Building a House of Legal Rights: A Plea for the Homeless

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BUILDING A HOUSE OF LEGAL RIGHTS: A PLEA FOR THE HOMELESS

Today, hundreds of thousands, perhaps millions of Americans are homeless, having only temporary housing in publicly or privately operated shelters or no housing at all. The causes of homelessness vary, and include deinstitutionalization, the reduction of aid to the poor, the unavailability of low cost housing, and unemployment. The price of homelessness is high; beyond the problem

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1 See Schneider, Food Stamp Benefits and the Homeless, 18 CLEARINGHOUSE REV. 31, 31 (1984). It is well recognized that it is difficult, if not impossible, to determine accurately the number of homeless living in the United States. See Werner, On the Streets: Homelessness Causes and Solutions, 18 CLEARINGHOUSE REV. 11, 11 (1984); Brief for the National Coalition for the Homeless as Amicus Curiae at 3, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984). Some scholars and organizations have estimated that there are approximately two million homeless persons in the United States. See Kimball, Homeless and Hungry in Chicago, 18 CLEARINGHOUSE REV. 18, 18 (1984) (between one and three million homeless in America); Brief for the National Coalition for the Homeless as Amicus Curiae at 3 & n.3, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984) (estimating number of homeless to be between two and three million, based upon newsletter by United States Department of Health and Human Services and estimates done by groups working to help homeless). But see Schneider, supra, at 31 (number of homeless estimated to be between 500,000 and 2,000,000).

2 See Collin, Homelessness: The Policy and the Law, 16 Urb. Law. 317, 317 (1984). Two basic definitions of homelessness pervade the legal material in the area. See id. One definition focuses on lack of residence—a homeless person is one “whose primary nighttime residence is either in the publicly or privately operated shelters or in the streets, in the doorways, train stations and bus terminals, public plazas and parks, subways, abandoned buildings, loading docks and other well hidden sites known only to their users.” Id. (citing E. BAXTER & K. HOPPER, PRIVATE LIVES/PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK 6-7 (1981)). The second definition emphasizes the homeless individual’s alienation from society—homelessness is “a condition of detachment from society characterized by the absence or attenuation of the affiliative bonds that link settled persons to a network of interconnected social structures.” Collin, supra, at 317 (citing H. BAHR, SKID ROW, AN INTRODUCTION TO DISAFFILIATION 17 (1973)). This Note adopts the “lack of residence” definition rather than the alienation definition.

3 See Brief for the National Coalition for the Homeless as Amicus Curiae at 9-14, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984). The major problems and causes of homelessness are the deinstitutionalization of the mentally incapacitated, see id. at 13-14; Rhoden, The Limits of Liberty: Deinstitutionalization, Homelessness and Liber-
of insufficient shelter the homeless are confronted with legal barriers preventing them from enjoying the benefits of our system of government.

In addition to the deprivation of adequate shelter, an individual who lacks a fixed, permanent legal residence is also denied certain rights and privileges, such as voting and public assistance. The homeless are also threatened with criminal sanctions in states and localities that have loitering statutes and ordinances. Moreover, according to many adult protective services laws, a homeless person can be compelled to remain in a shelter against his will.

The homeless need a political voice to challenge the consequences of homelessness. In the United States, the ability to vote is a political voice through which one may preserve existing, and obtain new, civil liberties. The franchise is particularly important.

5 See infra notes 93-123 and accompanying text.
6 See infra notes 15-41 and accompanying text.
7 See infra notes 42-54 and accompanying text.
9 Note, Establishing a Right to Shelter for the Homeless, 50 BROOKLYN L. REV. 929, 940 n.8 (1984) (homeless lack organization necessary to have political influence); see Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065, 3074 n.4 (1984) (Marshall, J., dissenting). Although the Supreme Court in Clark refused to recognize the first amendment right of the homeless to protest their situation by sleeping in a park outside the White House in contradiction to park rules, the dissent recognized that the homeless need political power if they are to attain and preserve civil liberties. See Clark, 104 S. Ct. at 3077 n.4 (Marshall, J., dissenting).
10 See Reynolds v. Sims, 377 U.S. 533, 565 (1964). As a citizen of the United States, one is guaranteed not only the basic civil liberties protected by the Constitution, but also the ability to protect and procure additional civil liberties through his representation in government. See Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667, 670 (1966); Reynolds, 377 U.S. at 561-62, 565.
to the homeless because they lack other channels of political influence. In most states, however, homeless individuals have been denied the right to vote because they have no “bona fide” residence. On one hand, denial of the right to vote to those without shelter is antithetical to the Supreme Court’s strict scrutiny and frequent rejection of state economic regulations restricting access to the ballot. On the other hand, the requirements of age, citizenship and residence are considered so essential to state government that state regulations imposing these restrictions have encountered the lowest level of judicial scrutiny.

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According to two commentators, the disenfranchisement of the homeless is rooted in a “property-ownership notion” that a poor individual somehow is not capable of making an intelligent decision. Id. at 17. A second reason for disenfranchisement proposed by these commentators is the fear that indigent voters are “susceptible to bribery.” Id.

Two state statutes that require “fixed, legal permanent residence,” have recently been challenged in federal district courts. See Pitts v. Black, No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984); Committee for the Dignity and Fairness for the Homeless v. Tartaglione, No. 84 Civ. 3447 (E.D. Pa. Sept. 14, 1984). In view of the recent decisions in New York City, Philadelphia and Washington D.C., see infra note 93, Reitman and Davidson may have been correct in their forecast that “economic means tests as a condition for voting may be waning,” A. Reitman & R. Davidson, supra, at 17.


This Note will examine the various rights and privileges denied to homeless persons and will describe and explain the legislative and judicial inactivity responsible for this denial. The need for federal, state and local governments to ensure the right to vote for the homeless will be highlighted, and this Note will suggest that the voting requirement of "bona fide" residence should be subject to the highest level of scrutiny by courts, requiring the redefinition of state tests of "good faith" residence. Having established the franchise as a source of political influence for the homeless, this Note will conclude that recognition of the homeless as a voting block could give rise to the establishment of a statutory right to housing.

PUBLIC ASSISTANCE AND HOMELESSNESS

The federal, state and local governments provide a number of relief programs that provide housing, medical assistance, food stamps, and substitute or supplemental income to the poor. Among these programs are Aid to Families with Dependent Children (AFDC), Medicaid, Medicare, Food Stamps, and Supplemental Security Income (SSI), restricting only those that do not reasonably further a legitimate state interest. See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973). This level of scrutiny is not sufficiently rigorous to apply to most restrictions on fundamental rights such as voting. See Reynolds v. Sims, 377 U.S. 533, 562 (1964). Contra Harper v. Virginia Bd. of Elections, 383 U.S. 663, 676 (1966) (Black, J., dissenting). Nonetheless, there is little case law that questions the validity of age, citizenship and residency as voting requirements, see, e.g., Kramer, 395 U.S. at 625, and courts have uniformly applied the rational basis test to these requirements, see Evan v. Comman, 398 U.S. 419, 422-23 (1970).

15 See Lurie, Major Changes in the Structure of the AFDC Program Since 1935, 59 CORNELL L. REV. 325, 825 (1974). An entitlement is usually defined as a particular privilege granted to those who fulfill the statutory requirements. See B. BRUDNO, INCOME REDISTRIBUTION THEORIES AND PROGRAMS 577 (1984). Whether the poor will benefit from governmental programs that provide relief depends therefore upon the statutory requirements of the entitlement. See Briar, Welfare From Below: Recipients' Views of the Public Welfare System, 54 CALIF. L. REV. 370, 375-82 (1966). A residency qualification is often one such requirement; thus the homeless are not entitled to any public assistance when the relief statute contains a residency qualification. See infra notes 20-35 and accompanying text. Although Brudno has argued that an alternative definition of entitlement—"an affirmative government duty to provide the necessities of life without which liberty is meaningless"—would qualify the homeless for public assistance, B. BRUDNO, supra, at 577, the Supreme Court resolved this issue by declaring that welfare assistance is not an accrued property right, see Wyman v. Jones, 400 U.S. 309, 312 (1971); Fleming v. Nestor, 363 U.S. 603, 606 (1960).


