

Saint Louis University Public Law Review

Volume 19
Number 2 *Representing the Poor and
Homeless: Innovations in Advocacy (Volume
XIX, No. 2)*

Article 8

2000

Homelessness and Human Rights: Towards an Integrated Strategy

Maria Foscarinis

National Law Center on Homelessness & Poverty, foscarinis@nlchp.org

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

Recommended Citation

Foscarinis, Maria (2000) "Homelessness and Human Rights: Towards an Integrated Strategy," *Saint Louis University Public Law Review*: Vol. 19 : No. 2 , Article 8.

Available at: <https://scholarship.law.slu.edu/plr/vol19/iss2/8>

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

HOMELESSNESS AND HUMAN RIGHTS: TOWARDS AN INTEGRATED STRATEGY

MARIA FOSCARINIS*

Years ago, a volunteer team of lawyers staffed a legal clinic at a shelter in Washington, D.C. Any resident who felt a need for legal counsel could come to the folding table we had set up in the shelter hall way. Quite a few did, bringing a wide range of problems: evictions, benefit denials, unpaid wages. While their circumstances were unusually desperate, these clients presented routine legal problems. Others had more complicated stories involving the CIA, radio waves and thought control. These problems we did not generally think of as legal: we referred these clients to the social workers thinking, almost certainly mistakenly, that there was a mental health treatment program for them.

Then there was the third, large category of people who came to the clinic, explaining that they had lost their job, or could not find housing they could afford on their welfare checks or their wages as day laborers. From their perspective, at least, these were problems that lawyers might be able to help address. But for us, these were the cases that were the most frustrating and unsettling: existing sources of aid—such as subsidized housing and jobs programs—were generally filled beyond capacity. As lawyers seeking redress within existing laws, there was not much that we could do.

I. INTRODUCTION

Lawyers and legal advocacy have played a crucial role in addressing homelessness since it became a major social problem in the United States in the 1980s. Lawyers have sought to bring the power, influence and strategies of the law and legal profession to bear in bringing about solutions to homelessness. This advocacy has resulted in important gains: it has raised public awareness, informed policy and decision makers, and provided concrete aid that has alleviated suffering and helped people move out of homelessness.

At the same time, however, legal advocacy has been circumscribed by the traditional parameters and constraints of the US legal system. The most

* Executive Director, National Law Center on Homelessness & Poverty; A.B. Barnard College (1977); M.A. Columbia University (1978); J.D. Columbia University (1981). I wish to acknowledge Michael Willis and Bobby Le for research assistance drawn upon for this article.

important elements of solutions—long-term and immediate—to homelessness are housing, jobs and medical care.¹ But there is little or no constitutional basis for protecting or creating access to these necessities; nor are there broad statutory guarantees of access to them. Statutory schemes have been restricted to particular categories of persons in need, limited by funding levels significantly lower than need, or both.² Indeed, our legal system is commonly described as one that protects civil and political rights, but not economic or social rights.³ As a result, legal advocacy to address and redress homelessness proceeds on a somewhat ambiguous foundation. In some important ways, there is an imperfect fit between the problem and the legal tools currently available to address it.

In the face of this disconnect, lawyers have been creative in devising legal strategies to effectively pursue solutions. Litigation, legislative advocacy and regulatory advocacy have all been successful in bringing some relief. Through such strategies, lawyers have also engaged in efforts to overcome or compensate for the limitations of current law by pressing for new laws, by establishing the political rights that might create the constituency to support them, and by advocating for access to larger systems of aid and the broader coalitions of political support they carry. But the limitations of these strategies have also resulted in some paradoxical remedies, misguided legal and policy debates, and unclear directions for the future.

This essay considers whether and how human rights principles can help resolve these tensions, adding to efforts to end homelessness. To establish a context, it begins with an overview of litigation and legislative advocacy to date, briefly reviewing major strategies, cases, and statutes; it also discusses imitations of these approaches, and some impacts of these limitations. The essay then considers relevant human rights principles, approaches and instruments, and whether they can be useful aids in addressing homelessness in the US. The essay concludes with examples of potential uses of human rights and describes some current strategies to begin implementing them.

1. MARTHA BURT, *OVER THE EDGE* 120-26 (1992); United States Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities*, at 66 (2000).

2. Further, systems that have been put in place have been eroded, as with the repeal of welfare benefits for needy families as an entitlement.

3. In theory, the former should ensure a democratic process in which everyone's interests in the latter can be addressed. Nevertheless, whatever the merits of this theory, the current reality is that for some significant number of Americans basic needs are not met, in the most extreme cases resulting in homelessness. Further, homeless Americans are often—and by virtue of their status—excluded from the political process as well.

II. LEGAL ADVOCACY TO DATE: SUMMARY OVERVIEW

Legal advocacy on behalf of homeless people over the past two decades has employed a wide range of strategies and focused on multiple substantive areas. Legal strategies to date have included litigation to enforce existing laws, legislative and regulatory advocacy to create new laws, and subsequent litigation to enforce those new laws. Substantively, these strategies have focused on a range of issues and goals: from meeting immediate and longer-term needs for food and shelter, to opening access to “mainstream” programs, to establishing political rights, to challenging efforts to “criminalize” homelessness.

Initially relying on litigation under existing laws, advocates expanded their efforts to include legislative and regulatory advocacy in order to move beyond the limitations of existing laws. The successes of this approach led to more litigation to enforce the new laws. Local monitoring of compliance with and implementation of laws has been crucial to that follow-up process, and outreach to inform local advocates and potential beneficiaries of legal rights has been essential. Through this effort, the importance of local partnerships and collaborations has also become apparent, giving rise to further options for advocacy. Currently, successful advocacy often depends on the integration of a wide variety of different strategies.⁴

It is, however, possible to identify some overall trends over the past two decades of legal advocacy on behalf of homeless persons. In broad outline, early legal advocacy focused on addressing immediate basic needs of homeless persons, such as shelter and food, through both litigation and then legislation. Later legal advocacy focused on prevention, such as discharge planning and transitional housing, and on establishing political and civil rights, again through both legislation and litigation. Current legislative efforts are focused on longer-term solutions, such as housing and access to mainstream programs; current litigation is focused on access to mainstream programs as well as challenges to efforts to “criminalize” homelessness.

In general, the overall direction of advocacy can thus be characterized as a movement from emergency to longer-term solutions. Both sorts of solutions are necessary, and generally part of advocacy agendas; emergency aid is typically easier to achieve. In light of this progression, the appearance of the criminalization trend is not surprising: the emergency solutions that have been achieved to date have been almost by definition insufficient to solve the problem, while giving the impression to policymakers and the public that

4. Litigation is limited by the constitutional and statutory context in which it occurs; in many ways, legislative advocacy has attempted to fill the gaps and redress the limitations of litigation.

solutions are in place. As the problem has nonetheless continues to grow, simply criminalizing it has become increasingly easier to justify.⁵

To date, however, what is missing from these efforts is an articulated, specific commitment to underlying rights to basic subsistence. While advocacy organizations often subscribe to basic principles of social justice that incorporate such rights, these may be difficult to integrate into legal advocacy strategies. Including human rights law and principles in such strategies may be one way to bridge this gap, strengthening legal advocacy and providing a clearer direction and firmer basis for moving forward.

The right to shelter and other immediate basic needs. Probably the most significant early legal advocacy was that focused on establishing a right to shelter in New York City. In *Callahan v. Carey*, a New York State trial court held that homeless plaintiffs had a reasonable likelihood of succeeding on their claim that state constitutional and statutory requirements that the city care for the needy included an obligation to shelter the homeless.⁶ Following that ruling, plaintiffs and the city entered into a consent decree obligating the city to provide overnight shelter and food to every needy homeless man and detailing minimum shelter standards.⁷ Several subsequent cases resulted in the establishment of similar rights to shelter in other parts of the country under state statutory provisions, either by court ruling⁸ or consent decree,⁹ under a federal statute,¹⁰ and by ballot initiative.¹¹

5. See Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy and Strategy*, 12 ST. LOUIS PUB. L. REV. 37 (1993), for a discussion of some of the considerations, trade-offs and consequences of advocacy for short- and long-term solutions.

6. *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979) (ruling on a motion for preliminary injunction), *reprinted in* N.Y.L.J., Dec. 11, 1979, at 10. The constitutional provision the court relied on states: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1. The state statute provides that "each public welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself." N.Y. SOC. SERV. LAW § 62(1).

7. *Callahan v. Carey*, No. 42582/79 (1981). Subsequent cases expanded this right to women, *Eldredge v. Koch*, 459 N.Y.S.2d 960 (N.Y. Sup. Ct. 1983), and families, *McCain v. Koch*, 484 N.Y.S.2d 985 (N.Y. Sup. Ct. 1984), 502 N.Y.S.2d 720 (1986).

