An American Vision: The Right to Shelter

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AN AMERICAN VISION: THE RIGHT TO SHELTER

S. Lynn Martinez*

Introduction

Like shoes on our feet and food on our table, most of us take our housing for granted. Personal views of "home" can form different images, ranging from warm and safe surroundings to violent and frightening prison-like environments. These visions, however, usually include a roof over our heads. For many, on the other hand, like the approximately 3 million Americans nationwide we call the homeless, housing is an unrealized dream.

Who are the homeless? They can no longer be classified as the drunken bum who has "chosen" a life on the streets, and therefore, justifiably ignored by society. They are people fighting to survive. They attempt to find shelter by sharing single family units with one or more families, or creating makeshift dwellings from a variety of available materials, such as cardboard boxes or plastic bags.

The homeless population is diverse, varying in age, gender, and color. According to the 1984 Housing and Urban Development (HUD) national study, approximately one-third of the homeless are women and their children. Currently, the average age is in the mid-thirties and only a small percentage of the homeless are over 60. In contrast to their representation in the general community, a large ratio of the homeless are people of color. Although the average income of a homeless person is $100 per month, more than one in five are completely destitute. The homeless receive food from soup kitchens or from garbage cans and they find shelter in public parks, campgrounds, city doorways, on a friend's couch or in temporary "homeless" shelters.

Every state in our nation has a statute "requiring counties to 'relieve and support' the indigent." Unquestionably, the

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2 See Mario M. Cuomo, Never Again: A Report to the National Governor's Association Task Force on the Homeless 39 (1983). The Census Bureau's annual Survey of Housing found that in 1982, the number of households with two or more related families sharing space jumped from 1.2 million units to 1.9 million units — an increase of 58%. Kim Hopper, The Ordeal of Shelter: Continuities and Discontinuities in the Public Response to Homelessness, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 317 (1989). "The scale of 'doubled-up' families in public housing alone in New York City outnumbers those who are officially homeless by 20 to 1."

3 Kim Hopper and Jill Hamberg, The Making of America's Homeless: From Skid Row to New Poor, 1945-1984 in CRITICAL PERSPECTIVES ON HOUSING 30 (1986). This is probably underestimated because the study "explicitly excluded families 'vouchedered' into hotels and motels on an emergency basis."

4 Rossi, supra note 1, at 283.

5 Coates, supra note 1, at 305.
basic needs of human survival consist of food, clothing and shelter. These needs, however, are not always met by our local systems. The very poor, finding clothing and food to be the least expensive of their basic needs, "choose" to go without permanent shelter in order to survive. Therefore, the temporary shelter has become the home of today's very poor.

Notwithstanding the issue of whether a right to housing exists, a constitutional right to shelter — to temporary emergency shelter — needs to be recognized in order to begin to repair the dilemma of the homeless. Naturally, the right to temporary shelter is a band-aid on an open sore. However, once established, this reform may lead to another right which should have existed all along: the right to clean and safe, affordable and habitable permanent housing.

This article focuses on the ingredients that are establishing the right to shelter. Part I outlines the history of homelessness, leading up to the reasons that homelessness exists as an epidemic as we enter the last decade of the twentieth century (Part II.) Part III summarizes the nationwide litigation efforts in which advocates for the homeless are slowly establishing that a fundamental right to shelter exists. In Part IV, this article profiles the frustrating, but generally successful, litigation process in California that is slowly defining statutory entitlements for the poor and is building the framework in which to house the right to shelter.

History.

The English legislature attempted to control vagrancy by imposing penalties as early as 1388. The law required people with transitory lifestyles to be imprisoned unless they carried papers which authorized them to travel. Furthermore, people were only allowed to give money or shelter to licensed beggars, identified by statute as the aged, the poor and the disabled.

Later, the legislature licensed no one to beg and in reaction to the steady increase in homelessness, Edward VI ordained an act in 1547 which provided for "all persons loitering, wandering and not seeking work" to be branded with a 'V' on his breast and made a slave of his captor (or returned to his home town and made a slave of his community) for the following two years. If he refused enslavement or escaped, he was branded with an 'S' on his cheek and following further refusal, he was sentenced to death.

The United States did not escape England's vagrancy problems. The beginning of the 17th century marked the arrival of the "first boatload of England's homeless, dependent children." Two centuries later, New York City opened its first soup kitchen and its earliest homeless shelter. Throughout our history, homelessness has continued to be a volatile problem. The numbers of people without homes increased with the flow of European immigration, the aftermath of the Civil War, the escalation of unemployment (up to 40%) following Black September in 1873 and during the Depression when emergency shelters and squatter camps were filled with several hundred thousand people without homes.

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7 SAMUEL E. WALLACE, SKID ROW AS A WAY OF LIFE 5 (1965).
8 Id. at 5-6.
9 Id. at 4.
10 Id. at 11.
11 Id. at 14-15.
12 See Coates, supra note 1, at 281. See also JOHN STEINBECK, THE HARVEST OF WRATH (1936).
Homelessness, however, declined severely in the postwar period as housing conditions, on the average, improved. The homeless that did exist were “almost exclusively . . . older white men . . . [many] of whom suffered from chronic ailments, especially alcoholism.” These people were relegated to Skid Row where they were housed in missions and flophouses, or single room hotels.

Today, the homeless who inhabit our streets differ from their earlier counterparts on Skid Row in that residents of Skid Row had access to some shelter, albeit inadequate. Additionally, there were “virtually no women or families on Skid Row.” Although it is often claimed that substance abuse leads to homelessness, alcoholism and drug addiction is not a major cause for the increase in today’s homeless. Rather, it is suggested that much of the alcohol and drug abuse encountered by the homeless is a product of their situation. It provides the means for escaping their environment and elevating their lowered self esteem.

The Creation of Today's Homeless.

There are many reasons why the number of people without homes has escalated in our nation today. They include a shortage of affordable housing, deinstitutionalization, rising unemployment, inadequate government benefits and the rise in divorce, causing the breakdown in families. Because of these differences, it is difficult to find solutions for one aspect of the problem without ignoring another facet of the dilemma.

