Fordham Urban Law Journal

Volume 10 | Number 4 Article 8

1982

Homelessness in a Modern Urban Setting

Mark Malone

HOMELESSNESS IN A MODERN URBAN SETTING

I. Introduction

The number of homeless persons[1] in urban areas has increased at an alarming rate—it is estimated[2] that there are 30,000 homeless men and 6,000 homeless women in New York City alone.[3] The increasing

---

1. The definition of a homeless person varies according to the sociological and legal material consulted. One New York City study defined the homeless as "those whose primary nighttime residence is either in the publicly or privately operated shelters or in the streets, in doorways, train stations and bus terminals, public plazas and parks, subways, abandoned buildings, loading docks and other well hidden sites known only to their users." E. BAXTER & K. HOPPER, PRIVATE LIVES/PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK 6-7 (1981) [hereinafter cited as PRIVATE LIVES/PUBLIC SPACES]. Another author defined the homeless as persons suffering from "a condition of detachment from society characterized by the absence or attentuation of the affiliative bonds that link settled persons to a network of interconnected social structures." H. BAHR, SKID ROW, AN INTRODUCTION TO DISAFFILIATION 17 (1973) [hereinafter cited as SKID ROW]. A survey by this Note's author sent to 25 social service agencies around the country defined homeless persons as "those persons who are unemployed for more than a temporary period of time with no visible means of support and who live in the streets, abandoned buildings, doorways, transportation facilities, public parks or under bridges." *See also* Beck & Marden, *Street Dwellers*, 86 NAT. HIST. 78 (1977).

2. Because of their transient, secretive and disaffiliated nature, it is difficult to make accurate estimates of the number of homeless persons in New York City.

3. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 8-9. This figure was used in testimony during public hearings by City Council President Carol Bellamy. N.Y. Times, Nov. 20, 1981, at B4, col. 1.

It also is estimated that Washington, D.C. has a homeless population of between 5,000-10,000, Boston between 4,000-8,000 and Philadelphia approximately 3,360. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 9. During 1981 there were approximately 5,900 homeless women in Baltimore, and at least half of these women were accompanied by children (2,500-3,000). B. WALSH & D. DAVENPORT, THE LONG LONELINESS IN BALTIMORE: A STUDY OF HOMELESS WOMEN 39-56 (Sept. 1981) [hereinafter cited as A STUDY OF HOMELESS WOMEN]. Other estimates of homeless persons in Baltimore are 12,000 homeless men and 8,580 homeless women. These figures are from a survey sent by this Note's author to Social Services Agencies in eight states covering approximately 25 counties throughout the U.S. Pinellas County, Florida, which incorporates the City of St. Petersburg, estimates that there are approximately 200 homeless men and between 50-60 homeless women within its boundaries. *Id.* Alameda County, California, which incorporates the City of Oakland, is capable of providing 6,361 bed days per month, but estimates that 1,895 individuals per month must be rejected because of a lack of available shelter. United Way of the Bay Area, United Way Subcommittee on Emergency Shelters: Final Report 3-4 (1980). A study comparing two groups of disaffiliated women found that homeless women tended to be younger than homeless men, better educated, drank alone but less heavily, and probably had more attenuated social ties than men. Black, homeless women of lower socioeconomic levels comprised a larger portion of the homeless women population than their relative representation in the overall population. Three-fourths of the

gravity of the homelessness problem has gained recognition because homeless individuals are no longer confined to skid row neighborhoods[4] but are encountered throughout American cities.[5]

---

homeless women had been married at least once and marital instability amongst homeless women was prevalent. This study also found that a majority of homeless women came from broken homes. The vast majority of homeless women were native born, 89% had an income of $100 per month or less, 67% had some high school education or had graduated from high school, 62% were between the ages of 35-54, 79% expressed Protestantism or Catholicism as their religious preference, 48% had a father with an eighth grade education or less and 54% had a mother with an eighth grade education or less. The authors concluded that female homelessness often resulted from a woman's failure to fulfill the traditional roles of wife and mother. The cause of homelessness in men, however, was found to be more commonly related to failure in one's occupational role. H. BAHR & G. GARRET, WOMEN ALONE (1976). *See generally* Beck & Marden, *Street Dwellers*, 86 NAT. HIST. 78, 81 (1977).

4. Although the historic causes of homelessness in the United States were similar to those in Great Britain and other European nations, S. WALLACE, SKID ROW AS A WAY OF LIFE 9 (1965), American cities witnessed the creation of "skid row" neighborhoods—economically depressed urban communities. The most famous of these "skid row" neighborhoods is the section of New York City known as the "Bowery," where a mission and lodging facility for indigent men was first opened in the 1870's. SKID ROW, *supra* note 1, at 32. The term "skid row" is a derivative of "skid road" and dates back to the mid-19th century. Lumberjacks in the Northwest used to slide or skid cut logs down the middle of crude roads. Shanties and cheap hotels sprang up along these roads to accommodate loggers and provide for their physical pleasures. The term skid road was applied to these areas and eventually was shortened to "skid row." S. WALLACE, SKID ROW AS A WAY OF LIFE 18 (1965). The stereotypical skid row began shortly after the Civil War when many discharged soldiers and displaced families and slaves flocked to the urban communities only to find that reintegration into society was difficult. *Id.* at 13-15; MORRISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 770 (1965). Immigration aggravated the problem, causing large numbers of homeless people without jobs to live in the streets. S. WALLACE, SKID ROW AS A WAY OF LIFE 14-15 (1965). During the economic strife and depression of 1873-1876, facilities were established specifically to alleviate the plight of the urban unemployed. Once the economic climate improved, these facilities assumed the task of providing for vagrants and the homeless. SKID ROW, *supra* note 1, at 35. A study was recently conducted of the five skid rows of Chicago, which encompass institutions such as bars, flophouses, rescue missions, temporary employment offices, pawnshops and second hand stores. W. MCSHEEHY, SKID ROW 13-15 (1979). The author found that, historically, policies dealing with the homeless and vagrants attempted to modify what was deemed apathetic, indolent behavior by incarceration in jails, workhouses or labor colonies. *Id.* at 105. Today, the strategy has changed and other devices are utilized because the homeless are viewed as mentally disabled. Responsibility for their care has thus been shifted to the therapeutic community. *Id.* at 106. Urban Renewal funds have been used to destroy the physical institutions of skid row with the hope of dispersing those already there and of abolishing the sanctuary to which future homeless persons would gravitate. *Id.* "Methods for dealing with tramps and bums today are not more humane, only more subtle. Greed and prejudice are far more influential than reason in determining policies which affect men on skid row." *Id.* at 107. *See also* Lee, *The Disappearance of Skid Row: Some Ecological Evidence*, 16 URB. AFF. Q. 81 (1980). The author described the decline of the skid row communities in urban areas between 1950-1970. The skid row communities were tolerated by society because they served the important economic purpose of

The enormity of the homelessness problem in New York City, and the willingness of the state legislature to focus its attention on the relevant legal issues, has placed New York in the forefront of those jurisdictions which accord legal rights to homeless persons through court decisions and legislation. A legal action commenced in New York City on behalf of six homeless men[6] resulted in a consent decree which guarantees homeless men the right to certain minimum living and health standards.[7] The New York State Legislature also has attempted to deal with the homelessness problem. In 1981 it enacted

---

providing an unskilled labor pool. *Id.* at 102. Due to historic preservation, gentrification, conversions to luxury housing, federal funding for urban rehabilitation and other measures undertaken to halt urban decay, much of the low cost housing and institutions which formerly comprised skid row have been severely reduced. *Id.* at 103. While skid row as a centralized community is breaking down, the numbers of homeless persons are increasing at a rapid rate. The author hypothesized that these conditions will lead to a decentralized skid row community with the appearance of widely dispersed "mini skid rows." These "mini skid rows" will offer less social organization, institutional support and community cohesiveness than the centralized skid row. In order to stop the break-up of the territorially definable concept of skid row, the author suggested that the skid row must offer society some valuable function such as becoming an "open asylum" where those mentally ill who are discharged from mental institutions are placed or reside. *Id.* at 104-05. Another author, when discussing the modern day rescue missions which require participation in religious services in exchange for food and shelter, has contended that these institutions owe their existence to continuous failure. The primary goal of these institutions, which cater to derelicts and homeless persons, is to eradicate deviant behavior. Because failure to attain this goal is essential to their continued functioning and expansion, they generally depict the problem as quite severe. Rooney, *Organizational Success Through Program Failure: Skid Row Rescue Missions*, 58 SOC. FORCES 904, 921-22 (1980).