17 42 U.S.C. §§ 1395-1395pp and 1396-1396f (1982). Medicaid is a federally funded program that provides reimbursements for medical care to individuals eligible for AFDC and
mentary Security Income (SSI). 19

To receive assistance from any of the programs except Medicare, 20 a person must have some form of residence. Federal statutes and regulations mandate that any residency requirement for state welfare assistance be defined broadly in terms of a voluntary intent to remain in the community indefinitely, and be based on the premise that a genuine resident of the state cannot be denied relief. 21 Nonetheless, it is clear that states have designed eligibility qualifications that deny assistance to otherwise qualified residents. 22 For example, the Food Stamps Program requires that recipients be members of a “household.” 23 The term “household” is not clearly defined by the Social Security Act or the regulations promulgated thereunder. 24 However, the act appears to incorporate a requirement of “purchasing and preparing meals,” 25 which homeless peo-

SSI and others who are “medically indigent.” B. BRUDNO, supra note 15, at 520. “Medically indigent” persons are those who do not qualify for AFDC or SSI, but would qualify if their medical expenses were deducted from their income in determining AFDC or SSI eligibility or “if coverage under [their state] plan was as broad as allowed under the federal law.” 42 U.S.C. § 1396a(t)(A)(i)(II)-(III). Medicare, on the other hand, provides medical care for individuals over 65 who qualify for Old Age and Survivors Insurance (OASI), regardless of financial need. Id. § 1395c.


21 See Lurie, supra note 15, at 829. The purpose of a bona fide residency requirement is often not so much to define that category of persons eligible for public assistance as to restrict the class of persons eligible for relief and discourage others from applying for it. Id. For example, one purpose of residency requirements is to discourage individuals from leaving the work force causing their families to rely on relief programs. Id.


23 See 7 U.S.C. § 2014(a) (1982); 7 C.F.R. § 273.1(a). Section 2012(i) defines a “household” in terms of those living in a place where one prepares meals for home consumption. 7 U.S.C. § 2012(i)(1)-(2). The regulations contain an exception for presently disabled individuals over
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People ordinarily cannot meet. Additionally, even though publicly and privately operated shelters arguably fit the definition of “household,” residents of these institutions are denied food stamp benefits. The requirement that applicants live “in the project area” serves similarly to exclude the homeless from this form of public assistance. Moreover, the problem is amplified by federal food stamp regulations that require verification of the residency and identity of applicants. Although a fixed residence and intention to remain permanently in the community are expressly excluded from the qualifications for eligibility and verification of residence, and identity can be accomplished by “collateral contacts” rather than by documentary evidence, the federal regulations are not broad enough to guarantee that otherwise eligible homeless will receive food stamp benefits.

60 who cannot purchase and prepare their own food. See id. § 2012(i); 7 C.F.R. § 273.1(a). A “household,” then, would not apply to those homeless who live on the street. See 7 U.S.C. § 2012(i)(1)-(2); 7 C.F.R. § 273.1(a).

26 7 U.S.C. § 2012; 7 C.F.R. § 273.1(2); see Schneider, supra note 1, at 32. An individual is a resident of an institution if the institution provides “the majority of [his] meals.” 7 C.F.R. § 273.1(e). As a result, a homeless person who “sleeps at a shelter that provides more than two meals a day . . . will not be eligible for food stamps.” Schneider, supra note 1, at 32. According to Schneider, once a homeless individual has lived in a shelter for more than half of a month, food stamp benefits will be discontinued. Id. It is submitted, however, that Schneider’s analysis erroneously supposes that during the first half of the month a homeless individual will receive food stamp benefits. It is submitted that this is not necessarily true because a homeless resident of a shelter may not fulfill the statutory requirements of a “household” and therefore not qualify for food stamps.

27 See 7 C.F.R. § 273.3.

28 Id. § 273.2(f)(1)(vi); Schneider, supra note 1, at 31.

29 7 C.F.R. § 273.3.

30 Id. § 273.2(f)(4)(i); Schneider, supra note 1, at 31. The federal regulations provide for waiver of residency verification in instances in which verification “cannot reasonably be accomplished.” 7 C.F.R. § 273.2(f)(4)(vi). The regulation refers specifically to migrant farm workers as an example of a case in which residency verification would be waived. Id. Schneider posits that like a migrant farm worker, a homeless person has no ties to the community in which he lives, Schneider, supra note 1, at 31, but unlike a migrant farm worker, the homeless’ presence in the community is not so evident that they, too, would be exempt from residency verification qualifications. Id. The federal regulations also require identity verification. 7 C.F.R. § 273.2(f)(1)-(vii). Verification of both identity and residency can be accomplished through collateral contacts, that is, through “an oral confirmation of a household’s circumstances by a person outside of the household.” Id. § 273.2(f)(4)(ii).

31 See Schneider, supra note 1, at 31. Even if verification of residency and identity were waived, the homeless may not fulfill the residency requirement of “living in the project area.” See id. Even Schneider’s exegesis of the residence requirement does not promise that the homeless will meet this qualification:

While “living in the project area” is not defined in the rule, the rule itself provides some guidance. The rule states that a “fixed residence” is not required and gives an example of a migrant campsite as satisfying the residency requirement. Only
The AFDC and SSI public assistance programs are not designed to ensure that those without fixed and permanent legal residence will qualify to receive aid. For a family to receive assistance for a dependent child under AFDC, the child must live "with [a specified relative] in a place of residence maintained . . . as his own home." Thus, a homeless family with children is effectively denied AFDC relief. Additionally, the elderly, blind and disabled are ineligible for supplementary income if they live in a "public institution," so that elderly homeless living in public shelters are denied SSI assistance. It is submitted that by requiring bona fide residence for AFDC and SSI relief, the legislative intent behind the programs is defeated. The goal of the AFDC program is to aid

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vacationers are listed as persons who are not residents of a project area. Consequently, for food stamp purposes, persons living on the streets should be considered residents of the project areas in which they live.

_id._ (emphasis added).

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[b] 42 U.S.C. § 607 (1982); 45 C.F.R. § 233.90(c)(1)(v) (1984). Two elements of subsection(c)(1)(v) emphasize the need for fixed, permanent lodging: "a place of residence" and "home." "A place of residence" is undefined by the regulations and leaves open the question of whether temporary or emergency shelter for homeless families is included; however, the term "home," defined as "a family setting maintained or in the process of being established," requires fixed permanent lodging. See 45 C.F.R. § 233.90(c)(1)(v) (emphasis added); accord Friedman, _Social Welfare Legislation: An Introduction_, 21 STAN. L. REV. 217, 225 (1969) (provision of Wisconsin aid to dependent children statute, "living in a residence maintained by one or more of such relatives as his or their own home," is residency requirement).

The foregoing discussion does not altogether deny the existence of welfare assistance for homeless families. Temporary shelter is provided for homeless families in strictly defined emergency situations. _See_, e.g., Canady v. Koch, 598 F. Supp. 1139 (E.D.N.Y. 1983) (emergency shelter for homeless individuals); Koster v. Webb, 598 F. Supp. 1134 (E.D.N.Y. 1983) (same). It is submitted, however, that for those homeless families who do not qualify for emergency shelter, other forms of relief are denied.

[a] A great deal of controversy has arisen over the "non-need factors" for eligibility for AFDC relief, which include residency. _See_ B. BRUDNO, _supra_ note 15, at 595-600; _Developments in Welfare Law_, _supra_ note 18, at 868-73. The issue of bona fide residency requirements, however, has not yet arisen in this context.

[a] 42 U.S.C. § 1382(e)(1)(A) (1982). According to § 1382(e)(1)(A), an individual or spouse is not eligible for SSI assistance "with respect to any month if throughout such month he is an inmate of a public institution." _Id._ Section 1382 does not define "public institution," but excludes from its meaning "publicly operated community residence[s] which [serve] no more than 16 residents." _Id._ § 1382(e)(1)(C). Because most publicly operated shelters serve many more than 16 residents, most are "public institutions."

The exclusion of public institutions as residences sufficient for SSI income eligibility is consistent with the view that while durational residence requirements must not be imposed, a bona fide residence requirement should be permitted. _Developments in Welfare Law_, _supra_ note 18, at 890-91 & n. 91.
family stability. The purpose of the SSI program is to ensure that the elderly and the handicapped have sufficient income on which to live. It is submitted that these legislative goals cannot be reached if the homeless and their families are denied access to sources of welfare relief.

