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# Homelessness in America: A Litigation Memorandum for Legal Service Advocates

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HOMELESSNESS IN AMERICA: A LITIGATION MEMORANDUM FOR LEGAL SERVICES ADVOCATES. By the Homelessness Task Force. Washington, D.C.: National Clearinghouse for Legal Services, Inc. 1986. Pp. 84.

Reviewed by Deborah H. Karpatkin\*

Particularly in the winter months, and particularly in cities like New York where the contrasts of rich and poor are so great and where the homeless population is so visible, it is heartening to read this Memorandum on homelessness litigation and to know that legal work is being done, on the whole successfully, to improve the quality and the quantity of shelter for the homeless.

The Memorandum is a compendium of cases, theories, and strategies on the gamut of litigation brought on behalf of America's homeless by legal service advocates across the country. It is organized around three categories of litigation: cases dealing with the right to emergency shelter; cases dealing with the causes of homelessness (insufficient income, deinstitutionalization, and the like); and cases dealing with the collateral consequences of homelessness. The Memorandum also deals briefly with creating and funding shelters.

The first section of the Memorandum covers litigation arguing for a right to emergency shelter. In numerous jurisdictions, advocates have employed state constitutions and statutes creatively to require governmental action in the form of increasing the availability of emergency shelters and improving the conditions of existing shelters.

Most exciting of the litigation in this area is that which seeks to rely on state constitutional provisions to require assistance for the homeless. In *McCain v. Koch*,<sup>1</sup> for example, legal services advocates argued that New York City's failure to provide eligible homeless families with safe and adequate emergency housing and other related necessities violated the state

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1. 127 Misc. 2d 23, 484 N.Y.S.2d 985 (N.Y. Co. Sup. Ct. 1984), *aff'd as modified*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

and federal constitutions as well as statutes and regulations. The New York Constitution provides: "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."<sup>2</sup> In substantially sustaining a preliminary injunction entered by the trial court, the appellate court found it likely that plaintiffs would succeed on their state constitutional claims. The court found that the framers of the State Constitution intended Article 17 to require the State to take positive steps to assist the needy, rather than simply to voice aspirations towards ideal social goals.

The New Jersey Constitution has also been invoked by homelessness advocates to support claims that the homeless have a right to adequate, safe and suitable emergency shelter. The New Jersey Constitution provides: "All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."<sup>3</sup> Plaintiffs in *Rogers v. Gibson*<sup>4</sup> argued that the serious harm suffered by homeless persons compels a judicial determination that a right to adequate emergency shelter is afforded to the homeless under the State Constitution. They relied on a well established body of state law recognizing the fundamental importance of housing and health to the general welfare of the state under Article I Section 1.

In addition to claims under state constitutions, legal advocates have constructed winning arguments under various state and federal entitlement statutes and regulations. For example, the Supreme Court of West Virginia in *Hodge v. Ginsberg*<sup>5</sup> upheld a claim to shelter under the state's act to provide protective services for incapacitated adults, which required the state Department of Welfare to "offer such services as are available and appropriate in the circumstances to persons. . .entitled to de-

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2. N.Y.CONST. art. XVII, § 1.

3. N.J.CONST. art.I, para. 1.

4. *Rogers v. Gibson*, no. L-17401-84 slip. op. (N.J. Super. Ct, transferred to Appellate Division Dec. 6, 1985).

5. 303 S.E.2d 245 (W. Va. 1983).

fined protective services. . ."<sup>6</sup> The Court ruled that the agency's definition of "incapacitated adult" was unduly restrictive and had to be applied so as to include the provision of shelter to the homeless plaintiffs.

