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RIGHTS AS A FUNCTIONAL GUIDE FOR SERVICE PROVISION IN HOMELESS ADVOCACY

NESTOR M. DAVIDSON*

Rights-based approaches to advocacy on behalf of homeless persons have long sought to vindicate important dignitary, liberty, and equality interests, as well as establish entitlements to housing, mental health, substance abuse, and other services. This advocacy has had some success in shaping the systems that define the interaction between homeless persons and the state. Rights paradigms, however, can be undermined by the day-to-day reality of the lives of homeless individuals and families that are often shaped by profound need less for protection from the state than for meaningful support, and entitlement advocacy remains circumscribed by the reality of severely limited resources at all levels of government.

Given these constraints, this essay argues that rights at the center of homeless advocacy can serve an additional function. The values underlying core rights asserted on behalf of those without shelter can provide a functional tool for providers of services to homeless individuals and families. Deploying rights in this way would serve less to hone an adversarial relationship between clients and service providers, and more as a set of guiding principles for program design and implementation. This essay accordingly argues that a self-conscious rights advocacy can help shape the systems that support homeless individuals and families, outlining core norms that advocates have asserted on the front lines of fighting for the rights of homeless persons and demonstrating how this is working in practice through examples from recent important developments in the field.

INTRODUCTION

As homelessness has remained a significant national concern over the past quarter century, advocates have taken a vital role in asserting the individual rights of those without shelter. Resisting moves by many communities to criminalize homelessness, advocates have fought to protect a variety of important rights, including access to public facilities, freedom of movement,

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and the right to attend to daily life functions where no adequate alternatives exist. Recognizing that the day-to-day lives of most of those facing homelessness are defined less by an overriding need for protection from a hostile state and more by a profound need for assistance, moreover, advocates have also worked to establish entitlements to housing, mental health, substance abuse, and other services.

Although this advocacy has had mixed success, it has done much to keep homelessness from descending into a nameless, faceless problem rather than a crisis of individuals who deserve protection from often remorseless efforts to marginalize them. The reality remains, however, that even as the current movement to end chronic homelessness garners increasing support, resources available at all levels of government remain woefully inadequate, and our legal and political culture is increasingly resistant to the idea of entitlements.

Individual rights, however, can play an additional and underappreciated role for advocates. Underlying core rights asserted on behalf of homeless persons are norms of dignity, autonomy, liberty, opportunity, and equality that have quite practical consequences if taken seriously in the design and implementation of services for homeless individuals and families. Service providers appropriately tend to focus on pragmatic goals—serving the greatest number of recipients in the most cost-effective and (for relevant clients) clinically appropriate manner. Norms underlying rights-based advocacy on behalf of the homeless, however, are directly relevant to how services are provided. Viewing rights-based norms as a functional tool for service providers would serve less to hone an adversarial relationship between clients and service providers and more as practical, client-oriented program guidance. It is thus possible to design and operate emergency shelters, transitional housing, permanent supportive housing, and the myriad of other services for those facing homelessness in ways that, even if not necessarily translating into legally enforceable rights, nonetheless seek to advance the dignity and autonomy of those served.

Many service providers are moving toward approaches that fulfill this rights-vindicating function. Although not typically described this way, a rights-as-functional-guide perspective can be seen in a number of recent significant developments in the field. A confluence of practical approaches to service provisions with an internalization of client-centered norms that parallel rights asserted on behalf of homeless individuals is evident in developments such as the rise of the “Housing First” movement and the trend toward permanent supportive housing; the increasing emphasis on short-circuiting the institutional cycle of placements facilitated by discharging clients from the health-care and the criminal-justice systems to the streets; creative new approaches to outreach; and, care for individuals with disabilities in less-

restrictive settings following the Supreme Court's 1999 decision in *Olmstead v. L.C.*¹

This brief essay seeks to make two points. First, advocacy has a significant role to play not just in protecting individual rights and securing resources, but also in directly shaping how services are provided to those experiencing or at risk of experiencing homelessness. Second, in approaching that task, advocates can draw on norms honed over many years of fighting for individual rights and for entitlements—norms that provide concrete, client-centered guidance for program design and implementation. In the current political climate, particularly at the local level where homeless persons and the government interact most directly, the need for individual advocacy is unlikely to abate. An active engagement in the systems that have emerged and are still developing to serve those without shelter, however, provides an additional fruitful avenue to help individuals and families most effectively find permanent housing.

I. INDIVIDUAL RIGHTS AND THEIR LIMITATIONS IN HOMELESS ADVOCACY

Advocacy on behalf of the homeless has taken on a number of distinct aspects since homelessness re-emerged as a fixture of national public concern in the early 1980s, focusing broadly on securing resources and challenging increasing moves to criminalize homelessness.² This long struggle has met with mixed success, but this advocacy has produced a set of particularized norms that can provide robust guidance for serving those without shelter.

A. *The Daily Lives of Homeless Individuals and the Circuit of Services*

Best estimates suggest that roughly a million and a half to over three million individuals experience homelessness over the course of a year.³ The experience of being without shelter, however, is only the most visible

1. *Olmstead v. L.C.*, 527 U.S. 581 (1999). See *infra* text accompanying notes 87-96 for a description of *Olmstead* and its ramifications.

2. See generally Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215 (2003); Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 329 (2000) [hereinafter Foscarinis, *Integrated Strategy*]; Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 691-695 (1997). Homelessness has been a fixture of American life since the colonial era, with periods of more intense public policy focus, such as the 1870s and the Great Depression, alternating with periods of less national visibility. See generally KENNETH L. KUSMER, *DOWN & OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* (2002).

