Homeless People: Establishing Rights to Shelter

Patricia Siebert*

I'm stranded on a road that
goes from sea to sea.
A hundred thousand others are
stranded same as me.
A hundred thousand years, a
hundred thousand more,
And I ain't got no home in
this world any more.
Woody Guthrie[1]

I. The Increasing Homeless Population

Homelessness,[2] no stranger to the dust-bowl days of Woodie Guthrie, is once again on the rise. Just how many people are presently homeless is almost impossible to ascertain, given the difficul-

* Patricia Siebert is a staff attorney at the Minnesota Mental Health Law Project, a statewide advocacy project for persons with mental health problems. She has worked to increase the number of housing alternatives available to mentally ill people and has been involved in cases regarding group home zoning issues and access of mentally ill people to public housing benefits. In her work, she has also emphasized governmental failure to provide needed and required health and social services and to protect low-cost housing stock as being responsible for the number of homeless mentally ill people on the streets, rather than deinstitutionalization per se.

Patricia is a native of North Dakota and graduated in 1980 from the University of Wisconsin Law School. She has also been a staff attorney at Western Wisconsin Legal Services, and has provided services to shelters for battered women.

1. Woody Guthrie, *I Ain't Got No Home In This World Anymore*, on Alan Lomax, Woody Guthrie Library of Congress Recording [sound recording]. Electra Records, EK 271272. 3 discs, on side 5.

2. LauraSue Epstein, the author of *Home at Seven*, 4 Law & Inequality 409 (1986) believes that the hallmark of homelessness is not having keys to a place of one's own. *See* Drew Darling, *Keys Are a Dead Giveaway*, Univ. of Minn. Update, Apr. 1986, at 4 (profile of Epstein). This definition compels a realization that homelessness results in a painful loss of personal privacy and security, as well as the more obvious exposure to the elements. The court in Burton v. New Jersey Dep't of Insts. & Agencies, 147 N.J. Super. 124, 129, 370 A.2d 878, 881 (1977), pointed out that homelessness involves more than the lack of a floor, four walls, and a roof. Homelessness includes parallel components of lack of sufficient nourishing food and adequate means of self-care to properly sustain life. One could also think of homeless people as indigent persons who, by reason of recurring misfortunes of life, lack the means to maintain a permanent residence. *See* Hodge v. Ginsberg, 303 S.E. 2d 245 (W. Va. 1983).

ties in counting them; estimates range from the Department of Housing and Urban Development's (HUD) figure of 250,000[3] to a figure of approximately three million cited by the Community for Creative Non-Violence and the National Coalition for the Homeless.[4] Most shelter advocates and the Department of Health and Human Services believe an accurate estimate of the number of homeless Americans to be two million.[5]

Who are the homeless? Until recently, the public perception of a homeless person was that of a single male—a hobo riding the rails, a skid-row bum, or a transient laborer. This country has begun to see a new and growing population of homeless people, including single parent families, children, immigrants, migrant workers, battered women, people with mental health problems, elderly people, people who have lost jobs or who have been removed from public assistance, and other groups of poor people.[6]

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3. Department of Hous. & Urban Dev., A Report to the Secretary on the Homeless and Emergency Shelters (1984). This figure was challenged in a lawsuit by the Community for Creative Non-Violence (CCNV). In Community for Creative Non-Violence v. Pierce, the plaintiffs argued that the government's report grossly underestimated the number of homeless people in the United States, and that as a result, legislators, administrators, and private benefactors would be misled as to the magnitude of the problem. No. 84-1898, slip op. at 1 (D.D.C. Sept. 4, 1984). CCNV contended that the report would ultimately result in drastically decreased governmental and private funding for homeless people. The District Court for the District of Columbia dismissed the action, concluding, inter alia, that the report did not constitute an "agency action" reviewable under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706 (1982). No. 84-1898, slip op. at 5-6. CCNV then moved to disqualify the United States Attorney's Office from representing HUD, reasoning that disqualification would enable the United States Attorney's Office to give fair and impartial consideration to CCNV's request for an investigation into the HUD report. The District of Columbia Circuit denied CCNV's motion, holding that CCNV had no standing to challenge the United States Attorney's process of prosecutorial and investigative decision making. Community for Creative Non-Violence v. Pierce, No. 84-5682, slip op. at 6 (D.C. Cir. Apr. 6, 1986). In its opinion, the court of appeals made clear that "[n]othing in this opinion addresses the validity of the holding of the district court, which concerns a wholly different standing issue. That decision will be reviewed as the appeal proceeds." *Id*. An appeal of the lower court's dismissal of the action is still pending.