8. See, e.g., *Maticka v. Atlantic City*, 524 A.2d 416, 418-19 (1991) (relying on state statute providing that "[i]mmediate public assistance shall be rendered promptly to any needy person by the director of welfare of the municipality"); *Hodge v. Ginsberg*, 303 S.E.2d 245 (W.Va. 1983) (required state to provide shelter, food and medical care to homeless persons, relying on state adult protective services statute requiring aid to "incapacitated adults" who by reason of physical, mental or other infirmity [are] unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health).

9. See, e.g., *Graham v. Schomehl*, No. 854-00035 (Mo. Cir. Ct. 1985).

10. See *Koster v. Webb*, 598 F. Supp. 1134 (E.D.N.Y. 1983) (federal emergency assistance to families program, optional program within the Aid to Families with Dependent Children

At the national level, funds for emergency food and shelter through the federal disaster relief program were appropriated for homeless persons on an *ad hoc* basis beginning in 1983.¹² In 1986, legislation creating and funding “demonstration” shelter and housing programs for the homeless was enacted.¹³ Also enacted in 1986 was the Homeless Eligibility Clarification Act, which removed permanent address requirements from a series of federal benefit programs.¹⁴ In 1987, the first major federal legislation addressing homelessness, the Stewart B. McKinney Homeless Assistance Act, was passed, incorporating shelter, transitional housing and a small permanent housing program as central elements;¹⁵ and creating some property rights to unused federal properties for groups serving homeless people.¹⁶ Following passage of the legislation, advocates initiated monitoring efforts to determine whether its programs were being properly implemented, and followed up with successful litigation to correct non-compliance.¹⁷

program, required states opting in to it and agreeing in their state plans to provide emergency shelter to actually do so). Subsequent litigation also established some procedural rights to notice and an opportunity to be heard before shelter could be withdrawn, *Williams v. Barry*, 708 F.2d 789, 790 (1983) and a right to have some procedures in place, *Russell v. Barry*, 1987 WL 15697 (D.D.C. 1987).

11. D.C. CODE ANN. § 3-601(1988) (repealed 1994).

12. Emergency Job Appropriations Act of 1983, Pub. L. No. 98-8 (1983). *See also* Foscarinis, *Beyond Homelessness*, *supra* note 5, at 44-45 & n.34.

13. In the mid-1980's, a coalition of advocates developed proposed legislation to address homelessness. The Homeless Persons' Survival Act of 1986 contained three titles: emergency aid, preventive measures, and long-term solutions. It was introduced in both the House and Senate in 1986. H.R. 286, 99th Cong. (1986); S. 2608, 99th Cong. (1986). In 1987, much of the emergency title was enacted as the Stewart B. McKinney Homeless Assistance Act.

14. Homeless Eligibility Clarification Act, Pub. L. No. 99-570 (1986).

15. The Homeless Housing Act, passed in October 1986, created two “demonstration” programs, to fund emergency shelter (at \$10 million) and to fund transitional housing (at \$5 million). Pub. L. No. 99-500, 100 Stat. 1783 (1986). Both were incorporated, in greatly expanded form, as programs of the Stewart B. McKinney Act in 1987. 42 U.S.C. §11411 (Supp. 1987).

16. 42 U.S.C. § 11301(a)(1),(6). Section 501 of Title V of the McKinney Act, created a right of first refusal for state and local government and non-profit entities providing services to homeless people. *Id.* at §§ 11411-12; *see also* National Coalition for the Homeless v. Veteran's Administration, 695 F. Supp. 1226 (D.D.C. 1988); National Law Center on Homelessness & Poverty v. Veterans Administration, 736 F. Supp. 1148 (1990); 765 F. Supp. 1 (D.D.C. 1991), *aff'd*, 964 F.2d 1210 (D.C. Cir. 1992), *modified*, 819 F. Supp. 69 (D.D.C. 1993).

17. *See* National Coalition for the Homeless v. Pierce, No. 87-2640 (D.D.C. filed Sept. 28, 1987) (suit to require HUD to distribute emergency shelter funds timely); National Coalition for the Homeless v. Veteran's Administration, 695 F. Supp. 1226 (D.D.C. 1988); National Law Center on Homelessness & Poverty v. Veterans Administration, 736 F. Supp. 1148 (1990); 765 F. Supp. 1 (D.D.C. 1991), *aff'd*, 964 F.2d 1210 (D.C. Cir. 1992), *modified*, 819 F. Supp. 69 (D.D.C. 1993), 98 F. Supp. 2d 25 (D.D.C. 2000) (permanent injunction requiring five federal agencies to comply with McKinney Act program to make unused federal property available for programs to aid homeless; subsequent enforcement orders); *see also* Senior Resources v. Cuomo, No. 97-1445 (D.D.C. 1998).

Since these early efforts, advocacy to meet homeless persons' immediate needs has evolved and changed. In New York City, while the Callahan decree initially resulted in significant legal and practical success in requiring the provision of emergency shelter, advocates expended much effort in attempting to ensure government compliance with the right to shelter,¹⁸ and city officials imposed restrictions narrowing the right.¹⁹ In Washington, D.C., in the face of repeated contempt orders,²⁰ city officials sought changes in the law to undermine the basis for the right. The result was the elimination of the right.²¹

Changes at the federal level have been more positive. Funding for the McKinney shelter and housing programs has increased somewhat significantly. In 1987, appropriations for these programs stood at \$190 million; currently, for 2001, they are \$1.26 billion. The McKinney Act programs have also changed substantively, with increased emphasis on long-term, not just emergency, solutions.²² At the same time, there has been increased emphasis on creating collaborative local processes to address the needs of homeless people. For example, the HUD McKinney programs are now distributed through a "Continuum of Care" process that brings together local government and non-profit providers, through a process aimed at collaboratively devising a plan to meet the needs of homeless persons in the community.²³

Limitations of this approach. Legal advocacy that is focused on the right to shelter and other immediate basic needs has a built-in limitation: it seeks a temporary solution. If the problem were simply short-term, this would not matter: for instance, where homelessness results from flood, hurricane or other natural disaster, and not from poverty, emergency solutions may be appropriate and effective. In those cases, once the sudden emergency is addressed, its victims are generally able to return to housing stability. Where the cause is poverty-related—such as the inability to find affordable housing, get a job at wage sufficient to pay for housing, or to obtain mental-health care or substance abuse treatment—then emergency shelter is not a sufficient solution to

18. See, e.g., *McCain v. Koch*, 117 A.D.2d 198 (1986).

19. See, e.g., *McCain v. Guliani*, 252 A.D.2d 461 (1998), *appeal dismissed*, 93 N.Y. 21 848 (1999).

20. See, e.g., *Aitchenson v. District of Columbia*, 585 A.2d 150,151 (1991).

21. District of Columbia Emergency Overnight Shelter Amendment Act of 1990, D.C. LAW 8-197, 37 DCR 4815 (1990) (codified as D.C. CODE ANN. § 3-206.9a).

22. See Interagency Council on Homelessness, *Priority Home!* (1994); Maria Foscarinis, *The Federal Response: The Stewart B. McKinney Homeless Assistance Act*, in HOMELESSNESS IN AMERICA (J. Baumhol, ed. 1996).

23. Later amendments and legislation added to the McKinney Act. For example, special legislation addressed the use of closed military bases, removing their disposition from the McKinney Act property program and creating a new legislative process that addresses their conversion to civilian use more broadly, but requires that process to address the needs of homeless persons and include their representatives. Rather than a rights-based approach, however, this is a process-oriented scheme.

homelessness: once the emergency need is met, there is nowhere to go. While shelters when available can provide important immediate relief, they are not appropriate as a long-term solution. It is important to emphasize that currently there is not nearly enough emergency shelters available to meet the need, and shelter regularly turn away requests for help.²⁴

On a practical level, emergency shelters also raise safety, privacy, and health concerns for homeless people. The rules and restrictions shelters impose in order to operate efficiently—such as the lack of private telephone access, curfews that require clients to leave very early in the morning or return early in the afternoon or evening—may compromise the ability of homeless persons to look for employment or housing.²⁵ Moreover, shelters typically impose time limits, ranging from a few days to several months. But without sufficient permanent, affordable housing—and without permanent supportive housing for those who need it—there may be nowhere to move to upon leaving shelter accommodations.²⁶

One result is that some homeless people may reject staying in a shelter in these circumstances and instead “choose” to live in public places, encampments or abandoned buildings. Because there is little public understanding of the limitations of shelter and the lack of long-term housing options, these homeless people may then be perceived to have “chosen” the homeless “lifestyle.”²⁷ Debates ensue about freedom and whether it is appropriate to force someone to accept help, diverting attention away from the nature and availability of that help.