3. See MARTHA BURT ET AL., *HELPING AMERICA'S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING?* 48-50 (2001) [hereinafter BURT ET AL., *HELPING AMERICA'S HOMELESS*].

manifestation of a complex of structural and individual problems that involve economic dislocation and poverty, as well as the effects of mental illness, substance abuse, and the interaction of these challenges.⁴ It is important in discussing homelessness to be sensitive not just to what unites various populations facing homelessness, but also to what distinguishes them.⁵

Over the past five years, the federal government has focused intensely, and not without controversy, on “chronic” homelessness.⁶ The federal government defines someone as chronically homeless if that person is an “unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more, or has had at least four episodes of homelessness in the past three years.”⁷ While a small fraction of the overall population of those experiencing homelessness, the chronically homeless appear to be a relatively static population⁸ (and therefore amenable to targeted assistance), require disproportionate resources, and tend to drive public perceptions of the problem.⁹

For many chronically homeless individuals, daily life involves a circuit of services provided in a variety of institutional settings.¹⁰ This circuit often

4. See Rob Rosenthal & Maria Foscarinis, *Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA 317, 317-319 (Rachel G. Bratt et al. eds., 2006); Christina Paul, *Putting Homelessness into Context*, 12 J. AFF. HOUS. & CMTY. DEV. L. 378 (2003).

5. See generally BURT ET AL., HELPING AMERICA’S HOMELESS, *supra* note 3, at 161-185 (documenting varying patterns of homelessness).

6. See generally Martha R. Burt, *Chronic Homelessness: Emergence of a Public Policy*, 30 FORDHAM URB. L. J. 1267 (2003) [hereinafter Burt, *Chronic Homelessness*]. Some advocates have raised concerns that the current focus on chronic homelessness represents a divide-and-ignore strategy, whereby the most visible homeless individuals receive public attention and resources while the needs of the bulk of those without shelter go unmet. See Nestor M. Davidson, “Housing First” for the Chronically Homeless: Challenges of a New Service Model, 15 J. AFF. HOUS. & CMTY. DEV. L. 125, 126-127 n.14 (2006).

7. 24 C.F.R. § 91.5 (2006). Under the McKinney-Vento Act, by contrast, a person is considered homeless if they lack “a fixed, regular, and adequate nighttime residence,” or if their “primary nighttime residence” is a shelter or “a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.” 42 U.S.C. § 11302(a)(1)-(2) (2000).

8. See Judith Hahn et al., *The Aging of the Homeless Population: Fourteen-Year Trends in San Francisco*, 21 J. OF GEN. INT. MED. 775, 775-778 (2006) (reporting on a study that indicates that the literally homeless population in San Francisco appears to be a static and aging cohort).

9. Public perception of the “homeless” and the political and legal responses that flow from that perceptions have been their own arena of advocacy. Gary Blasi has argued persuasively that prevailing cultural perceptions of homelessness are shaped by stereotypes and associations some of which can be attributed to the lasting results of advocates who took the lead decades ago in defining the problem. See Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 233 (2000).

10. See Kim Hopper et al., *Homelessness, Severe Mental Illness, and the Institutional Circuit*, 48 PSYCH. SERV. 659, 662 (1997) [hereinafter Hopper, *Institutional Circuit*]; see also

involves a rotating combination of institutional settings, a hobbled-together succession of shelters, rehabilitation facilities, hospital emergency rooms, jails, informal arrangements, and, of course, the streets.¹¹ For those for whom homelessness reflects more of a structural economic problem and often a shorter-term experience, the network of available services is fragmented and disconnected.¹² The result of this fragmented system of services is that for both the chronically homeless and for those experiencing homelessness on a more short-term basis, the experience of being without shelter involves significant dislocations.

B. *Swords and Shields in the Rights of the Homeless*

The homelessness crisis of the past two decades has spawned waves of advocacy. Somewhat artificially divided, cycles of homeless advocacy have focused on immediate shelter needs, securing more permanent resources, and, increasingly, on individual rights in the face of attempts to criminalize homelessness.¹³

Advocates responded to the homelessness crisis initially by focusing on the dearth of emergency shelter beds, and were largely successful in securing national, state and local resources to form a minimal safety net.¹⁴ Recognizing

KIM HOPPER, RECKONING WITH HOMELESSNESS 135-143 (2003) (describing an ethnographic study of the use of public spaces by homeless individuals).

11. See Hopper, *Institutional Circuit*, *supra* note 10, at 663; Sidney D. Watson, *Discharges to the Streets: Hospitals and Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 357, 358 (2000); Stephen Metraux & Dennis P. Culhane, *Recent Incarceration History Among a Sheltered Homeless Population*, 52 CRIME & DELINQUENCY 504, 507-510 (2006); see also MARTHA BURT ET AL., STRATEGIES FOR REDUCING CHRONIC STREET HOMELESSNESS: FINAL REPORT (2004), available at <http://www.huduser.org/Publications/PDF/ChronicStrtHomeless.pdf> [hereinafter BURT ET AL., STRATEGIES]. Malcolm Gladwell recently chronicled one example of this cycle in his portrait of Murray Barr, a homeless man in Reno, Nevada who suffered from alcoholism. Barr cycled in and out of the local jail and emergency rooms, often several times a week. See Malcolm Gladwell, *Million-Dollar Murray*, NEW YORKER, Feb. 13 & 20, 2006, at 96-97.