Residency requirements alone do not deprive the homeless of welfare assistance. Other incidental statutory qualifications for welfare relief emphasize the necessity of a "bona fide" residence. For example, a mailing address is necessary to receive food stamps or medicaid and medicare. Similarly, visits to a child's home by social service officials can be an important factor in determining whether the child will qualify for AFDC relief. It is submitted therefore that lack of housing denies the homeless a statu-

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57 See H.R. Rep. No. 231, 92d Cong., 2d Sess. 3, reprinted in 1972 U.S. CODE CONG. & AN. NEWS 4989, 4992; Whaley v. Schweickes, 663 F.2d 871, 873 (9th Cir. 1981) (purpose of SSI "is to assure that recipients' income is maintained at a level viewed by Congress as minimum necessary for the subsistence of that individual").

58 See H.R. Rep. No. 231, 92d Cong., 2d Sess. 3, reprinted in 1972 U.S. CODE CONG. & AN. NEWS 4889. It is submitted that the fundamental question that must be asked in evaluating relief programs for the poor is whether a program as structured is meeting the needs of all of those for whom the program is intended. One such group for whom welfare relief must have been intended are the homeless, the poorest of the poor. If welfare relief was intended to extend to the homeless, the structure of AFDC, SSI, and other public assistance programs must sufficiently accommodate the special circumstances of this group by eliminating any qualification based on residence.

59 See 7 C.F.R. § 274.2(a) (1985) (states may issue food coupons through direct mail-out system). But see Schneider, supra note 1, at 32. Schneider states that mailing address requirements for food stamps are imposed by local agencies, and that it is illegal for the states to place such qualifications on federal aid. See id. Indeed, Schneider suggests that most of the problems the homeless face in regard to food stamp relief stem not from the federal regulations, but from the "local food stamp office's misinterpretation of complex federal rules." Id. at 31.

60 Collin, supra note 2, at 323. A homeless person has no mailing address at which to receive welfare checks. See id. The failure to receive welfare assistance because of a lack of mailing address is of great consequence. See id. Collin notes, "[w]ith no mailing address... [the homeless] no longer receive public assistance checks or other mail. It is in this manner that the detachment from society characteristic of homelessness begins." Id.

61 See Lurie, supra note 15, at 851-52 & n.133. To verify information about AFDC applicants and recipients, social service agents may visit the applicant's or recipient's home. Id. at 851-52. The importance of this visit is highlighted by the fact that a recipient who refuses to allow a social service agent into his home may be denied further AFDC relief. See Wyman v. Jones, 400 U.S. 309, 324-26 (1971). It is submitted that this "simplified" method of determining eligibility guarantees that homeless families will be denied AFDC assistance because the social service agent has no home to visit.
tory entitlement to public assistance.

VAGRANCY

In both England and America, vagrancy laws were originally a means with which to deal with the threat of crime in areas of poverty. To prevent crime, criminal sanctions were imposed on those who were idle. Those who were most often idle were the poor; hence, vagrancy laws served to punish status rather than specific criminal conduct. Presently, in recognition of the Supreme Court's rejection of statutes that impose criminal liability on the basis of status, courts are rejecting vagrancy statutes, frequently on various grounds.

The demise of vagrancy laws resulted in the adoption of simi-
lar statutes known as loitering statutes.\textsuperscript{47} Loitering statutes generally permit the arrest of individuals who fail to produce "credible and reliable" identification when their apparent aimlessness provokes the suspicion that they are about to commit a crime.\textsuperscript{48} Many loitering statutes have been found unconstitutionally vague because they failed to give sufficient notice of the proscribed conduct and created a potential for arbitrary enforcement.\textsuperscript{49} These difficulties do not exist however in the two types of statutes that have withstood constitutional muster—those that combine prohibitions against loitering with prohibitions of specific criminal conduct,\textsuperscript{50} and those that forbid loitering in a particular time, place and manner.\textsuperscript{51}

Although loitering statutes ostensibly punish criminal conduct rather than social status, these statutes are virtually indistinguishable from earlier vagrancy laws.\textsuperscript{62} Indeed, it is submitted that the

\textsuperscript{47} Note, supra note 8, at 756-58.

\textsuperscript{48} E.g., Utah Code Ann. § 76-9-703(1) (1953). The Utah loitering statute contains the typical elements of a loitering statute:

(1) A person is guilty of loitering if he appears at a place or at a time under circumstances that warrant alarm for the safety of persons or property in the vicinity, and upon inquiry by a law enforcement official, he fails to give a reasonably credible account of his identity, conduct, or purposes.

\textit{Id.} (emphasis added).

\textsuperscript{49} E.g., United States ex rel. Newsome v. Malcom, 492 F.2d 1166, 1174 (2d Cir. 1974), \textit{aff'd sub nom.} Lefkowitz v. Newsome, 420 U.S. 283 (1975). A loitering statute may also violate an individual's fifth amendment rights by requiring the individual to explain his presence in a particular place. See Note, supra note 44, at 607 & n.28 (citations omitted).

\textsuperscript{50} Yuen v. Municipal Court of San Francisco, 52 Cal. App. 3d 351, 358, 125 Cal. Rptr. 87, 92 (Cal. Ct. App. 1975) (statute penalizing loitering coupled with concealment of dangerous weapon is constitutional); State v. Armstrong, 282 Minn. 39, 40-43, 162 N.W.2d 357, 359-60 (1968) (law that prohibits loitering with intent to solicit prostitution is constitutional).

\textsuperscript{51} Note, supra note 8, at 759 n.42. Loitering statutes limiting the place and/or time in which one can, for example, enter a school or public park, have been held to be sufficiently delimited to provide adequate notice and prevent arbitrary enforcement. E.g., United States v. Cassiagnol, 420 F.2d 868, 872 (4th Cir.) (statute prohibiting loitering on government property is valid), cert. denied, 397 U.S. 1044 (1970); cf. People v. Velazquez, 77 Misc. 2d 749, 759, 354 N.Y.S.2d 975, 986-87 (N.Y.C. Crim. Ct. N.Y. County 1974) (provision proscribing loitering in public transportation facility, if limited in place and time, would have been held constitutional).


Unlike earlier vagrancy laws, loitering statutes do not include indigence as an element of the crime. Comment, supra note 44, at 783-84. It is submitted that the effect of these statutes is to punish the homeless, in addition to those who may actually be attempting to commit crimes. Comment, supra note 44, at 783-84.
loitering statutes punish the homeless, a class of persons likely to provoke suspicion because they tend to wander the streets and loiter in proscribed areas, on the basis of what they are, not what they do. Moreover, it is probable that their apparent idleness and inability to produce identification result from their financial condition. It is submitted that the possibility that criminal sanctions can be imposed on the homeless merely because of their economic status is an injustice that must be addressed by the courts and the legislatures.

ADULT PROTECTIVE SERVICES LAWS

Although vestiges of vagrancy laws remain today in a number of states, the legislatures, through the impetus of the Supreme Court, have begun to recognize that criminal punishment is not the solution to homelessness. However, an equally misguided effort made by several state governments has been the imposition of adult protective services laws. Adult protective services laws permit social service agencies to force the homeless into shelters. These laws indicate a growing awareness in state governments that the physical safety of those without shelter is threatened by harmful conditions such as subfreezing temperatures. Nonetheless, although well-intended, adult protective service laws raise constitu-

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63 Cf. Schneider, supra note 1, at 31 (recognizing that homeless cannot fulfill requirement of documentary verification of identity for food stamp eligibility, federal regulations provide for verification by “collateral contacts”).

64 See, e.g., CAL. PENAL CODE § 653(g) (West 1970); FLA. STAT. ANN § 856.021(2) (West 1976); GA. CODE ANN. § 16-11-36 (1984); Nev. REV. STAT § 207.030 (1981).


66 Note, supra note 8, at 760-61. The New York State Legislature has been listening to accounts of the plight of the homeless. Id. at 761 nn.54-55.

67 See id. at 773-81. In addition to New York, see N.Y. SOC. SERV. LAW § 473-a (McKinney Supp. 1983), four other states have enacted protective services laws, see supra note 8.

68 See Note, supra note 8, at 774-75. Adult protective services laws empower social service agencies to impose limited emergency services on needy individuals who resist aid. See id. These agencies, however, must initiate certain legal procedures before being permitted to impose these services. See id. By following these procedures, social service officials can, for example, force resisting homeless into shelters while protecting themselves from legal liability. See id.; cf. N.Y. SOC. SERV. LAW § 473-b (McKinney Supp. 1984-1985) (in 1984 state legislature enabled private individuals to inform social service agencies that adult might be endangered without fearing civil liability for their report).

tional issues involving the deprivation of individual liberty.\textsuperscript{60} It is submitted that these statutes, although civil in action, are as unjust as earlier vagrancy laws because both attempt to solve the problem of homelessness by imposing sanctions on the homeless that violate due process.