4. Mary Ellen Hombs & Mitch Snyder, Homelessness in America: A Forced March to Nowhere, at xvi (1983).

5. *See*, *e.g.*, Frances E. Werner, *Homelessness: A Litigation Roundup*, 18 Clearinghouse Rev. 1255, 1265 (1985); *see also* Robert Pear, *The Need of the Nation's Homeless Is Becoming Their Right*, N.Y. Times, July 20, 1986, at E5, col. 1 (number of homeless people—those living in public or private shelters, parks, transportation terminals, abandoned buildings, and cars—in major United States cities as estimated by the National Coalition for the Homeless: New York—60,000, Los Angeles—50,000, Chicago—25,000, and Detroit—27,000).

6. General Accounting Office, Homelessness: A Complex Problem and the Federal Response 4-6 (1985) [hereinafter GAO Report]. Even children are not protected from the crisis of homelessness. "More than 20% of all homeless people in shelters, excluding runaway shelters, are children. . . . In New York City alone, over 10,000 homeless children live on the streets." David Lambert, *National Trends*

At a time when the numbers of our nation's poor are increasing,[7] the amount of affordable housing has been steadily decreasing.[8] For example, the amount of single room occupancy (SRO) housing such as cheap hotels and rooming houses, often the housing of last resort for many poor individuals, has been decimated.[9] A million units were lost during the 1970's, representing almost half the available supply, and the reduction is likely to be just as drastic in the 1980's.[10] New York City alone lost 32,000 SRO units from 1978 to 1982.[11] Nationally, one to three million low-income units are scheduled to be demolished.[12] Reasons for the decline of low-income housing include: greater profits available for other types of construction, declining federal subsidies for both developers and tenants, downtown redevelopment, condominium conversion, neighborhood opposition to public housing and other housing alternatives such as group homes for mentally disabled people, and higher taxes and income tax provisions that encourage property abandonment.[13]

The cost of available housing has become an excessive burden on the poor. An expanding number of low-income households face the burden of rent payments that consume almost three-fourths of the household's total income. In 1975, two million low-income households (twenty-five percent of the total number of low-income households) spent over seventy percent of their incomes for rent.[14] This number rose to 3.7 million in 1983 (thirty percent of all low-income households).[15] While the proportion of income devoted to rent is rising among poor people, the level of federal support for housing costs has declined since 1980 under a Reagan administration policy of shifting housing aid away from subsidies for con-

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Indicate Growing Hostility Toward Young People, Youth Law News, Jan.-Feb. 1986, at 1-2.

7. *See, e.g*, *Poverty: the War Isn't Over*, Newsweek, Sept. 9, 1985, at 24; *America Becomes Less Equal*, New Republic, Feb. 18, 1985, at 7.

8. GAO Report, *supra* note 6, at 25.

9. Frances E. Werner & David B. Bryson, *A Guide to the Preservation and Maintenance of Single Room Occupancy (SRO) Housing*, 15 Clearinghouse Rev. 999, 1003-04 (1981-82).

10. GAO Report, *supra* note 6, at 25.

11. New York State Dep't of Social Servs., 1 Homelessness in N.Y. State: a Report to the Governor and the Legislature 40 (1984).

12. Commissioner Andrews' Task Force on Homeless Mentally Ill Persons, Issues and Recommendations: A Plan for Assisting the Homeless Mentally Ill 1 (1985) (citing National Coalition for the Homeless (1985)).

13. GAO Report, *supra* note 6, at 25.

14. *Id*. The statistics were computed by the GAO from data obtained from the American Housing Survey's national data tapes, 1975-1981 and 1983. Low income households were defined as those earning 0-5% of the median income.