12. See BURT ET AL., STRATEGIES, *supra* note 11, at 41-49 (discussing the multiplicity of service providers). Robert Solomon has described his experience with conflicts over funding and programmatic control that flow from how the “homeless” are defined. See Robert A. Solomon, *Representing the Poor and Homeless: A Community-Based Approach*, 19 ST. LOUIS U. PUB. L. REV. 475, 479 (2000). Solomon recounts his mystification with an intense debate between two legal services attorneys over “whether homelessness was an ‘entitlements problem’ or a ‘housing problem.’” *Id.* What he later came to understand was this was in no sense an academic issue: how the problem was defined determined which agency funded services and accordingly how the needs of the clients would be served. *Id.* This kind of service fragmentation and resulting conflict over turf is unfortunately all too common.

13. As Maria Foscarinis has noted, legal advocates have employed numerous strategies modulating between litigation and legislative and regulatory advocacy, substantively focusing on both immediate and long-term needs. See Foscarinis, *Integrated Strategy*, *supra* note 2, at 329.

14. See BURT ET AL., HELPING AMERICA’S HOMELESS, *supra* note 3, at 12, 93.

the limits of emergency shelters, advocates over the past three decades have engaged in a sustained effort to establish legally enforceable entitlements to services.¹⁵ Despite a legal culture increasingly inimical to positive rights, advocates have argued for rights to emergency shelter¹⁶ as well as housing more generally.¹⁷ Given the dearth of federal constitutional support, advocates have creatively drawn on state statutory and constitutional rights,¹⁸ and even international human rights law.¹⁹ Advocates have likewise sought to establish entitlements to other services necessary for homeless individuals and families, such as securing important rights to education for children facing homelessness²⁰ and mental health and substance abuse services.

This entitlement focus is evident to an extent in advocacy for procedural rights in social welfare programs that intersect with homeless populations.²¹ Advocates have sought to ensure that clients are not erroneously deprived of benefits to which they are entitled, whether in terms of welfare, Social Security benefits, food stamps, or other general public benefits.²² Advocates have also focused on employment²³ as well as other avenues of economic self-sufficiency.²⁴ Advocates have likewise worked for systemic and political-level change, shaping the national dialogue about homelessness,²⁵ as well as defending political rights.²⁶

Civil rights law, moreover, has taken a central, if at times contradictory, role in the system of services for homeless persons, increasingly with respect

15. See Rosenthal & Foscarinis, *supra* note 4, at 319-320.

16. See Hafetz, *supra* note 2, at 1231-1232.

17. See Rosenthal & Foscarinis, *supra* note 4, at 317-318.

18. See Hafetz, *supra* note 2, at 1232-1233; see also Andrew J. Liese, Note, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process*, 59 VAND. L. REV. 1413, 1437-1433 (2006).

19. See Foscarinis, *Integrated Strategy*, *supra* note 2, at 327-328.

20. See McKinney-Vento Homeless Assistance Act, U.S.C. §§ 11431-11435 (2000).

21. See Hafetz, *supra* note 2, at 1248-1254.

22. See *id.*

23. See generally Lucie White, *On Abolitionist Critiques, "Homeless Service" Programs, and Pragmatic Change*, 19 ST. LOUIS U. PUB. L. REV. 431 (2000).

24. See generally Susan R. Jones, *Representing the Poor and Homeless: Innovations in Advocacy, Tackling Homelessness through Economic Self-Sufficiency*, 19 ST. LOUIS U. PUB. L. REV. 385 (2000) (discussing microenterprise as a tool of homeless advocacy).

25. See Blasi, *supra* note 9, at 207-210; see also Florence Wagman Roisman, *The Lawyer as Abolitionist: Ending Homelessness and Poverty in Our Time*, 19 ST. LOUIS U. PUB. L. REV. 237 (2000). The movement to end chronic homelessness, for example, can be traced to the work of the National Alliance to End Homelessness. See BURT ET AL., *STRATEGIES*, *supra* note 11, at xiii.

26. See Tulin Ozdeger & Jewel Baltimore, *Homeless but Not Voiceless: Protecting the Voting Rights of Homeless Persons*, 40 CLEARINGHOUSE REV. 313 (2006).

to individuals with disabilities.²⁷ The deinstitutionalization movement, and more recently, advocacy for less-restrictive institutional placements under *Olmstead*,²⁸ are predicated on norms of equality and individual dignity.

Beyond the focus on securing shelter and entitlements to services, advocates have played a growing role in seeking protection for homeless persons from hostile local communities. Faced with the persistence of homelessness, local communities are increasingly utilizing criminal law to penalize activities associated with homelessness.²⁹ This “criminalization” of homelessness involves restrictions on the use of public places, anti-camping ordinances, restrictions on the location of homeless persons,³⁰ prohibitions against begging,³¹ as well as broad efforts to punish the status of homelessness itself.³² Criminalization also involves the revival and selective enforcement of provisions such as open container or loitering laws and sweeps of areas where homeless individuals are living.³³

Advocates have had mixed success in fighting this trend. They have challenged sanctions connected to unavoidable aspects of homeless life as violating the Eighth Amendment’s prohibition on cruel and unusual punishment.³⁴ This approach builds on a pair of Warren-Court-era Supreme Court cases—*Robinson v. California*³⁵ and *Powell v. Texas*³⁶—that together have come to stand for the proposition that the Eighth Amendment limits a

27. See generally Henry Korman, *Clash of the Integrationists: The Mismatch of Civil Rights Imperatives in Supportive Housing for People with Disabilities*, 26 ST. LOUIS U. PUB. L. REV. 3 (2007).