In a further paradox, because of the lack of permanent housing, shelters tend to become permanent, and those who do use them on a longer-term basis may become dependent and “institutionalized,” rather than self sufficient.²⁸ Shelter may also become acceptable in the public eye as housing of last resort, defining societal notions of acceptable minimum safety net standards downward. At the same time, the limitations of shelters mean that homelessness remains unsolved—and people remain on the street or in other public places—and the problem begins to be perceived as “intractable.” The

24. See, e.g., U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness*, in AMERICAS CITIES 61 (2000) [hereinafter *A Status Report*].

25. For a description of such difficulties, see National Law Center on Homelessness & Poverty, *Broken Contract: Failing the District of Columbia’s Welfare Recipients* (1999) (Describing barrier homeless families living in transitional housing facilities face in complying with welfare law’s work requirements).

26. See, e.g., *A Status Report*, *supra* note 24.

27. See Kim Hopper & Jim Baumhol, *Held in Abeyance: Rethinking Homelessness and Advocacy*, 37 AM. BEHAV. SCIENTIST 522 (1994) (for a discussion of unintended but harmful consequences of emergency aid in “framing” homelessness as a problem separate from poverty and its systemic sources).

28. See *id.* at 537 (discussing “shelterization” of homeless).

result is further loss of public will to address it, opening the way to simply blaming or demonizing homeless people.²⁹ Completing the cycle, homeless people are then seen as not only not “like you and me” but completely “other.”³⁰ This may lead to divisiveness, hostility and in some cases even violence.³¹

Advocates seeking to counter these characterizations may then find themselves arguing for a view of homelessness that honors homeless persons’ agency and self-determination.³² From a completely different perspective, such advocates may also be neglecting or minimizing the important realities of homelessness: the lack of resources—housing, income, services, and shelter—that do force many people to live in public places. But calling homelessness “involuntary” does not need to be interpreted as diminishing anyone’s capacity for self-determination. Nor is recognizing that homeless people suffer disproportionately from physical and mental disabilities and illnesses necessarily patronizing.

While acknowledging the significance of respect, it is important to remember that facts sometimes are just facts.³³ In fact, there is not enough housing, or employment opportunity, or healthcare. Indeed, stepping back from this sort of debate suggests that it is at least to some extent a byproduct of a legal strategy aimed at securing emergency shelter. If instead we focus our attention on the need for longer-term solutions to homelessness—such as housing, jobs and health care—then many of these issues become irrelevant. For example, if there were sufficient housing, jobs and healthcare, homeless

29. Often, the result is charity-style, emergency aid to meet immediate needs, or structuring aid designed to correct the assumed character or moral defects.

30. A recurring debate has centered on whether homeless people are “just like you and me,” as sometimes stated by advocates, see Burt, *supra* note 1, at 21 (rather suffer from personal “pathologies,” as claimed by some commentators); see, e.g., ALICE S. BAUM & DONALD W. BURNES, *A NATION IN DENIAL* 153 (1993).

31. See discussion of “criminalization” of homelessness, *infra* notes 50-57 and accompanying text.

32. E.g., 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 (1997).

It also does not necessarily imply individual helplessness. The shortage of affordable housing means that some set of persons will be left out; this fact does not depend on individual choice. Which individuals fall into that set is, to some extent, dependent on individual choices, actions or circumstances. *Klostermann v. Cuomo*, 481 N.Y.S.2d 580 (1984). See also *Palmer v. Cuomo*, 503 N.Y.S.2d 20, 22 (1986).

33. Instead of trying to change, rename or reinterpret them, we may be better off examining the theoretical and practical structures in which they play out. Why isn’t there sufficient permanent affordable housing? Why isn’t there even enough shelter? And why isn’t that shelter geared towards helping people into self-sufficiency and housing? If the answer is again that there is a lack of affordable housing and supportive housing, then debate—and action—is better focused on those issues.

people would not be forced to choose between emergency shelter and autonomy.

Homelessness prevention. Legal advocacy to prevent homelessness seeks to engage these underlying causal factors. Such advocacy has generally focused on persons in a variety of state programs or custody arrangements who are at risk of homelessness. For example, advocates have successfully argued that, under state law, state psychiatric institutions must address housing in planning for the discharge of patients,³⁴ and that state-determined welfare benefit levels must be sufficient to allow recipient families to maintain their own housing.³⁵ In these cases, the focus was on persons who were wards of the state or beneficiaries of government aid; thus, advocacy to prevent homelessness could build on already-established government duty. Along similar lines, in 1986 federal legislation established a pre-release program to allow institutionalized persons to apply for food stamps and SSI benefits prior to their release, in order to prevent their becoming homeless upon release.³⁶

State legislation has created special programs to prevent persons from becoming homeless through the loss of their own housing due to some sudden emergency event. For example, the Homelessness Prevention Program in New Jersey provides a pool of funds that those at risk of homelessness through eviction or foreclosure can borrow from in order to avert that risk; several other states have adopted similar programs. While successful, however, these programs are limited in scope: the New Jersey program, among the largest, can aid only a fraction of families that seek it help.³⁷ This type of program does not represent a right or entitlement, but rather a limited sum of money set aside for a specific purpose.

A different prevention-oriented approach focuses on gaining access for homeless people to “mainstream” entitlements that could provide resources to help them out of homelessness.³⁸ For example, the McKinney Act protects the right of homeless children to enroll in and attend public school and pre-school,

34. Klostermann, 81 N.Y.S. 2d. at 580. *See also* Palmer, 503 N.Y.S.2d at 20 (court required New York state welfare agencies to provide services to youth “aging out” of foster care to prevent them from becoming homeless).

35. Massachusetts Coalition for the Homeless v. HHS, 511 N.E.2d 603 (Mass. 1987).

36. 42 U.S.C. § 1383(m) (1992); *see also* National Law Center on Homelessness & Poverty, *Abandoned to the Streets* (1992).

37. Department of Community Affairs, Division of Housing and Community Resources, State of New Jersey, *Annual Performance Report*, at 6 (1999) [hereinafter *Annual Performance Report*]; U.S. Government Accounting Office, *Homelessness: Too Early to Tell What Kind of Prevention Assistance Works Best* (1990).

38. Because most government systems assume that applicants and recipients have fixed addresses, homeless persons are often excluded from their aid, and thus driven deeper into poverty and isolation; advocacy to remove and address such barriers can help people out of homelessness. *See* General Accounting Office, *Homelessness: Barriers to Using Mainstream Services* (2000).

and sets forth special procedures to accommodate their circumstances and ensure their ability to exercise this right.³⁹ Legislation also protects the right of homeless persons to receive SSI, veterans and Medicaid benefits despite their lack of a permanent address.⁴⁰ Similarly, legislative and regulatory advocacy led to the removal of IRS language that required applicants for the Earned Income Tax Credit to be living in a “home,” thus expanding eligibility to the large percentage of homeless people who work.⁴¹

Limitations of this approach. Much of this prevention-oriented advocacy, while effective, has been and is constrained by the limited resources available to implement remedies when they are won—as well as to carry out the advocacy itself. In part, this is because of limitations in the legal system, and the difficulty in compelling government agencies to spend additional funds to carry out court rulings. Advocacy is limited by political constraints: the absence of a powerful constituency means that programs and policies created to prevent homelessness lack a strong base of support, and typically remain too limited in scope to meet anything approaching the entire need. More fundamentally, though, here too there is a built in limitation: resources are typically spent according to specific allocations, and not according to need.⁴²

Partly in response to resource limitations, some advocacy has focused on targeting, setting aside, or prioritizing resources to meet the needs of homeless people, which are presumably most urgent. Precisely because resource allocation amounts are not tied to need, however, this can lead to paradoxical results. On a practical level, by taking resources away from low-income housing for the poor, it increases the risk of homelessness for the overall poverty population. On a policy level it can lead to proposals to create

39. Subsequent litigation established the enforceability of homeless children’s right to education. *Lampkin v. District of Columbia*, 27 F.3d 605, 612 (1994).

40. Homeless Eligibility Clarification Act, Pub. L. No. 99-570, 100 Stat. 3207-167 (1986) (codified as amended at 7 U.S.C. § 2011 (1988)).

41. Advocates initially obtained committee report language in a tax bill acknowledging that significant numbers of homeless people worked, and urging the IRS to explore using outreach programs to educate these homeless workers about the EITC. Following the inclusion of such language by Congress, advocates were able to persuade the IRS to revise its instructions to remove a requirement that EITC claimants have a “home.” See Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, § 13131, 107 Stat. 312, 433-35 (1993) (codified as amended at I.R.C. § 32) (1988 & Supp. V 1993).

42. Sources of prevention funds are generally not “entitlement” programs. This means that a fixed amount of funds are allocated by the legislature, and when those funds are spent, no more can be given out, even if eligible applicants for the funds remain. As a result, some programs, including the New Jersey Homelessness Prevention program, stop taking new applications before the end of the year. See *Annual Performance Report*, *supra* note 37.

substandard housing—despite health and other concerns that led to its demise originally—as a resource-conserving solution of last resort.⁴³

Ensuring access to “mainstream” benefits is not alone a sufficient solution to homelessness. The low levels of many public benefits programs may contribute to homelessness to begin with; indeed, a significant number of homeless persons do receive welfare and other benefits, yet because those benefits are so low relative to housing costs, they remain homeless. However, if undertaken in coalition with other anti-poverty groups—and coupled with advocacy for higher assistance levels—it can lead to more meaningful change. Indeed, in some cases advocates have sought to address this underlying problem through advocacy to increase benefits to reflect housing costs. However, the legal basis for such advocacy is limited.