15. *Id*.

struction and operation of public housing.[16] The Urban Institute estimates that about 300,000 more families were living in substandard housing at the end of 1985 than there would have been under a continuation of pre-1981 policies.[17]

The plight of homeless mentally ill persons has recently received much media attention. Some estimates indicate that one-third of the nation's homeless people may be mentally ill.[18] Deinstitutionalization is often cited as the reason for this disproportionate representation among those on the streets. The American Psychiatric Association, however, has conducted a task force study of homeless mentally ill persons which concluded that "homelessness among the mentally ill is not the result of de-institutionalization per se but [rather] the way de-institutionalization has been implemented . . . and the related problem of the lack of clear understanding of the needs of the chronically mentally ill in the community."[19]

The Association made several recommendations as a result of its task force findings. Foremost was a recommendation that "a comprehensive and integrated system of care for this vulnerable population of the mentally ill, with designated responsibility, with accountability, and with adequate fiscal resources, must be established."[20] The task force further stated that "any attempt to address the problem of the homeless mentally ill must begin with provisions for meeting their basic needs: food, shelter, and clothing."[21] Finally, the task force recommended the establishment of a range of community housing settings, adequate and accessible psychiatric rehabilitation services, general medical care, crisis services, social services, and a system for ensuring continuing provision of comprehensive services.[22]

The conclusions of the American Psychiatric Association regarding mentally ill homeless persons can be equally applied to other groups of homeless people. Without the basic necessities of adequate food, clothing, and shelter, people are not able to successfully address factors which may contribute to their homelessness, such as illiteracy and lack of education, unemployment, limited income, or family dysfunction.

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16. *Id*. *See also* Frances Fox Piven & Richard Cloward, The New Class War: Reagan's Attack on the Welfare State and Its Consequences 18 (1982).

17. GAO Report, *supra* note 6, at 26.

18. *Abandoned*, Newsweek, Jan. 26, 1986, at 14-20.

19. H. Richard Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, 35 Hosp. & Community Psychiatry 899 (1984).

20. *Id*. at 908.

21. *Id*.

22. *Id*. at 908-09.

II. The Right to Shelter: Some Legal Responses

Recognizing the role of shelter as a first line of defense against continuing poverty, public interest lawyers across the country have been active in bringing lawsuits affirming the right to adequate shelter.[23] They have used a variety of legal theories based on state and federal laws, often involving innovative and creative arguments, in order to advance cases that assert and protect a basic right to shelter. Claims have relied on state constitutions, state welfare laws and regulations, and to a lesser extent on federal statutory rights and federal regulations. This article, which does not attempt to be exhaustive, discusses some of the leading cases.

A. Federal Constitutional and Statutory Law

Efforts to ground a right to shelter in the United States Constitution, based on due process and equal protection claims under the fifth and fourteenth amendments, have not prevailed. In the early 1970's, the Supreme Court held that no federal constitutional guarantee of adequate housing exists. In *Lindsey v. Normet*,[24] tenants challenged Oregon's Forcible Entry and Wrongful Detainer (FED) Statute,[25] which granted landlords several significant procedural advantages over tenants. Among other provisions, tenants were precluded from raising the defense that the landlord failed to maintain the premises in accordance with local housing codes.[26] The plaintiffs argued that because housing was involved, the right

23. This essay presents an overview of the legal claims uitilized by advocates for homeless people. For a comprehensive look at right-to-shelter litigation, see Frances Werner, *supra* note 5; *see also* Sara Johnson, Case Docket and Legislative Update Re: Homeless (1984) (available from the National Clearinghouse for Legal Services, Inc., 407 South Dearborn, Suite 400, Chicago, IL 60605).

24. 341 F. Supp. 638 (D. Or. 1970), *aff'd in part rev'd in part*, 405 U.S. 56 (1972). The tenants in *Lindsey* refused to pay their rent after the City Bureau of Buildings declared their single-family dwelling unfit for habitation because substandard conditions existed in the building (such as broken windows, missing rear steps, and improper sanitation) and after the landlord failed to make certain repairs at the tenants' request. 405 U.S. at 58-59. Before the landlord instituted an action for summary eviction, the tenants brought a class action in federal district court seeking both injunctive and declaratory relief arguing that the eviction statute was unconstitutional on its face. The district court granted the defendant's motion to dismiss the complaint, finding that the statute did not violate due process or the equal protection clause. 341 F. Supp. at 640-42.

25. Or. Rev. Stat. §§ 105.105-.165 (1985). An FED action is an action for summary eviction, also referred to as an action for possession of the premises.