Shortage of Affordable Housing

Displacement of the poor from their homes results from demolition, gentrification, fire, eviction, rent increases, and changing urban land use laws. For the low-rent and subsidized housing units that still remain, long waiting lists exist. The large numbers of the single-room occupancy (SRO) hotels which provided shelter for the residents of Skid Row have been demolished or refurbished into senior citizen units, condominiums or other uses.

Urban renewal is also depleting housing in downtown areas of American cities. Middle income families, pushed out of the traditional first time homeowner market, are either “out-bidding” lower income families for rentals or buying and renovating houses located in deteriorated urban areas and thus, displacing the poorer residents. Moreover, new houses are not being built fast enough to replenish the supply of needed housing. In 1979, there were 200,000 publicly subsidized housing units built or renovated. Budget cuts reduced this figure to 55,000 in 1983 and one year later, to 30,000. Between fiscal years 1981 and 1985, low income housing assistance funds were cut from $31 billion to $10 billion.

The 1980’s also saw a drastic rent increase while tenant’s income increased at a slower rate. According to Hopper, by 1980, “seven million households, mostly low income renters, were paying more than 50 percent of their incomes for housing.  

13 See Hopper & Hamberg, supra note 3, at 16.
14 See Rossi, supra note 1, at 282.
15 See WALLACE, supra note 7, at 34.
16 See Rossi, supra note 4, at 283.
17 See Hopper & Hamberg, supra note 3, at 33.
18 See Rossi, supra note 1.
19 See generally Hopper and Hamberg, supra note 3.
For the very poor, the 2.7 million renter households with incomes below $3,000, the situation became catastrophic: half were paying over 72 percent of their incomes for rent, leaving $71 a month for all other needs.”

Exclusionary zoning is also a major hurdle confronting the establishment of affordable housing and temporary shelters. Since zoning is a police power function and usually considered constitutional, zoning ordinances are usually not overturned by the courts unless they are considered adverse to the general welfare of its citizens. Consequently, zoning usually serves to preserve the wealthier landowner’s rights while ignoring the earnest need for low-income housing and emergency shelter for the homeless.

**Deinstitutionalization**

Although far more noticeable because of their appearance, the severe and permanently mentally disabled make up only between 25% and 50% of the homeless population. Their presence on the street is due largely to the deinstitutionalization movement of the 1960’s.

Originally founded on profoundly well-meaning intentions, the objective of the movement was to integrate the mentally ill into the community in order to afford them a more complete and human life. The reduction of widespread use of medication coupled with the abatement of the negative effects of long-term institutionalization proved encouraging. Furthermore, the movement resulted in tremendous monetary savings when the population of mental hospitals was reduced from 559,000 in 1956 to only 133,550 in 1980.

Despite the failure for our communities to absorb and care for the mentally ill, we have not learned from our mistakes. According to the New York Times, “Discharge to the municipal shelter system will henceforth be considered an ‘appropriate’ aftercare placement for psychiatric patients in municipal hospitals.”

**Unemployment**

In addition to incomes failing to adjust to the rising inflation of the 1970’s, the changing labor force significantly influenced the increase in unemployment. Between 1960 and 1980, the number of the labor force employed in manufacturing fell 20%, and each year, two million jobs in steel, textiles and other industries continue to disappear. Hopper and Hamberg describe the occurrence of a “domino effect” in which the surplus of skilled, experienced workers begin taking jobs in low wage services, such as “pushing brooms in McDonalds.” This results in the displacement of the unskilled worker who would normally be able to occupy these job positions.

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22 See Hopper & Hamberg, supra note 3, at 21.
28 See Hopper & Hamberg, supra note 3, at 18.
29 See Kozol, supra note 1, at 13.
30 See Hopper & Hamberg, supra note 3, at 18.
The displacement of industrial workers is not the only factor causing the increase in homelessness. As jobs became scarce, the unemployment rates affecting people of color increased, accounting for their growing numbers in the homeless population. Minorities, especially young minority men, face unemployment rates estimated at three times higher than their white counterparts. Since 1975, these unemployment figures have at times reached highs of 40%.

**Inadequate Benefits**

In 1980, 11 million households lived under the poverty level. Forty two percent of these households did not receive any government benefits, including living or medical assistance, food stamps, school lunch programs or public housing.

Even with government benefits, it is difficult to survive and virtually impossible to find affordable housing. Families with children are eligible for Aid to Families with Dependent Children (AFDC). Many states, however, do not make AFDC payments to families where both parents are still in the home. Furthermore, AFDC benefits declined 30% in value by the mid-80's while the number of families receiving AFDC continued to grow. Benefits for the elderly, on the other hand, saw a 50% increase in value. This resulted in a severe reduction of people over 65 falling below the poverty line.

Other benefits available include Unemployment Benefits, Supplemental Security Income (SSI) and state-provided General Assistance (GA). Unemployment benefits are limited in time and are based on previous employment. In most cases, the poor must seek alternative help other than unemployment benefits. SSI is available, if the beneficiary is aged, blind or disabled.

GA provides benefits for people without families. Because it is state-provided, a number of states, especially in the sunbelt, opt not to make it available. Other states limit the availability of GA benefits to only one or two months a year. Most states use GA as the last resort, preferring to use federal subsidized programs if the recipient can qualify. Although they vary in amounts, GA payments have also not kept up with inflation and are insufficient to take care of all the human basic needs.

Finally, as in housing assistance, administration cuts have severely affected benefits. Between 1981 and 1985, AFDC was cut by $4.8 billion, child nutrition by $5.2 billion, and food stamps by $6.8 billion. Low-income energy assistance was also cut by $700 million.