These advocacy efforts can have mixed effects on public perceptions as well. Preventive—or emergency—programs that meet only a small portion of the need provide crucial help to those who are assisted. They also focus attention on the issue, the need and—in the case of preventive measures—the causes of homelessness. But without concerted, properly framed public education efforts, they also risk conveying the impression to policymakers and the public that solutions are in place. Then, the fact that the problem remains may be attributed to the perceived individual failings of those who are in fact left out.

Political rights. A series of advocacy efforts has focused on homeless persons’ political rights. In a court case challenging the denial of registration to vote to homeless persons, the court held that homeless persons could not constitutionally be denied their fundamental right to vote simply because they lacked an address.⁴⁴ Instead, the court held that homeless voters should be permitted to show residency in a particular voting district by designating a particular place where they regularly return and intend to remain for the present—be it a park bench or shelter. In essence, the court required that traditional methods of establishing and documenting residence in a particular district be adjusted to accommodate homeless persons’ circumstances.

Following passage of the National Voter Registration Act, the Federal Election Commission promulgated regulations specifically providing for registration of persons with “non-traditional” residences;⁴⁵ FEC comments to the regulation make clear that this includes “those living on city streets.”⁴⁶ Outreach by national advocacy organizations to state and local advocacy and

43. See, e.g., CHRISTOPHER JENKS, *THE HOMELESS*, at 19-20, 70-74, 113-117 (1994) (suggesting revival of old “cage” hotels prevalent in Chicago’s skid row before the 1960’s).

44. *Pitts v. Black*, 608 F. Supp. 696 (1984).

45. 11 C.F.R. § 8.4(a)(2) (1995).

46. See, e.g., Margaret Sims, *Voter Registration for the Homeless*, 17 *FEC J. ELECTION ADMIN.* at 7 (1996).

service groups has aimed to help them inform their homeless clients about their rights to vote, and to help them register. Such outreach efforts have also aimed to help local groups organize campaign forums focused on homelessness, housing, jobs and other important issues, in an effort to inject issues relevant to homeless people into electoral campaigns. Get out the vote efforts organized locally with national support have attempted to help homeless people actually exercise these rights.⁴⁷

Related to this advocacy are efforts to counter the exclusion and under representation of homeless persons in the decennial U.S. census. Directly relevant to political representation, as well as to funding allocations dependent on poverty data, the Census Bureau in 1990 adopted a process that expressly excluded large numbers of homeless people. After advocates challenged the legality of this process, the Bureau issued a disclaimer, included as part of its official data, acknowledging that they were not a “count” of the homeless population.⁴⁸ This provided some victory and relief; however, subsequent litigation to secure further relief was unsuccessful, and no full accounting of the homeless population occurred.⁴⁹

Limitations of this approach. Advocacy on behalf of homeless people’s political rights is important: it advances their rights as well as advocacy for solutions to homelessness. Homeless people are widely perceived as non-voters, and this perception is often true; the resulting political weakness of homeless people as a constituency hampers advocacy, especially in legislative arenas. Thus, establishing political rights appears in some ways a promising advocacy avenue: in addition to vindicating rights that are inherently valuable, it also is the basis on which political pressure could be exercised, building a more potent constituency. But in practice, while this work is valuable, it is also limited.

While political rights are of course extremely important, they are in fact often secondary to the basic survival needs that homeless people face by virtue of their circumstances. Further, beyond the difficulty homeless people face in simply establishing and then exercising their political rights, organizing into a constituency on issues specific to homelessness is even more elusive. Isolation and lack of access to communication and transportation systems, severe and urgent material needs—all of the factors that impede the establishment and exercise of voting rights to begin with—also make it extremely difficult for homeless people to come together in organized groups, formulate joint positions, and mount letter-writing and telephone campaigns.

47. National Coalition for the Homeless and National Law Center on Homelessness & Poverty, *You Don’t Need a Home to Vote, 2000 Voter Rights Registration Packet* (2000).

48. Nat’l Law Center on Homelessness and Poverty v. Kantor, 91 F.3d 128 (D.C. Cir. 1996).

49. *See id.*

In short, the traditional mechanisms by which ordinary citizens participate in the political process—and which are assumed to be available to all in our democratic system—are generally not available to homeless people, simply because they are homeless. Without some minimum level of material stability, the exercise of political rights becomes highly problematic, if not impossible. Poor people in general are often marginalized from traditional political processes; homeless people, however, are marginalized in ways that are deeper and more extreme in both nature and degree. A fixed address is an essential aspect of membership in contemporary American society; without it, participating in any organized process or system is very difficult.

Countering the “criminalization” of homelessness. In the last decade, the criminalization of homelessness has been a growing trend. Cities have enacted new laws or resurrected old laws that regulate the use of public space, imposing criminal sanctions for conduct such as sleeping or begging in public places. This trend has been fueled by city concern over the growing presence of homeless people in public places such as parks, sidewalks and transportation stations, and their use of such sites as living spaces. Laws enacted or enforced as part of this trend have been aimed specifically at homeless people, or have had their primary impact on them.⁵⁰

In response, litigation has challenged this trend, typically on federal constitutional grounds, and such litigation has recently dominated legal advocacy on homelessness.⁵¹ Some courts have held that where there is no alternative but to sleep in public—where the number of shelter spaces is smaller than the number of homeless persons—then criminal laws that prohibit homeless persons from sleeping in any public place are unconstitutional.⁵²

50. See generally Maria Foscarinis et. al., *Out of Sight, Out of Mind? The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO J. ON POVERTY L. & POL’Y 145 (1999); National Law Center on Homelessness & Poverty, *Mean Sweeps: A Report on Anti-Homeless Laws, Litigation and Alternatives in 50 United States Cities* (1996); National Law Center on Homelessness & Poverty, *Right to Remain Nowhere* (1993); National Law Center on Homelessness & Poverty, *Go Directly to Jail* (1991); Maria Foscarinis, *Downward Spiral*, 14 YALE L. & POL’Y REV. 1 (1996).

51. Foscarinis *Downward Spiral*, *supra* note 50, at 1.

52. *Id.* For example, in *Pottinger v. Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992), the court held that the city’s policy of arresting homeless persons for sleeping in any public place when there were only 700 shelter spaces for some 6,000 homeless persons violated the Eighth Amendment, the right to travel, the Equal Protection Clause and the Due Process Clause. *Id.* at 1551. The remedy proposed by the judge—but never actually implemented by the parties—was the creation of two “safe zones,” public areas in which homeless persons could sleep without danger of arrest. See also *Johnson v. Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev’d*, 61 F.3d 442 (5th Cir. 1995) (on grounds that plaintiffs had not shown they had actually been convicted and thus lacked standing); *Church v. Huntsville*, No. 93-C-1239-S (N.D. Ala. Sept. 23, 1993); *vacated* 30 F.3d 1332 (11th Cir. 1994) (on grounds that plaintiffs had not shown that challenged actions were part of official city policy).

Similarly, courts have held that broad restrictions on begging in public spaces may violate the First Amendment and possibly the Equal Protection Clause.⁵³ In these cases, courts have generally viewed begging—or solicitation—as speech protected by the First Amendment. Homeless persons’ privacy and belongings have also been held to be protected by the Fourth Amendment in some cases, and traditional Fourth Amendment analysis adjusted to reflect the reality that they are living in public: reasonable expectations of privacy have been expanded to protect public areas where those areas are in fact someone’s home.⁵⁴

Other courts have rejected such challenges, however.⁵⁵ Moreover, in the wake of successful litigation, many cities have taken steps to try to make their laws “litigation proof.” Most commonly, they adopt narrower public space restrictions that do not prevent sleeping in all public spaces or at all times, thus eliminating much of the basis of or making much more difficult the constitutional challenge.⁵⁶ Similarly, they have altered the restrictions on begging, broadening them to cover all forms of solicitation while also focusing them more tightly on specific conduct, again limiting the possibility of constitutional challenge. In many cases, these are and should be taken as victories; in some cases, they simply move the battle to the enforcement arena.⁵⁷

Limitations of this approach. By definition, countering criminalization is a reactive approach: it fights what is a very negative, destructive and even dangerous trend.⁵⁸ As such, it tends to focus advocacy efforts and energy away from solutions to homelessness. Further, it risks framing the issue in terms of the assertion of “negative” freedoms; for example, the “right” to sleep on the

53. *E.g.*, *Loper v. New York City Police Dept.*, 999 F.2d 699 (2d Cir. 1993); *Benefit v. Cambridge*, SJC-07341 (Mass. May 14, 1997); *Patton v. Baltimore*, Civ. No. S-93-2389 (D. Md. Aug. 19, 1994); Helen Hershkoff & Adam Cohen, *Begging to Differ*, 104 HARV. L. REV. 896 (1991).