The Oregon statute provided that a landlord may bring an action for possession if the tenant has failed to pay rent within ten days of its due date or the tenant is holding contrary to some other covenant in the lease, the landlord gives proper notice for terminating the rental agreement, and the tenant does not leave the premises after the expiration date specified in the notice. *Lindsey*, 405 U.S. at 63.

26. The statute restricted the issues in FED actions to whether the tenant had

of the tenant was "fundamental," and the Constitution would require a compelling governmental interest to support the summary eviction proceedings of the Oregon statute. In rejecting the plaintiffs' claim, the Supreme Court stated:

> We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.[27]

Advocates on behalf of homeless people have fared better when bringing claims based on federal statutory laws involving various categorical assistance programs supported by federal funds, including Aid to Families with Dependent Children (AFDC).[28] Although these federal programs leave a high degree of discretion to the states in drafting their own plans, once a state commits itself to a particular plan and receives federal funds for implementation, federal law requires the state to comply with the terms of that plan.

In *Koster v. Webb*,[29] the plaintiffs were AFDC families living in New York who had been evicted from their apartments. The New York AFDC plan, as it appears in the state's administrative code, sets forth certain emergency services which "shall be provided" by the state, including "securing family shelter."[30] The plaintiffs claimed the New York State Department of Social Services was providing either no emergency housing whatsoever or grossly substandard emergency housing. The district court denied the defendants' motion to dismiss for failure to state a claim and motion for summary judgment, holding that the plaintiffs' complaint stated both a federal claim under the federal Civil Rights Act[31] and a valid pendent state law claim.[32] Regarding the federal claim, the court concluded:

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paid rent or otherwise complied with the provisions of the rental covenant. *Lindsey*, 405 U.S. at 65.

27. *Id.* at 74.

28. 42 U.S.C. §§ 601-610 (1982).

29. 598 F. Supp. 1134 (E.D.N.Y. 1983), *class certification granted sub nom.* Koster v. Perales, 108 F.R.D. 46 (E.D.N.Y. 1985).

30. N.Y. Comp. Codes R. & Regs. tit. 18, § 372.4(d) (1982).

31. 42 U.S.C. § 1983 (1982).

32. The state law claims were based on various provisions of New York Social Services Law. *See* N.Y. Soc. Serv. Law §§ 62, 131(1), 371(3), 397(1) (McKinney 1983). In *Koster*, the court commented: "[P]laintiffs have stated a claim by alleging the denial of rights created explicitly by the Social Services Law to aid, care and support destitute children." 598 F. Supp. at 1138 n.2. Whether emergency shelter is

> It is clear that New York State voluntarily has committed itself to provide emergency family shelter to needy families with dependent children as part of its participation in the AFDC program. The State, having assumed the responsibility for providing emergency shelter pursuant to the Social Security Act, is bound to fulfill its promise.[33]

A similar lawsuit was soon brought in New York state court. In *McCain v. Koch*,[34] the defendant city conceded that under the Aid to Families with Dependent Children Act it was obligated to assist families in locating emergency shelter for thirty days in each twelve-month period. The defendants argued that beyond that time period, however, their obligation only extended to providing homeless families with cash grants.[35] The court granted the plaintiffs' request for a preliminary injunction and ordered the city to take certain steps while a final decision of the plaintiffs' claims pended. The order required that families with children in need of emergency housing or assistance be provided notice of the right to emergency housing and notice of the right to a hearing to contest the denial of emergency housing.[36] Families granted emergency housing were to be placed in facilities meeting New York City fire, health, safety, and residential regulation requirements. Shelter locations were to be chosen in light of the children's education needs. Families were to be provided with emergency housing and assistance until they received the opportunity to contest denial of emergency housing and assistance.[37]

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the guaranteed remedy or appropriate remedy would be determined at the trial on the merits.

33. 598 F. Supp. at 1137. The court noted that neither the federal statutes nor the accompanying regulations require the states to supply emergency shelter for homeless families with children eligible for assistance, but states are required to indicate whether shelter is one of the services to be provided. *See* 45 C.F.R. § 233.129(a)(4) (1985).

34. 127 Misc. 2d 23, 484 N.Y.S.2d 985 (1984), *modified*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

35. *Id*. at 24, 484 N.Y.S.2d at 987.

36. *Id*. at 23, 484 N.Y.S.2d at 987.