**Divorce**

Half of the marriages in the United States end in divorce; the divorce rate doubled in the 1970's. Therefore, not only is there an immediate lack of housing

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31 See Rossi, supra note 1, at 296.
32 See Hopper & Hamberg, supra note 3, at 20.
33 Hopper & Hamberg, supra note 3, at 20. See also Rossi, supra note 3, at 293 n.25. Some states have enacted AFDC-UP (Unemployed Parent) which is available to families with both parents in the home.
34 See Hopper & Hamberg, supra note 1, at 292; and Rossi, supra note 3, at 20.
35 See Rossi, supra note 1, at 292.
36 See Hopper & Hamberg, supra note 3, at 27.
37 See Rossi, supra note 1, at 293. In 1988, for example, General Assistance payments ranged from $212 a month in Los Angeles to $154 a month in Chicago. The state of Texas did not extend any assistance.
38 See Kozol, supra note 1, at 163.
39 See Hopper & Hamberg, supra note 3, at 19.
but there are twice as many people competing for the housing that is available. Between 1970 and 1984, female-headed households increased by 84% and the number of children living with divorced mothers doubled in roughly the same time period.\(^40\) This has resulted in the "feminization of poverty," and by 1984, two out of every three poor adults were women. At the same time, one out of every five children lived below poverty level.\(^41\) Consequently, the fastest growing subgroup of the homeless population are women with children, which is becoming more evident by the presence of families in shelters and on the streets.\(^42\)

**Nationwide: The Right to Shelter.**

A fundamental right to shelter does not exist under our federal constitution, nor is there a common law right to shelter. Homeless advocates throughout the nation, however, are using the litigation process to slowly convince our judicial system that a right to temporary and permanent shelter does exist. A large proportion of these litigation efforts are directed primarily toward public assistance and the welfare of children. Other jurisdictions, such as New York, the District of Columbia and California, also concentrate on defining vague statutory entitlements.

**Statutorily Defining the Homeless**

The imbroglio of the exploding homeless population has not gone unrecognized by Congress. In early 1987, the legislative branch introduced The Homeless Assistance Act of 1987 (also known as the "Stewart B. McKinney Homeless Assistance Act") as an emergency bill.\(^43\) While implicitly stating that shelter is considered a basic human need, the McKinney Bill does not, however, recognize a fundamental right to permanent housing or whether the federal government has an obligation to fulfill such a right. The McKinney Bill acknowledges only the immediate needs of temporary shelter for the homeless but does not address the demand "to provide sufficient permanent affordable housing to prevent homelessness in the first place." (emphasis added)\(^44\)

In order to begin assessing a right to shelter, the nation should adopt a uniform definition of "homelessness." Many of the versions embraced by the states do not include families who are "doubled-up" or do not address homelessness as a long-term condition. The Homeless Assistance Act defines the homeless person as an individual who:

lacks a fixed, regular, and adequate nighttime residence; and . . .

1) [whose] primary nighttime residence . . . [is] a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill), or

2) an institution that provides a temporary residence for individuals intended to be institutionalized, or


\(^{41}\) *id.* at 92.


\(^{44}\) *See New Federal Assistance for the Homeless in HOUSING LAW BULLETIN* 82 (September/October 1987).
3) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.\(^{45}\)

The definition embraced by Congress differs from the versions upheld by the states that employ narrower definitions, such as the one adopted by the Governor's Advisory Committee on the Homeless in Boston, Massachusetts:

[The homeless are] persons or families who, on one particular day or night, have neither friends, family nor sufficient funds which will provide for certain elementary resources they need to survive. (emphasis added)\(^{46}\)

or, in California, the Homeless Relief Pilot Project defined a homeless person as:

an individual who lacks the financial resources, mental capacity, or community ties needed to provide for his or her own adequate shelter. (emphasis added)\(^{47}\)

Juxtaposed to the definition of a homeless person as adopted by Congress, the states' definitions are extremely restrictive. They do not take into account, for example, the abundance of families doubling up in single family units.\(^{48}\) Although concededly sleeping with roofs over their heads, these families lack a place to call their "own home," which is emotionally disturbing and depletes the self-esteem of the family. Since doubled-family situations cannot last indefinitely, these families are on the edge of literal homelessness.

Moreover, some statutory definitions do not acknowledge that shelter is a long-term necessity. In Massachusetts, the issue of homelessness is addressed by the homeless person on a daily basis. Shelter must be sought every day in order to be homeless in the state. If they have a place to stay for a week, they are not considered, by definition of the statute, "homeless." The homeless, therefore, must spend each day finding shelter for the night. Since most of their time is spent on this element of survival, they do not have a chance to restructure their lives and pull themselves up.

Because so many Americans are likely to remain homeless under existing statutory definitions, some researchers have recommended the adoption of model definitions, such as "anyone 'without an address which assures them of at least the following thirty days' sleeping quarters which meet minimal health and safety standards.'\(^{49}\)

This suggested definition has not, as yet, been followed.

New York

In 1979, the first case concerning a right to shelter was brought in the New York Supreme Court. In Callahan v. Carey,\(^{50}\) the plaintiffs, an estimated 10,000 homeless men in New York, filed suit alleging that there was a shortage of shelters and that the existing shelters were unhealthy and dangerous. The complaint also

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\(^{46}\) Cuomo, supra note 2, at 15.


\(^{48}\) See generally supra note 2.


alleged that the failure to provide sufficient and adequate shelter violated Article XVII, section 1 of the New York Constitution which states, "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." (emphasis added)\(^5\)

After a preliminary injunction was issued requiring state and city officials to provide shelter,\(^5\) a consent decree was settled which obligated the officials "to provide shelter and board to each homeless man who applies" if the applicant qualifies for standard relief, or is in need of temporary shelter because of a mental or physical disability or social dysfunction.\(^5\)

Subsequently, the rights of the homeless frequently have been litigated in the New York courts. In 1982, the right to receive emergency shelter was expanded to also include homeless women,\(^4\) and homeless families.\(^4\) In Koster v. Webb,\(^5\) the court found that federal AFDC benefits were available to families if they met the eligibility standards and if the parent was aware of the benefit availability. However, there is no federal duty under the AFDC program to provide housing. Furthermore, it was not mandatory that a state participate in the federal AFDC program. Therefore, if a state chose to take part in the program, it may also choose whether to incorporate a provision for emergency housing into its own specific plans.

The Koster court held that the state of New York participated in the AFDC plan and chose to voluntarily incorporate such a provision for emergency housing. The court found that in doing so, the state committed itself to provide emergency family shelter and was bound to perform under its promise.