54. *See, e.g.*, *Connecticut v. Mooney*, 588 A.2d 145 (Conn. 1991).

55. *E.g.*, *Joyce v. San Francisco*, 845 F. Supp. 843 (N.D. Cal. 1994), *appeal dismissed as moot*, 87 F.3d 1320 (9th Cir. 1996).

56. *E.g.*, *Roulette v. Seattle*, 78 F.3d 1425 (9th Cir. 1996).

57. A related and also increasingly important area of advocacy concerns zoning laws that exclude housing and services for homeless persons from certain areas. Just as with criminalization, there has been a recent trend in some cities to enact new laws or more stringently enforce existing laws so as to exclude or severely limit housing or service providers. Legislative advocacy at the local level has been aimed at defeating or modifying such zoning laws, and in some cases has succeeded; in addition, litigation has established some rights of service providers and their homeless clients to be sited.

58. In addition to criminalization, recent years have seen an increase in violence aimed at homeless people. National Coalition for the Homeless, *No More Homeless Deaths* (1999). The convergence of these trends is probably not coincidental: private violence likely reflects, at least in part, public hostility.

street and other public places. Nevertheless, this is not a necessary result; indeed, advocates can instead use criminalization efforts positively and proactively.⁵⁹

Taking advantage of city concern with the problem of homeless people sleeping in public places, advocates can focus attention on the lack of indoor alternative places—shelter and housing—and argue that additional resources should be directed at those alternatives, rather than at use of the criminal justice system. They can also reach out to the business community to lend its political support to efforts to increase resources. In the shorter term, outreach by social service agencies, drop in centers, training and education of local police forces, can all be used to foster a more constructive approach, and to build a larger constituency of concerned and informed members of the public.

Countering the criminalization of homelessness may in fact form the basis for effective, proactive advocacy, provided it is framed properly. Taking advantage of city and business interest in addressing the problem of people living in public, advocacy can focus attention on the causes of and solutions to this problem. In some ways this is an opportunity to rethink advocacy and, informed by the experience of the past, as well as new information and models now available, place it on a firmer footing.

* * * *

Legal advocacy on homelessness has been a creative patchwork of approaches and substantive lines of attack. Pulling together bits and pieces of statutes, federal and state constitutional provisions, and new legislative frameworks, advocacy has led to some new rights, benefits and legal protections for homeless people. It has resulted in concrete benefits: emergency shelter, food and services, transitional and some permanent housing. It has provided specific relief to homeless men, women and children, created and defined rights and processes to protect and accommodate them and, in some cases, led to recognition of important rights.

However, it has also been insufficient, and led to some contradictory and unintended consequences. Emergency aid, while critically important, does not solve the problem. Access to “mainstream” programs, also important, does not address the underlying substantive inadequacies of those programs. Civil and political rights remain largely unexercised, as meeting basic survival needs takes priority. And prevention, while obviously the key, has no dependable, broad-based legal or political hook.

Meanwhile, largely unhelpful debates and policy initiatives flourish. Commentators and scholars wonder why homeless people “choose” not to use

59. Unlike advocacy to counter criminalization, successfully countering exclusionary policies can directly result in new resources for homeless people through the siting of housing or service programs. However, this advocacy strategy is dependent on the existence of such programs or proposed programs—and the funds on which they are predicated.

shelters, and argue whether forcing them to accept help is legally and morally appropriate. Others debate homeless persons' "freedom" to live in parks and on sidewalks versus the general public's interest in clean and attractive public spaces. Policymakers grapple with the need to revitalize the inner city by attracting businesses and more affluent residents versus the interests of those seeking to establish housing and services for the poor. While all of these debates have some substance, they all also are missing some important point.

III. INCORPORATING A HUMAN RIGHTS APPROACH: CAN IT HELP STRENGTHEN ADVOCACY?

On a fundamental level, each of these advocacy approaches may also unintentionally reinforce the isolation of the poor and homeless. Focusing on providing help to homeless people can set them apart from others, even though in fact all members of society benefit from help of some kind: businesses benefit from tax incentives, homeowners benefit from tax deductions, non-profits benefit from tax exemptions, for example. Advocacy focusing on specifically on the needs of some, and government obligation to meet those needs, may skew our perspective and further isolate homeless people from the rest of what are in fact interdependent societal structures.

Advocating for others' rights as if they are separate from "our" rights, can not only lead to divisiveness, albeit the more benign sort fostered by charity, but also to a narrow base of support. One of the reasons it is so difficult to build support—political or financial—for advocacy on homelessness and poverty is because those seen as the direct beneficiaries are poor and powerless. In contrast, civil liberties groups have built a far broader base of support founded on the notion that everyone's civil rights are jeopardized whenever anyone's rights are violated.

Incorporating a human rights approach into domestic advocacy may help broaden our focus and support by laying a foundation that is more universal in its reach. Such an approach does not necessarily imply dramatic change; it is no magic bullet. Recognizing a right to housing would not immediately or necessarily solve the problem of homelessness. Nor is it antithetical to a collaborative, process-oriented approach; indeed, the human rights approach includes and emphasizes attention to process and inclusion. Rather, it may help us conceptualize what it is that advocacy aspires to, and provide some legal content to those concepts.

Human rights: relevant documents. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, provides that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability. . .or other lack of livelihood in circumstances beyond his control. . . ." In addition, the Declaration provides

that everyone has this right, “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶⁰ In addition, the Universal Declaration recognizes and protects civil and political rights.⁶¹

Initially, one comprehensive human rights covenant was planned to elaborate and flesh out the provisions of the Universal Declaration. Ultimately, however, the provisions were divided and a pair of subsequent conventions adopted to elaborate on the Universal Declaration: The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁶² The ICESCR elaborates further on the meaning of an adequate standard of living and its component elements.

States parties to the ICESCR “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.” The ICESCR also commits the states parties to “take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operations based on free consent.”⁶³ The committee in charge of the ICESCR’s interpretation and enforcement have defined the right to consist of seven elements: legal security of tenure; availability of services, resources and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. The obligation on states consists of four “layers:” to respect, protect, promote and fulfill the right.⁶⁴ Further, certain components of the right that can be immediately carried out, such as the non-discrimination provisions, are immediately effective. Others are subject to “progressive realization.”⁶⁵

Recent documents, in particular, the Vancouver Declaration on Human Settlements, and the Habitat Agenda, documents resulting from the Habitat I and II Conferences in 1987 and 1996, respectively, elaborate further on these concepts.⁶⁶ The Habitat Agenda incorporates the right to housing, reaffirming

60. Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 (III) (1948).

61. *Id.* at art. 1-21.

62. See Scott Leckie, *From Housing Needs to Housing Rights: An Analysis of the Right to Adequate Housing Under International Human Rights Law*, INTERNATIONAL INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT, at 10 (1992).

63. *Id.*

64. *Id.* at 112-113, 113 n. 27.

65. Other treaty documents also elaborate on the right to housing and elements of it. See, e.g., the Covenant on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC), and the Convention on the Elimination of Discrimination Against Women (CEDAW).

66. See NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, HABITAT II AND U.S. IMPLEMENTATION: BACKGROUND AND OVERVIEW 4 (1998) (Habitat I was held in 1976 in Vancouver, and resulted in the Vancouver Declaration). See also National Law Center On

the commitment to the right to housing “as set forth in the UDHR and as provided for in the” ICESCR, the CERD, ICEDW, and the CRC, “taking into account that the right to housing, as included in the above mentioned international instruments, shall be realized progressively.”⁶⁷ The Agenda also elaborates further on the definition of the right, stating for instance that: “Adequate shelter means more than a roof over one’s head.”⁶⁸ It includes provisions to link housing to employment opportunities, transportation and other basic services, to ensure access to financing, and a to create participatory processes. It addresses the need for government regulation and legal frameworks to enable markets to work, and directly to assist vulnerable and disadvantaged groups, which may be otherwise excluded by the market. It includes provisions to prohibit discrimination in housing, including that based on property, combat exclusionary practices, and to protect persons from forced evictions.⁶⁹

The Habitat Agenda contains provisions specifically focused on the very poor and homeless, in no small part due to the active participation of non-governmental organizations in drafting the document. In addition to direct assistance to disadvantaged and vulnerable groups—including homeless persons⁷⁰—it specifically commits governments to promote supportive services for homeless and other vulnerable groups, to ensure that homeless persons are not penalized for their status, and to give “special attention” to the “circumstances and needs of people living in poverty, people who are homeless. . . and those belonging to vulnerable and disadvantaged groups” in implementing all of the document’s commitments. In addition, it includes commitments to “[p]romot[e] shelter and support[] basic services and facilities for education and health for the homeless” and to address “the specific needs and circumstances of children, particularly street children.”⁷¹

The document also includes a provision that homeless persons not be penalized for their status. This latter provision was sponsored and successfully promoted by the US delegation, at the request of US NGOs, to address the trend towards the “criminalization” of homelessness in many US cities. It was inserted in the section addressing “forced evictions,” on the theory that the current “sweeps” of homeless encampments are the US counterpart to the forced evictions of squatters living in tent cities in other parts of the world.