New York is one of five states that has enacted adult protective services laws.\textsuperscript{61} Recognizing the potential for the deprivation of civil liberties,\textsuperscript{62} the state legislature strictly limited the circumstances under which, and the procedures through which, social service officials are empowered to compel protective services for an individual.\textsuperscript{63} An individual must be confronted with a life threatening situation and must lack "the capacity to comprehend the nature and consequences of remaining in that situation."\textsuperscript{64} Social Service officials are required to give the homeless person notice of the imposition of the protective services and an opportunity to be heard.\textsuperscript{65} Services can be provided for a maximum of six days.\textsuperscript{66} Such limited relief in emergency situations has been held valid under the due process clause.\textsuperscript{67}

In drafting the protective service statutes the legislatures generally have failed to address a number of important issues, with the result that these laws are as vague as the vagrancy statutes.\textsuperscript{68} As with vagrancy statutes, the vagueness of protective services laws

\begin{footnotes}
\item[60] See Note, supra note 8, at 773-74, 775 n.122; N.Y. Times, Jan. 27, 1982, at A1, col. 1.
\item[64] Id. § 473-a(1)(a)(ii). Individuals on whom protective services are being imposed must be in danger of imminent death or serious physical harm, and they must be unable to comprehend the danger. Id. at § 473-a(1)(a)(i).
\item[65] See id. § 473-a(10)(b).
\item[66] See id. § 473-a(4)-(5) (imposition of services is of limited duration; three days with possibility of further three-day extension).
\item[67] See In re Byrne, 402 So. 2d 383, 385 (Fla. 1981) (imposition of protective services on elderly couple incapable of caring for themselves is constitutional), appeal dismissed sub nom. In re Turner, 455 U.S. 1009 (1982).
\item[68] Cf. Developments in the Law—Civil Commitment of the Mentally Ill, 87 Harv. L. Rev. 1190, 1254 (1974) (although vagueness doctrine has generally been employed with regard to criminal statutes, it has also been applied to civil sanctions) [hereinafter cited as Civil Commitment].
\end{footnotes}
means that the homeless individual is not provided with sufficient notice that his or her conduct will result in involuntary commitment. At the same time, a potential for arbitrary enforcement exists when the statute lacks clear criteria for determining whether an individual lacks "capacity to comprehend the nature and consequences of remaining in that situation or condition." Beyond the issue of statutory vagueness is the more fundamental problem of whether the due process rights of the homeless are protected when mentally incapacitated homeless individuals are forced into shelters that are themselves places of potential danger.

Apart from adult protective services laws, state and local governments have attempted to solve the problems of homelessness through the use of police powers. Emergency imposition of protective services based on state police power is even more threatening to the civil liberties of the homeless than the invocation of adult services laws. Police powers authorize peace and police officers to take mentally incapacitated individuals, who are incapable of caring for themselves and who may be a danger to themselves or

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60 Cf. Lessard v. Schmidt, 379 F. Supp. 1376 (E.D. Wis. 1974)(person subject to state civil commitment proceedings entitled to notice of both basis of detention and standard on which detained), vacated on other grounds, 421 U.S. 957 (1975), prior judgment reinstated, 413 F. Supp. 1318 (E.D. Wis. 1976).

70 N.Y. SOC. SERV. LAW § 473-a(1)(a)(ii)(a)-(b)(McKinney Supp. 1983). Neither mental illness nor refusal to accept aid is sufficient, in and of itself, to constitute the lack of capacity required for classification as an endangered adult. Id.; See Civil Commitment, supra note 68, at 1253 (vagueness results from failure to provide guidelines restricting scope of government officer's authority to enforce law). Limited guidelines are provided by the legislature to aid the social service agency in determining whether an individual is an "endangered adult."

71 See Werner, supra note 1, at 14-15.

72 See N.Y. Times, Jan. 24, 1985, at B3, col. 6. The homeless are placed in hospitals against their will through the imposition of police powers. See id. In New York, for example, the use of police powers in this context is not based on adult protective services laws, but on the Mental Hygiene Law. See N.Y. MENTAL HYG. LAW § 9.45 (McKinney Supp. 1984-1985); Note, supra note 8, at 779. Police powers are distinguished from the doctrine of parens patriae, a doctrine under which the state has inherent power to protect individuals suffering from a disability. Note, supra note 8, at 777; see also Civil Commitment, supra note 68, at 1222 (civil commitment based on societal interest rather than individual interest is grounded in police power). Police powers carry with them connotations of criminal sanction while parens patriae does not. See Note, supra note 8, at 777.

73 See Note, supra note 8, at 777 n.126. Associated with the use of police powers is the possibility of civil commitment in a mental hospital. See Civil Commitment, supra note 68, at 1222. This indicates that the use of police powers instead of adult protective services laws poses a threat to the homeless individual's civil liberties. See Note, supra note 8, at 777 n.126.
others, into custody for purposes of psychiatric examination.\textsuperscript{74} Unlike statutory adult protective laws, the use of police power does not require a hearing and therefore poses a greater threat of violating due process.\textsuperscript{75} As a result the courts have applied strict scrutiny to the invocation of police powers and have allowed the states to take the homeless individual into custody without notice and a hearing only when it is clear that no less restrictive alternative exists.\textsuperscript{76} Yet recently, the New York City police placed some homeless individuals in hospitals against their will without determining whether a danger existed.\textsuperscript{77}

It is submitted that state and local governments must face the fundamental contradiction that they have created. On the one hand, state and local lawmakers have refused to guarantee the

\textsuperscript{74} Note, \textit{supra} note 8, at 777 n.126, 780-81; \textit{Civil Commitment, supra} note 68, at 1228-38; \textit{see, e.g., N.Y. MENTAL HYG. LAW} \S 9.45 (McKinney Supp. 1984-1985). The underlying purpose of police powers is to prevent criminal activity by a person who is mentally ill and potentially harmful. \textit{See Civil Commitment, supra} note 68, at 1228-30. Therefore, two conditions must be met before police powers can be used to commit an individual: he must be mentally incapacitated, and dangerous to himself or others. \textit{See id.}

\textsuperscript{75} \textit{See Civil Commitment, supra} note 68, at 1245 n.231. Police powers threaten an individual's due process rights for several reasons. \textit{See id.} at 1228-48. The individual is deprived of his liberty in "anticipation of future criminal behavior." \textit{Id.} at 1228. Moreover, detention is imposed without a hearing. \textit{Id.} at 1245 \& n.231. In addition, preventive detention of the mentally ill may constitute an unconstitutional punishment of status. \textit{Id.} at 1228-29; \textit{cf. supra} note 44 (vagrancy and loitering statutes present issue of punishment of status).

\textsuperscript{76} \textit{See Civil Commitment, supra} note 68, at 1223, 1245 n.231. Before police powers may be invoked for the purpose of civil commitment, a compelling state interest must exist. \textit{See id.} Such an interest does exist when the individual endangers his own life or the lives of others. \textit{See id.} However, even in cases in which the use of police powers has been premised on the saving of a life, only the possibility of temporary, rather than permanent, deprivation of the individual's civil liberties has been considered. \textit{See, e.g., N.Y. MENTAL HYG. LAW} \S 9.39(b) (McKinney 1978) (involuntary treatment authorized for maximum of 15 days unless longer period is judicially authorized); \textit{id.} at \S 21.90 (authorizes police to take individual incapacitated by alcohol into custody for period of twenty-four hours or until condition wanes); \textit{cf. United States v. George, 239 F. Supp. 752, 753-54 (D. Conn. 1965)} (saving life is compelling consideration in decision whether to judicially order blood transfusion for Jehovah's Witness). Thus, even greater safeguards are necessary to protect the due process rights of homeless persons confronted with the possibility of civil commitment.