37. *Id*. at 23-24, 484 N.Y.S.2d at 987. In issuing its order, the court emphasized that the city of New York must provide shelter which meets reasonable minimum standards:

> These general principles are not immutable nor exhaustive, but indicative of the minimum standards which this society at this time finds acceptable within the meaning of the word shelter. It may well be that in other places and times shelter means or meant literally, a roof over one's head. In a civilized society a "shelter" which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all. Providing a homeless family with a hotel room—often a cubicle in a crumbling plaster palace, or in rooms infested with vermin, with filthy bedding, children sleeping on the floor for lack of cribs, an entire family sleeping in one bed, exposed electrical wires and rooms soiled by human waste are unacceptable shelter

On appeal, the lower court's preliminary injunction was modified.[38] The state appellate division upheld that portion of the preliminary injunction requiring the city to provide emergency shelter to eligible families for thirty days as required by the state plan,[39] concluding that the plaintiffs had a high probability of establishing at trial that two provisions of federal law had been violated. Since New York had elected to provide the service of "securing family shelter" in an emergency,[40] the plaintiffs therefore could have established that the state and city Departments of Social Services' failure to assure emergency shelter for all eligible families violated the Social Security Act requirement of mandatory enforcement of the state plan.[41] In so ruling, the court utilized the precedent of *Koster v. Webb*.[42] The court also found that the defendant's "ad hoc, uneven practices and policy" further violated regulations enacted under the Social Security Act,[43] which prohibit states from excluding individuals "on an arbitrary or unreasonable basis."[44]

In order to determine the plaintiffs' right to emergency shelter beyond the thirty-day period, the court determined it was necessary to reach the plaintiffs' constitutional claims. The plaintiffs had claimed that the city's failure to assure emergency shelter to homeless families beyond the thirty-day period violated the equal protection clause of the fourteenth amendment.[45] The plaintiffs relied on the consent decree in *Callahan v. Carey*,[46] in which the city agreed to make emergency shelter available to homeless single men who met the eligibility criteria of the home relief program, or

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> for anyone, and especially families with young children. The equitable powers of this court may be invoked to compel compliance with minimal standards. If convicted criminals have such rights, the homeless who become interim wards of a governmental entity are entitled to no less.

Id. at 24-25, 484 N.Y.S.2d at 987.

38. McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

39. For the text of New York's state plan, see N.Y. Soc. Serv. Law § 350.j(3) (McKinney 1983); N.Y. Comp. Codes R. & Regs. tit. 18, § 372.4(d) (1982).

40. *See* N.Y. Soc. Serv. Law § 350.j(3) (McKinney 1983); N.Y. Admin. Code tit. 18, § 372.4(d) (1982).

41. 117 A.D.2d at 212, 502 N.Y.S.2d at 728.

42. 598 F. Supp. 1134, 1137 (E.D.N.Y. 1983).

43. 45 C.F.R. 233.10(a)(1) (1985).

44. 117 A.D.2d at 212, 502 N.Y.S.2d at 728 (quoting Blum v. Bacon, 457 U.S. 132 (1982)).

45. *Id*. at 214, 502 N.Y.S.2d at 729.

46. No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981) (order entering final consent decree). For a discussion of *Callahan*, see *infra* notes 61-64 and accompanying text. The *Callahan* decision was successfully used to establish the same right to emergency shelter for homeless women based on the constitutional guarantee of equal protection. *See infra* note 65 and accompanying text.

who suffered a physical or mental dysfunction. The court agreed that the plaintiffs had a right to shelter equal to that provided for homeless men under the *Callahan* decree.[47] In fact, the court believed the needs of families, particularly children, are greater than those of single adults. The court concluded that the "[d]efendants' less than equal treatment of plaintiffs is plainly irrational."[48]

The appellate division reversed the lower court on important protections based on state constitutional and statutory law, holding that the lower court erred in invoking its equitable powers to order the city's compliance with certain minimal standards of decency and habitability.[49] Reluctantly, the appellate division deferred to the legislature's power to set the standards for shelter facilities for welfare recipients.[50] The court concluded that in view of the broad discretion given to the legislature, the plaintiffs were not likely to prove that the state constitution[51] substantively guarantees "minimal physical standards of cleanliness, warmth, space, and rudimentary convenience in emergency shelter."[52]