Homelessness & Poverty, *Habitat II and U.S. Implementation: Background and Overview, Agenda* (1998) [hereinafter *Habitat Agenda*].

67. *Habitat Agenda*, *supra* note 66, at para. 26.

68. *Id.* at para. 60. The *Habitat Agenda* uses the terms shelter and housing interchangeably.

69. See generally Janet Ellen Stearns, *Voluntary Bonds: The Impact of Habitat II on U.S. Housing Policy*, 16 ST. LOUIS PUB. L. REV. 419 (1998).

70. The document includes homeless and poor people within “vulnerable groups.” See, e.g., *Habitat Agenda* para(s). 34, 61(c)(iv).

71. E.g., *Habitat Agenda*, *supra* note 66, at para(s). 38; 40(1); 61(b); (c)(iv); 71; 97(a).

The Agenda embeds the provisions on homelessness and adequate housing in a broader policy and legal framework. It defines the concept of adequacy broadly to include proximity to work, social services and transportation. Placing housing in the larger context of economic and community development it emphasizes the need for links between housing and jobs. The document also makes clear, consistent with developing international jurisprudence, that government recognition of the right to housing is not tantamount to government obligation to provide a home free of charge to everyone.⁷² Rather, the obligation of government is to pursue and promote policies that will promote housing rights through a mix of market and government forces.⁷³

The human rights documents create a balanced conceptual framework for rights and responsibilities and for integrating individual with societal needs. For example, the Universal Declaration recognizes basic rights to housing, food, medical care; but it also incorporates the responsibility of the individual: assistance is foreseen only when needed due to disability or other circumstances beyond the individual's control.⁷⁴

The Agenda incorporates and promotes openness ("transparency") and community participation, especially by those most immediately affected, in carrying out these policies. It also adopts and incorporates an "enabling" approach, in which the national government brings together and "enables" the collaboration of different actors, including the private sector, non-profit organizations, local governments and labor unions. However, within this approach, the Agenda imposes a special responsibility on governments to protect members of disadvantaged and vulnerable groups.⁷⁵

The Habitat Agenda is the most recent and comprehensive elaboration on the meaning of the human right to housing in the contemporary world. While not a treaty, the Agenda was agreed to and the Istanbul Declaration was signed by 171 countries, including the United States.⁷⁶

Using human rights in the US: approaches and limitations. Substantively, each of the documents described above is highly relevant to addressing

72. See Scott Leckie, *Towards an International Convention on Housing Rights: Options at Habitat II*, AMERICAN SOCIETY OF INTERNATIONAL LAW (1994); see also Habitat II and U.S. Implementation: Background, *supra* note 66, at 7-8.

73. See, e.g., Habitat Agenda, *supra* note 66, at para. 61.

74. Universal Declaration of Human Rights, Dec. 10, 1948, U.N.G.A. Res. 217 (III) (1948), at art. 25(1); see also Habitat Agenda, *supra* note 66, at para. 32.

75. E.g., Istanbul Declaration, at para. 12; Habitat Agenda, *supra* note 66, at para. 45, 181-82.

76. During that process, the US raised serious objections to the inclusion of the right to housing; however, eventually, the right was included and the US participated in the process and signed the document. See, e.g., Philip Alston, *The U.S. and the Right to Housing—A Funny Thing Happened on the Way to the Forum*, 2 EUR. HUM. RTS. L. REV. 120 (1996).

homelessness in the United States. However, legally their applicability in the domestic context is by no means clear. Moreover, the status of each document is not the same.

The UDHR is not a treaty, but rather a declaration; as such, it is arguably not binding law.⁷⁷ Nevertheless, many scholars believe that as a result of consistent practice of states and the international community, the UDHR has become part of “customary international law,” and has thus become binding international law.⁷⁸ Moreover, some argue that even though it may not be sufficiently accepted to be binding customary law, it is binding by virtue of states’ adoption of the UN Charter.⁷⁹

Numerous subsequent treaties and conventions, which are binding international law, recognize and elaborate on the right to housing as well as other related economic rights. The most detailed and relevant to housing rights, the ICESCR, was signed by the United States in 1972 but has not yet been ratified.⁸⁰ The Convention on the Rights of the Child, which includes recognition of children’s right to housing, has been ratified by 191 nations, but not by the U.S. However, the Convention on the Elimination of All forms of Racial Discrimination, which includes at least an acknowledgement of the right to housing, has been signed and ratified by the U.S. Likewise, the International Covenant on Civil and Political Rights has been signed and ratified by the U.S.⁸¹

In any case, ratification of a treaty does not automatically incorporate it into US law. While the U.S. Constitution accords treaties the same status as federal statutes,⁸² they have typically been ratified with reservations that provide that they are not “self-executing,”⁸³ and courts have upheld such reservations.⁸⁴ Not self-executing means that the treaty provisions are not judicially enforceable in the U.S. absent passage of implementing legislation by Congress.⁸⁵

77. See Leckie, *From Housing Needs to Housing Rights*, *supra* note 62, at 15.

78. *Id.*

79. *Id.*; See also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1985), reporter’s note 4.

80. The Rights of the Child treaty similarly has not been ratified. Arguably, the signing of the treaty has some significance: Under article 18 of the Vienna Convention, signatories are obliged to “refrain from acts which would defeat the object and purpose of a treaty.” See also American Declaration of the Rights and Duties of Man, art. 11 (obligation of state to provide for health and basic necessities).

81. Signed by President Johnson in 1966.

82. U.S. CONST. art. VI, § 2; art. 2 § 2.

83. See *Foster v. Nielson*, 27 U.S. (2 Pet.) 253, 314 (1829); Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L. L. 695 (1995).

84. See *Foster*, 27 U.S. at 314.

85. However, this limitation does not apply to customary international law—law derived from the long-standing and consistent practice of nations—and it requires no implementing

None of the human rights treaties is self-executing, and none has been implemented legislatively. However, the Supreme Court has held that whenever possible, federal statutes must be interpreted so as not to conflict with international law.⁸⁶ This principle, which applies to ratified treaties whether self-executing or not, and to customary international law, injects human rights law into US law as an interpretive tool in cases where US law is unclear and capable of more than one interpretation.

Thus, despite significant limitations, international human rights law can be a useful supplement to legal advocacy on homelessness. First, it can serve as an interpretive tool in litigation where federal or state law is unclear. Second, it can serve a “standard setting” function in policy advocacy. And third, it can help reframe and re-conceptualize advocacy, placing it on a firmer foundation: away from charity and dependence and towards justice and interdependence. Moreover, such a redefining of the issues may also help broaden the advocacy constituency: human rights are universal; as such, their assertion benefits all, not merely those in need. This section looks at some of these potential uses; rather than a comprehensive discussion, it is an outline meant to stimulate thought, discussion and, potentially, action.

Human rights law as an interpretive guide. According to established Supreme Court precedent, “an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.”⁸⁷ Indeed, according to later court decisions and commentators, courts must interpret ambiguous domestic law in general so that it is consistent with binding international law, whether derived from treaty or custom. Moreover, courts in their discretion may rely on non-binding international law—such as declarations, treaties that have not been ratified, and practices that have not become customary law—to interpret ambiguous domestic law.⁸⁸

The Supreme Court has looked to international law as well as the laws and practices of other nations in analyzing whether a particular punishment offended civilized standards of decency, and was thus “cruel and unusual” under Supreme Court the Eighth Amendment to the U.S. Constitution.⁸⁹

legislation to become binding law. See *The Paquete Habana*, 175 U.S. 677 (1900). Customary international law is federal common law, binding on states through the supremacy clause. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). A practice becomes binding customary law when two conditions are met. First, the practice is regularly repeated. Second, the repetition results from a generally accepted belief that the practice is required by law. See BARRY CARTER & PHILIP TRIMBLE, *INTERNATIONAL LAW* 143-44 (1995).

86. See *Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

87. *Id.* at 118.

88. See *Oyama v. California*, 332 U.S. 633 (1948), *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

89. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1957) (plurality); *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977); *Estelle v. Gambelle*, 429 U.S. 97 (1976).