New Jersey statutes and regulations of similar import were relied on by the trial court in *Maticka v. City of Atlantic City*<sup>7</sup> to require the City to prepare a comprehensive plan for providing shelter and services to the homeless. Plaintiffs in that case alleged that the state General Public Assistance Law and attendant regulations,<sup>8</sup> which required "such aid and material assistance. . .necessary to the end that such person may not suffer unnecessarily, from cold, hunger, sickness, or be deprived of shelter. . ."<sup>9</sup> were violated by Atlantic City's failure to provide shelter for the homeless.

Similar state statutes have provided the basis for successful litigation in Connecticut<sup>10</sup> and Missouri.<sup>11</sup> Federal statutory claims have also been used successfully on behalf of the homeless.<sup>12</sup> And the Memorandum reports at least one instance of the

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6. W. VA. CODE § 9-6-7 (1983).

7. No. A-91-86T5, slip. op. (N.J. Super. Ct. Feb. 3, 1987). On appeal, the Appellate Division directed the Department of Human Services to conduct a public hearing with respect to its regulation governing emergency public assistance to the homeless, and invalidated the Department's requirement that applicants for public assistance give prior notice of impending homelessness.

8. N.J. STAT. ANN. §§ 44:8-107 to 152 (West Supp. 1986) and N.J. ADMIN. CODE tit. 10, §§ 10:85-1.1 to 11.2 (1986).

9. N.J. STAT. ANN. § 44:8-122 (West 1947).

10. *Lubetkin v. City Manager of Hartford*, (Conn. Super. Ct., complaint filed Feb. 4, 1984), argued that CONN. GEN. STAT. § 17-273 required the city to shelter the homeless. After the complaint was filed, plaintiffs negotiated a settlement where the state by regulation required each municipality to provide shelter and general relief to the homeless.

11. In *Graham v. Schoemehl*, Docket No.854-00035 (St. Louis Cir. Ct., Nov. 15, 1985) homeless plaintiffs based their claim on MO. REV. STAT. § 205.580, an 1815 statute providing that "poor persons shall be relieved, maintained, and supported by the county of which they are inhabitants." By consent decree, St. Louis agreed to provide shelter to the homeless, to appropriate money for shelter and services, and to provide related necessary services.

12. *Koster v. Webb*, 598 F.Supp. 1134 (E.D.N.Y. 1983) argued that 42 U.S.C. § 1983 was violated because New York State violated the Social Security Act, 42 U.S.C. § 601 (1968) by failing to provide for family shelter under its Emergency Assistance Plan. *Cf. Klosterman v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984), which held that persons discharged from a state psychiatric facility, a population that figures prominently among the homeless, failed to state a claim for relief when they alleged that defendants' failure to place them in community-based residences violated the Social Security Act, 42 U.S.C. § 1396 (1924). *Algor v. County of Ocean*, Docket No.L-37425-85

successful use of a local ordinance to enforce the right to shelter in Philadelphia.<sup>13</sup>

The Memorandum properly includes in its "right to shelter" section, litigation that has focused in whole or in part on the adequacy of shelter already provided. Again, the litigation in this area has been successful,<sup>14</sup> but successful litigation has not resulted in shelters becoming safe, hospitable places to stay; a walk through New York at night indicates that large numbers of homeless people find the shelters available to them less attractive than sleeping out on the street.

Most of the litigation reported in the Memorandum has been brought by legal services groups on behalf of homeless persons. Homelessness litigation also takes the form of cases brought by non-profit groups who wish to operate a shelter but are prevented from doing so by local zoning laws. In *St. John's Evangelical Lutheran Church v. City of Hoboken*,<sup>15</sup> the city sought to prevent the church from operating a shelter, arguing that the shelter was not an accessory church use under the zoning ordinance. The church argued successfully that churches

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(N.J. Super. Ct., preliminary injunction issued Nov. 27, 1985), argued that under the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §670 (1986), the New Jersey Division of Youth and Family Services was required to make "reasonable efforts" to prevent the removal of a child from his or her home, including the provision of adequate shelter. Finally, in the case of a federally-owned shelter, the Administrative Procedure Act provided a basis for arguing in *Robbins v. Reagan*, 780 F.2d 37 (D.C. Cir. 1985) that shelter once provided cannot be withdrawn without notice, an opportunity to comment, and an administrative record of the decision-making that can pass an arbitrary and capricious test. The court imposed the APA requirements but nevertheless upheld the decision to close the shelter (which as of the writing of the Memorandum was still open).