The court also rejected the plaintiffs' claim that a New York city regulation[53] created an entitlement to continued residency in the emergency shelter of one's choice,[54] and invalidated transfer provisions ordered by the lower court.[55] The court ruled, however, that the city regulation required emergency housing placement based upon primary consideration of the needs of children, including educational needs and the minimal disruption of community ties.[56]

After the lower court's preliminary injunction in *McCain* was granted, a similarly situated group of homeless plaintiffs attempted to sue the city of New York in federal court on essentially the same grounds: failure to provide them with decent, safe, and sanitary emergency housing.[57] The defendants in *Canaday v. Koch*

47. 117 A.D.2d at 212, 502 N.Y.S.2d at 729.

48. *Id.* In addition to the plaintiff's federal constitutional claims, the appellate division believed the plaintiffs would probably also succeed on their claim that article 17 of the New York State Constitution requires the defendants to provide emergency shelter for homeless families. *See infra* notes 61-64 and accompanying text.

49. 117 A.D.2d at 216, 502 N.Y.S.2d at 731.

50. *Id.*

51. For further discussion of state constitutional arguments, see *infra* note 61 and accompanying text.

52. 117 A.D.2d at 217, 502 N.Y.S.2d at 731.

53. For the text of the regulation, see N.Y. Comp. Codes R. & Regs. tit. 18 § 352.3(g)(1) (1985).

54. 117 A.D.2d at 218, 502 N.Y.S.2d at 732.

55. *Id.*

56. *Id.*

57. Canaday [sic] v. Koch, 598 F. Supp. 1139 (E.D.N.Y. 1984), *action stayed*, 608 F. Supp. 1460 (S.D.N.Y. 1985), *aff'd sub nom.* Cannady v. Valentin, 768 F.2d 501 (2d

urged the federal court to abstain from exercising its jurisdiction due to the pending state court proceeding in *McCain v. Koch*. The District Court for the Southern District of New York stayed the action, invoking the doctrine of *Burford v. Sun Oil Co*.,[58] and simply concluded that the case "would better be decided in the state system."[59] The Court of Appeals for the Second Circuit affirmed:

> We are neither blind nor insensitive to the serious plight of the homeless in New York City and other cities throughout our country. That these plaintiffs seek housing for homeless *families* only underscores the critical social and economic problems at hand. But while these problems are serious, stubborn, and frustrating, we do not believe that federal courts are more adequately suited to address them than state courts.[60]

As the Second Circuit suggested, state courts have indeed expressed concern over the problem of homelessness and have attempted to fashion remedies based on both federal and state laws.

B. State Constitutional and Statutory Law

In several states, homeless plaintiffs have brought lawsuits based on state constitutional provisions and state statutes governing adult protection services and categorical or general assistance programs. For example, the New York Constitution provides in relevant part: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such a manner and by such means, as the legislature may from time to time determine."[61]

The New York Court of Appeals interpreted this section to mean that the state has an "affirmative duty to aid the needy."[62] In addition, New York Social Services Law provides for the assistance and care of the needy as required by the state constitution.[63] Although neither the state constitution nor the New York Social Services Law *explicitly* guarantees a right to shelter, the city and state of New York entered into a landmark consent decree in *Cal-*

Cir. 1985). The plaintiffs were "homeless, indigent mothers with children who . . . have been, are being, or will be denied lawful emergency housing by the defendants." 598 F. Supp. at 1140-41.

58. 319 U.S. 315 (1943). (The "Burford doctrine" holds that it is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the independence of state governments in carrying out their policies.)

59. 608 F. Supp. at 1470.

60. 768 F.2d at 503 (emphasis in original).

61. N.Y. Const. art. XVII, § 1.

62. Tucker v. Toia, 43 N.Y.2d 1, 8, 371 N.E.2d 449, 452, 400 N.Y.S.2d 728, 731 (1977).

63. N.Y. Soc. Serv. Law §§ 62(1), 131(1), 131(3) (McKinney 1983).

lahan v. Carey.[64] In that consent decree, the city and state defendants obligated themselves to provide emergency housing to homeless men. The decree set forth detailed standards to be maintained at public shelters.