\textsuperscript{77} \textit{See N.Y. Times, Jan. 24, 1985, at B3, col. 6. Recently, Mayor Koch ordered the police to remove the homeless from the bitter cold and place them in shelters and hospitals. Id. Two homeless were placed against their will in city hospitals. Id. The Mental Hygiene Law was cited as the authority for that commitment; yet the requirement that an individual be a danger to himself or others was apparently ignored. \textit{See id.} The city's action was evidently rationalized in terms of a proposed change in the current police power requirements. \textit{See id.} Under this new legislation, police powers would permit the placement of homeless individuals in danger of death or substantial physical harm in hospitals. \textit{Id.} It is submitted that this proposed legislation undermines the essential due process requirement of civil commitment and distorts a doctrine that is already under constitutional fire.
homeless shelter. On the other, they have recognized that those without shelter face life threatening dangers, and have enacted adult protective service laws that violate the civil liberties of the homeless.

**LEGISLATIVE AND JUDICIAL INACTIVITY ON BEHALF OF THE HOMELESS**

Federal, state and local legislatures have provided government subsidies, low-cost housing, and some shelter for the poor and the homeless.\(^7^8\) This legislative activity can be criticized nonetheless because these governments have supplied this minimal aid reluctantly,\(^7^9\) and have failed to take steps to solve the causes of home-

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\(^7^8\) See Werner, *supra* note 1, at 14-15; Note, *supra* note 9, at 940. Congress has held hearings to determine what federal action is necessary on behalf of the homeless. *See Homelessness in America: Hearing Before the House Subcomm. on Housing and Community Dev., 97th Cong., 2d Sess. 14 (1982).* The federal government has also passed legislation providing for the distribution of $50 million to local agencies rendering aid to the homeless. *See Werner, *supra* note 1, at 15. State and local governments have also provided subsidies for the homeless. For example, the Governor of New York recently proposed the collection of funds for homeless services. *See N.Y. Times, Jan. 26, 1984, at B2, col. 1.*

One particular area in which federal, state, and local legislatures have provided for the poor has been in the area of housing. *See, e.g.,* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified in scattered sections of 12, 15, 20, 40, 42, 49 U.S.C.); The Special Needs Housing Act, N.Y.A. 8390, 206th Sess. (1983) (legislative activity to respond to crisis housing for homeless in New York). However, although federal and state governments provide public housing for the poor, "[t]he historical development of public housing in the United States has been characterized as a 'chronicle of frustration and failure.'" *Comment, The Housing and Community Development Act of 1974—Who Shall Live in Public Housing?, 25 CATH. U.L. REV. 320, 320-22 (1976).* Moreover, while state and local governments have provided low cost housing for the poor, they are less than willing to provide shelter for the homeless. *See Brief for the National Coalition for the Homeless as Amicus Curiae at 4 & n.4, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984); see generally Homelessness in America: Hearing Before the House Subcomm. on Housing and Community Dev., 97th Cong., 2d Sess. 57-60 (1982) (testimony heard regarding state and local inability and/or refusal to provide shelter to homeless). Indeed, the response of local government in particular to the problem of sheltering the homeless has been far from cooperative. *See Werner, *supra* note 1, at 14-15. While some local governments work together with private organizations to provide shelter, other cities either shift the responsibility to charitable organizations or do nothing at all. *See id.* at 15.

\(^7^9\) See Werner, *supra* note 1, at 14. Federal, state and local activity on behalf of the homeless has been chiefly characterized by a reluctance to provide aid; this reluctance is particularly apparent in major cities. *See id.* The city of Phoenix, with an estimated 3300-6200 homeless, has no shelters. *Id.* San Diego, which is in the process of revitalizing its downtown area, "ha[a]n been subtly urging the missions operating shelters to relocate so that they will not spoil the renewal efforts." *Id.* New York City has virtually ignored a judicial decree ordering the furnishing of shelter to all homeless individuals who apply for it. *Collin, *supra* note 2, at 325; see Homelessness in America: Hearing Before the House Subcomm. on Housing and Community Dev., 97th Cong., 2d Sess. 33 (1982).* But see Note, *supra* note 9,

For example, loitering and adult protective services laws have confronted the problem of homelessness negatively by depriving the homeless of civil liberties rather than positively by providing permanent housing, employment, and aftercare.\(^81\)

Future legislative activity on behalf of the homeless is unlikely in view of a recent report by the Department of Housing and Ur-

\(^80\) See generally Collin, supra note 2, at 320-21, 323. The federal and state legislatures are beginning to recognize the needs of the homeless, and have begun to allocate funds to local agencies so that the homeless may be furnished with basic services. See supra note 78. The problem with government corrective measures is that homelessness is not being prevented. Housing, unemployment and deinstitutionalization problems must be dealt with by government and not exacerbated by it. Thus, the federal government must work to reverse the sociological trend away from low cost housing as well as the significant decrease in federal low cost housing subsidies that has occurred within the last five years. See Brief for the National Coalition for the Homeless as Amicus Curiae at 10, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984) (comparing housing assistance in 1980 (26.6 billion) with that in 1984 (0.5 billion)). Government must also try to counter the effects of the recent recession and the reduction in unemployment compensation, which "ha[ve] meant a more rapid descent into poverty than the unemployed experienced in previous recessions," and "ha[ve] exposed the unemployed worker, and his family, to a greater risk of homelessness than victims of earlier recessions." Id. at 11; see The Poverty Rate Increase: Hearing Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means, 98th Cong., 1st Sess. (1983). Indeed, as a result of the recession, the homeless population has "become more diverse, including increasing numbers of skilled and educated people and large numbers of young people." Brief for the National Coalition of the Homeless as Amicus Curiae at 11, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984). Finally, the states must either discourage deinstitutionalization or provide aftercare, including shelter, for the deinstitutionalized mentally ill. See Collin, supra note 2, at 320-21; Reich, Care of Chronically Mentally Ill—A National Disgrace, 130 AM. J. PSYCHIATRY 911, 912 (1973).

Perhaps the single greatest instance of congressional exacerbation of the problem of homelessness is the federal reduction in aid to the poor. See Reich, supra, at 912; Brief for the National Coalition of the Homeless as Amicus Curiae at 12-13, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984). Reduction in federal and state aid to the poor has contributed to homelessness by forcing individuals to choose between the basic necessities of life. For example, the poor may be forced to choose between shelter and food when food stamp aid is decreased, and between shelter and health care when health care and Social Security benefits are reduced. See Brief for the National Coalition of the Homeless as Amicus Curiae at 12-13, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984) (while average earnings per family will have declined by 4% across nation during period from 1979-1984, average welfare and food stamp benefits have declined by 14%) (citing F. LEVY & R. MICHEL, THE WAY WE'LL BE IN 1984: RECENT CHANGES IN THE LEVEL AND DISTRIBUTION OF DISPOSABLE INCOME 4 (1983)).

One example of federal aid reduction that has increased the frequency of homelessness among the impoverished is the Omnibus Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599 (1980), which reduced numerous welfare assistance programs such as the School Lunch Program, Medicaid and Medicare, Unemployment Compensation, and the Old Age and Survivor's Disability Insurance Program, id. at 2599-2603, 2609-55, 2655-60.\(^81\) See supra notes 56-71 and accompanying text.
ban Development (HUD). HUD has estimated the number of homeless at a number far lower than the result reached by any other statistical study. It is submitted that this estimate may have the effect of thwarting any movement to aid the homeless on federal, state, and local levels.

The failure of the judiciary to address the issue of homelessness stems not from a lack of initiative but rather from a lack of opportunity and means. The homeless have traditionally lacked access to the courts and, as a result of the scarcity of common and statutory law on the subject, the judiciary has been ill-equipped to resolve those questions that have reached it. None-
theless "[l]itigation has become the preferred tool of advocacy
groups working to improve conditions for the homeless," and the
courts are now more willing to recognize their role in this area even
though it may involve them in questions of social policy. Indeed, it is through the courts that the right to shelter was created, the right to vote guaranteed, and the right to notice and a hearing before the closing of a homeless shelter was provided.

While the judiciary has been the most effective channel for influencing government policy in the area of homelessness, it alone cannot bring about the broad changes necessary to eliminate homelessness. To achieve these changes, the homeless need a political voice.

GUARANTEING THE HOMELESS THE RIGHT TO VOTE

Homeless have been denied the right to vote because they lack a "bona fide residence," an essential qualification for voting. This hearing before shelter is closed).

See Note, supra note 9, at 940. Organizations for the homeless such as the Coalition for the Homeless, headed by attorney Robert Hayes, and the Community for Creative Non-Violence, in Washington, D.C., have used litigation to gain rights for the homeless. See Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984); Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (Sup. Ct. N.Y. County).