13. *Committee for Dignity and Fairness for the Homeless v. Pernsley*, No.886 (Pa. Ct. C.P. settled Apr. 1985)

14. See, e.g., *McCain v. Koch*, *supra*, 484 N.Y.S.2d at 987: "In a civilized society a 'shelter' which does not meet minimal standards of cleanliness, warmth, space and rudimentary conveniences is no shelter at all." Homelessness is a problem even in sunny southern California; the Memorandum reports two cases against the Los Angeles County Board of Supervisors which precluded the County from issuing \$8 vouchers for housing to homeless persons unless there were a sufficient number of suitable shelter spaces available for that price, and those spaces were not in substandard condition. *Ross v. Bd. of Supervisors of the County of Los Angeles* (Cal. Super. Ct., filed June 11, 1984) and *Paris v. Bd. of Supervisors of the County of Los Angeles*, No.C 523361, slip. op.(Cal.Super.Ct., Dec. 24, 1985). However, *Robbins v. Reagan*, 780 F.2d 37 (D.C.Cir. 1985) affirmed the district court's ruling that a Washington, D.C. shelter could be closed because adequate alternative facilities existed.

15. 195 N.J. Super. 414, 479 A.2d 935 (1983).

have traditionally provided sanctuary, and that the operation of the church shelter was thus an exercise of religion which could not, consistent with the first amendment, be prohibited by the city. The court required only that the shelter comply with reasonable health and safety regulations.

Under the heading "Causes of Homelessness," the Memorandum briefly identifies some of the causes of homelessness (lack of employment, inadequate low income housing supply) but focuses primarily on the collateral problems of homeless persons. Residency is not supposed to be a barrier to receiving government benefits;<sup>16</sup> nevertheless, durational residency requirements often cause persons recently arriving in a state to become homeless while they look for work. General assistance relief is supposed to be available to all who are eligible; yet many public assistance agencies have refused to provide financial assistance to the eligible homeless because they lack a fixed address.<sup>17</sup> Food stamps, too, have been denied to homeless people, despite explicit legislation making clear that no fixed residence is required for eligibility;<sup>18</sup> litigation was necessary to force compliance with the law.<sup>19</sup> The Memorandum analyzes arguments that can be made under the Supplemental Security Income laws and regulations<sup>20</sup> and under the Rehabilitation Act<sup>21</sup> to enhance the benefits available to homeless persons under these laws.

This section of the Memorandum also discusses the special relationship between deinstitutionalization and homelessness. The trend in recent years to treat the mentally ill in less restrictive community environments instead of in institutions envisaged the availability of suitably sheltered community residences for the mentally ill. As part of this trend, the mentally ill have

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16. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

17. For example, in *Martin v. Milwaukee County*, No.656-770, slip. op. (Milwaukee County Cir. Ct., Jan. 9, 1985), the court enjoined the county from denying general assistance benefits to anyone on the basis that the individual has no "permanent" or "established" address in the county, provided the person does and intends to continue to reside there.

18. The Food Stamp Amendments of 1985, 7 U.S.C. § 2020(e)(2) (1985), and preceding regulations at 7 C.F.R. § 273.3 (1986).

19. In *Ciaio v. Bates*, No.83 Civ. 8630 (LPG) (S.D.N.Y., consent decree Mar. 1984), for example, welfare agencies were required to provide food stamps on an expedited basis and to train welfare workers to work with homeless persons.