Four years later, the Court of Appeals of New York held in McCain v. Koch,\(^5\) that the Supreme Court had the power to issue a temporary injunction requiring certain New York City departments to "provide housing which satisfied minimum standards of sanitation, safety and decency."\(^5\) These requirements, however, were only mandated when the City had already undertaken to provide emergency housing for homeless families. The court refused to "resolve questions pertaining to the underlying obligation to furnish ‘emergency shelter to eligible homeless families with children.’"\(^5\)

**District of Columbia**

Federal courts also resist addressing the issue of whether a fundamental right to shelter exists. In Williams v. Barry,\(^6\) the District of Columbia decided to close three of their shelters. The city gave the residents four days notice. The District

\(^{51}\) Coates, *supra* note 1, at 310.

\(^{52}\) Coates, *supra* note 1, at 310.


\(^{57}\) 517 N.Y.S.2d 918, 923 (1987). See also Barnes v. Koch, 136 Misc.2d 96, 518 N.Y.S.2d 539 (Sup. Ct. 1987) cited in Coates, *supra* note 1, at 310 n.54 ("[R]ight to emergency shelter includes provision of environment free of potentially significant health dangers such as lead-based paint, asbestos insulation, and lack of sprinkler system and of lavatory facilities . . .").


\(^{59}\) Id. at 921, 922.

\(^{60}\) 708 F.2d 789 (D.C. Cir. 1983).
Court for the District of Columbia granted preliminary injunctive relief to plaintiffs who sought to enjoin the city from terminating shelters which housed homeless men without giving them procedural due process. The court found that there was a likelihood that, in providing shelter to the homeless men, the city had created "a constitutionally cognizable entitlement [to shelter]." The court relied on *Goldberg v. Kelly* which stated that "welfare provides the means to obtain essential food, clothing, housing, and medical care." (emphasis added.) The court concluded that government benefits constitute a property interest, and when termination of welfare benefits "deprive an eligible recipient of the very means by which to live," such deprivation results in the denial of the recipient's property right. Therefore, the recipient must be afforded procedural due process upon termination of benefits.

The United States Court of Appeals held that notice of the planned closing with a given opportunity to respond was sufficient procedural due process. Further, the *Williams* court stated that confrontation of the issue regarding whether the City's decision to terminate emergency shelter services was procedurally correct, "was not ripe for decision by the district court." The plaintiffs argued that a District of Columbia regulation requiring the D.C. government to "provide, on a contract basis, temporary shelter and social services to homeless, unattached adult males" supported the District Court's finding that there was a constitutional entitlement to shelter. The Court of Appeals ruled that the regulation did not provide for specific services, did not give any indication regarding the level of support provided to homeless persons and did not guarantee any certain number of homeless persons would be sheltered. Therefore, the court concluded, the regulation did not expand the rights of the homeless to receive shelter from the City.

Two years later, a statutory right to shelter was established in the District of Columbia when the D.C. Overnight Shelter Initiative became law after being approved by voters. The summary statement for the initiative stated:

The District of Columbia, in recognition that:

(1) All persons have a right at all times to overnight shelter adequate to maintain, support and protect human health;

(2) The costs of providing adequate and accessible shelter to all in need are outweighed by the costs of increased police protection, medical care, and suffering attending the failure to provide adequate shelter; and

(3) It is in the best interest of the District to provide overnight shelter for the homeless, hereby establishes in law the right to adequate overnight shelter, and provides for identification of those in need of shelter and provision of such shelter. (emphasis added)

The Overnight Shelter Act further provided judicial relief in the event that the District of Columbia failed to provide the overnight shelter. If the right to shelter is denied, the aggrieved person "may sue for relief in any court . . . [and] the court

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62 Id. at 262.
63 708 F.2d at 792.
65 708 F.2d at 792 n.4.
may grant such relief as it deems appropriate. Sovereign immunity shall not bar actions to enforce rights established . . .”

The government filed suit seeking to enjoin and invalidate the initiative, stating that it violated the “laws appropriating funds” exception to citizens’ right to make laws through initiative process. In *District of Columbia Board of Elections and Ethics, et al v. District of Columbia*, the D.C. Court of Appeals reversed the Superior Court summary judgment in favor of the District. The court upheld the initiative’s validity while disparaging the right to shelter proclaimed by the Act, stating that “the fact that the initiative may be denominated loosely an entitlement program,” does not make an initiative a law appropriating funds.

The following year, after recognizing that one room highway hotels were not an adequate means of housing for minor children, the District of Columbia enacted the Emergency Shelter Services for Families Act. This legislation provided for emergency shelter units (in an apartment-style atmosphere) for homeless families. Each unit was required to have, among other things, separate cooking and bathroom facilities, separate sleeping quarters for adults and minor children and an outdoor area sufficient for exercise and play use by children. The Act further provided for resource counseling and training centers, and required the City to move families out of emergency housing and into permanent housing as swiftly as possible. Since the District of Columbia has failed to comply with this law, litigation is now pending.

Likewise, suits have been filed to enforce (and explore the boundaries) of the Overnight Shelter Act. In 1989, preliminary injunction was granted ordering the District of Columbia to improve family shelters, and later that year, a final order was entered by D.C. Superior Court which increased the number of beds and the quality of shelter, including clean towels and linens.

On June 26, 1990, the D.C. City Council enacted a bill to repeal parts of the Act, including the entitlement provision. A Referendum Committee has announced that the bill will be suspended until it can be submitted to the voters. On the same day, the City Council also enacted an “Emergency Act” which, because it was presented as emergency legislation, was effective immediately. The “Emergency Act” purports to repeal the entitlement facet of the Overnight Shelter Act. Subsequent litigation, including *Atchison* has challenged the validity of the Emergency Act.