28. See *infra* text accompanying notes 87-96.

29. See Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE L. & POL’Y REV. 1, 2 (1996) [hereinafter Foscarinis, *Downward Spiral*]; NATIONAL COALITION FOR THE HOMELESS AND THE NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8 (2006) [hereinafter A DREAM DENIED], available at <http://www.nationalhomeless.org/publications/crimreport/report.pdf>; see also Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual “Crimes,”* 96 J. CRIM. L. & CRIMINOLOGY 329, 330-331, 356-357 (2005).

30. See Foscarinis, *Downward Spiral*, *supra* note 29, at 16-18; see also Justin Cook, Comment, *Down and Out in San Antonio: The Constitutionality of San Antonio’s Anti-Homeless Ordinances*, 8 SCHOLAR 221, 223-224 (2006) (discussing one local example of a package of ordinances prohibiting sitting, lying down, or camping in public places, “aggressive solicitation,” and urinating and defecating in public).

31. See Foscarinis, *Downward Spiral*, *supra* note 29, at 20-21.

32. See Weisberg, *supra* note 29, at 346-356 (discussing cases involving status crimes and homelessness).

33. See A DREAM DENIED, *supra* note 29, at 9.

34. See Foscarinis, *Downward Spiral*, *supra* note 29, at 38-43; Weisberg, *supra* note 29, at 346-356.

35. 370 U.S. 660 (1962).

36. 392 U.S. 514 (1968).

state's ability to criminalize "status" as opposed to "acts."³⁷ In a series of cases, advocates have asserted the *Robinson* doctrine to argue that homelessness and many aspects of life associated with homelessness represent a status that cannot be criminalized.³⁸ Few courts have been willing to adopt a wholesale Eighth Amendment limitation on restrictions affecting homeless persons.³⁹ Other theories for resisting the criminalization of homelessness have included the right to travel⁴⁰ as well as First Amendment and Equal Protection challenges to anti-begging statutes.⁴¹

C. Rights, the Need for Support, and the Limits of Political Will

Rights-based advocacy, whether in securing resources or in resisting criminalization, faces inherent limitations. In the individual-rights context, advocacy risks reinforcing an adversarial relationship between homeless individuals and those institutions that can at least potentially be a part of the solution. That this risk arises from the inevitably defensive posture that rights advocates find themselves in makes it no less salient in considering the unintended consequences of an approach designed to ensure some space between official hostility and the reality of life on the streets. Securing this negative liberty is critical where resources are unavailable to provide meaningful alternatives—a situation that is true in communities throughout the country. What is secured is nonetheless still freedom to go about daily life under extremely marginalized conditions.⁴²

Resource advocacy recognizes that what is needed for many, if not most, homeless persons is less protection than support from the state. Advocacy can change local and national political dynamics, but the resources devoted to all aspects of homelessness are far outweighed by the magnitude of the need.⁴³ The question then becomes how best to use the resources that are available. Is there a role for advocacy in shaping how programs are designed and operated?

37. See Weisberg, *supra* note 29, at 338-341. Weisberg notes the on-going debate in the lower courts about whether *Robinson* and *Powell* reaches "status" crimes that involve acts beyond the volition of the actor, a doctrinal step further than the prevailing "act/status" interpretation. *Id.*

38. See *id.* at 331 n.12 (collecting cases).

39. Some courts that have rejected Eighth Amendment challenges have allowed a necessity defense on the premise that even if what is being criminalized is an act, not a status, that act may for some homeless persons be necessary to avoid some larger harm. See Antonia K. Fasanelli, Note, In re Eichorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323, 345-346 (2000).

40. See Foscarinis, *Downward Spiral*, *supra* note 29, at 43-48.

41. See *id.* at 27-34.

42. See, e.g., Jane B. Baron, *The "No Property" Problem: Understanding Poverty by Understanding Wealth*, 102 MICH. L. REV. 1000, 1022-1023 (2004).

43. See Rosenthal & Foscarinis, *supra* note 4, at 319-322.

II. RIGHTS AS A FUNCTIONAL GUIDE FOR SERVICE PROVISION

Norms that advocates have spent the better part of the past quarter century honing to guide the relationship between the state and the homeless can serve an additional function. These norms can provide a practical tool through which the needs of homeless persons can be placed at the center of the fractured web of services that define so much of the day-to-day lives of those without shelter.

A. *Alternative Accounts of the Role of Rights*

Rights can serve functions other than shielding individuals and securing resources from the state. The clash of rights at the heart of the adversarial system is generally touted not just for its protection of individuals, but also for advantages that such adversarial clashes can bring to the institutions involved.⁴⁴ Decisions are thus not only more fair in some abstract sense, but may also be more accurate and the result of better information.⁴⁵ In the modern bureaucratic state, rights similarly serve an accountability function, ensuring that those most affected by the government's decisions have a role to play in the substantive outcome of those decisions.⁴⁶

Individual rights are often seen as a cost to the government—a necessary, if at times grudging concession, that nonetheless undermines the effective functioning of public entities. Adversarial approaches, moreover, are also most relevant where the interests of clients are truly marginalized. Rights-based approaches risk myopically focusing on crisis and not on the underlying experience of those in need of support.⁴⁷

As David Super has argued, however, rights can serve to improve the efficiency and operation of social welfare programs. Super focuses on the potential of rights to operate as a ground-level, client-initiated auditing function, allowing recipients to provide a counterbalance to incentives that providers face not to be overly generous with public benefits.⁴⁸ A managerial view of individual rights—that rights can shape the day-to-day manner in which services are provided—points toward an additional role for advocates in responding to homelessness. Rights reflect a judicial, legislative or regulatory response to certain underlying values. Rights in an adversarial system ensure that decision-makers give adequate weight to those values regardless of political or practical incentives to ignore them. Jonathan Hafetz has argued for

44. See David Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CAL. L. REV. 1051, 1063-1067 (2005).

45. See *id.*

46. See *id.* at 1070.

47. Cf. Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637 (2006).

48. See Super, *supra* note 44, at 1129-1135.

overcoming the disconnect between legal advocacy and service provision.⁴⁹ Recognizing that what homeless individuals and families need most is support, Hafetz has argued that legal advocacy is too often disconnected from clients' needs for support. This argument is right, but limited. In the structure of legal advocacy lies a set of tools through which advocates can advance the individual interests of clients by engaging directly with providers and policy makers in shaping the design and day-to-day implementation of services.