See Seide v. Prevost, 536 F. Supp. 1121, 1125 (S.D.N.Y. 1982). One way courts address homelessness issues when faced with a dearth of statutory and common law is by looking at social policy. See id. The courts are generally discouraged from becoming policymakers, but in the area of homelessness such a role is at times necessary:

While the impropriety of judges determining social policy is frequently sounded by those with loud trumpets, nonetheless, in the context of the needs of the homeless and the mentally disturbed, it is the court that must decide the issues brought before it and seek to achieve a just result and do so promptly.

Id.; see also BAM Historic Dist. Ass'n v. Koch, 723 F.2d 233, 236 (2d Cir. 1983) (historical association sought injunction to prevent city from operating shelter in renovated community; injunction denied as against public interest in housing homeless); Blackshear Residents Org. v. Romney, 472 F.2d 1197, 1198 (5th Cir. 1973) (per curiam) (injunction preventing low cost housing contrary to public interest).

See infra notes 126-129 and accompanying text.

See infra notes 107-122 and accompanying text.


See Pitts v. Black, No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984) (available on LEXIS, Genfed library, Dist file); Committee for the Dignity and Fairness for the Homeless v. Tartaglione, No. 84 Civ. 3447 (E.D. Pa. Sept. 14, 1984). Thus far, there have been only three challenges to "bona fide" residence requirements. See Tartaglione, No. 84 Civ. 3447 (Philadelphia); Black, 84 Civ. 5270 (New York); Silas, Alley Voters, 70 A.B.A. J. 37 (1984) (Washington, D.C.). Since most states have some form of fixed, permanent legal residence voting requirement, see Brief for the National Coalition for the Homeless as Amicus Curiae at 35, Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984), it is probable these
residency requirement serves two important purposes: it helps prevent fraud and ensures that the voter becomes a part of, and thus has a stake in, the political community in which he votes. However, the test employed to determine whether a person is a bona fide resident—the maintenance of a fixed, permanent legal residence—creates problems for the homeless. By defining bona fide residence in this manner, state legislatures have imposed an economic restriction on voting by excluding those who cannot afford housing. Yet, because the residency requirement has been subject to only minimal scrutiny, the fixed and permanent lodging test has been held valid until recently.

three decisions will encourage challenges to residency requirements in other states.

Dunn v. Blumstein, 405 U.S. 330, 346 (1972); Pitts v. Black, No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984) (available on LEXIS, Genfed library, Dist file). In Dunn, the Supreme Court left open the question of whether the state interest in preventing fraud was a compelling one. See 405 U.S. at 343, 356. Nonetheless, in Black, Judge Lowe recognized the prevention of fraud as a compelling state interest that is furthered by a bona fide residency requirement. See Black, No. 84 Civ. 5270.

Black, No. 84 Civ. 5270. While rejecting a durational residency requirement, the Dunn court noted that an appropriately defined and uniformly applied requirement of bona fide residence may nonetheless be required to ensure that the compelling interest of each state that its citizens have a stake in the political community is protected. See 405 U.S. at 343-44. Rejecting the fixed, legal permanent lodging test in Black, Judge Lowe agreed that a uniform test of bona fide residence is needed to preserve the basic concept of a political community. Black, No. 84 Civ. 5270.

See Pitts v. Black, No. 84 Civ. 5270 (S.D.N.Y., Sept. 25, 1984) (available on LEXIS, Genfed library, Dist file) (permanent injunction and declaratory judgment to prohibit application of election laws in such a way as to disenfranchise homeless). Bona fide residency has not been rejected in those cases in which the homeless challenge a denial of the right to vote. See id.; Committee for the Dignity and Fairness for the Homeless v. Tartaglione, No. 84 Civ. 3447 (E.D. Pa. Sept. 14, 1984); N.Y. Times, May 1, 1984, at A28, col. 1. However, in each instance the "fixed and permanent lodging" test has been redefined.

It is submitted that requiring an individual to have a fixed and permanent legal residence is as much an economic restriction on voting as the requirement of property ownership, or a poll tax. See infra notes 100-103. In each case, those who cannot afford to meet the statutory qualifications are denied the right to vote, even though voting statutes containing a bona fide residency test do not appear on their faces to draw economic lines of demarcation. Id. While "[t]he states . . . are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws," Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting), state statutes must also avoid covert discrimination between the two groups. Thus, it is submitted that when a state law contains a "built in opportunity for the rich to receive a different treatment than the poor," Davis v. Page, 618 F.2d 374, 386 (5th Cir. 1980), as in an election law containing a bona fide residence requirement defined in terms of fixed and permanent legal residence, the statute must be deemed unconstitutional.


See Evans v. Cornman, 398 U.S. 419, 422 (1969); Carrington v. Rash, 380 U.S. 89, 91
The Supreme Court has eliminated most economic requirements for voting, including property ownership$^{100}$ and the poll tax.$^{101}$ According to Justice Douglas in *Harper v. Virginia State Board of Elections*, "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental, to be so burdened or conditioned."$^{102}$ If the practical effect of the fixed and permanent lodging test is to place an economic limitation on the right to vote$^{103}$ it is submitted that the Supreme Court's acceptance of the traditional test of bona fide residency cannot be reconciled with the Court's rejection of the property ownership and poll tax requirements.

As recently as 1980, the Supreme Court took the position that the legislature has no responsibility to "equalize the condition" of the poor.$^{104}$ A government, according to the Court, has no duty to remove economic obstacles that prevent the poor from enjoying
fundamental rights. At the same time, however, the highest court also has stated that the legislature may not place economic barriers in the path of an individual who wishes to exercise a fundamental right. It is submitted that the states have actively prevented those without shelter from exercising their fundamental right to vote by defining "bona fide" residence in terms of a fixed, permanent, legal residence. Only by redefining the individual state tests of bona fide residency can the obstacles imposed by state legislatures on the franchise be overcome.

State legislatures will not feel compelled to create better tests of good faith residency if the traditional tests continue to be weighed against a rationality standard. It is submitted that strict scrutiny should be used to judge bona fide residency requirements. This argument is supported by the fact that recognized economic restrictions on voting, as well as durational tests of residency, have been subject to this standard. Recently, in Pitts v. Black, See Note, supra note 9, at 965. In Harris v. McRae, 448 U.S. 297 (1980), the Supreme Court addressed the issue of whether the government had to provide welfare benefits for abortions. Id. at 312. The Supreme Court held that although all individuals have a constitutional right to choose to undergo an abortion, the state does not have to subsidize the abortion. Id. at 318. The fact that individuals are poor and therefore incapable of exercising a fundamental right does not impose any obligation on the government. See id.

In creating fixed and permanent legal residence tests, it is submitted, state legislatures have not merely refused to provide the economic means necessary for the homeless to exercise the franchise, but have affirmatively prevented them from voting. See, e.g., Committee for the Dignity and Fairness for the Homeless v. Tartaglione, No. 84 Civ. 3447 (E.D. Pa. Sept. 14, 1984) (to fulfill residency requirements, homeless may register at street corners and benches, as well as shelters with which they have established relationship and which accept first class non-forwardable mail); N.Y. Times, May 1, 1984, at A28, col. 1 (homeless in District of Columbia may designate local home and mailing address for residence requirement).

See supra note 14 and accompanying text.


Dunn v. Blumstein, 405 U.S. 330, 337 (1972). The durational residency qualification, which imposes a time restriction before which a bona fide resident may vote, is subject to strict scrutiny as well. See id. Durational residence was an earlier form of the test of bona fide residence. See Comment, Applying Equal Protection to Bona Fide Residence Requirements, 59 IOWA L. REV. 671, 672-76 (1974).
the federal district court for the Southern District of New York applied a stricter standard to a New York election law that required voters to show fixed, permanent legal residence.\(^{113}\) The court held that because this test of bona fide residence completely disenfranchised the homeless, it was unconstitutional as applied.\(^{114}\)

In *Black*, a group of homeless individuals brought a class action against the New York city and state election boards to enjoin permanently the boards from applying New York State Election Law sections 1-104, 5-102 and 5-104 in state and city elections.\(^{115}\) The plaintiffs argued that the traditional definition of residence denied those without shelter equal protection of the law.\(^{116}\) The plaintiffs offered an alternative definition of bona fide residence: "the act of being in one geographical locale, where one performs the usual functions of sleeping, eating, and living in accordance with one's life style, and a place to which one, wherever temporarily located always intends to return."\(^{117}\)

Writing for the court, Judge Lowe stated that restrictions on the fundamental right to vote must undergo strict scrutiny.\(^{118}\) Applying this standard, the court reasoned that although the fixed and permanent lodging test served to prevent fraud and to ensure an individual's stake in the political community, less restrictive

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\(^{113}\) No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984) (available on LEXIS, Genfed library, Dist file).