In the subsequent case of *Eldredge v. Koch*,[65] the court held that under the equal protection clause homeless women must have access to equivalent facilities. A New York state court recently relied on *Callahan* to uphold a preliminary injunction requiring the city of New York and the state to provide emergency shelter beyond the limited thirty-day statutory period to homeless AFDC families.[66]

Similarly, the West Virginia Supreme Court in *Hodge v. Ginsberg*,[67] broadly interpreting the statutory term "incapacitated adult," held that the state's Social Services for Adults Act required the Department of Welfare to provide shelter to indigent persons lacking the means to maintain a permanent residence, even when such persons were not mentally or physically impaired. The West Virginia court's willingness to fashion a remedy is an instructive example of how a seemingly unrelated statute can be creatively utilized to further one's right to adequate housing.

C. *Challenging Arbitrary Requirements Posing Barriers to Assistance*

In some states, an applicant for welfare benefits or emergency housing must provide an address or a form of identification. For homeless people, such requirements are often difficult, if not impossible, to meet. Some of these requirements have been successfully challenged by homeless people seeking benefits. For example, in *Lake v. Illinois Department of Public Aid*,[68] state and city defendants entered into a consent decree whereby applications for General Assistance could no longer be denied solely because applicants did not have a permanent residence or because they were in rescue missions or other temporary housing facilities. Similarly, in *Ehlers v. Bates*,[69] homeless plaintiffs complained that they were arbitrarily being denied public assistance, food stamps, and medical assistance because they could not produce a perma-

64. No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981).

65. 118 Misc. 2d 163, 459 N.Y.S.2d 960 (1983), *rev'd on other grounds*, 98 A.D.2d 675, 469 N.Y.S.2d 744 (1983).

66. McCain v. Koch, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986). For a further discussion of this case, see *supra* notes 34-56 and accompanying text.

67. 303 S.E.2d 245 (W. Va. 1983).

68. No. 79 CH 3434 (Cook County Cir. Ct. July 10, 1979).

69. No. 10525/83 (N.Y. Sup. Ct. Feb. 16, 1984).

nent local address; they had been living in their cars. A consent decree was entered invalidating the address requirement.[70]

D. Right to Continued Availability of Shelter Services Once They Have Been Provided by the Government

The right to have adequate shelter remain continuously available once it is provided by the government has also been the subject of litigation. In *Williams v. Barry*,[71] plaintiffs challenged a decision on the part of the city to close several shelters for the homeless. Plaintiffs argued that the components of due process—notice and an opportunity to be heard—had not been met before the decision was made. The District Court for the District of Columbia, however, held that fifth amendment due process required only notice detailing the reasons for the proposed shelter closing and an opportunity to present written comments. The defendants were not required to provide an oral hearing. The rationale offered by the court was that this case did not involve individual, adjudicatory determinations but rather a broad-based legislative decision; therefore, only a minimum level of due process was necessary. The District of Columbia Circuit Court affirmed this holding.[72]

Similarly, an attempt by the Community for Creative Non-Violence to challenge yet another shelter closing by the government in the District of Columbia did not succeed. In *Robbins v. Reagan*,[73] the plaintiffs argued that the shelter closing violated the Administrative Procedure Act.[74] The district court held that the closing was not arbitrary, capricious, or an abuse of discretion, and was otherwise in accordance with the law. On appeal, the District of Columbia Circuit Court affirmed the decision.

As long as the shelter being provided is within minimal standards of decency, homeless people might not have a right to express shelter preferences. In *Caton v. Barry*,[75] another District of Columbia case, residents of a family shelter alleged that their transfer to a different, less desirable shelter placed them in unsafe, inferior living conditions. They claimed a property interest in being allowed to remain in the first shelter. The district court held

70. *Id.*

71. 490 F. Supp. 941 (D.D.C. 1980), *aff'd in part and vacated in part*, 708 F.2d 789 (D.C. Cir. 1983).

72. 708 F.2d at 792.

73. 616 F. Supp. 1259 (D.D.C. 1985), *aff'd in part*, 780 F.2d 37 (D.C. Cir. 1985).

74. 5 U.S.C. §§ 701-706 (1982).

75. 500 F. Supp. 45 (D.D.C. 1980).

that conditions at the second shelter were not so unsafe or inadequate as to constitute a constructive eviction or denial of benefits in violation of due process of law.[76]

In essence, where shelter has been provided by government largess rather than according to welfare statutes or regulations, courts have not accorded homeless people a vested interest significant enough to entitle them to due process hearings before those shelters are closed.