B. The Functional Value of Rights for Service Provision

Returning to the variety of tools that advocates have honed in fighting for the rights of homeless persons, it is possible to discern clear underlying values. The rhetoric of rights in advocacy for the homeless manifests concern for dignity, liberty, and equality. These norms have evolved, even when the specific legal challenges have not succeeded, as concrete manifestations of the interests of the most vulnerable and vilified segments of the population.

How might these values serve as practical guidance in program design and implementation? Currently, service providers naturally turn to a variety of sources in creating programs. In crisis situations, immediate need drives services. The initial wave of shelter-oriented responses to homelessness shows the inevitability of this kind of practical experimentation and its obvious limitations. In designing longer-term solutions, research-based approaches draw on the hard work of social scientists, psychiatrists, substance abuse experts, and others.⁵⁰ Political reality is also a powerful force. The political salience of focusing on narratives of family homelessness over individuals, for example, can shape programs with greater force at times than ground-level reality.⁵¹

Viewing persons without shelter as rights-bearing individuals can thus have a direct bearing on programs that serve them. Consider the liberty and autonomy interests underlying Eighth Amendment and First Amendment claims. On one level, these claims serve the narrow—if critical—function of protecting homeless persons from overreaching state restrictions, particularly where no alternatives for daily living exist. On a slightly higher level of abstraction, however, such claims also serve as a profound recognition of the value of individual choice and autonomy. In other words, the movement to resist the criminalization of homelessness represents a concrete legal defense

49. See Hafetz, *supra* note 2, at 1247-1257.

50. See SUSAN WELLS ET AL., SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., U.S. DEPT. OF HEALTH AND HUMAN SER., BLUEPRINT FOR CHANGE: ENDING CHRONIC HOMELESSNESS FOR PERSONS WITH SERIOUS MENTAL ILLNESSES AND/OR CO-OCCURRING SUBSTANCE ABUSE DISORDERS 59-79 (2003) [hereinafter WELLS ET AL., BLUEPRINT FOR CHANGE] (discussing evidence-based and promising practices), available at <http://download.ncadi.samhsa.gov/ken/pdf/SMA04-3870/SMA04-3870.pdf>.

51. Cf. Blasi, *supra* note 9.

against concerted efforts to dehumanize those living on the streets. The act/status debate in the Eighth Amendment jurisprudence of homelessness asks fundamental questions about whether homeless individuals share the same ability to exist in public space, to meet basic needs, and to go about daily life as those with shelter. Courts have been hesitant to reach too far in judicially protecting those rights against assertions of deviance from community norms, but advocates have resisted the loss of individualization and choice that the criminalization movement embodies.

Similarly, while procedural rights primarily vindicate individual entitlements, the individual dignitary interests they serve suggest that service providers themselves can involve consumers. And however contested equality norms may be in practice,⁵² they represent a concrete commitment to individual distinctiveness, substantive fairness, and, under *Olmstead*, integration over isolation.⁵³ In short, the panoply of norms that advocates have developed in fighting for the rights of homeless individuals can be applied to services for homeless individuals. Advocates can thus work with service providers to translate abstract values into program-specific approaches that further such rights, albeit from a perspective less grounded in enforceability than advocates may have traditionally approached provider-client relations.

This is not an argument for any specific mix or type of services, but rather for a new conversation within existing service structures, recognizing that such structures constantly evolve and adapt generally with an eye toward clinical and other practical outcomes. The mode of advocacy explored in this essay would not displace those primary concerns, but would mediate them through a rights-filter that privileges consumer choice, autonomy, and equality.⁵⁴ To see how this might work in practice—to move from the abstract to the concrete—it is possible to discern a nascent rights-as-functional-guide approach in several important developments in the field.

III. MODELING THE RIGHTS-AS-GUIDE FUNCTION

A number of current developments in the arena of responses to homelessness evince a confluence between clinical and practical goals and

52. See Korman, *supra* note 27, at 6.

53. See *infra* text accompanying notes 87-96.

54. Cf. Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 886-887 (1990) (“Those who have been diagnosed as different, as disabled, must assume the power to describe their own circumstances, discover their own ‘capacities,’ and define their own ‘needs.’ The society must free them to locate safe social spaces where they can explore their injuries, feel their own fluency, and recast their ‘difference’ as the very ground of their power.”).

sensitivity to individual rights.⁵⁵ Recognizing this underlying pattern can provide a template for advocates to engage with service providers and build on the promise of these approaches.⁵⁶

A. *Permanent Supportive Housing and the “Housing First” Movement*

A central aspect of the contemporary push to end chronic homelessness is the increasingly widespread adoption of a service model called “Housing First.”⁵⁷ With respect to individuals with mental illness, substance abuse, and dual or multiple diagnoses,⁵⁸ Housing First reverses a long-standing practice of conditioning increasingly permanent housing placements on compliance with treatment plans and other clinical requirements.⁵⁹ Housing First instead offers chronically homeless individuals permanent housing and then follows such placement with intensive services. These services are typically provided through an Assertive Community Treatment (“ACT”) model of multiple service providers focusing together on individual clients.⁶⁰ Central to the approach is a harm-reduction philosophy that makes available, but does not mandate, substance abuse, mental illness, or other treatment.⁶¹ Complementing this harm-reduction approach, Housing First also emphasizes

55. See BURT ET AL., HELPING AMERICA’S HOMELESS, *supra* note 3, at 267-302, for a thorough overview of program structures and approaches in services for homeless individuals and families.