5. N.Y. Times, June 28, 1981, at 34, col. 1. A study of homeless persons who frequented the Greenwich Village area of New York City stated that these persons prefer to dwell in moderate income areas because they are too conspicuous and incur the wrath of residents in the wealthier areas, but they fear the high incidence of crime in lower income areas. Observations indicated that women have smaller traveling and home ranges than men. Beck & Marden, *Street Dwellers*, 86 NAT. HIST. 78 (1977). Public libraries in urban communities have had difficulty adjusting to the great increase in the number of homeless and mentally disturbed persons who are using library facilities for shelter. *Urban Librarians Seek Ways to Deal with "Disturbed Patrons,"* N.Y. Times, Nov. 24, 1981, at A16, col. 1. Recently, New York City transit officials initiated a program to remove homeless persons who sleep or aimlessly ride the city subways. *Homeless Riding in Subways Being Taken to City Shelters*, N.Y. Times, Mar. 25, 1982, at B3, col. 5.

6. Callahan v. Carey, N.Y.L.J., Dec. 11, 1979, at 10, col. 5 (Sup. Ct. N.Y. County).

7. Callahan v. Carey, No. 79-42582 (Sup. Ct. N.Y. County) (Aug. 26, 1981) (Final Judgment by Consent). In 1979, the Mayor of Washington, D.C. announced a policy to provide shelter for anyone who wanted it. Williams v. Barry, 490 F. Supp. 941, 943 (D.D.C. 1980). A suit has been commenced to force New York City to expand and upgrade its shelters for homeless women. *Suit Seeking to Upgrade City Shelters for Women*, N.Y. Times, Feb. 25, 1982, at B12, col. 5.

the Protective Services for Adults Law of the Social Services Law[8] which provides for short-term involuntary protective services for endangered adults.[9] The inadequacy of the Protective Services Law, however, was demonstrated dramatically by the death of a homeless elderly woman just before she could be helped by application of the new law.[10] This incident emphasizes the need to institute more effective means to help homeless persons in danger.

Today's homeless individual can no longer be characterized as an elderly or alcoholic person, but is more typically unemployed or suffering from a mental disability.[11] As a result, responses to the homeless problem require innovative and imaginative approaches. This Note briefly traces the historic causes of homelessness, examines the purposes behind vagrancy and loitering statutes, and explores the reasons why such laws have proven to be inadequate to cope with the current dimension of the problem. The actions taken in New York

---

8. 1981 N.Y. Laws ch. 991, *codified at* N.Y. SOC. SERV. LAW § 473-a (McKinney Supp. 1981-82) (Article 9B); *Should We Seize Homeless People Against Their Will?*, N.Y. Daily News, Feb. 14, 1982, at 65, col. 1. Other state adult protective services laws are: FLA. STAT. ANN. §§ 410.10-410.11 (Supp. 1982); KY. REV. STAT. §§ 209.010-09.150 (1977 & Supp. 1980); MD. SOC. SERV. CODE ANN. §§ 106-110 (1979); TENN. CODE ANN. §§ 14-25-101-113 (1980 & Supp. 1981); TEX. HUM. RES. CODE ANN. § 48.061 (Vernon Supp. 1982). The Florida Adult Protective Services Act was held to be constitutional in *In re* Byrne, 402 So. 2d 383, 385 (Fla. 1981).

9. For the purposes of this section, an endangered adult is a person 18 years of age or over who is in a situation or condition which poses an imminent risk of death or an imminent risk of serious physical harm to him or her and is lacking the capacity to comprehend the nature and consequences of remaining in that situation or condition. 1981 N.Y. Laws ch. 991, *codified at* N.Y. MENTAL HYG. LAW § 473-a (i-ii) (McKinney 1981).

10. *Woman Refuses Aid, Dies in Carton on Street*, N.Y. Times, Jan. 27, 1982, at A1, col. 1. A homeless women thought to be in her late 60's was found dead of hypothermia in her home of 8 months, a cardboard box. New York City officials said she died "just hours before they were to obtain a State Supreme Court order to take her forcibly to a city shelter or hospital." *Id.* It was the first time the city had attempted to use the Protective Services for Adults Law. N.Y. MENTAL HYG. LAW. § 473-a (McKinney 1981). The woman repeatedly had refused to accept help from several private and public agencies. *Id.* at B6, col. 1. The city had lobbied heavily for the state custody procedure law, primarily intended to help "elderly people suffering in their homes and refusing help." *Id.* at B6, col. 2. It took a long time to obtain the court order because it was necessary "to show the court that every effort was made" to do it on a voluntary basis. *Id.* at A1, col. 3. Officials were "concerned about [protecting] people's civil rights." *Id.* at B3, col. 1. A limited effort, had been made to send vans around the city to find street dwellers, particularly "shopping bag ladies," and persuade them to enter city shelters. *Pact Requires City to Seek Homeless Men*, N.Y. Times, Aug. 27, 1981, at B11, col. 2.

11. *See generally* NEW YORK STATE OFFICE OF MENTAL HEALTH, SHELTER OUTREACH PROJECT: STATISTICAL REPORT (Mar. 1981) (survey of clients referred to mental health teams at New York City's Men's and Women's Shelters).

relating to the homeless are analyzed and suggestions which may be applicable to all municipalities are offered. This Note concludes that the legal doctrine of *parens patriae*, combined with the policies behind several existing provisions of the New York State Mental Health and Social Services Laws, is a basis upon which further additions to the New York State Social Services should be made.

II. Historical Background

Refugees, migrant laborers, and a disproportionate share of the lower economic strata of society historically have formed the homeless population.[12] This condition can be attributed to their weak social ties, lack of education, and inability to adapt to drastic economic, political and social changes.[13] Throughout the first half of the twentieth century the number of homeless persons in the United States fluctuated. The homeless population decreased with the commencement of the First World War, but homelessness increased again after the war due to the return of servicemen. Although the Great Depression of 1929 precipitated a massive homeless problem, New Deal legislation and the Second World War reduced the numbers of homeless individuals.[14] As the number of homeless individuals increased once again, following the readjustment period after World War Two, skid row lost its community-like atmosphere,[15] and the problem spread beyond individual neighborhoods.

English vagrancy and loitering statutes provided the basis for their American counterparts, but the social and economic environment from which those laws emerged had a character far different than

---

12. SKID ROW, *supra* note 1, at 18. The Greek city-state of Athens provided a welfare network for its resident poor while non-resident indigents were forced to survive by begging in the streets. *Id.* During the European Middle Ages, a segment of the population became detached from the land and roamed the countryside. *Id.* at 19. The devastation of the Black Death coupled with the gradual collapse of feudalism, the emergence of a trading class and the increasing acceptance of the notion that money was a source of wealth and power, released many workers from the land. M. CHAMBERS, R. GREW, D. HERLIHY, T. RABB & I. WOLOCH, THE WESTERN EXPERIENCE 357-58 (1974). Virtually every religion, including Islam, Buddhism, and Christianity, contributed to the ranks of the homeless by encouraging members to renounce material wealth and adopt an ascetic way of life. J. Noss, MAN'S RELIGION 122, 124-26, 455-56, 473-74, 535 (5th ed. 1974).

13. Due to the economic conditions of these groups, financial survival generally does not permit the adequate support of an extended family. In addition, the absence of education or acquisition of a skilled trade impedes social mobility. SKID ROW, *supra* note 1, at 23.

14. S. WALLACE, SKID ROW AS A WAY OF LIFE 22-23 (1965).

15. SKID ROW, *supra* note 1, at 36-39. Before World War II skid row provided a ready source of migrant labor. S. WALLACE, SKID ROW AS A WAY OF LIFE 21 (1965).

that which is typical of today's urban areas. Although initially English vagrancy and loitering statutes had an economic rationale,[16] ultimately they evolved into a means to prevent crime.[17] Early American

---

16. The labor shortage which occurred in the wake of the Black Death induced English laborers to roam the country offering their services to the highest bidder. Landowners offered higher wages in order to augment their depleted work forces. Ledwith v. Roberts, 1 K.B. 232, 271 [1937]; KENNY'S OUTLINES OF CRIMINAL LAW, ch. 25, ¶ 483 (J.W.C. Turner ed, 17th ed., 1958); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 104 (1962) [hereinafter cited as *Vagrancy Reconsidered*]. The emergence of a tradesman class and the deterioration of the feudal system caused laborers to leave the fiefs to find other jobs. SKID ROW, *supra* note 1, at 19; Ledwith v. Roberts, [1937] 1 K.B. 232, 271. Parliament's first responses, A Statute of Labourers, 25 Edw. 3, ch. 1 (1350), and the Statute of Labourers, 23 Edw. 3, ch. 1, 3, 7 (1349), compelled laborers to remain within stated areas, and halted escalating wages by instituting a fixed rate of pay. Papachristou v. City of Jacksonville, 405 U.S. 156, 161 n.4 (1972); 3 S. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 267 (1882) [hereinafter cited as A HISTORY OF THE CRIMINAL LAW]; KENNY'S OUTLINES OF CRIMINAL LAW ch. 25 ¶ 483 (J.W.C. Turner ed., 17th ed., 1958); *Vagrancy Reconsidered, supra* at 104. A subsequent statute which sought to quell the migration of laborers required them to receive the King's written permission in order to travel from an individual's place of residence. 12 Rich. 2, ch. 3 (1388); KENNY'S OUTLINES OF CRIMINAL LAW ch. 25 ¶ 483 (J.W.C. Turner ed., 17th ed., 1958). This act distinguished between able-bodied beggars and the invalid poor who were encouraged to rely on their home parishes for support. 12 Rich. 2, ch. 7 (1388). A HISTORY OF THE CRIMINAL LAW, *supra* at 268. The government sought to prevent vagrants from becoming a "public charge," *Vagrancy Reconsidered, supra*, at 102; Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 237 (1958) (using vagrants to work), and to protect the other members of society. *Id.* In 1530, able-bodied vagrants were subjected to such sanctions as whipping "till his body be bloody," scourging and bodily mutiliation, while the disabled homeless were required to obtain a license to beg in the locality. 22 Hen. 8, ch. 12 (1530); A HISTORY OF THE CRIMINAL LAW, *supra* at 270. If caught begging outside the locality, the punishment was specified as three days in the stocks on a diet of bread and water. *Id.*