Similar analyses have been used by the Court in applying the Due Process Clause.⁹⁰ However, more recent signs from the Court are less than clear. In a 1988 death penalty case, a four-Justice plurality cited human rights treaties and international comparative information in applying Eighth Amendment analysis.⁹¹ The following year, in another death penalty case, the plurality was reversed, and rejected the argument that other countries' practices are relevant to that analysis.⁹²

Nonetheless, in a 1997 decision concerning the constitutionality of a state law banning assisted suicide, Justice Rehnquist, writing for the Court, cited the practices of other countries (in particular, "Western democrac[ies]").⁹³ The Supreme Court's views on the status of human rights law and international comparative information may thus be somewhat unclear—and in particular, may depend on the nature of the case at issue. Currently, at least, it is difficult to consider human rights law and comparative analysis a reliable basis for argument. However, at the same time, it is clear that both remain significant and potentially relevant.⁹⁴

A number of lower court decisions, federal and state, have referred to or cited human rights law in potentially relevant contexts. Two cases in the Second Circuit relied in part on international documents in analyzing prison conditions under the Eighth Amendment;⁹⁵ in another case, a federal district court cited human rights law in ruling that the children of illegal aliens had a right to an education under the Equal Protection Clause.⁹⁶ A state court relied in part on international law in protecting the right to travel within a state;⁹⁷ and another state court cited the Universal Declaration of Human Rights in

90. See, e.g., *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

91. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).

92. *Stanford v. Kentucky*, 492 U.S. 361 (1989). Nonetheless, a reconciliation of these decisions is possible. The question of the relevance of laws and practices of other nation' arose in the context of determining whether the execution of a minor violated "evolving standards of decency," one of the standards established in Supreme Court jurisprudence for analyzing Eighth Amendment claims. By positing that "it is *American* conceptions of decency that are dispositive," and then embarking on a review of what he considered to be those standards, Justice Scalia removed the possibility of looking to international law or information, which would come into play as an interpretive guide only if there was ambiguity in domestic law.

93. *Washington v. Glucksburg*, 521 U.S. 702, 710 n.8, 718 n.16, 734 (1997).

94. Most recently, in a dissent from a denial of certiorari in this death penalty case, Justice Breyer cited numerous decisions by foreign courts, noting that while they were obviously not binding they were nonetheless relevant. *Knight v. Florida*, 120 S. Ct. 459, 462-64 (1999) (mem.). At a minimum, this suggests that even in the Eighth Amendment context, the issue of the relevant of comparative analysis is still alive.

95. *Detainees v. Malcom*, 520 F.2d 392 (2d Cir. 1975); *Lareau v. Manson*, 507 F. Supp. 117, 1188 n.9 (D. Conn. 1980), *aff'd in part*, 651 F.2d 96 (2d Cir. 1981).

96. *Plyler v. Doe*, 458 F. Supp. 569 (E.D. Tex. 1978), *aff'd*, 628 F.2d 448 (5th Cir. 1980), 457 U.S. 202 (1982).

97. *In re Barbara White*, 158 Cal. Rptr. 562, 567 (Ct. App. 1979).

interpreting a state statute setting a minimum subsistence standards for welfare benefits.⁹⁸

According to one state supreme court judge:

It is a potentially powerful argument to say to a court that a right which is guaranteed by an American constitutional provision, state or federal law, surely does not fall short of a standard adopted by other civilized nations. It is a much more difficult, and riskier, argument to tell a court that it must displace some law of a state or of the United States, with an external international standard.⁹⁹

This approach has potential applications in legal advocacy on behalf of homeless persons in various areas. For example, challenges to “criminalization” laws and policies sometimes rely on a right to intrastate travel, which has not been explicitly recognized as a constitutionally protected right by the Supreme Court, or a right to “freedom of movement” under the Due Process Clause, which is not always clearly articulated. The ICCPR, however, guarantees the “right to liberty of movement,” and freedom to choose one’s residence “within the territory of a state.”¹⁰⁰ Similarly, while education is not recognized as a fundamental right in the federal constitution, a number of state constitutions protect it; international law on children’s right to an education may be relevant to interpreting such provisions.¹⁰¹ Perhaps most importantly, while a right to housing seems difficult to construct in the U.S. constitutional context, some movement in that direction may be possible.¹⁰²

While it is sometimes stated that the U.S. Supreme Court has held that there is no constitutional right to housing,¹⁰³ in fact this is not quite the case: the Court held, in the context of a landlord-tenant dispute over habitability, that there is no right to housing of a particular quality.¹⁰⁴ Thus, in theory the

98. *Boehm v. Superior Court*, 178 Cal. App. 3d 494 (1986).

99. Hans Linde, *Comments*, 18 INT’L LAW 77, 77-78 (1984) (Oregon Supreme Court judge). See also *Caballero v. Caplinger*, 914 F. Supp. 1374, 1379 (E.D. La. 1996); *Fernandez v. Wilkinson*, 505 F. Supp., 787, 795-97 (D. Kan. 1980).

100. International Covenant on Civil and Political Rights, art. 12.

101. See, e.g., Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?* 11 HARV. BLACK LETTER L.J. 37 (1994).

102. For example, in considering a zoning ordinance that required all household residents to be members of a family, the court cited the Universal Declaration of Human Rights for the proposition that there is a right to privacy within the home, not just within the family. *City of Santa Barbara v. Adamson*, 610 P.2d 436 (Cal. 1980).

103. E.g., Chester Hartman, *The Case for a Right to Housing*, 9 HOUSING POL’Y DEBATE 223, 234 n.19 (1998).

104. *Lyndsey v. Normet*, 405 U.S. 56 (1972). See also Florence Wagman Roisman, *Establishing a Right to Housing: An Advocate’s Guide* (1991); Marc-Olivier Herman, *Fighting Homelessness: Can International Human Rights Law Make A Difference?*, 2 GEO. J. ON FIGHTING POVERTY (1994); Cheryl P. Derricotte, *Poverty and Property in the United States: A*

question remains open, although not likely given current trends in the Court and its jurisprudence to be resolved in favor of such a right. However, as several commentators have noted, numerous federal statutes recognize the importance of housing and provide funds, albeit insufficient, towards making it available to all.¹⁰⁵ Moreover, federal law protects some housing rights, such as the right to be free from discrimination; additional rights are guaranteed in state and local law.¹⁰⁶ While incorporating the entire right may be an elusive and far-off project, using elements of the human right to housing to help interpret housing rights that are protected may be feasible.¹⁰⁷

Standard setting. Even if they do not create binding legal rights, international documents create standards that nations endorse and to which they may be held. By adopting the Universal Declaration, for example, the US publicly committed itself in the world community to abide by the norms it articulates. Regardless of whether or not the Declaration constitutes binding international law, it defines and sets a standard that the US has recognized and adopted. Similarly, while the Habitat Agenda—or Istanbul Declaration—is not a binding treaty, it is at a minimum a statement of understanding as to internationally accepted norms and standards. By its terms, it is a commitment made to and before the international community to carry out a series of steps to abide by and conform to those standards.

Standard setting can be translated into a useful tool for policy advocacy in the US. According to the Habitat Agenda, a special session of the UN General Assembly is scheduled for June 2001 to follow up on Habitat II. In preparation for the session, known as Habitat II + 5, signatory states are to collect information and report to UNCHS on the status of their implementation efforts. While this is an obligation on national governments, there is also provision in the Agenda for monitoring by other entities, including “communities.” This is an opportunity for national and local community groups and advocacy organizations, as well governments, to conduct their own evaluations of implementation to date.

The UN Commission on Human Settlements (“UNCHS” or “Habitat”), the UN body responsible for the implementation and oversight of the Agenda, has developed a set of both “indicators” and “qualitative data” for measuring implementation outcomes. “Indicators” designed to measure implementation of the 20 key provisions of the Habitat Agenda by the states-signatories. These indicators identify key elements of the commitments that are measurable, and

Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing, 40 HOWARD L.J. 689 (1997).

105. *E.g.*, Peter Salsich, *A Decent Home for Every America: Can the 1949 Goal be Met?* 71 N. CAROLINA L. REV. 1619 (1993).

106. *E.g.* Hartman, *supra* note 103, at 234-35.

107. *See* Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987).

seek quantifiable data relevant to them. The major Habitat II commitments covered by these indicators include the following, of particular relevance to US advocates on homelessness and housing.¹⁰⁸

Provide security of tenure. The two indicators designed to measure compliance with this commitment concern tenure types and evictions. With respect to tenure types, the relevant data is: “percentages of woman and man-headed households in the following tenure categories: (a) owned; (purchasing); (c) private rental; (d) social housing; (e) sub-tenancy; (f) rent free; (g) squatter no rent; (h) squatter rent paid; (i) other, including homelessness. With respect to evictions, the relevant data—for developed countries—focuses on evictions for non-payment of rent; however, it also includes evictions during large public works projects [presumably from public places].¹⁰⁹ Significantly, in the section on forced evictions, the Habitat Agenda specifically states that homeless persons are not to be penalized for their status.¹¹⁰

Promote the right to adequate housing. Within this area, UNCHS identifies a qualitative data set, including “yes/no” questions regarding whether the constitution or national law promotes housing rights, and protects against eviction. This area also includes an indicator focused on the housing price to income ratio.¹¹¹

Promote social integration and support disadvantaged groups. The indicator measures numbers of poor households, according to the poverty line.