56. It is important to preface this discussion with a note of caution and clarification. These examples largely focus on services for chronically homeless individuals as currently defined. See *supra* text accompanying note 7. This is not to deny the centrality of housing as such to preventing and responding to homelessness. See Rosenthal & Foscarinis, *supra* note 4, at 326. Advocates have and can continue to play a role in the creative implementation of federal, state, and local housing programs. This essay, however, focuses on services beyond shelter (temporary or permanent) itself.

57. See Davidson, *supra* note 6, at 127. Housing First is part of a larger policy emphasis on permanent supportive housing as a response to homelessness particularly for individuals with disabilities or others who need on-going services. See generally YIN-LING IRENE WONG ET AL., PREDICTING STAYING IN OR LEAVING PERMANENT SUPPORTIVE HOUSING THAT SERVES HOMELESS PEOPLE WITH SERIOUS MENTAL ILLNESS vii-ix (HUD ed., 2006), available at <http://www.huduser.org/Publications/pdf/permhsgstudy.pdf> (discussing the evolution of policy toward permanent supportive housing).

58. Housing First is also used to describe approaches to family homelessness, where it takes on a similar approach, albeit focused on the needs of families in crisis. E-mail from Ryan Macy-Hurley, Institute Coordinator, Institute for Research, Training, and Technical Assistance, Beyond Shelter, Inc., to Nestor Davidson, Associate Professor, University of Colorado Law School (Nov. 17, 2006) (on file with author).

59. See Davidson, *supra* note 6, at 128.

60. See *id.* at 127-28.

61. See *id.* at 128; BURT ET AL., STRATEGIES, *supra* note 11, at 27-28; see also WELLS ET AL., BLUEPRINT FOR CHANGE, *supra* note 50, at 73-74 (discussing low-demand services).

a consumer focus that gives primacy to a client's own determination of needs.⁶²

A striking aspect of the rhetoric surrounding the Housing First movement is its emphasis on a "right" to housing in framing the permanency of the shelter offered to homeless persons.⁶³ To legal advocates, the "permanent" nature of the housing provided in most Housing First programs would look less like an entitlement and more like a rhetorical commitment. When Housing First providers talk about a right to housing, they are really advancing the concept that there is clinical and practical value in signaling to clients that the shelter being provided is not fragile, fleeting, or transitory. At a cultural moment when conceptions of home have taken on increasingly strident political valence in response to perceptions that local governments are abusing the power of eminent domain,⁶⁴ the value of this rhetoric cannot be discounted. The "right" to housing asserted by some Housing First providers, however, is largely rooted in an evaluation of the clinical and practical advantages that long-term placements can provide.⁶⁵ Advancing stability and facilitating the ACT model by ensuring that service teams have ready access to clients thus dovetail with the deep-seeded impulse for stability, inclusion, and individual dignity that a "right" to housing represents.

The confluence of individual rights and clinical concerns also informs the harm-reduction aspect of Housing First.⁶⁶ The increasing recognition that there are clinical benefits to less coercive approaches to substance abuse services translates norms of individual dignity into radically new program designs. Mental-health and substance-abuse professionals have recognized that for clinical reasons, individuals who are unable to limit substance abuse as

62. See Ronni Michelle Greenwood et al., *Decreasing Psychiatric Symptoms by Increasing Choice in Services for Adults with Histories of Homelessness*, 36 AM. J. OF COMM. PSYCH. 223, 225 (2005); Sam Tsemberis & Ronda Eisenberg, *Pathways to Housing: Supported Housing for Street-Dwelling Homeless Individuals with Psychiatric Disabilities*, 51 PSYCH. SERV. 487, 488-89 (2000).

63. See, e.g., Tsemberis & Eisenberg, *supra* note 62, at 488 (discussing a leading Housing First program as having been "[f]ounded on the belief that housing is a basic human right for all individuals, regardless of disability").

64. The Supreme Court's recent decision in *Kelo v. New London*, 545 U.S. 469 (2005), spawned a national outcry over so-called eminent domain abuse and legislation at the national and state level to restrict eminent domain for economic development. At the center of this political reaction is veneration for the home, a theme in American law with deep roots and significant contemporary cultural resonance. See generally D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255 (2006).

65. See, e.g., Leyla Gulcur et al., *Housing, Hospitalization, and Cost Outcomes for Homeless Individuals with Psychiatric Disabilities Participating in Continuum of Care and Housing First Programmes*, 13 J. COMM. APPL. SOC. PSYCH. 171, 177-83 (2003) (discussing the comparative benefits of the Housing First model of service provision).

66. See BURT ET AL., STRATEGIES, *supra* note 11, at 27.

a condition of receiving housing may nonetheless be able to manage and reduce substance use without the threat of program termination.⁶⁷ This parallels the norms of individual dignity involved in Eighth Amendment and other advocacy.

Likewise, emphasizing consumer choice has clear benefits in terms of individual outcomes and program effectiveness. The consumer-choice aspect of Housing First evinces mental-health and housing-retention benefits in treating clients as empowered decision makers and not passive recipients of assistance.⁶⁸ This not only parallels client-centered models of advocacy,⁶⁹ but embodies norms of individual choice.