17. The "Slavery Acts," so called because of the two years enslavement penalty they provided for anyone who "liveth idly and loiteringly, by the space of three days," 1 Edw. 6, ch. 3 (1547), no longer reflected the thinking that labor shortages caused economic havoc, but rather the hypothesis that wanderers supported themselves through the commission of criminal acts at the expense of the more economically prosperous. *Id.* A HISTORY OF THE CRIMINAL LAW, *supra* note 16, at 274; *Vagrancy Reconsidered, supra* note 16, at 105-06. In 1597 and 1600, during the reign of Elizabeth I, correction houses were established in each county where able-bodied beggars were forced to work until they were placed elsewhere or banished. 39 Eliz. ch. 4 (1597); N. EDEN, THE STATE OF THE POOR 17-18 (1929); A HISTORY OF THE CRIMINAL LAW, *supra* note 16, at 274. Legislation passed in 1744 divided the crime of vagrancy into three classes: idle and disorderly persons, rogues and vagabonds, and incorrigible rogues. 17 Geo. 2, ch. 5 (19744); A HISTORY OF THE CRIMINAL LAW, *supra* note 16, at 273. These acts, which signaled a shift away from legislation intended to punish status crimes to laws which proscribed criminal conduct, 5 Geo. 4, ch. 83 (1824), are the foundations for the present English vagrancy laws. 5 Will. 4, ch. 76 (1834); Ledwith v. Roberts, [1937] 1 K.B. 232.

laws governing the poor and the homeless borrowed[18] from English law.[19] The rationale behind American vagrancy statutes thus perpet-

---

18. The English enacted vagrancy laws with criminal and poor relief components when they established their rule over New York in 1664. D. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE, 1867-1940 4 (1969). Initially each parish had to levy taxes and provide for its indigents, often in almshouses. *Id.* Displacement caused by the American Revolution made it necessary for the state to assume financial responsibility for the needy and homeless who did not reside in a particuar town or county. *Id.* at 4-5. An 1824 state law required each county to build almshouses for its poor and homeless. *Id.* at 6. When it became apparent that the transfer to the counties of total responsibility for the poor was a failure, the state began to grant greater subsidies to localities and assumed responsibility for special institutions such as veterans homes, insane asylums, and homes for the blind and juveniles. *Id.* at 7-8. Nevertheless, the town-county poorhouse system remained the major source of poor relief. The many non-New York State residents who came to New York City following the Civil War and the depression of 1876 were provided with sleeping space in police stations where conditions posed health dangers for the police and the lodgers. J. RICHARDSON, THE NEW YORK POLICE 264-66 (1970). In reaction to the deplorable conditions, a reform movement led by Jacob Riis and Police Commissioner Theodore Roosevelt succeeded in establishing municipal lodging houses for the homeless and shifting the duty to provide for them from the police to the State Board of Charities. *Id.* at 265; D. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1867-1940 108 (1969). A comprehensive statute, the Poor Law, was enacted in 1896 which defined the responsibilities of local relief officials and enlarged on the state's supervisory powers over those officials. *Id.* at 130-33. A 1927 law consolidated the plethora of state agencies which dealt with dependents into the Department of Mental Health, the Department of Charities and the Department of Corrections. *Id.* at 273. In 1929, The Department of Charities became the State Department of Social Welfare, and the Public Welfare Law, which replaced the Poor Law, made each county a welfare district where New York City, Kingston, Poughkeepsie, Oswego and Newburgh each became independent welfare districts. The readjustment of power and responsibility between the state and counties was accompanied by a greater emphasis on home relief and a deemphasis on institutionalization in almshouses. *Id.* at 283-86. The state assumed a greater financial burden for the unemployed homeless following the Depression of 1929 when local welfare districts faltered under the financial strain. *Id.* at 307-10. The 1940 Social Welfare Law established the present relationship between the state and local welfare networks which imposed a duty on the state to provide for the indigent, poor and homeless within its borders. *Id.* at 374-75.

19. A 1535 law authorized church officials and two designated persons in each parish to solicit donations for food and other necessities for the disabled poor as well as to establish methods of providing work for the able-bodied vagrant. 27 Hen. 8, ch. 25 (1535); A HISTORY OF THE CRIMINAL LAW, *supra* note 16, at 270. During the reign of Elizabeth I, poor law relief provisions were enacted which provided for compulsory assessment of taxes on a county level for the purpose of aiding the poor, homeless and indigent. The Poor Relief Act, 43 Eliz. 1, ch. 2 (1601); KENNY'S OUTLINES OF CRIMINAL LAW, ch. 25. ¶ 483 (J.W.C. Turner ed., 17th ed., 1958). Although it was recognized that severe punishment and voluntary charity had not succeeded in eradicating the existing problem, A HISTORY OF THE CRIMINAL LAW, *supra* note 16, at 272, severe penalties against vagrants were necessary to protect individual parishes from new arrivals who drained the parish treasury. KENNY'S OUTLINES OF CRIMINAL

uates the theory that society must have a means of removing the idle and undesirable from its midst before their potential for criminal activity is realized.[20]

The principal constitutional grounds upon which American vagrancy statutes are attacked include violations of due process and equal protection guarantees.[21] The most common strategy employed in attacking vagrancy provisions is to assert that the statute is void for

---

LAW, ch. 25, ¶ 483 (J.W.C. Turner ed., 17th ed., 1958). The 1601 Poor Law Relief Acts were significant because they shifted responsibility for the poor and homeless to secular institutions in order to tax and appropriate funds for almshouses and provide for the helpless and involuntarily unemployed in their own homes. B. COLL, PERSPECTIVES IN PUBLIC WELFARE 5 (1969). Nevertheless, the criminal component of the poor laws were still status-oriented. VAGRANCY RECONSIDERED, *supra* note 16, at 106. In 1834, the Poor Law Amendment Bill, 5 Will. 4, ch. 76 (1834), established the Poor Law Commission which was allowed a free hand to take steps to reduce costs because the tax burden had become too great. M. ROSE, THE ENGLISH POOR LAW 1780-1930 75, 77, 96 (1971). The Commission, in order to encourage economic independence, declared that the government would no longer dispense home relief to the able-bodied indigent, but would provide relief to those persons in workhouses only. The revisions were enacted to place the non-working able-bodied vagrant at a lower economic level than the lowest paid independent laborer. B. COLL, PERSPECTIVES IN PUBLIC WELFARE 2-3 (1969). Two persons responsible for the philosophical motivation behind this legislation were Jeremy Bentham and T. R. Malthus, who considered relief for the poor detrimental to the national economy. Malthus theorized that any program designed to increase population or prevent its natural attrition was harmful. N. EDSALL, THE ANTI-POOR LAW MOVEMENT 1834-44 1-8 (1971). *See also* B. COLL, PERSPECTIVES IN PUBLIC WELFARE 9 (1969).

20. Papachristou v. Jacksonville, 405 U.S. 156, 169, 171 (1972); United States *ex. rel.* Newsome v. Malcolm, 492 F.2d 1166, 1171-72 (2d Cir. 1974); Fenster v. Leary, 20 N.Y.2d 309, 315, 229 N.E.2d 426, 282 N.Y.S.2d 739, 744 (1967); Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237, 250 (1958). The first American vagrancy laws were intended to prevent crime. Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1172 (2d Cir. 1974); Goldman v. Knecht, 295 F. Supp. 897, 902 (D. Colo. 1969); Alegata v. Commonwealth, 353 Mass. 287, 295-96, 231 N.E.2d 201, 206 (1967); Fenster v. Leary, 20 N.Y.2d 309, 313, 229 N.E.2d 426, 428, 282 N.Y.S.2d 739, 742 (1967). American vagracy statutes were fashioned upon early English statutes, but while the English law had progressed to the extent of punishing specific criminal acts, American law continued to punish a status or condition. *Vagrancy Reconsidered, supra* note 16, at 113; *See also* Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 562 (1960); Perkins, *The Vagrancy Concept*, 9 HASTINGS L.J. 237,254 (1958). American statutes which punish status offenses have been declared unconstitutional. Robinson v. California, 370 U.S. 660 (1962); Goldman v. Knecht, 295 F. Supp. 897, 907 (D. Colo. 1969). In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held that legislation which imposed sanctions on the status of drug addiction violated the fourteenth amendment's due process clause. 370 U.S. at 667. Powell v. Texas, 392 U.S. 514, 531-33 (1968), however, held that public intoxication was a crime.