While these indicators are quite general, they can be used by advocates both locally and nationally to place the US in an international context and to place homelessness and housing in human rights context. For example, advocates can incorporate these concepts in their advocacy to local city councils, using for instance the Habitat Agenda language on forced evictions, which specifically admonishes against penalizing homeless persons for their status as part of their argument against sweeps. The indicators system, and the monitoring and oversight mechanisms it is tied to, allows advocates to argue that cities pursuing such policies are violating the Habitat II commitments, lessening US compliance with this international norm.

Some US cities have adopted resolutions identifying themselves as human rights cities. In particular, three California cities—San Francisco, Berkeley and Oakland—have passed resolutions affirming the Universal Declaration of Human Rights and the International Covenant on Economic, Social, and Cultural Rights and pledging to oppose any legislation or actions that infringes

108. See UNCHS, Guidelines for Collecting and Analysing Urban Indicators Data; see also UNCHS’s Urban Observatory System, available at <http://www.urbanobservatory.org/network>.

109. For developing countries, the indicator refers mainly to squatter evictions. Tellingly, in the U.S. “evictions” of homeless people are typically more akin to the conditions in developing countries.

110. Habitat Agenda, *supra* note 66, para. 61 (b).

111. Other qualitative questions concern barriers to home- and land-ownership by women.

on those rights.¹¹² Though these resolutions are non-binding, they can give particular meaning to monitoring efforts in those particular cities: a city that has adopted such a resolution has a particular obligation to respect the human rights of homeless people.¹¹³

The Habitat Agenda provides that indicators may be modified as appropriate to a nation's particular circumstances, and this may be useful for US advocates as well. Developing minimum standards that cities must follow with regard to their homeless residents, within the Habitat context could create a specific objective against which cities are measured and which they work to meet. For example, meeting minimum human rights criteria on homelessness in the criminalization context could mean no sweeps without adequate indoor spaces.

Reframing. In addition to litigation and policy advocacy tools, an international human rights approach offers an opportunity to reframe the underlying policy analysis and public debate. This reframing is critical, especially given hostile and punitive assumptions about poor and homeless people that are pervasive in current policy and discussion, and that drive and underlie much policy and law.¹¹⁴ Reframing can also provide a context for lawyers working on behalf of homeless people, and on behalf of solutions to homelessness, that motivates and gives meaning to their effort.¹¹⁵ Analyzing homelessness within a human rights framework offers several possibilities for reframing the issue.

First, human rights are universal. These are not rights granted only to the poor or needy; they are not welfare benefits or even entitlements granted out of the largesse of the more fortunate, or associated with a particular political party. Rather, they are rights inherent in all human beings by virtue of their status as such. In this sense, they are inclusive and unifying.¹¹⁶ While homeless people and other "vulnerable groups" are accorded special protection, this is done within a wide context: these are groups excluded from the normal housing markets. This articulates a basis for this protection rooted in circumstance. As such, it suggests at least a possibility for seeing that

112. See Resolution No. 74206 C.M.S., Resolution of the Oakland City Council on Economic, Social and Cultural Human Rights, Apr. 28, 1998; Berkeley City Council, Resolution Supporting the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

113. See San Francisco Coalition on Homelessness, "Mouthing 'Human Rights' Won't Cover Up Wrongs," STREET SHEET, Mar. 1999 (noting contradiction between city policy and actions).

114. See Edelman, *supra* note 167.

115. See Melanie B. Abbott, *Seeking Shelter Under a Deconstructed Roof: Homelessness and Critical Lawyering*, 64 TENN. L. REV. 269 (1997) (importance of underlying principles and beliefs in motivating lawyers on behalf of homeless people).

116. In contrast, welfare and other benefits specifically for the poor, particularly in recent years, have often been perceived, and resented, as special treatment for the needy.

protection as part of a larger scheme of structural dynamics that may not allow all members of a society to engage actively or successfully in the market economy. Human rights provide the basis of a safety net to fall back on in the event of such exclusion—for all.

This universal approach is more consistent with a view oriented towards justice rather than charity. If these rights belong to all, then their denial should be a concern of all: the phrase “it could happen to anyone” takes on some real meaning. The denial of some type of right to anyone is a real, not simply theoretical possibility.¹¹⁷ The protection of these rights thus should be of concern to all; it should not be left to happenstance or to the vagaries of individual conscience and charity.¹¹⁸ At the same time, however, human right principles include the notion of individual responsibility as well as rights, and this too is more consistent with justice rather than charity. These principles provide that those who are able to will work, and concern themselves with the availability of jobs and the adequacy of wages. But they also provide that those unable to work due to circumstance beyond their control will not be left destitute and homeless. Thus, this approach focuses attention on issues such as job availability and wage adequacy rather than on issues such as dependency, laziness and “cultural” inadequacies.

Second, and relatedly, the human rights approach injects a different sort of authority into debate about poverty and homelessness. On one level, the appeal to international norms places debate outside the US and current political climates. By invoking the world stage, it appeals to US policymakers to consider a bigger perspective. How will the US be perceived? How are its national policies affecting its international standing? How can homelessness and dire poverty be tolerated in a country with our resources? At international perspective encourages us to look at the US reality from a stranger’s perspective, one in which these questions may appear more starkly.

On another level, the appeal to human rights as a higher, or more fundamental, authority may allow for a different type of discussion: By

117. In fact, housing rights of others are protected. For example, the federal tax code grants homeowners deductions; some benefit programs take into account housing costs in setting levels of assistance; and of course, the Constitution protects property ownership. Incorporating these protections into a framework that recognizes housing rights as human rights available to all helps clarify that defending the housing rights of one set of people—such as the homeless—advances the interests of all. Of course, in practice these interests may at times be at odds. For instance, low income housing groups have argued that housing for homeless people could be paid for through a cap on the homeowner’s mortgage deduction, *see also* Hartman, *supra* note 103, at 239. But placing both in the context of the right to housing may help frame the conflict as one over priorities, opposed to conflict between two groups of people.

118. Moreover, to the extent that a human rights approach also includes the principle that human rights are indivisible—namely, that civil and political rights and economic and social rights are interdependent and cannot exist without each other—then this universalism becomes stronger.

assuming the inherent value and worthiness for all individuals, it may obviate debate over the worthiness—or lack thereof—of particular recipients of aid, while at the same time also assuming their complementary obligation to reciprocate. At a time when national debate has focused much attention on the responsibilities of the poor and homeless, human rights analysis provides a framework that has a built in balance between rights and responsibilities, as well as grounding in external realities.

For example, welfare reform has required work, and sanctions failure to comply with myriad requirements designed to instill a sense of responsibility. But it does not address the issue of job availability or adequacy (wage, transportation or child care) or indeed protect the right to work at a living wage. Thus, to the extent that advocacy simply focuses on opposing the punitive aspects of the policies it risks advocating for dependency: a welfare check, not a job. Similarly, efforts to impose “quality of life” laws that in effect criminalize homelessness argue that homeless people should be subject to the same standards of behavior as everyone else. To argue otherwise, they say, is to “enable” bad behavior. Advocates opposing these efforts risk appearing to advocate for a right to sleep on the street. A human rights approach can place the issue in larger context: the lack of alternatives, in particular the gross violation of the right to housing which requires people to live in public places and invariably accompanies concerted efforts to punish homeless people for being in public.

IV. CONCLUSION

The globalization of national economies places new focus on international dependency and also on human rights. Habitat II brought particular focus and debate to housing rights, culminating in a document with particular attention to the housing needs and rights of the poor and homeless. It also created a mechanism for ongoing monitoring and reporting, with a major, five-year follow-up UN conference scheduled for June 2001. In this context it is appropriate that advocates for poor and homeless people become familiar with basic human rights concepts. These concepts directly address issues of concern to advocates: issues such as housing, jobs and health care. While they may not currently be legally binding, human rights principles can be integrated into advocacy strategies so as to enhance and add to them.

Let us return to the legal clinic at the shelter with which this essay began. Will a human rights approach add anything to our legal team’s ability to aid those who seek legal help simply because they cannot find a job that pays enough or housing they can afford? Most likely, it will not add much that is immediately helpful. But it will add something that is important: a framework of rights and obligations within which this group of people belongs. As such, it also adds an understanding of justice to aspire to and work towards, and a

legal structure to which to attach it. Translating these concepts into concrete tools and relief can only happen incrementally.

Nevertheless, as the world continues to shrink and global interdependence becomes more apparent, there is a real opportunity to make human rights more meaningful in the US. Advocates should not wait but rather be proactive in adding this advocacy tool to the mix in advocating to protect the rights of homeless Americans and to bring an end to homelessness in America.