B. Short-Circuiting the Institutional Cycle: Focusing on Discharge Planning

Another important development in service provision for homeless individuals is an increasing focus on moments of transition in the institutional cycle that many homeless persons experience.⁷⁰ If many homeless persons hobble together an intermittent chain of institutional placements in between stints on the streets,⁷¹ that chain is often abetted by the failure of the institutions that interface with homeless individuals to plan or sufficiently account for what happens to clients after discharge. Sydney Watson has noted, for example, that treatment facilities, state psychiatric hospitals, detoxification programs and similar institutions often discharge clients literally to the streets or give to-be-released patients names and addresses of shelters.⁷² The lack of discharge planning likewise plays a critical role in homelessness for individuals transitioning out of incarceration.⁷³

Accordingly, discharge planning is coming to the fore as a critical tool to short-circuit the institutional cycle.⁷⁴ To short-circuit the cycle of placements, discharge planning focuses on community-based efforts to connect those

67. *See id.*

68. *See* Greenwood et al., *supra* note 62, at 225, 235-236.

69. *See* Hafetz, *supra* note 2, at 1241-45.

70. *See* BURT ET AL., STRATEGIES, *supra* note 11, at 31 (discussing the importance of “effective discharge planning from the many institutions that interface with chronically homeless people and those at risk of chronic homelessness: hospitals, treatment facilities, psychiatric institutions, correctional facilities, and sometimes foster care”).

71. *See supra* text accompanying notes 10-11.

72. *See* Watson, *supra* note 11, at 362-63.

73. *See* Metraux & Culhane, *supra* note 11, at 514-15; Caterina Gouvis Roman & Jeremy Travis, *Where Will I Sleep Tomorrow? Housing, Homelessness and the Returning Prisoner*, 17 HOUS. POL’Y DEB. 389 (2006).

74. *See* BURT ET AL., STRATEGIES, *supra* note 11, at 31; Watson, *supra* note 11, at 372-373. Some courts have held that discharge-planning statutes for health-care facilities preclude discharging clients to shelters. *See id.* at 377-84.

experiencing homelessness or at risk of homelessness with appropriate resources.⁷⁵ Effective discharge planning also focuses on individual choice.⁷⁶

This focus on the risks inherent in moments of transition for homeless persons and those at risk for homelessness reflects norms of individual care and the reality of the vulnerability of those who rely on institutional support. The most innovative discharge planning efforts have been client-driven and highly particularized, bridging service gaps and ensuring appropriate follow through.⁷⁷ This kind of individualization and concern for vulnerability can vindicate advocates' emphasis on resisting the transmutation of homeless persons into alien presences so evident in efforts to secure resources and resist criminalization.

C. *Reconceiving Outreach*

Outreach plays a critical role in making initial contact and maintaining contact with individuals living on the streets, providing a link to other facets of the system of services.⁷⁸ Service providers are accordingly paying increasing attention to the design of outreach approaches. The Choices Unlimited drop-in center, for example, provides a consumer-choice model of outreach.⁷⁹ In this model, clients determine the sequence of services, and continuity is facilitated by retaining the same case manager as a client moves through program stages.⁸⁰ The Choices Unlimited program has put this approach into operation through outreach, a drop-in center, respite housing, and coordination on follow-up services.⁸¹ The emphasis throughout is on consumer participation and direction, giving direct voice to recipients of services—a focus that makes it more likely that homeless individuals will avail themselves of the services and reduce their contact with institutional placements and the streets, among other positive outcomes.⁸² Similar innovative outreach efforts have included coordinated outreach centers that field teams from several agencies, provide

75. See BURT ET AL., STRATEGIES, *supra* note 11, at 31.

76. See Watson, *supra* note 11, at 373-74.

77. See *id.* at 374-76.

78. See BURT ET AL., STRATEGIES, *supra* note 11, at 20; WELLS ET AL., BLUEPRINT FOR CHANGE, *supra* note 50, at 60-61.

79. See Sam J. Tsemberis et al., *Consumer Preference Programs for Individuals Who Are Homeless and Have Psychiatric Disabilities: A Drop-In Center and a Supported Housing Program*, 32 AM. J. OF COMM. PSYCH. 305, 307 (2003).

80. *Id.* at 307-308.

81. *Id.*

82. *Id.* at 308 (noting the results of a comparative study that showed that consumer-focused outreach lead to greater participation in services, less contact with the criminal justice system, improvements in life satisfaction for clients, and reduced time on the streets).

twenty-four hour service referrals, and collect data.⁸³ A consistent element of successful outreach has been a connection to permanent housing options.⁸⁴

What unites these innovative approaches to outreach is the pragmatic recognition that the most effective approach to engaging those literally living on the streets with services requires planning, coordination, and responsiveness to individual circumstances. This focus on consumer choice vindicates aspects of individual-rights advocacy that have highlighted the importance of allowing those without shelter to attend to the necessities of daily life without undue interference.⁸⁵ A recent report for the federal Department of Health and Human Services on chronic homelessness for persons with mental illness and substance abuse disorders identifies values of choice, voice, empowerment, dignity and respect, and hope as essential to successful recovery from homelessness.⁸⁶ These core values parallel in many respect the norms advocates have asserted on behalf of homeless individuals.