21. U.S. CONST. amend. XIV, § 1.

vagueness—people of ordinary intelligence are denied the right to procedural due process because it would not be possible for them to ascertain from the statute the particular conduct proscribed.[22] As a corollary, this theory maintains that the statutes which provide no reasonable guidelines for proper enforcement confer upon the police unfettered discretion as to when and against whom the statute may be used.[23]

Another related avenue of attack is to allege that the vagrancy statute exceeds the permissible police powers of the state. Acting under its police powers, the state may enact only those statutes which bear a reasonable relationship to the promotion of the public health, welfare, safety or good.[24] These were the grounds upon which the New York vagrancy law[25] was declared unconstitutional in *Fenster v. Leary*.[26] After being arrested three times within a short period for vagrancy, the plaintiff sought an order prohibiting the court from hearing and adjudicating the third charge.[27] The New York Court of Appeals concluded that the statute made conduct criminal "which in

---

22. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); Giacco v. Pennsylvania, 382 U.S. 399, 402-03 (1966); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961); Raley v. Ohio, 360 U.S. 423, 438 (1959); United States v. Harriss, 347 U.S. 612, 617-18 (1954); Winters v. New York, 333 U.S. 507, 509 (1948); People v. Berck, 32 N.Y.2d 567, 571, 300 N.E.2d 411, 414, 347 N.Y.S.2d 33, 37 (1973). Void for vagueness is a deprivation of the fair notice requirement and amounts to a violation of procedural due process. Smith v. Goguen, 415 U.S. 566, 572 (1974); Herndon v. Lowry, 301 U.S. 242, 261, 264 (1937).

23. Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972); Thornhill v. Alabama, 310 U.S. 88, 97-98 (1939). Although *Fenster v. Leary* was not decided on the void for vagueness grounds the New York Court of Appeals stated, "statutes cannot stand if . . . the class of persons coming within their ambit is so vaguely defined as to make it unclear to potential violators just what conduct will subject them to criminal liability and what will not." (citation omitted). 20 N.Y.2d at 314, 229 N.E.2d at 429, 282 N.Y.S.2d at 743.

24. Fenster v. Leary, 20 N.Y.2d 309, 314, 229 N.E.2d 426, 429, 282 N.Y.S.2d 739, 743 (1967); People v. Bunis, 9 N.Y.2d 1, 4, 172 N.E.2d 273, 274, 210 N.Y.S.2d 505, 507 (1961). Substantive due process prohibits arbitrary and capricious government action and requires that any exercise of a state's police powers must bear a rational relationship to the promotion of the public welfare, safety, and health. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715, 738 (1972) (nature of civil commitment must bear some rational relationship to the reason for such commitment).

25. N.Y. CRIM. PROC. LAW § 887 (1), *repealed by* 1967 N.Y. Laws ch. 681, § 90.

26. 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

27. This order was denied in the lower New York courts and affirmed in the New York Court of Appeals. Fenster v. Criminal Ct. of City of N.Y., 17 N.Y.2d 641, 216 N.E.2d 342, 269 N.Y.S.2d 139 (1966). Fenster's request that a three judge panel of the Federal Court for Southern District of New York rule on the constitutionality of § 887(1) was denied on the grounds that plaintiff's proper remedy was an application to the state courts for a declaratory judgment. Fenster v. Leary, 264 F. Supp. 153, 156-57 (S.D.N.Y. 1966), *aff'd*, 386 U.S. 10 (1967).

no way impinges on the rights and interests of others and which has in no way . . . more than the most tenuous connection with the prevention of crime and preservation of the public order. . . ."[28] Therefore, the court held that the statute violated due process and amounted to an excessive exercise of the state's police power.

Although the New York vagrancy law was repealed,[29] in an apparent attempt to circumvent *Fenster v. Leary*,[30] New York enacted a loitering statute[31] which included a provision that was conspicuously similar to the unconstitutional vagrancy provision.[32] Historically, loitering statutes had their origins in English law. They were often incorporated within vagrancy statutes[33] because the concepts of loitering[34] and vagrancy overlapped.[35] The primary purpose of such loiter-

---

28. 20 N.Y.2d at 312-13, 229 N.E.2d at 428, 282 N.Y.S.2d at 742. Other theories of attack maintain that various vagrancy provisions violate the equal protection clause of the fourteenth amendment by establishing invidious class distinctions, which apply only to the poor and not the affluent, Goldman v. Knecht, 295 F. Supp. 897, 906 (D. Colo. 1969); Fenster v. Leary, 20 N.Y.2d 309, 315, 229 N.E.2d 426, 429, 282 N.Y.S.2d 739, 744 (1967) (raised issue of "whether persons of means are entitled any more than the poor to enjoy the allegedly debilitating effects of idleness. . . ."); Note, *Vagrancy Reconsidered*, *supra* note 16, at 125-28, or that vagrancy laws violate the involuntary servitude clause of the thirteenth amendment, Fenster v. Leary, 20 N.Y.2d 309, 315, 229 N.E.2d 426, 429, 282 N.Y.S.2d 739, 744 (1967) (possible thirteenth amendment argument); Thompson v. Bunton, 117 Mo. 83, 93, 22 S.W. 863, 865 (1893). *See also* Thornhill v. Alabama, 310 U.S. 88, 105 (1939); Alegata v. Commonwealth, 353 Mass. 287, 297, 231 N.E.2d 201, 207 (1967).

29. Repealed by 1967 N.Y. Laws ch. 681.

30. 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

31. N.Y. PENAL LAW § 240.35(6) (1967) (repealed by 1978 N.Y. Laws 1978 ch. 446, § 1).

32. United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1171 (2d Cir. 1974); *Recent Decision*, People v. Beltrand, 35 ALB. L. REV. 391, 392 (1971). "The Code still contains dubiously constitutional vagrancy provisions, now renamed loitering. . . ." Schwartz, *Introduction to Note, Criminal Law Revision Through A Legislative Commission: The New York Experience*, 18 BUFFALO L. REV. 211, 211 (1968), described the loitering statute as "New York's formulation of a dragnet approach to the maintenance of public order that had its roots in feudal England and which has survived, despite considerable disapproval, in urban America."

33. *See, e.g.*, 1 Edw. 6, ch. 2 (1547); Vagrancy Act of 1824, 5 Geo. 4 ch. 83 (1824); Ledwith v. Roberts, [1937] 1 K.B. 232, 270; HARRIS'S CRIMINAL LAW 242 (McClean & Morish eds., 22d ed., 1973). In People v. Inglee, 69 Misc. 2d 1059, 332 N.Y.S.2d 81 (Warren County Ct. 1972), the court, in determining whether enforcement of N.Y. PENAL LAW § 240.35(6), was intended only for on the scene arrests or whether it could be used in order to arrest for prior acts, compared this provision to the old vagrancy statute and used cases interpreting it to decide that defendant had been illegally detained. 69 Misc. 2d at 1060-61, 332 N.Y.S.2d at 82-83.

34. One court has stated that "while the definition of the word [loitering] is clear the concept of the offense is somewhat shapeless." People v. Nowak, 46 A.D.2d 469, 471, 363 N.Y.S.2d 142, 145 (4th Dep't 1975).

35. "To loiter is to consume time idly, to linger, to delay, to spend time in a place in an idle manner, to travel indolently." *Id.* at 471, 363 N.Y.S.2d at 145. In People v.

ing statutes was to prevent criminal acts by permitting an arrest to be made before a crime was committed.[36] The loitering provision enacted after *Fenster v. Leary*[37] prohibited a person from loitering, remaining or wandering in or about a place without apparent reason under circumstances which justify suspicion that he is committing or about to commit a crime,[38] and subsequently it was held unconstitutional.[39]

Another provision of New York's loitering statute[40] which apparently was directed against wandering indigents was held unconstitutional in *People v. Velazquez* because it failed to provide any "comprehensive normative standard."[41] The statute provided that anyone loitering or sleeping in a transportation facility who could not explain his presence was subject to arrest. The court held that although loitering was a broad and nebulous word which meant staying or remaining around a place without any purpose or aim, it was never intended to transform innocent behavior into criminal conduct.[42] Alone, the

---

Sohn, 269 N.Y. 330, 333, 199 N.E. 501, 502 (1936), the court stated that § 887(1) of the Code of Criminal Procedure "has reference to those hangers-on of society, ne-er-do-wells, loafers who stand about our street corners and public places without visible means of employment and refuses to work when employment can be had."

36. Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972); United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1171-72 (2d Cir. 1974); People v. Nowak, 46 A.D.2d 469, 471, 363 N.Y.S.2d 142, 144-45 (4th Dep't 1975). The legislative intent behind certain loitering provisions was to prevent "nondescript characters and 'degenerates' from infesting subway, elevated or other railway stations." People v. Merolla, 9 N.Y.2d 62, 67, 172 N.E.2d 541, 544, 211 N.Y.S.2d 155, 159 (1961); People v. Bell, 306 N.Y. 110, 113-14, 115 N.E.2d 821, 822, 115 N.Y.S.2d 821 (1953); People v. Velasquez, 77 Misc. 2d 749, 752, 354 N.Y.S.2d 975, 979 (N.Y. Crim. Ct. 1974).

37. 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

38. N.Y. PENAL CODE § 240.35(6) *repealed by* 1978 N.Y. Laws ch. 446, § 1.

39. United States *ex rel.* Newsome v. Malcolm, 492 F.2d 1166, 1172 (2d Cir. 1974); People v. Berck, 32 N.Y.2d 567, 300 N.E.2d 411, 347 N.Y.S.2d 33 (1973); People v. Bambino, 69 Misc. 2d 387, 391, 329 N.Y.S.2d 922, 927 (Nassau County Ct. 1972); People v. Villanueva, 65 Misc. 2d 484, 487-88, 318 N.Y.S.2d 167, 170-71 (Long Beach City Ct. 1971); People v. Beltrand, 63 Misc. 2d 1041, 1047, 314 N.Y.S.2d 276, 283 (N.Y. Crim. Ct. 1970). See note 22 *supra* and accompanying text for void for vagueness discussion.

40. N.Y. PENAL LAW § 240.35(7) (McKinney 1980). A person is guilty of loitering when he: "[l]oiters or remains in any transportation facility, or is found sleeping therein, and is unable to give a satisfactory explanation of his presence. . . ."

41. 77 Misc. 2d 749, 354 N.Y.S.2d 975 (N.Y. Crim. Ct. 1974).

42. People v. Velazquez, 77 Misc. 2d 749, 760, 354 N.Y.S.2d 975, 986 (N.Y. Crim. Ct. 1974). In *Velazquez*, the court pointed out that other loitering provisions which restricted their ambit to specific facilities where the occurrence of criminal activity was frequent had been held constitutional. These provisions involved areas whose boundaries were clearly demarcated and which were open to the public for a limited purpose only. The language of the statute in *Velazquez* referred to a transportation facility which may encompass areas which more closely resemble a small

word "loitering" connoted no misconduct or transgression of the law. Therefore, in order to be a valid exercise of the police power, a loitering statute had to specify a prohibited act.[43]

Vagrancy and loitering statutes with criminal sanctions have proven to be inappropriate tools to deal with the homeless.[44] As *Fenster v. Leary* stated, these provisions are used against "derelicts and other unfortunates"[45] because their appearance and presence offends the sensibilities of those outside the confines of skid row.[46] The *Fenster* court indicated that the welfare laws were a more appropriate means of solving the problem because street dwellers were not criminals. By the late 1960's, moreover, it was recognized that criminal sanctions were not a viable solution to the homelessness problem because they did not address the causes. As a result, while homeless persons were sometimes arrested for trespass,[47] disorderly conduct,[48]

---

city with streets, stores and concessions which are normally open to the general public. *Id.* at 759, 354 N.Y.S.2d at 986.

43. People v. Diaz, 4 N.Y.2d 469, 471, 151 N.E.2d 871, 872, 176 N.Y.S.2d 313, 315 (1958).

44. Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 649-50 (1956).

45. 20 N.Y.2d 309, 315, 229 N.E.2d 426, 430, 282 N.Y.S.2d 739, 745 (1967).

46.

> It is also obvious that today the only persons arrested and prosecuted (for vagrancy) as common law vagrants are alcoholic dereclicts and other unfortunates, whose only crime, if any is against *themselves*, and whose main offense usually consists in their leaving the environs of skid row and disturbing *by their presence* the sensibilities of residents of nicer parts of the community, or suspected criminals, with respect to whom the authorities do not have enough evidence to make a proper arrest or secure a conviction on the crime suspected. As to the former, it seems clear that they are more properly objects of the welfare laws and public health programs than of the criminal law and, as to the latter, it shoud by now be clear to our governmental authorites that the vagrancy laws were never intended to be and may not be used as an administrative short cut to avoid the requirements of constitutional due process in the administration of criminal justice.

Id. at 315-16, 229 N.E.2d at 430, 282 N.Y.S.2d at 744-45. One commentator stated, "*Fenster* holds that the status of chronic deterioration known as vagrancy in no way disturbs the rights or interests of others and is, therefore, beyond the functional orbit of the criminal law." Murtagh, *Status Offenses and Due Process of Law*, 36 FORDHAM L. REV. 51, 53 (1967). *See also* Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 614 (1956) (principal use of vagrancy law is to clean-up urban "skid-row" districts).

47. N.Y. PENAL LAW § 140.05 (McKinney 1975), provides that "[a] person is guilty of trespass when he knowingly enters or remains unlawfully in or upon premises." Proof of a trespass requires proof of the individual's actual knowledge of the illegal conduct. *See* Matter of Fred H., 103 Misc. 2d 170, 425 N.Y.S.2d 514, 515 (N.Y. Fam. Ct. 1980).

48. N.Y. PENAL LAW § 240.20 (McKinney 1980) (disorderly conduct).

and loitering violations,[49] police became reluctant to arrest homeless persons for such violations. More frequently the police[50] make these persons move to other locations knowing they probably will return.[51]

Society, thus far, has been unable to formulate a comprehensive strategy to deal with the problem of homelessness.[52] No guidelines or enlightening principles have been developed by which it may effectively confront and react to the plight of the homeless: "The hospitals don't want them. The courts don't want them. And if they don't ask for help, the charities can't do anything."[53]

III. Recent Responses in New York

Three predominant social phenomena have contributed to the enormous increase in New York City's homeless population: the drastic reduction of low-cost housing,[54] the massive deinstitutionalization of New York State mental hospitals over the past fifteen years[55] and persistent and substantial unemployment.[56] These phenomena have

---

49. N.Y. PENAL LAW § 240.35 (McKinney 1980) (loitering).

50. SKID ROW, *supra* note 1, at 229.

51. During the Democratic National Convention in August, 1980, systematic but temporary relocation efforts by the New York City police occurred in the area near Madison Square Garden. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 95.

52. During the depression of 1907-08 it was recognized that vagrancy was a national problem and that previous proposals such as jailing or commitments to almshouses had little effect. Officials also had begun to distinguish between vagrants who sincerely sought employment and those who were indolent. Serious consideration was given to the establishment of labor colonies where lazy vagrants would be compelled to work in hopes of rehabilitation. Money was appropriated for this reclamation effort, but the plan was never implemented. D. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK 1867-1940 200-04 (1969). One reaction by society is to declare that those who could, or would, not provide for themselves are schizophrenics. This gives society a convenient rationale for institutionalizing these persons to undergo therapeutic treatment intended to remedy their alleged mental illness. This attempt has been criticized as being worse than doing nothing at all. Szasz, *The Lady in the Box*, N.Y. Times, Feb. 16, 1982, at A19, col.1.

53. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 97 (citation omitted).

54. *Homeless New Yorkers: The Forgotten Among Us: Background Information for the New York State Assembly Public Hearing on the Homeless* 1 (1980) [hereinafter cited as *Homeless New Yorkers*]; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31-32; A STUDY OF HOMELESS WOMEN, *supra* note 3, at 28, 42-44; N.Y. Times, Nov. 20, 1981, at B1, col. 1.

55. *Testimony on Shelter and Support Services for the Homeless Population, Hearings before the Standing Committees on Mental Health, Social Service and Housing of the New York State Assembly* 1-8 (testimony of Edward I. Koch) [hereinafter cited as *Testimony of the Mayor of N.Y.C.*]; *Homeless New Yorkers, supra* note 54, at 1; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31; A STUDY OF HOMELESS WOMEN, *supra* note 3, at 29-30, 35-40.

56. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 30-33; A STUDY OF HOMELESS WOMEN, *supra* note 3, at 40-42.

combined to create unprecedented numbers of homeless persons, comprised primarily of the mentally ill, the elderly, and the unskilled.

In the past ten years, New York City has experienced an acute shortage of low-cost housing. The city's overall vacancy rate for rental housing is estimated to be substantially below the optimum level.[57] Figures for low-cost housing are decidedly worse: [58] it is estimated that the city has lost at least 31,000 single-room occupancy (SRO) units.[59] Escalating rents and the widespread conversion of rental units into cooperative apartments have forced persons on fixed incomes[60] into the population of homeless persons.[61] Finally, because of austerity

---

57. Five percent is considered optimal. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31. According to a report prepared for the city, the vacancy rate in New York City is 2.13%, the lowest in a decade. In 1981, of the 1.9 million apartments in New York City, 42,000 were vacant. Manhattan's vacancy rate of 1.9% was the lowest in the city and apartments with a monthly rental of between $200 and $249 were extremely scarce with a city-wide vacancy rate of 1.8%. *Rate of Vacancy In Rental Units Shows Big Drop*, N.Y. Times, Mar. 2, 1982, at B1, col. 6.

58. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31-32; *Homeless New Yorkers, supra* note 54, at 1.

59. *Testimony of the Mayor of N.Y.C., supra* note 55, at 11. Other estimates of lost units reach as high as 36,000. In 1975 there were approximately 290 hotels with rentals fees of under $50 per week for a room. Today it is estimated that there are less than 120 hotels with rental fees under $50 per week for a room. N.Y. Times, Nov. 20, 1982, at B1, col. 1. The New York City Administration has taken the position that the correlation between the dramatic loss of single-room occupancy (SRO) housing units and the increase in homeless persons is "provocative," but "simplistic" and contends that such a relationship is not supported by empirical data. New York City's Mayor Koch stated that only a very small percentage of displaced SRO residents require shelter services. *Testimony of the Mayor of N.Y.C., supra* note 55, at 11-12; N.Y. Times, Nov. 20, 1981, at B4, col. 4. City Hall also disputes the validity of the figures on lost units, asserting that the "actual number of habitable housing units lost is much smaller than the raw figures indicate." This assertion is premised on the fact that in 1975, 26% (nearly 13,000 units) of all SRO units were vacant because they were uninhabitable. *Testimony of the Mayor of N.Y.C., supra* note 55, at 11-12. There has been a 63% decrease in SRO units since 1975. *Homeless New Yorkers, supra* note 54, at 1, which is attributed to the New York City real estate tax abatement programs. *Homeless New Yorkers, supra* note 54, at 1; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 32; *To Shelter The Homeless*, Catholic New York, Jan. 3, 1982, at 3, col. 1; *Take Care of the Homeless*, Catholic New York, Oct. 4, 1981, at 10, col. 2. Under the city's J51 program, substantial tax incentives (exemptions and abatements) are granted, for periods up to 20 years, to developers who convert low cost housing to luxury housing. NEW YORK, N.Y., ADMIN. CODE § J51-2.5 (Supp. 1981). The city states that J51 tax incentives are only "minor" contributing factors responsible for the shortage of SRO units: 6,258 (20.3%) out of a total of 30,835 units lost since 1975 were directly attributable to J51 conversions. *Testimony of the Mayor of N.Y.C., supra* note 55, at 16-17.

60. "Escalating rents, primarily attributable to an all-time low vacancy rate . . . [and] the wholesale co-opping in many middle and high-income as well as formerly marginal neighborhoods are forcing many persons on fixed incomes out of the apartments." *Homeless New Yorkers, supra* note 55, at 1.

61. Even without the J51 tax abatement program, see note 28 *supra*, propitious circumstances presently exist for developers who wish to convert a low-cost hotel to

budgets and fiscal crises on city, state and federal levels, there has been little, if any, new construction of low-cost housing.[62]

A second major cause of the homeless problem has been the mass deinstitutionalization of mental patients from state hospitals[63] coupled with inadequate aftercare treatment and facilities. In addition, the state has adopted stringent admission criteria which make it more difficult for those suffering under a mental disability to gain admission

---

luxury or cooperative housing. Because of the extremely tight apartment market, a developer can profit handsomely by rehabilitating or renovating an SRO hotel and then renting units at whatever price the market will permit. Newspapers are replete with accounts of developers and landlords engaging in unethical and illegal behavior in an effort to force tenants out of low-rent buildings in order to begin conversion. N.Y. Times, Nov. 20, 1981, at B1, col. 1. *On the Streets*, Catholic New York, Oct. 4, 1981, at 9-10.

62. *Homeless New Yorkers, supra* note 55, at 1. The City Council, in an effort to counteract the unfavorable housing situation, enacted revisions to the J51 program which included tax incentives for rehabilitation of SRO housing units. NEW YORK, N.Y., ADMIN. CODE ch. 51, J51-2.5c (Supp. 1981); *Testimony of the Mayor of N.Y.C., supra* note 55, at 15-16; in addition, the city has instituted legal programs staffed by attorneys who assist and represent SRO tenants, has allocated 2.8 million dollars in the Community Development budget for special housing projects including construction of SRO units, and is establishing an SRO Loan program, which probably will include 1% financing with a maximum of 20 years to reimburse, to help finance improvements for prolonging the useful life of an SRO facility. *Testimony of the Mayor of N.Y.C., supra* note 55, at 14-17. Some skeptics, including community activists, city council members, and attorneys for SRO hotel owners, have expressed serious doubt as to whether the new provisions in the city's J51 program will be successful in overcoming market forces which make luxury conversions so financially attractive to developers. N.Y. Times, Nov. 20, 1981, at B4, col. 4. The New York State Assembly has passed The Special Needs Housing Act, N.Y.A. 8390, and amendment N.Y.A. 9208, 205th Sess. (1982), in response to the housing crisis in New York City, which would allocate three million dollars to voluntary agencies in order to acquire and upgrade housing for the homeless. The city fully supports the legislation but emphasizes that the amount of money is insufficient and asks for a modification of the legislation so that it would include new construction of low-cost housing as well as rehabilitation. *Testimony of the Mayor of N.Y.C., supra* note 55, at 13-14. Both the city and the state have recognized the need to involve the voluntary and charitable sectors in a comprehensive and coordinated plan to alleviate the plight of the homeless. *Id.* at 11. N.Y. Times, Jan. 29, 1982, at B1, col. 2. The charitable sector has in at least one case proven itself to be an adept and efficient manager in these matters. The Franciscans Catholic order purchased a building in the east midtown area for under $600,000 and thereafter renovated it in order to provide shelter for homeless persons. Although it provides a myriad of services and charges reasonable rents, it does not operate at a deficit. *On the Streets*, Catholic New York, Oct. 4, 1981, at 9, col. 1.

63. *Homeless New Yorkers, supra* note 54, at 1; *Testimony of the Mayor of N.Y.C., supra* note 55, at 2; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31; A STUDY OF HOMELESS WOMEN, *supra* note 20, at 35-40. Since 1965, more than 126,000 former state mental patients have been discharged in the New York City metropolitan area. *Homeless New Yorkers, supra* note 54, at 1; Private Lives/Public Spaces, *supra* note 1, at 31.

to state in-patient institutions.[64] As a result, an estimated 47,000 former mental hospital patients now reside in New York City.[65]

An important reason for the depopulation of psychiatric facilities was a legal theory known as the "right to treatment in the least restrictive alternative."[66] The first instance in which the "least restrictive alternative" theory was applied to the mentally ill[67] was *Lake v. Cameron.*[68] The court ordered that alternative methods of treating

---

64. *Testimony of the Mayor of N.Y.C., supra* note 55, at 2; *Homeless New Yorkers, supra* note 54, at 1; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31. In addition, some state institutions have refused to admit patients with serious mental problems even though they were direct referrals from municipal hospitals and emergency rooms. *Testimony of the Mayor of N.Y.C., supra* note 55, at 6. In-patient psychiatric facilities at public and private hospitals in New York City have become severely overburdened and understaffed, *id.* at 5, and patient care has necessarily suffered. Persons with chronic mental health problems who are in need of extended care often receive brief treatment only to be released in order to make space available for others experiencing more severe psychotic tendencies or episodes.

65. *Testimony of the Mayor of N.Y.C., supra* note 55, at 2; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 31.

66. Lake v. Cameron, 364 F.2d 657, 660 (D.C. Cir. 1966). This theory expands on the "right to treatment" doctrine which states that involuntary hospitalization by the state, without proper and adequate treatment, is a deprivation of liberty without due process of law. The idea was first proposed by a psychiatrist-lawyer, Birnbaum, *The Right to Treatment,* 46 A.B.A.J. 499 (1960), and was later applied by the courts. Rouse v. Cameron, 373 F.2d 451, 453 (D.C. Cir. 1966) ("The purpose of involuntary hospitalization is treatment, not punishment."); Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (mentally ill patients who are committed involuntarily must receive the individual treatment that reasonably is calculated to improve or cure their condition, and failure to provide adequate and effective care cannot be excused by lack of staff personnel); Nason v. Superintendent of Bridgewater State Hosp., 233 N.E.2d 908, 913 (Mass. 1968); Wyatt v. Stickney, 344 F. Supp. 387, 390 (M.D. Ala. 1972) (mentally retarded are entitled to the same right to treatment as the mentally ill), *modified sub nom.* Wyatt v. Aderhol, 503 F.2d 1305 (5th Cir. 1974); New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715, 718 (E.D.N.Y. 1975) (there exists a constitutional duty on the part of the state to protect mentally retarded persons whose confinement is not involuntary); Sas v. State of Maryland, 334 F.2d 506, 509 (4th Cir. 1964) (lack of treatment for involuntarily hospitalized mentally ill patient may violate equal protection of the laws); Roberts, *Right to Treatment: A Pandora's Box for Law and Psychiatry,* 10 COLO. LAW. 538, 538 (1981); K. MILLER, THE CRIMINAL JUSTICE AND MENTAL HEALTH SYSTEMS 38-49 (1980).