20. SSA Program Circular 05-84-OSSI (May 29, 1984).

21. 29 U.S.C. § 794 (1986).

been released from institutions in great numbers. Without suitable places for them to go however, these people often end up not only without appropriate medical treatment but also homeless. The Memorandum reviews at length some of the ongoing litigation in this area.<sup>22</sup>

The Memorandum also discusses arguments against homelessness that have been made under the Uniform Relocation Act,<sup>23</sup> and under Section 202 of the Housing Act of 1959,<sup>24</sup> which provides subsidized housing for low income elderly and physically handicapped people.

If the Memorandum has a weakness, it is that it fails to draw our attention to the fundamental cause of most homelessness in America—the lack of sufficient low income permanent housing. A December 1986 report by the United States Conference of Mayors identifies lack of permanent housing as a significant cause of homelessness,<sup>25</sup> and details the housing problem in America's major cities in chilling detail. In the twenty-five major cities surveyed, the demand for low-income housing increased an average of forty per cent in 1986, and more than half of the cities surveyed reported that the supply of affordable housing had decreased over the last five years.<sup>26</sup>

All twenty-five of the cities surveyed reported that their inability to meet demand for low income housing was attributable to the decline in federal housing programs,<sup>27</sup> evident in the 1988 proposed federal budget, which seeks sharp declines in housing programs. According to a report in the Wall Street Journal, the budget would eliminate or cut several housing programs and reduce overall spending on housing by \$705.2 million. This would include urban development action grants, which foster develop-

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22. *Klostermann v. Cuomo*, 61 N.Y.2d 525, 463 N.E.2d 588, 475 N.Y.S.2d 247 (1984), *on remand to*, 126 Misc. 2d 247, 481 N.Y.S.2d 580 (N.Y. Co. Sup. Ct. 1984); *Arnold v. Sarn*, no. C432355, slip. op. (Ariz. Super. Ct. June 25, 1985); *Clark v. Cohen*, 613 F. Supp. 684 (E.D. Pa. 1985), *aff'd*, 794 F.2d 79 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 459 (1986); *Thomas S. v. Morrow*, 601 F. Supp. 1055 (W.D.N.C. 1984), *modified*, 781 F.2d 367 (4th Cir. 1986).

23. 42 U.S.C. §§ 46014655 (1982).

24. Pub. L. No. 86372, § 202, 73 Stat. 654, 66769 (1959) (codified at 12 U.S.C. § 1701q (1982)).

25. UNITED STATES CONFERENCE OF MAYORS, *THE CONTINUED GROWTH OF HUNGER, HOMELESSNESS AND POVERTY IN AMERICA'S CITIES: 1986*, at 2627 (1986).

26. *Id.* at 29-30.

27. *Id.* at 30.

ment in distressed areas, and programs that help build or renovate apartments for elderly, disabled, and low income people.<sup>28</sup>

The 1988 Budget would continue a trend over the last seven years showing a decrease in the number of new public housing units provided by the Federal Government. Data from the Department of Housing and Urban Development show that despite the increased demand for low income housing, the number of new federally subsidized public housing units has decreased markedly since 1979. In 1983 and 1984, more public housing units were destroyed than built.<sup>29</sup>

In sum, "Homelessness in America" makes a significant contribution to advocates for the rights of the homeless, both substantively, by its well-presented summary and analysis of litigation in the area, and supportively, by letting those who work in the area know how much is being done, so creatively and so effectively, by others. But it is not the fault of the homelessness advocates that government is not providing sufficient low income housing to avoid the problems of homelessness. But, it is the responsibility of all of us to work for more affordable permanent housing for those who are now homeless.

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28. *What President's Fiscal '88 Budget Does to Programs; Education, Transportation and Housing Face Big Cuts*, Wall St.J., Apr. 6, 1987, at 10, col. 1.

29. Herbers, *Outlook for Sheltering the Poor Growing Even Bleaker*, N.Y. Times, Mar. 8, 1987, § 4 (Week in Review), at 5, col. 1.