D. *Olmstead and Deinstitutionalization*

In *Olmstead v. L.C.*,⁸⁷ the Supreme Court held that the public services provision of the Americans with Disabilities Act⁸⁸ imposed a form of a less-restrictive-setting obligation on states providing services to individuals with disabilities.⁸⁹ *Olmstead* requires states to provide community-based treatment for persons with mental disabilities when such placement is appropriate, not opposed by the recipient, and can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.⁹⁰ *Olmstead*, with its sweeping language about the harms that segregation causes for individuals with disabilities, has become one of those decisions that transcends the context in which it arises to become a cultural symbol.⁹¹ The decision has had significant practical implications as well, as

83. See BURT ET AL., STRATEGIES, *supra* note 11, at 20-23.

84. *Id.* at 23.

85. See WELLS ET AL., BLUEPRINT FOR CHANGE, *supra* note 50, at 29-30.

86. *Id.*

87. 527 U.S. 581 (1999).

88. Americans with Disabilities Act of 1990, 42 U.S.C. § 12132 (2000).

89. *Olmstead* involved a suit by two mentally retarded women, one of whom had been diagnosed with schizophrenia, and the other with a personality disorder. 527 U.S. at 593-594. The women were institutionalized in a Georgia psychiatric hospital despite clinical assessments that they could be treated appropriately in community-based settings. *Id.* Attorneys from Atlanta Legal Aid filed suit on their behalf, asserting that the failure to place these women in community programs violated Title II of the ADA. *Id.*; see also Mary C. Cerreto, *Olmstead: The Brown v. Board of Education for Disability Rights: Promises, Limits, and Issues*, 3 LOY. J. PUB. INT. L. 47, 49-50 (2001).

90. See *Olmstead*, 527 U.S. at 587.

91. See generally Cerreto, *supra* note 89; Jefferson D.E. Smith & Steve P. Calandrillo, *Forward to Fundamental Alteration: Addressing ADA Title II Integration Lawsuits After*

advocates have rallied around *Olmstead*'s endorsement of integration as a practical tool for galvanizing providers of services for those with mental illness, for those experiencing or at risk of homelessness, and for individuals facing institutionalization more generally.⁹²

The application of *Olmstead* in the context of services for homeless individuals with mental disabilities again illustrates the potential of rights to guide approaches to advocacy.⁹³ *Olmstead*'s vision of integration—that the ADA creates an affirmative obligation to move individuals with disabilities into community-integrated settings—takes norms of equal treatment and dignity and shapes a variety of day-to-day service decisions.⁹⁴ Advocates have seized upon this vision of *Olmstead* to promote freedom of choice in services, emphasizing client involvement in service planning and decision-making.⁹⁵ Service providers are accordingly increasingly aware of *Olmstead*'s broad implications for integrating individuals with disabilities into mainstream programs and ensuring, to the extent possible, that such individuals can be supported to live where and how they wish.⁹⁶

Olmstead v. L.C., 24 HARV. J.L. & PUB. POL'Y 695, 695 (2001); cf. Robert Tsai, *Sacred Visions of Law*, 90 IOWA L. REV. 1095, 1109-13 (2005) (discussing the iconic symbolism of constitutional decision making).

92. See Rachel Rubey, Note, *There's No Place Like Home: Housing for the Most Vulnerable Individuals with Severe Mental Disabilities*, 63 OHIO ST. L.J. 1729, 1733-34 (2002); see also Patricia E. Kefalas Dudek, *Using the Olmstead Decision as an Advocacy Tool for your Clients*, 15 WTR NAELA Q. 4 (2002) (describing the potential impact of *Olmstead* in advocacy for individuals in long-term care); cf. John T. Pardeck & Paul A. Rollinson, *An Exploration of Violence Among Homeless Women with Emotional Disabilities: Implications for Practice and Policy*, 4 J. SOC. WORK IN DISABILITY & REHAB. 63 (2002) (arguing that *Olmstead* may force states to provide services to homeless women with emotional disabilities to respond to the high incidence of violence among that group).

93. While *Olmstead* does not provide a clear entitlement to services, it has been cited as a source for an equality-based argument for such an affirmative right. See Mark C. Weber, *Home and Community-Based Services, Olmstead and Positive Rights: A Preliminary Discussion*, 39 WAKE FOREST L. REV. 269, 289-90 (2004). While *Olmstead* recognized that the integration obligation it was outlining was limited by state resources, *Olmstead*, 527 U.S. at 605, some courts have held that resource constraints alone will not shield public entities from similar ADA claims. See Dudek, *supra* note 92, at 6. The "fundamental alteration" defense took on greater salience after *Olmstead* as a ground for resisting institutional change. See generally Smith & Calandrillo, *supra* note 91.

94. See Cerreto, *supra* note 89, at 76 ("Perhaps the most fundamental impact of the *Olmstead* decision lies in its ability to foster the self-determination of people with disabilities.").

95. *Id.* at 76-78; see also Emily Miller et al., *The Olmstead Decision and Housing: Opportunity Knocks*, OPENING DOORS, Vol. 12 (Dec. 2000) (discussing housing advocacy based on *Olmstead* on behalf of individuals with disabilities, including federal housing planning requirements).

96. Cf. Miller et al., *supra* note 95.

CONCLUSION

Advocates have long taken vital roles in shaping public discourse about homelessness, securing resources, and, of course, defending the individual rights of those without shelter. To these on-going and still necessary roles can be added an additional critical task: influencing the design and implementation of services for homeless persons. Advocates come to this task with a set of tools honed over decades of long struggles. These tools can translate the dignity, autonomy, liberty, and equality norms at the center of rights-based advocacy into a practical guide through which to shape how providers serve the homeless. In all of the many settings in which those experiencing or at risk of homelessness find help, advocates can improve service provision, ultimately providing another avenue to vindicate the rights of those without shelter.