*West Virginia*

The same year the *Williams* court denied that the homeless had a right to housing in D.C., the West Virginia Department of Welfare was ordered to provide emergency shelter to all persons who were unable to obtain shelter on their own. In *Hodge v. Ginsberg*, six homeless residents of Charleston, West Virginia brought suit to compel the Welfare Department to provide them with shelter and other basic needs. The Supreme Court of Appeals of West Virginia granted a writ of manda-

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67 D.C. Code § 3-606, *reprinted in Roisman, id.* at 41.
69 *Id.* at 675.
73 *See Roisman, supra* note 66, at 41-42.
74 303 S.E.2d 245 (W.Va. 1983).
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mus requiring the Department of Welfare to comply with the West Virginia Code\textsuperscript{75} and the Department’s own Social Services Manual\textsuperscript{76} which provided that incapacitated adults would receive emergency shelter, food, and medical care. The court interpreted the term “incapacitated adults” to include indigents “who, by reason of the recurring misfortunes of life, are unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health,”\textsuperscript{77} and specifically included persons, such as the plaintiffs, as incapacitated adults.

\textit{New Jersey}

Unlike the state of New York, a provision to furnish emergency shelter under its AFDC plan does not automatically guarantee that homeless children will continue to be sheltered. The Supreme Court of New Jersey held that emergency aid to homeless families with children could be terminated after five months of initial receipt. In \textit{Franklin v. New Jersey Department of Human Services},\textsuperscript{78} eleven mothers who had been placed in motels for emergency shelter, brought suit when the defendant’s regulation placed a five month limitation on the receipt of emergency housing benefits. They argued that the “arbitrary (i.e. fixed) expiration date for the program of emergency assistance violate[d] their right to shelter for their dependent children” as provided under the State AFDC program and the State Constitution.\textsuperscript{79}

The plaintiffs stated that although they do not want their families to continue living in a one-room highway hotel, the alternative to that may be no shelter at all. The court noted the importance of keeping families together and acknowledged that “all persons, regardless of fault, are entitled to the basic human needs for shelter and food and it is the obligation of the government to ensure that these needs are met.” The court concluded, however, that the regulation was valid. Believing that there were other programs in place or other programs soon to be established which would provide housing, the court found that “the commissioner [of the department] has not abandoned these children.”\textsuperscript{80}

\textit{Massachusetts}

In 1987, an important event occurred in Massachusetts. The Supreme Judicial Court of Massachusetts held that providing temporary emergency accommodations for families in motels, hotels and shelters did not satisfy the state’s duty to provide housing under its AFDC program. In \textit{Massachusetts Coalition for the Homeless, et al v. Secretary of Human Services, et al.},\textsuperscript{81} the court held that the State Welfare Department itself did not have the authority to fix the AFDC standard of need, and that the department was obligated to advise the legislature when it determined that the standard of aid that was insufficient to enable an AFDC parent to bring up a child, according to the level provided for in G.L. c. 118 § 2, “properly in his or her own home.”\textsuperscript{82}

The \textit{Massachusetts Coalition} court found that family homelessness in Massachusetts was increasing. It further acknowledged that in 1985, 75% of the homeless were families and 80% of these families relied on AFDC as their sole source of

\textsuperscript{75} W. Va. Code § 9-6-1 through 9-6-8.
\textsuperscript{76} Department of Welfare Social Services Manual, Chapter 29.
\textsuperscript{77} 303 S.E.2d at 250 (W.Va. 1983).
\textsuperscript{78} 543 A.2d 1 (N.J. 1988).
\textsuperscript{79} \textit{Id.} at 2.
\textsuperscript{80} \textit{Id.} at 10.
\textsuperscript{81} 511 N.E.2d 603 (Mass. 1987).
\textsuperscript{82} \textit{Id.} at 614.
support. By rejecting the Welfare Department’s argument that the Code’s provision “really only meant that the family should be kept together,” the Massachusetts Coalition court acknowledged that there was a statutory right to permanent housing.

**California**

A right to shelter simply does not exist in California. The judicial system, however, is beginning to liberally interpret statutory language in order to provide “the homeless with only a semblance of the legal rights which most other Americans take for granted.” In one such case, Hansen v. Department of Social Services, the result of such broad judicial interpretation was significant because it caused the legislature to take action to provide relief for homeless AFDC families.

Prior to 1987, the Welfare and Institutions Code § 16500 et seq. provided emergency shelter for homeless children. Under § 16504.1, however, the provision for emergency shelter was interpreted to only provide such shelter to homeless children who no longer resided with their parents. Many families, whose sole income was AFDC, were unable to find housing on the benefit allowance that was given to them. The parents were often forced to place their children in foster care in order to provide housing for their children. Believing that foster care would be a temporary situation until they were able to find housing for their families, the parents were then notified that they were no longer eligible for AFDC benefits because their children were no longer living with them. Not only did this result in a loss of income for the parents, it also contributed to the permanent breakup of families.

In Hansen v. Department of Social Services, a class action suit was brought in Los Angeles County on behalf of homeless families or families who were threatened with homelessness. The plaintiffs sought to compel the Department of Social Services (DSS) to provide emergency shelter or other child welfare services to homeless families in order to keep the families intact.

DSS argued that § 16504.1 did not require the department to assist homeless families in securing housing. Furthermore, DSS contended, that destitute, but intact families were not eligible for any sums (beyond their AFDC grant) to help obtain adequate housing. Homeless children were only eligible to receive emergency shelter if they were removed from their homes.

The Hansen court held that § 16504.1 must be “given a broad meaning” and affirmed the trial court’s order enjoining DSS from excluding homeless children who still remained with a parent or guardian from receiving emergency shelter. The court further stated that it was the court’s “obligation to ensure that [the California legislature enactments] be actively and humanely enforced . . . with the reasonable understanding of the practical demands of the circumstances with which individual homeless families are faced.”

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83 Id. at 605 n.3.
84 See Coates, supra note 1, at 300.
86 Unless otherwise noted, all further statutory references are to the Cal. Welfare & Institutions Code (Deering 1985).
88 Id. at 287.
89 Id. at 290.
90 Id. at 298.
91 Id. at 298.
A few months after Hansen, the California Legislature enacted a new program which provided special needs allowances designed to assist homeless AFDC families find temporary and permanent housing. The Welfare & Institutions Code §11450(f) provided that a homeless family would receive homeless assistance when its members were eligible for AFDC, including $30 a day for up to four weeks in order to obtain temporary shelter. It also included provisions for permanent housing assistance, such as payment of the last month rent, the security deposit, and utility deposits. Eligibility for temporary and permanent shelter assistance was limited to once every 12 months.