67. The foundation for the "least restrictive alternative" theory is Shelton v. Tucker, 364 U.S. 479 (1960), which involved an Arkansas statute requiring teachers in state supported schools to list all organizations to which they belonged or contributed to in prior years. The Supreme Court held that the state had a legitimate and substantial governmental purpose in investigating the qualifications and affiliations of its teachers, but that much of what the state required had no bearing on teacher competency. *Id.* at 490. Even legitimate governmental purposes "cannot be pursued by means that broadly stifle fundamental personal liberties" if a less drastic means of achieving that interest is available. *Id.* at 488.

68. 364 F.2d 657, 661 (D.C. Cir. 1966).

individuals committed to mental institutions had to be examined and that all alternative avenues of treatment, including discharge to community homes and half-way houses, where appropriate, be made available in order to provide adequate care to such persons.[69] In 1975, the Supreme Court in *O'Connor v. Donaldson*,[70] declared that a diagnosis of mental illness alone could not justify the indefinite detention of an individual in custodial confinement.[71] The Court held that there was no constitutional basis for confining mentally ill persons involuntarily if they are not dangerous to anyone and can live safely in freedom by themselves or with the aid of others.[72]

The most serious aspect of deinstitutionalization is the inadequacy of aftercare services made available to those discharged from state mental hospitals.[73] Instead of providing rehabilitation, socialization and vocational services, ex-patients often receive little or no supportive services designed to help them re-enter society.[74] This practice

---

69. *Id.*

70. 422 U.S. 563 (1975). A former mental patient, confined for almost fifteen years, sued the superintendent of the mental institution for compensatory and punitive damages under 42 U.S.C. § 1983 (1976), for intentional and malicious deprivation of his constitutional right to liberty. *Id.* at 565. A district court jury determined that the patient was entitled to compensatory and punitive damages in the amount of $38,000, the Fifth Circuit affirmed the judgment, 493 F.2d 507 (5th Cir. 1974), and the Supreme Court held that a "state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members and friends." 422 U.S. at 576.

71. 422 U.S. at 575.

72. *Id.* at 575-76.

73. A 1978 report to the New York State Assembly, entitled FROM THE BACK WARDS TO THE BACK ALLEYS, REPORT OF THE SUBCOMM. ON AFTERCARE TO THE STANDING COMM. ON MENTAL HEALTH OF THE NEW YORK STATE ASSEMBLY (1978) [hereinafter cited as FROM THE BACK WARDS TO THE BACK ALLEYS], found that directors of state hospitals were making mass discharges of mental patients in order to maintain deinstitutionalization "quotas," and that a director's effectiveness was evaluated on the basis of fulfilling his discharge quota, "regardless of whether the discharged patients were ready to go and regardless of where they went." *Id.* at 5. The Subcommittee suggested that attempts be made to locate those deinstitutionalized patients, *id.* at 10, "who were precipitously discharged," and to "offer them the opportunity to return to the hospital for fuller treatment . . . ." *Id.* at 5. One witness testified that because of the lack of aftercare many patients were worse off after release than if they had remained in an institution. *Id.* at 6. Many discharged patients are greeted acrimoniously by community residents and the Subcommittee blamed the state for this because of its lack of effort and expenditure in establishing adequate community residences and the required aftercare programs. *Id.* at 6, 10. The practice of "dumping" or discharging many psychiatric patients within a particular locale without providing for gradual acclimation into the community, combined with complete absence of perfunctory aftercare services, has been prevalent since 1968. *Id.* at 7. N.Y. Times, Nov. 18, 1981, at B24, col. 4.

74. This practice of "dumping" discharged mental patients into an area without providing aftercare programs has aroused great hostility and alienation in many

contravenes the right of a person to receive treatment in the least restrictive alternative consonant with a patient's needs because it fails to provide any course of treatment at all.[75]

---

communities. FROM THE BACK WARDS TO THE BACK ALLEYS, *supra* note 73, at 7, 16. *See generally* Segal, *Sheltered Care Needs of the Mentally Ill*, 4 HEALTH AND SOC. WORK 41 (1979). On numerous occasions, patients have been discharged to SRO units with no provision for aftercare. FROM THE BACK WARDS TO THE BACK ALLEYS, *supra* note 73, at 14. The SRO units are disappearing at a rapid rate which, it is estimated, will make them extinct by 1984. The city has proposed as one of the requirements of the SRO Loan program, *see* note 36 *supra*, that wherever "feasible," the owner, making improvements, must set aside space in the hotel for use by "on-site" workers who would deliver various social services and administer aftercare programs. *Testimony of the Mayor of N.Y.C.*, *supra* note 55, at 17. Cohen, Sichel, & Berger, *The Use of a Mid-Manhattan Hotel as a Support System*, 13 COMMUNITY MENTAL HEALTH J. 76, 76 (1977) (concludes that by organizing and using present community resources in a SRO-hotel setting it is possible to arrest the "revolving door" syndrome of single-room occupancy unit to city hospital to state hospital and to provide an alternative to long-term hospitalization).

75. FROM THE BACK WARD TO THE BACK ALLEY, *supra* note 73, at 7. "Deinstitutionalization without aftercare is abandonment." *Id.* at 33. Many severely ill patients have been forced to struggle, alone and unaided, with many of the same problems which caused or aggravated their initial illness. Among the reasons for the failure of deinstitutionalization in New York have been, first, the lack of a major financial committment from state and federal governments for aftercare, community facilities and services, *id.* Second, on the state level, there has been inadequate reallocation of funds from the large state institutions to smaller community aftercare residences and programs, despite the release of large numbers of state hospital in-patients, *id.* at 33, 51. State in-patient mental health facilities continue to receive between 80 and 90% of present, total, budgeted allocations for mental health care, while delivering services to a vastly reduced population. *Testimony of the Mayor of N.Y.C.*, *supra* note 55, at 2, 6. *Homeless New Yorkers*, *supra* note 54, at 5. Less than 20% of the budgeted allocation is given to local facilities for aftercare programs. It is estimated that between 1977 and 1981 New York State spent 3.459 billion dollars to care for approximately 25,000 patients in its in-patient hospitals. This represents less than 8% of all persons served by the state and local mental health systems combined. *Testimony of the Mayor of N.Y.C.*, *supra* note 55, at 3. The failure to reapportion funds to reflect the changes may be attributable to a misconception on the part of New York State fiscal officers and the New York State Office of Mental Health. These officials view deinstitutionalization as a convenient device to reduce the economic responsibilities of New York State. They do not realize that deinstitutionalization would be just as costly as institutionalization if carried out in accordance with current legal standards and with provision of required aftercare services. FROM THE BACK WARDS TO THE BACK ALLEYS, *supra* note 73, at 33. Third, no transitional programs designed to ease the adjustment process of former patients to independent life have been provided. *Id.* at 49. Finally, there has been a failure to provide safe and adequate housing for discharged patients and to fund private organizations sufficiently in order to become important sources of aftercare services. *Id.* at 49-50. *On the Streets*, Catholic New York, Oct. 4, 1981, at 9, col. 1. Bureaucratic delays in providing funds to private organizations for the purpose of establishing community residences for discharged patients are formidable obstacles. Rather than encouraging involvement by the private sector, the present allocation procedures seem to discourage the efforts of private organizations. FROM THE BACK WARDS TO THE BACK ALLEYS, *supra* note 73, at 50.

A third cause of the increase in the number of homeless persons is the strained economic climate of the past ten years and the resulting increase in the ranks of the unemployed.[76] Historically, economic recessions and depressions have added to the number of unemployed[77] and consequently the number of homeless persons. Unemployment not only causes a strain on family relations but, in extreme cases, can lead to detachment from all social bonds and affiliations.[78] If social isolation occurs at the same time that unemployment insurance benefits have ceased, circumstances may force a person to become homeless. Homelessness is often permanent because it generally is necessary to have a home, clean clothes, and the ability to maintain a reasonable level of personal appearance and hygiene in order to obtain steady employment.

The decreased availability of low-cost housing, the deinstitutionalization of psychiatric facilities, and prolonged periods of unemployment have combined to cause a homelessness problem of significant proportions in New York.[79] The severity of the problem, however, has spurred efforts to provide new solutions which take into account the modern characteristics of homeless persons.

A. Consent Decree

The New York State Constitution, the New York State Social Services Law, and the New York City Administrative Code impose upon state and city government a duty to provide shelter for the homeless. The New York State Constitution grants to the state legislature the authority and the duty to provide aid, care and support to the needy.[80]

---

76. *Homeless New Yorkers*, *supra* note 54, at 1; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 32-33; A STUDY OF HOMELESS WOMEN, *supra* note 3, at 40-41.

77. *See* notes 14-15 *supra* and accompanying text.