\(^{114}\) *Id.*

\(^{115}\) *Id.* The homeless plaintiffs sought a permanent injunction and a declaratory judgment to prohibit application of the New York State Election Law "in such a manner as to [render them] completely disenfranchise[d]." *Id.* The specific provisions of the state election laws under scrutiny in *Black* were New York Election Law §§ 1-104, 5-102, and 5-104. Section 1-104 provides that residence is "that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return." N.Y. ELEC. LAW § 1-104 (McKinney 1978). Sections 5-102 and 5-104 add the requirements that voter registration cannot take place unless an individual is a "resident." *Id.* §§ 5-102(1) and 5-104(2).

\(^{116}\) No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984).

\(^{117}\) *Id.* The fixed and permanent lodging test could be redefined, the plaintiffs argued, in the less rigid terms of "domicile." *See id.* Domicile requires only that the focus of one's existence be in a geographical locale, rather than in a particular lodging. *See id.*; N.Y. Times, Sept. 11, 1984, at A18, col. 1 (since homeless fulfill "domicile" requirements like other citizens, they also fulfill residence requirement).

\(^{118}\) *See No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984); N.Y. Times, Sept. 11, 1984, at A18, col. 1. Judge Lowe argued for the strict scrutiny standard at the hearing for the preliminary injunction. *See Pitts v. Black, No. 84 Civ. 5270, at 15 (S.D.N.Y. Sept. 25, 1984). The rationale for this stricter standard was the same as that applied by the Dunn Court with regard to durational residency. *See id.* at 13.*
procedures and sanctions exist to protect these state interests. The court adopted a new test that required the homeless to identify "a specific location within a political community which they consider their 'home base,' to which they return regularly, manifest an intent to remain for the present, and a place from which they can receive messages and be contacted . . ." Judge Lowe noted that alternative eligibility procedures for the homeless consistent with the new test of bona fide residence had already been established in Philadelphia and Washington, D.C.

Although the New York district court has been the only court to adopt a new definition of bona fide residence to date, the need for a new test is evidenced by the growing number of challenges to state residency qualifications that deny the homeless the franchise. It is submitted that the residence test adopted in Pitts will serve two purposes: first, it will act as a model for the redefinition of bona fide residence requirements in other contexts, such as public assistance. Second, and more significantly, it will guarantee the homeless a political voice with which they can challenge the denial of welfare assistance, the imposition of loitering and adult protective services statutes, and demand a statutory right to shelter.

119 No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984). Signature verifications, return of registration notice and criminal sanctions are a few alternative ways that the New York city and state boards of election could prevent voter fraud. Id. A mailing address at a local shelter should be sufficient to meet the requirement that the homeless be part of, and have a stake in, the political community. See id.

120 Id. When the district court redefined bona fide residence in terms of an intent to remain in a geographical locale, it evidently adopted the definition of residence stated in Ramey v. Rockefeller, 348 F. Supp. 780, 788 (E.D.N.Y. 1972), and in Palla v. Suffolk County Bd. of Elections, 31 N.Y.2d 36, 47, 286 N.E.2d 247, 252, 334 N.Y.S.2d 860, 866.

121 See Pitts v. Black, No. 84 Civ. 5270 (S.D.N.Y. Oct. 10, 1984). The new test of bona fide residence which calls for a "home base" and a "means by which the homeless individual can be contacted" is satisfied by residency requirements for the homeless in Washington, D.C., and Philadelphia. See id. The Washington, D.C., board of elections requires a specifically identified location and a mailing address; the Philadelphia elections board requires a shelter for homeless that accepts "first-class non-forwardable mail." Id.

122 The District of Columbia board of elections evaded review by the district court by reaching its own decision on the disenfranchisement of the homeless. See Resky, A Right to Live, A Right to Vote, N.Y. Times, Aug. 29, 1984, at B6, col. 4. In New York and Philadelphia, on the other hand, the plaintiffs were compelled to resort to the district courts. See Pitts v. Black, No. 84 Civ. 5270 (S.D.N.Y. Sept. 24, 1984); Committee for the Dignity and Fairness for the Homeless v. Tartaglione, No. 84 Civ. 3447 (E.D. Pa. Sept. 14, 1984).
To guarantee the homeless the right to vote, the courts of Philadelphia and Washington, D.C. redefined the test of bona fide residence so that the homeless could register their park benches, street corners and local shelters as their residences. The registration of such places to fulfill residency qualifications, it is submitted, underscores the existence of a more fundamental problem that must be addressed by federal and state legislatures and the judiciary: the lack of a right to shelter. Although the Supreme Court has explicitly refused to find a right to shelter in the Constitution, it is submitted that the creation of a constitutional or federal statutory right to shelter is not inconsistent with the Constitution. Indeed, several authors have argued that a right to shelter is implicit in the third, fourth, fifth, and fourteenth amendments, each of which protects the individual from deprivation of his property. An argument also has been advanced that the Constitution is dynamic rather than static in nature, and therefore permits the development of new rights, such as housing, in accordance with the needs of a changing nation. Perhaps the most cogent argument for a constitutional right to shelter for the homeless was that offered by Justices Brennan and Marshall. These justices argue that a right to shelter must be implied within the Constitution if the exercise of another fundamental constitutional right depends

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123 See supra notes 120-121.
124 See supra note 80 and accompanying text.
125 Lindsey v. Normet, 405 U.S. 56, 74 (1972). In Lindsey, although the Supreme Court recognized the importance of adequate housing, it argued that it had no constitutional basis on which to establish a right to shelter. Id.
126 See Steinberg, Adequate Housing for All: Myth or Reality?, 37 U. Pitt. L. Rev. 63, 68 (1974); Comment, Towards a Recognition of a Constitutional Right to Housing, 42 UMKC L. Rev. 362, 362 (1974). A reading of the Constitution suggests that the founding fathers recognized the importance of an individual's home. See Comment, supra, at 362. For example, the third amendment forbids the quartering of soldiers in any house; the fourth amendment secures one's home against unreasonable search and seizure; and the fifth amendment prohibits deprivation of one's property. See id.
127 See Comment, supra note 126, at 363. The Supreme Court recognized at an early date that the Constitution did not embody all the rights that are guaranteed to individuals. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (Constitution outlines rights guaranteed to individuals). A flexible Constitution is necessary to approach and resolve the "various crises of human affairs." Id. at 415 (emphasis added). It is submitted that the lack of decent housing is one such "crisis of human affairs" for which a constitutional resolution must be found. See Steinberg, supra note 126, at 65.
upon an individual having adequate housing.\textsuperscript{129} This argument is particularly important for the homeless, since their fundamental right to vote generally is denied because of their lack of adequate housing.

A right to shelter is also consistent with federal, state and local activity in the area of housing.\textsuperscript{130} Through the United States Housing Act of 1937 and its amendments,\textsuperscript{131} the federal government has attempted to ensure that all Americans have adequate housing.\textsuperscript{132} State and local housing authorities have followed the federal government's lead by establishing housing codes and regulations.\textsuperscript{133} Moreover, in the District of Columbia, an initiative that would require the city to provide shelter to any District resident was recently placed on the ballot.\textsuperscript{134}

\textsuperscript{129} See id. at 62-63 (Brennan, J., dissenting); id. at 102-13 (Marshall, J., dissenting). Certain non-constitutional rights play an important role in the protection of constitutional rights. See id. at 62-63 (Brennan, J., dissenting); id. at 102-13 (Marshall, J., dissenting). Justices Brennan and Marshall argue that the more essential the non-constitutional right is to the constitutional right, the greater the need for the government to guarantee that non-constitutional right. See id. at 62-63 (Brennan, J., dissenting); id. at 102-13 (Marshall, J., dissenting). The arguments of Justices Brennan and Marshall are at odds with the Supreme Court's view of the federal, state, and local governments' responsibility to protect the fundamental rights of the poor. See supra notes 104-105.

\textsuperscript{130} See Steinberg, supra note 126, at 72-73.


