital facilities; (e) supportive and supervisory services to homeless individuals in certain residential settings; and (f) appropriate case management services.<sup>170</sup> Moreover, a state cannot receive funding unless it agrees that the monies received will not be used either to provide in-patient services, to make cash payments to the recipients of mental health services, to purchase or improve real property, to purchase major medical equipment, or to satisfy any requirement for the expenditure of

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166. States receiving monies for AFDC and Emergency Assistance are to retain meaningful fiscal and programmatic control. *Quern v. Mandley*, 436 U.S. 725, 746 (1978).

167. See Pub. L. No. 100-77, § 611, 101 Stat. 482, 526 (1987) (amending 42 U.S.C.A. § 290 (1982)) (codified as amended at 42 U.S.C. §§ 290cc-21 to 290cc-36, 290dd to 290dd-3, 290ee to 290ee-3 (West Supp. 1988)).

168. 42 U.S.C.A. § 290cc-35 (West Supp. 1988) (amending 42 U.S.C.A. § 290 (1982)).

169. 42 U.S.C.A. § 290cc-21(b) (West Supp. 1988) (amending 42 U.S.C.A. § 290 (1982)).

170. 42 U.S.C.A. § 290cc-24 (West Supp. 1988) (amending 42 U.S.C.A. § 290 (1982)).

non-federal funds.<sup>171</sup> By thus limiting the autonomy and decision making capabilities of the state agencies receiving federal funding under Title VI, Congress has eliminated the triggering factor of *Burford* abstention.<sup>172</sup> A state receiving money under Title VI will not be fulfilling a state administrative procedure, but, instead, will be carrying out a federal one.

Thus, *Burford* abstention is inappropriate when the states and cities involved are receiving funds under Title III and Title VI of the Act. Administration of the agencies serving the homeless is no longer solely delegated to the state. Instead, Congress expressly intended that administration of the funds under Title III and Title VI bear the stamp of direct federal supervision. Accordingly, the Act can be used to avoid *Burford* abstention and further the rights of the homeless.

### C. Avoiding Colorado River Abstention

Situations involving the use of the *Colorado River* abstention doctrine usually arise in one of three ways: when a plaintiff concurrently files both a state and federal action; when a state court defendant asserts a defense which is within the exclusive jurisdiction of the federal courts; or when a state court defendant files a "reactive" federal suit.<sup>173</sup> Using the Act in situations involving *Colorado River* abstention will most likely be unsuccessful, because the doctrine is premised on judicial efficiency, rather than federalism concerns.<sup>174</sup> Accordingly, any federal action on behalf of the homeless which is also pending in state court faces the prospect of being dismissed or stayed because of *Colorado River* abstention.<sup>175</sup>

Nonetheless, by using the Act as a vehicle to make changes in existing law, Congress provided a new area of federal questions. Now that the homeless specifically are referenced, and federal legislation designates new services to provide for their needs, there is an increasing likelihood that federal courts will be faced with actions involving the homeless. While this alone is not a basis for re-

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171. 42 U.S.C.A. § 290cc-25 (West Supp. 1988) (amending 42 U.S.C.A. § 290 (1982)).

172. For a discussion of *Burford* abstention, see *supra* notes 99-108 and accompanying text.

173. Sonenshein, *supra* note 53, at 664.

174. For a discussion of judicial efficiency as a rationale for *Colorado River* abstention, see *supra* note 129 and accompanying text.

175. See, e.g., *Canaday v. Koch*, 608 F. Supp. 1460 (S.D.N.Y.) (action stayed because of contemporaneous state court proceeding), *aff'd sub nom. Cannady v. Valentin*, 768 F.2d 501 (2d Cir. 1985). For a discussion of the holding in *Canaday*, see *supra* notes 109-20, 137-40 and accompanying text.

fusing to invoke *Colorado River* abstention, it does present a policy question for judges considering abdicating their given jurisdiction. Given the narrowness with which the doctrine is supposed to be applied, those judges must ask themselves whether abstaining from an action presenting a clear federal question effectuates the purpose of the Stewart B. McKinney Homeless Assistance Act. If judges truly explore the purpose of the Act they will find that the invocation of *Colorado River* abstention, as well as the *Pullman* and *Burford* doctrines in cases involving the homeless thwarts Congressional intent and deprives us all of a possible resolution of a national problem.

#### IV. Conclusion

Homelessness is a national problem effecting an ever-increasing variety of people. The issues involved in homelessness contain questions that touch upon many areas of social and constitutional policy, thus demanding resolution from the federal courts. Nevertheless, resolution has been hindered because federal judges, working under the existing abstention doctrines, have abdicated their given jurisdiction.

The recent enactment of the Stewart B. McKinney Homeless Assistance Act, by changing existing law and creating new, federally administrated programs, presents a means for homeless plaintiffs and federal judges to circumvent the abstention doctrines and adjudicate issues of homelessness.