As homeless families celebrated their victory, the battle continued to rage. The County of Los Angeles DSS Director enacted emergency regulations to activate the statute before its effective date. The emergency regulation would remain in effect for 120 days. Upon expiration of the emergency regulation, the Director planned to implement a new revised homeless assistance regulation. Whereas the emergency regulation considered families who were sharing housing as homeless, the revised regulation "would have barred any family that was sharing housing with others from eligibility for the program, even if the family was truly homeless."

In counteraction, several single homeless mothers with children brought suit to prevent DSS from modifying the emergency regulation in Merriman v. McMahon. The purpose of the suit was to prevent DSS from abolishing the homeless assistance program to families who were sharing a dwelling with another family while trying to obtain their own housing. The Alameda Superior Court enjoined the DSS from implementing its new program or "any other similarly designed regulation." The battle had been won.

Even though AFDC families are guaranteed assistance in obtaining housing, not all homeless families receive AFDC. Families with both parents in the home are often ineligible for AFDC benefits. These families, and families that for other reasons do not receive AFDC, do not have access to emergency shelter. This results in the breakdown of the family structure, either when one parent leaves the home in order to allow the family to become eligible for AFDC, or when parents give their children up in order to provide housing for them. In either case, the result is tragic.

There is also no right to emergency shelter for single persons, whether or not they receive General Assistance. In Hodge, the court mandated that shelter must be provided for all homeless adults in West Virginia, regardless of their eligibility for benefits. On the other hand, California homeless advocates have had to spend their time fighting arbitrary barriers to general assistance and in trying to define the boundaries of legislative discretion which exists in California's relief and support statute. Recently, however, advocates are beginning to bring cases before the courts to try to establish a fundamental right to shelter under the state relief and support statute.

The Welfare & Institutions Code §17000 was adopted by the California legislature in 1901. It provides that "[e]very county and every city and county shall re-

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9 See Coates, supra note 1, at 352.
9 See Coates, supra note 1, at 352.
9 Coates, supra note 1, at 353.
lieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident . . . when they are not supported by their relatives or friends, by their own means, or by state hospitals . . .”

As further designated by § 17001, the standard of aid and care provided for the indigent is determined by the board of supervisors of each county. Although the duty of each county and city to support their indigents is mandatory, judicial encroachment by the California courts on legislative territory has traditionally been avoided unless the court finds that the standard administered by the board of supervisors is arbitrary and capricious. The legislature described the scope of § 17000 when it enacted § 10000 which provides, in pertinent part, that,

The purpose of this division is to provide for protection, care and assistance to the people of the state in need thereof, and to promote the welfare and happiness of all the people of the state by providing appropriate aid and services to all of its needy and distressed. It is the legislative intent that aid shall be administered and services provided promptly and humanely, with due regard for the preservation of family life . . . and that aid shall be so administered and services so provided . . . as to encourage self-respect, self-reliance, and the desire to be a good citizen, useful to society. (emphasis added)

Some counties have taken extreme measures to discourage the poor from applying for relief. In Sacramento County, the county welfare department required that new applicants, in order to receive GA, move into its Bannon Street Shelter, “the first poorhouse to be established in the United States for more than half a century.” As a result, the county was actually creating homelessness.

In 1983, the California Supreme Court held in Robbins v. Superior Court that “the county’s policy violates the goals of the states’ welfare laws as reflected in § 10000.” It concluded that the county’s program of placing GA recipients in the Bannon Street Shelter does not “humanely promote ‘self-reliance’ or ‘self-respect’” when it compels the recipient to “eat, drink, sleep, bathe and socialize according to a rigid schedule. . . .” Additionally, the Robbins court acknowledged that the requirement to live at the Shelter infringed on the recipients constitutional right to privacy.

While judicial encroachment on the legislative domain is usually avoided, the Robbins court concluded that “the courts play an important role in assuring that the provisions of the public welfare laws are liberally interpreted and actively enforced. . . . The courts must enforce the counties’ duty . . . in a ‘humane’ manner consistent with modern standards.”

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100 See Boehm v. Superior Court, 178 Cal.App.3d 494, 501, 223 Cal.Rptr. 716 (1986) (The county must set GA standards of aid and care that provide benefits necessary for basic survival). See also Mooney v. Pickett, 4 Cal.3d 669, 94 Cal.Rptr. 279, 483 P.2d 1231 (1971)(County aid cannot be denied to applicant on the sole ground he is employable).
101 City and County of San Francisco v. Superior Court, 57 Cal. App. 3d 44; 128 Cal.Rptr. 712 (1976).
103 SACRAMENTO BEB, July 1, 1983, at 1.
105 38 Cal.3d at 209.
106 38 Cal.3d at 215-16.
107 38 Cal.3d at 208-10.
Thus when the courts find the standard of care set by the county to be clearly arbitrary and capricious, they are willing to order that the standard be changed or substantiated. In *Mooney v. Pickett*, the Supreme Court of California acknowledged that § 17001 conferred broad discretion on the county to determine eligibility standards, the type and amount of relief available and any condition attached to the receipt thereof. However, the court further held that “this discretion may be exercised only within fixed boundaries.”

The fixed boundaries created by *Mooney* were expanded by the appellate court in *City and County of San Francisco v. Superior Court*. In *City and County of San Francisco*, plaintiffs established that the maximum monthly grant under the city’s general assistance program was $83 for men and $88 for women. This amount was substantially lower than the GA grants of neighboring counties. The court held that a county must make a determination of facts necessary to establish subsistence standards within the county. It concluded that “the fixing of a level of aid so far below what is necessary to survive to persons who have no other means by which to live is arbitrary and capricious and not consistent with the objective and purposes of the law . . . set forth in section 10000.” Furthermore, the court flatly rejected the city’s argument that it “had made a ‘colorable’ effort to provide relief for its indigent.”

Two successive cases brought by the indigent residents of Merced County established that the county must substantiate its grants of assistance with a factual study which includes all of the basic needs for survival. In *Boehm v. County of Merced* (*Boehm I*), the county based its grant amounts on a recommendation from the Merced County Department of Human Resources. The appellate court held that the county was required to conduct a study beyond just the recommendations of another county department. Following *City and County of San Francisco*, the court found that a survey or study would satisfy the county’s duty to determine the needs of its indigents. Therefore, it held that the board of supervisors had acted arbitrarily and capriciously in reducing the amount of its GA benefits without conducting such a prior study.