E. Right of Private Providers to Operate Shelters

In many locales, private charities who provide shelter to homeless people have encountered intense opposition. In most cases local zoning ordinances have been the tool used to keep homeless people out of residential communities.

An attempt to use a zoning ordinance to close a shelter was averted in *St. John's Evangelical Lutheran Church v. City of Hoboken*.[77] In that case, the church obtained an injunction against the city prohibiting it from using its zoning laws to close the shelter. The Superior Court of New Jersey held that in sheltering the homeless, the church and its parishioners were engaging in the free exercise of religion, and the city's use of its zoning authority to curtail such free exercise violated the first amendment. In reaching this result, the court noted that caring for the homeless and the poor was one of the basic mandates in the Judeo-Christian heritage. The court further found that imminent and irreparable harm, one of the conditions precedent to equitable relief, had been met:

> If the shelter is closed its occupants will be left without food or shelter. Government alone is not presently able to cope with this grave social problem. . . . St. John's represents the only bulwark these homeless people have. To tear that bulwark away would be a travesty of justice and compassion. Any inconvenience to the City of Hoboken and its other residents pales into insignificance when contrasted with what the occupants of the shelter would have to face if turned out into the city streets in winter weather.[78]

The court concluded with the proviso that the church was obliged to make a good faith effort to comply with applicable health and safety regulations. Other lawsuits on this issue in other jurisdictions have reached similar results.[79]

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76. *Id*. at 53.
77. 195 N.J. Super. 414, 479 A.2d 935 (1983).
78. *Id*. at 421, 479 A.2d at 939.
79. *See* Werner, *supra* note 5, at 1262-64.

F. Right of Homeless, Mentally Ill People to Live in Community-Based Residential Facilities

Life presents special difficulties for those who face the double burden of being homeless and mentally ill. As attorney and poverty law expert Frances Werner has noted:

> Lacking appropriate housing, the mentally ill have no choice but to live on the streets or in public shelters, both hostile environments that frequently result in a relapse to more severe mental illness. These people are then returned, often repeatedly, to costly inpatient facilities, only to be discharged to the streets to repeat the cycle.[80]

Community resistance to residences for mentally ill people has been a significant barrier for homeless mentally ill persons. The Fifth Circuit had held that zoning laws which act to exclude "group homes" for the mentally retarded from neighborhoods should be reviewed with "intermediate scrutiny" under the equal protection clause,[81] but was recently reversed by the United States Supreme Court. The Supreme Court ruled that mentally retarded individuals are not considered members of a quasi-suspect class for purposes of equal protection analysis, and that mental retardation may legitimately be taken into consideration in a wide range of governmental decisions, including zoning. In *Cleburne Living Center, Inc. v. City of Cleburne*, the Supreme Court held that a city ordinance requiring a special use permit prior to establishing a group home for mentally retarded persons in a residential neighborhood was rationally related to a legitimate government interest and valid on its face.[82] The Court invalidated the ordinance as applied in that instance, however, clarifying that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like."[83]

The *Cleburne* case, although in theory failing to extend a greater level of scrutiny to laws involving mentally disabled people, clearly limits the factors which a community may consider in reaching zoning decisions excluding particular groups of people from living in a neighborhood. In that sense, the decision may benefit homeless people rejected by a community because of the fear that they are different.

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80. *Id.* at 1264.

81. Cleburne Living Center, Inc. v. City of Cleburne, 726 F.2d 191 (5th Cir. 1984), *aff'd in part and vacated in part*, 105 S.Ct. 3249 (1985).

82. 105 S. Ct. 3249 (1985).

83. *Id.*

III. Conclusion

Whatever the cause of homelessness for a particular person, and regardless of the legal theory advocating a right to shelter, the cases discussed here contain an underlying philosophical assumption that all people are entitled to the basic needs of human existence—food, clothing, and shelter. Ike, one of the homeless people in *Home At Seven*, summed up this basic desire for a room of one's own to a church worker at the shelter: "Y'know, you ask me what I want more than anything in the world. I want to live in my own place, where I say who comes and goes. I want to sit down at my own table, to eat my own dinner, with no one, or someone I choose to eat with. Is that too much to ask, Larraine?"[84]

84. LauraSue Epstein, *Home at Seven*, *supra* note 2, at 465.