\textsuperscript{132} See id. The United States Housing Act of 1937 ("the Act") was the first federal attempt to confront the great need for decent and adequate housing in this country. Staff Project: The Tenant Selection Process in Public Housing in Kansas City, Missouri, 46 UMKC L. Rev. 507, 539 nn.183-184 (1978). The goal of the Act and its amendments was to provide adequate housing for all Americans. See id. at 539. The Housing Act of 1949 provides:

The Congress hereby declares that the general welfare and security of the Nation and the health and living standards of its people require . . . the realization . . . of the goal of a decent home and a suitable living environment for every American family.

Housing Act of 1949, Pub. L. 171, ch. 338, 63 Stat. 413. It is submitted that it is difficult to reconcile this goal with the reluctance of the federal government to secure decent housing for the homeless.

\textsuperscript{133} See, e.g., Staff Project, supra note 132, at 528-32 (establishment of public housing authority in Kansas City, Missouri); see Steinberg, supra note 126, at 72-73. The creation of a constitutional or statutory right to shelter is consistent with indication of concern at all three levels of government for the plight of the homeless. See id. Contra Michelman, The Advent of a Right to Housing: A Current Appraisal, 5 Harv. C.R.-C.L. L. Rev. 207, 211-13 (1970) (panoply of housing acts are not promises to public to achieve ideal welfare state of housing for all needy).

\textsuperscript{134} See Washington Post, Nov. 8, 1984, at A58, col. 5; Washington Post, Oct. 24, 1984, at C1, col. 6; Washington Post, Aug. 2, 1984, at C3, col. 4. The initiative proposed enactment of the D.C. Right to Overnight Shelter Act, which now requires the District of Columbia to provide shelter for the homeless that is "'accessible, safe and sanitary and has an atmo-
In spite of the Supreme Court's resistance to establishing a federal constitutional right to shelter, individual state courts have guaranteed this right to state and local residents. The New York Supreme Court has guaranteed a state constitutional right to shelter in Callahan v. Carey. However, since this right is based on the New York State Constitution, the court's rationale in Callahan is not binding on other state courts. Nonetheless, West Virginia courts have found authority for guaranteeing shelter to the homeless in state social services laws.

sphere of reasonable dignity.'" See Washington Post, Nov. 8, 1984, at A58, col. 5. This act is the first instance of legislative activity to guarantee the homeless the right to shelter. See N.Y. Times, May 1, 1984, at A28, col. 1.


133 N.Y.L.J., Dec. 11, 1979, at 10, col. 4. In Callahan, the New York Supreme Court for New York County issued a consent decree finding that the destitute "are entitled to board and lodging" and setting forth the minimum standards necessary to guarantee homeless men the right to shelter in New York City. See id. The resistance of the city to the court's decision led to the Callahan Decree, an agreement between the city and state and the homeless plaintiff which provided:

that sanitary and safe shelter and board be supplied to a homeless man who applies for it as long as the man meets the need standard to qualify for home relief established in New York State or the man, by reason of physical, mental, or social disfunction, is in need of temporary shelter.

Id. The right to shelter set forth in the Callahan Decree has been extended to homeless women in New York. See Eldredge v. Koch, 118 Misc. 2d 163, 459 N.Y.S.2d 960 (Sup. Ct. N.Y. County), rev'd on other grounds, 98 App. Div. 2d 675, 676, 469 N.Y.S.2d 744, 746 (1st Dep't 1983).

However, New York City has persisted in ignoring the judicial mandate in spite of the Callahan Decree, see Collin, supra note 2, at 325, even though the city faces a dilemma when the temperature drops and the homeless face the threat of severe physical injury and death, see N.Y. Times, Jan. 24, 1985, at B3, col. 6. It is submitted that if the city were to comply with the requirements of Callahan, it would not have to compel the homeless into shelters in sub-freezing temperatures.


136 See id. at 250-51. The Supreme Court of Appeals held that those without permanent residence are "incapacitated adults" within the meaning of West Virginia's adult protective services laws, so that the homeless could compel the Department of Welfare to provide shelter for them. Id.

It is interesting to compare the offensive use of adult protective services laws by the
Once the homeless gain the right to vote, their political resources will undoubtedly be directed toward compelling the state and federal governments to guarantee a right to shelter. The importance of this right must not be minimized because it is inextricably intertwined with another problem of the homeless: the right to aftercare. A large percentage of the homeless are mental patients, who, because of social reform and the reduction of government spending, have been deinstitutionalized without having been provided with aftercare. Indeed, the importance to the homeless of a political voice becomes increasingly apparent on examination of the many problems and deprivations they face.

**CONCLUSION**

Homelessness is a problem that has virtually been ignored by the legislative and judicial systems in America. Indeed, even when the legislature and judiciary have attempted to solve the problem, their lack of commitment to what would be a real solution, a statu-

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plaintiffs in *Hodge* with the defensive use of such laws by state and local governments. See *supra* notes 54-77 and accompanying text. The homeless plaintiffs in *Hodge* sought to take advantage of protection provided by the state; they were not being compelled. See 303 S.E.2d at 250.

140 See *N.Y. Times*, May 1, 1984, at 28, col. 1. The political voice of the homeless has begun to develop now that they have been guaranteed the right to vote in Washington, D.C., Philadelphia, and New York City, and now that they have begun to make use of political channels such as publicity and moral pressure. See *supra* notes 88-89 and accompanying text. The recent D.C. Right to Overnight Shelter Act initiative evidences this group's growing political influence. The measure was overwhelmingly approved by the voters of Washington, D.C., most of whom could not have been the recently enfranchised homeless. Washington Post, Nov. 8, 1984, at A58, col. 5 (109,000 voters approved “Initiative 17”).

Placement of the D.C. Right to Overnight Shelter Act on the ballot is also important because it suggests that the homeless will use their political influence first to gain a statutory right to shelter. Indeed, this is necessary because most of the difficulties experienced by the homeless are caused by their lack of a fixed, permanent legal residence.

141 Rhoden, *supra* note 3, at 415-16. One major cause of homelessness is deinstitutionalization. Collin, *supra* note 2, at 320-23. Approximately 20-50% of the homeless suffer from mental disability. *Id.* Social reformers saw deinstitutionalization as a means of returning to the community mental patients who did not require constant care; the government regarded it as a means to cut spending. *Id.* at 318-20. Returning discharged mental patients to the community, however, did not guarantee them housing or aftercare. *Id.* at 320 (community resistance is one cause of displacement); *Note*, *supra* note 9, at 949. According to Rhoden, the problems of housing and aftercare are inextricably intertwined. Rhoden, *supra* note 3, at 415-16. “The rise in homelessness among the mentally ill graphically illustrates the fact that their need for housing cannot be divorced from their need for mental health treatment . . . .” *Id.* See generally *Note*, *supra* note 9, at 949 (homeless, mentally ill and right to aftercare discussed in relation to doctrines of parens patriae, right to treatment, and entitlement).

tory right to shelter, has produced absurd and contradictory re-
sults. It is difficult to understand how the neediest of the poor—the homeless—are ineligible for many forms of welfare assis-
tance. Yet, perhaps more incomprehensible are the civil and crimi-
nal sanctions imposed on the homeless through vagrancy, loitering,
and adult protective service laws. If shelter were guaranteed to the
homeless, these laws would be unnecessary. Equally, the vote, the
only source of political influence by which the homeless could
change their situation, is also denied to them because they have no
fixed and permanent residence.

The fixed and permanent lodging test for the voting require-
ment of bona fide residency invidiously discriminates against those
who cannot afford housing. When an arbitrary test contains a
built-in means of eliminating a group’s fundamental rights because
of the group’s economic status, the test is unconstitutional. The
fixed and permanent lodging test can be rejected simply because a
less restrictive alternative definition of bona fide residence is avail-
able. But the fundamental importance of voting and the fragile
predicament of the homeless require more rigid scrutiny of the re-
jected discrimination. Economic restrictions must be rejected as
the prerequisite for obtaining rights in the United States or the
poor, particularly the homeless, will be left out in the cold.

“A poor person is not just a person who is lacking the eco-
nomic wherewithals—he is also poor if he lacks power. This is a
fundamental issue in the whole problem of poverty.”

Maria L. Ciampi

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143 B. BRUDNO, INCOME DISTRIBUTION THEORIES AND PROGRAMS 10 (1976).