The following year, in *Boehm v. Superior Court* (*Boehm II*), plaintiffs brought suit when the county reduced GA benefits based on a study as to the recipients’ needs for food, housing and utilities alone. The appellate court held that since §§ 10000, 11000, 17000 and 17001 required the county to provide GA recipients with an appropriate allowance for each of the basic necessities of life, the county had violated its mandatory duty under § 17000. The court stated that “minimum subsistence, at the very least, must include allocation for housing, food, utilities, clothing, transportation and medical care.” (emphasis added)

The requirements set out by *Boehm I* and *Boehm II*, however, do not allow the court to consider if the county’s grants actually meet minimum subsistence needs. Instead, factual inquiry is limited to whether the board of supervisors considered

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104 Cal.3d 669, 94 Cal.Rptr. 279, 483 P.2d 1231 (1971).
105 Cal.3d at 679.
107 57 Cal.App.3d at 49.
108 57 Cal.App.3d at 48.
110 163 Cal.App.3d at 453.
112 178 Cal.App.3d at 501.
the factors of subsistence mandated by § 17000 and whether there is an evidentiary predicate on which the grant levels were set. In Poverty Resistance Center v. Hart,\(^{117}\) the court concluded that "absent allegations of impropriety in the conduct of Board proceedings, or in the provision of information to the Board, judicial review is limited to the record of the proceedings before the board."\(^{118}\) The plaintiffs appealed after the trial court sustained the county’s demurrer, contending that the amount allocated by the county for the cost of shelter was not supported by any of the county’s studies or surveys.\(^{119}\)

The county, on the other hand, claimed that the discrepancy was justified by the cost of living surveys which “represent[ed] hypothetical rather than real data . . . [of] actual costs incurred by GA recipients.” The appellate court responded to the county’s claim, stating that “[the required survey] is not a charade. Persons cannot eat hypothetical food nor live in hypothetical houses.”\(^{120}\) It further held that the allowances adopted by the county for housing and utilities were not reasonably supported by evidence, and therefore, plaintiffs presented an actionable claim for relief for improper standards of aid and care under § 17001.

The appellate court concluded in Poverty Resistance Center that the plaintiffs were entitled to judicial relief if the board of supervisors exceeded the boundary of discretion it is allowed under § 17001. It further ruled that once those boundaries were shattered, the adequacy of the assessments become a question of law for the court.\(^{121}\) The court, however, limited its ability to review the board’s decision to only those assessments pertaining to the core elements of survival. Therefore, the court declined to address the adequacy of other needs which it felt were not essential to subsistence, such as unprescribed medicines, use of laundry facilities, barber services, telephone services and newspapers.\(^{122}\)

The Poverty Resistance court also concluded that “the county is not constrained to make an individual needs assessment for each recipient” when determining the monthly flat grant. The court allowed that the county may average the costs in making a needs assessment as long as it is done fairly.\(^{123}\)

The issue of fair averaging later surfaced when Yolo County relied on a defective study in determining its assessment of GA needs. In Guidotti v. County of Yolo,\(^{124}\) the court held that the board did not satisfy the statutory and case law requirements that there be evidentiary support for the board's assessment of needs for GA benefits. In Guidotti, plaintiffs filed a class action suit questioning the standards of the county’s GA relief benefits. The trial court, finding that the benefits were inadequate and that the county had failed to investigate the subsistence needs of GA recipients, ordered the county to complete a study immediately.

The county conducted the study and thereafter adopted new standards. Reappearing in court, the county moved for summary judgment. The plaintiffs opposed the motion, stating that there was a factual issue concerning the adequacy of the housing allowance in the new study. The trial court, however, granted the summary judgment.

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\(^{118}\)261 Cal.Rptr. at 549.
\(^{119}\)261 Cal.Rptr. at 552.
\(^{120}\)261 Cal.Rptr. at 552.
\(^{121}\)261 Cal.Rptr. at 551.
\(^{122}\)261 Cal.Rptr. at 554.
\(^{123}\)261 Cal.Rptr. at 553-54.
The appellate court reversed and held that evidence did not support the county's determination that the appropriate housing allowance for the county's GA recipients was $121 per month. The court found that only 183 GA recipients were surveyed by the county, and 39 of those received subsidized housing or substandard housing. Furthermore, 61.7% of those surveyed shared housing, and some of the recipients surveyed were young adults who lived with their parents and presumably paid "token rent." Still others, the court found, paid as little as $20 for monthly rent. Thus, the court held that the study was flawed in that it averaged disparate groups to determine the market value of minimal subsistence housing. The court held that averaging, while in itself not an unreliable basis for setting grant levels, "must be fair and it must be reasonable."125

In Guidotti, the county's study made no suggestion that any housing was available for $121 per month. In response, the county emphasized that "the level of GA assistance is measured not by pleasure, generosity or even what is minimally acceptable to the average person but what is necessary to survive or basic survival." The court replied that a person could survive by sleeping on a riverbank, or in a car, or even on the side of the road. But that, the court concluded, can hardly be considered habitable housing.126 The court in Poverty Resistance further criticized the possibility that emergency shelter could be considered "home" for GA recipients. The court stated that "the homeless shelters, at best, supplant a monthly grant for some recipients, but afford nothing to those recipients who do not and cannot patronize them."127

The assumption that the homeless can meet all of their basic needs on general assistance is patently absurd. Furthermore, many single homeless people do not receive GA benefits. In addition to those who are not willing to accept public assistance, numerous others are uninformed of the availability of benefits or are incapable of completing the bureaucratic process one must survive to receive the grants. Still others are automatically ineligible due to "arbitrary pre-conditions, such as a lack of identification and/or address."128

Three cases filed in the Los Angeles Superior Court have gleaned favorable results for the homeless. They began in 1984 when there were an estimated 30,000 homeless people domiciled in the County of Los Angeles. The only shelters available were private shelters which were limited to 500 beds. Los Angeles County did not fund any additional public shelters; instead, it followed a procedure in which the first people to apply for shelter were referred to voucher hotels. Voucher hotels provided rooms in return for deferred payment from the county. Because there was a limited number of voucher hotels available, rooms did not remain vacant past mid-morning. The remaining applicants would be issued a check for $8.00 and returned to the street to find a hotel which offered an $8.00 rate. A survey reported that there were only seven hotels which would accept the county's $8.00 check and many times, it was out of reach of the recipient's means of transportation.129

The plaintiffs filed a complaint that this system, which provided the only form of emergency assistance to homeless persons, was inadequate. In Ross v. Board of Supervisors of the County of Los Angeles,130 the court entered preliminary injunc-
tion prohibiting the county from issuing the $8 checks unless there was a sufficient number of hotel rooms available for that price. This resulted in the abandonment of the check system. In its place, the county doubled the voucher hotel program to provide more emergency housing for the homeless.

The year before the Ross injunction, a suit had been brought challenging not the form of emergency shelter relief, but the procedure that the homeless person had to go through in order to receive her $8.00 check. The complaint stated that the county did not immediately provide emergency shelter when requested. Usually, a homeless person would have to wait at least a week for an appointment to receive relief. Once present at the appointment, the complaint alleged, the homeless person was often denied emergency shelter because she could not produce formal proof of identification. Failure to produce identification is not uncommon among the homeless because they are often robbed or frequently lose their belongings. The court issued a temporary restraining order prohibiting the county from barring relief to homeless persons who could not produce identification. The terms of the TRO was incorporated into the settlement submitted to the court and "within two weeks, the hotels were filled."

The voucher hotels, however, were uninhabitable. There were frequent break-ins because of the broken windows and unsecured rooms. The rooms were soiled and infested with vermin. As a result, attorneys with Legal Aid Foundation of Los Angeles (LAFLA) filed Paris v. Board of Supervisors because, according to LAFLA attorney Gary Blasi, "living in the park was better than living in voucher hotels." In the end, the county negotiated a settlement in which the hotel standards were improved.

Homeless advocates have also challenged San Diego County's regulation terminating GA payments to any recipient who did not obtain a valid address in 60 days. In Nelson v. Board of Supervisors of San Diego County, the court held that the regulation requiring an address violated the county's mandatory duty under § 17000. In addition, the Nelson court found that plaintiffs had a sufficient claim that the regulation unconstitutionally discriminated against those county residents without valid addresses. The court, however, did not address the merits of the constitutional claim.

Recently, however, Cal. Court of Appeals, First District, struck down plaintiff's assertion that there is a fundamental right to shelter when it upheld the constitutionality of a San Francisco ordinance that prevented people from sleeping overnight in their vehicles on public streets. In Vehicular Residents Association v. Agnos, the plaintiffs charged that the ordinance denied equal protection to poor people who had nowhere to live except in their cars. The court declared that the ordinance did not discriminate between the poor and the non-poor in that the ordinance also prohibited the non-poor from inhabiting motor homes between the hours of 10 p.m. and 6 a.m.

133 Id. n.133 at 32 & 34.
135 Id., n.133 at 32 & 34.
According to the L.A. Daily Journal, the Deputy City Attorney believed that "the court's decision is correct." He further questioned whether there actually were any San Franciscans living out of their cars as a matter of economic necessity."

(A Lack of) Conclusion.

People without homes have always been regarded by our society as second-class citizens. They are often dirty and unkempt and dressed rather strangely; sometimes extending palms out for money or sometimes mumbling to somebody that nobody else can see. The general public scurries by them, wrapped in warm coats, trying to ignore them, hoping they will go away. But they can't go away, for there is no place to go.

Is there a fundamental right to shelter? Homeless advocates across our nation envision such a right and are slowly establishing that perhaps the right to shelter indeed exists. It has taken much time to lay the foundation and it will take even more time to support the structure. Meanwhile, millions of people live on our streets, hungry and cold.

Frequent litigation to establish or improve emergency housing has, for the most part, been successful. Homeless advocates in California have challenged the levels of benefits and the habitability of shelters made available by counties throughout the state. While acknowledging that housing is a basic necessity of life, the courts still refuse to consider whether a right to either permanent or temporary housing exists.

Across the nation, the D.C. Emergency Shelter Services for Families Act and the Massachusetts Coalition court ruling are both unique and promising in the fight for shelter. Although enforcement of such legislative acts and judicial decisions is frustrating, they establish the necessity for children to be raised by their own families in permanent and adequate housing situations. In short, they confirm that an emergency shelter is just not a home.

In New York, the courts will usually issue mandatory injunctions when the public entity has obligated itself to provide relief and then, failed to perform. Furthermore, an injunction may be granted when the entity has declined to comply with a statutory duty, or has clearly abused its discretion under a statutory duty. Like her sister states, however, the New York courts continually refuse to address the issue of whether there is a fundamental right to shelter under the State Constitution. Therefore, an 'abstract right to shelter' becomes difficult and time-consuming to enforce and the needs of the poor continually remain unmet.199

Is there enough time? Advocates not only have to establish the right to shelter but they also have to confront the reasons behind homelessness. Increased housing allotments are not going to mean anything if there are not enough low-income homes being built to house our people, or enough jobs being created to employ our workers, or enough medical care being provided to help our mentally and physically disabled. Advocates must deal with these issues in addition to confronting the immediate right to shelter for our homeless today. Is there enough time?

We can no longer depend on our legislatures. Our cities, counties and states across the nation seem to be more concerned with avoiding the dilemma surround-

199See Coates, supra note 1, at 310-11.
ing the homeless than curing the problem. The only avenue available is litigation — slowly building the right to shelter, slowly defining legislative boundaries, slowly enforcing court mandates on cities and counties. Through litigation, advocates can bring to the public attention the plight of the homeless and work to change the common misconceptions surrounding these people without homes.

Through litigation, we can educate our public and our judges that the homeless are not second-class citizens but that they are people and families who have needs, just as we do, for enough food and for adequate housing. Through litigation, we can teach our nation that our homeless are our own.