78. A STUDY OF HOMELESS WOMEN, *supra* note 3, at 42; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 33.

79. Research indicates that homelessness is usually caused by an immediate precipitating event. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 34-43. Such an event often forces someone clinging to a tenuous social bond or existing on the brink of homelessness to become homeless. The precipitating event is often eviction or the threat of eviction or patterns of systematic harassment employed by landlords and developers; uninhabitable housing conditions; substantial rent increases or lack of aftercare services. Detachment from family or stabilizing social organizations and contacts, loss of income due to unemployment, and cessation of welfare or relief benefits, or major theft have also been recognized as traumatic catalyzing events. *Id.*

80. N.Y. CONST. art. XVII, § 1. The New York Court of Appeals has stated that the New York State Constitution imposes an affirmative duty to provide care and assistance to the needy. Tucker v. Toia, 43 N.Y.2d 1, 7-8, 371 N.E.2d 449, 451-52, 400 N.Y.S.2d 728, 730-31 (1977); Matter of Hudson v. Sipprell, 76 Misc. 2d 684, 687, 351 N.Y.S.2d 915, 920 (Sup. Ct. Erie County 1974).

Pursuant to its constitutional power, the legislature enacted provisions in the Social Services Law which require the state to provide adequate treatment and care to those unable to care for themselves,[81] with the ultimate goal of restoring such persons to a state of independence.[82] It has been argued that because homeless persons in New York City need assistance in the form of decent housing, they satisfy the statutory requirements of the New York State Social Services Law and hence are entitled to decent shelter.[83]

A public welfare official may use community resources such as non-profit, private agencies to provide assistance and services to needy persons wherever they reside.[84] In addition, each local welfare district is required to provide care and assistance to all such persons found within its territory and can expect reimbursement for expenses incurred as a result of these services from the state.[85] However, the duty of the local welfare district is not contingent upon reimbursement from the state but rather the duty stands on its own and must be fulfilled regardless of state reimbursement.[86] Finally, the New York City Administrative Code[87] provides that it is the duty of the superintendent of any municipal lodging to give to any homeless or needy person who applies, free food and lodging for a night.[88] Both New York City and New York State are thus under a statutory duty[89] to provide care and assistance to those unable to care for themselves.

---

81. N.Y. Soc. Serv. Law § 131(1) (McKinney 1976). This requirement is conditional on the availability of adequate funding. *Id.*

82. *Id.* The state must attempt to keep together any families receiving such care. *Id.* § 131(3).

83. Plaintiff's Trial Memorandum, at 35-41, Callahan v. Carey, No. 79-42582 (Sup. Ct. N.Y. County) (Jan. 16, 1981).

84. N.Y. Soc. Serv. Law § 131(1) (McKinney 1976).

85. *Id.* §§ 62(1) & (2).

86. Matter of Jones v. Berman, 37 N.Y.2d 42, 54-55, 332 N.E.2d 303, 309-10, 371 N.Y.S.2d 422, 431 (1975); Matter of Szanto v. Dumpson, 77 Misc. 2d 392, 395, 353 N.Y.S.2d 683, 686 (Sup. Ct. Kings County 1974); Matter of Lawson v. Shuart, 67 Misc. 2d 98, 99, 323 N.Y.S.2d 488, 490 (Sup. Ct. Nassau County 1971); Ross v. Barbaro, 61 Misc. 2d 147, 149, 304 N.Y.S.2d 941, 943-44 (Sup. Ct. Nassau County 1969).

87. New York, N.Y., Admin. Code ch. 24 § 604-1.0 (b) (1978).

88. In *Callahan v. Carey*, plaintiff's trial memorandum argued that the denial of decent housing for the homeless violated the equal protection clauses of both the state and federal constitutions by arbitrarily discriminating against applicants for shelter and according preferential treatment to persons receiving home relief benefits. Plaintiff's Trial Memorandum at 41, Callahan v. Carey, No. 79-42582 (Sup. Ct. N.Y. County) (Jan. 16, 1981).

89. New York City is required to provide the homeless with food and lodging under § 604.1.0(b) of the New York City Administrative Code. Because Social Services Law § 65(3) designates the commissioners of local social service agencies as agents for the state, local city agencies must comply with § 131 (1) of the Social Services Law.

In 1979, a suit was brought on behalf of six homeless men who claimed that they had a right to receive safe and decent shelter in accessible locations from the New York State and New York City governments.[90] The court stated, in granting plaintiffs' motion for a preliminary injunction, that the New York State Constitution,[91] the New York Social Services Law,[92] and the New York City Administrative Code[93] entitled the plaintiffs to "board and lodging" and required "those public officials responsible for caring for the needy to find such lodgings."[94]

A consent decree[95] was entered into a year and a half later which required that the city provide shelter[96] and board to every eligible homeless man[97] who applies for it. The decree requires the establish-

90. The defendants were the Governor of New York State, the New York State Department of Social Services Commissioner, the Mayor of New York City, the New York City Human Resources Commissioner and the Director of the Men's Shelter in New York City.

91. N.Y. CONST. art. XVII § 1.

92. N.Y. SOC. SERV. LAW §§ 62(1), 131(1),(3) (McKinney 1976). *See also* CONN. GEN. STAT. ANN. § 17-272 (1975); MICH. COMP. LAWS ANN. §§ 400.14(a&b) (Supp. 1981-82).

93. NEW YORK, N.Y., ADMIN. CODE ch. 24, § 604.1.0(b).

94. Callahan v. Carey, N.Y.L.J., Dec.11, at 10, col.5 (Sup. Ct. 1979). In addition the defendants were ordered to submit a plan to provide at least 750 beds "for the helpless and hopeless men of the Bowery. . . ." These beds were to be in addition to those beds and services provided at the Men's Shelter and its satellites. *Id.*

95. The consent decree was agreed to without adjudication of any issue of fact or law. Callahan v. Carey, No. 79-42582 (Sup. Ct. N.Y. County) (Aug. 26, 1981) (Final Judgment by Consent) [hereinafter cited as Final Judgment].

96. The consent decree promulgates unambiguous health, safety and security standards for both the shelters and Bowery hotels which the city uses and requires that each person who enters a city-run shelter be provided with a clean, substantially constructed bed, a clean and comfortable mattress and pillow, clean sheets, blanket, pillow cases, toilet tissue, a change of bed clothing for each new individual and a change of bed linen at least once a week, a lockable storage compartment, two staff attendants for every 100 sheltered men, a staff member trained in first aid on duty at all times, and a minimum number of group recreation hours. Final Judgment, *supra* note 95, at 3-4. The hotels which the city uses to shelter homeless men must comply with the above bedding and bed clothing requirements, and additionally, must provide shower facilities, adequate supervision, towels, soap, a secure storage compartment, and must be kept clean and in compliance with the New York City heating requirements for rental dwellings. Final Judgment, *supra* note 95, at 3-9.

97. Although the Consent Decree explicitly affirms a homeless man's right to shelter, the city recognizes that homeless women also have this right. N.Y. Times, Aug. 27, 1981, at B11, col. 3. *But see Suit Seeking to Upgrade City Shelters for Women*, N.Y. Times, Feb. 25, 1982, at B12, col. 5. In order to be eligible to enter the shelter the applicant must meet the New York State need standard for home relief or be in need of temporary shelter due to physical, mental or social dysfunction. Final Judgment, *supra* note 95, at 3. New York City provides temporary shelter for homeless families in various hotels and renovated apartment houses. Homeless families are easier to monitor, track and relocate than homeless single persons because they generally come from an established address, often are receiving public assistance

ment of additional intake centers[98] to accept applicants for shelter and also provides for either direct transportation or adequate fare and directions to the shelters from these centers. In addition, the city must provide, at all shelters, information concerning additional benefits to which homeless persons may be entitled.[99]

One significant aspect of the consent decree is that it provides for outside monitoring and verification of compliance with the regulations and standards. It grants plaintiffs' counsel access to all the city operated facilities and the city's records concerning the operation of the shelters.[100] This provision has been very important because there has been a continuous effort to implement and enforce those rights. On several occasions, litigation has been necessary to determine which measures must be undertaken to achieve compliance with the consent decree,[101] although this is a time consuming and expensive oversight procedure.[102] The city was once ordered to open immediately an

---

payments and thus have an on-going relationship with a social worker and generally are perceived by the public as less threatening than single homeless persons. The city has experienced problems maintaining habitable living conditions and adequate security in the shelters it owns and in those hotels and apartments privately owned and used to house homeless families. N.Y. Times, Mar. 5, 1982, at B1, col. 5.

98. The consent decree requires that the Men's Shelter on Third Street accept applications for shelter 24-hours a day, seven days a week, that the Eighth Avenue shelter accept applications from 5:00 P.M. to 1:00 A.M. seven days a week and that additional satellite intake centers at Harlem Hospital, Kings County Hospital Center, Lincoln Hospital and Queens Hospital Center accept applications all day Monday through Friday. Final Judgment, *supra* note 95, at 9-11.

99. *Id.* at 11.

100. The monitoring provisions require the Commissioner of the New York City Human Resources Administration to appoint employees to inspect all intake and shelter facilities and to submit a written report twice a month to the Commissioner. The provision provides for complete access for plaintiff's counsel to all facilities and records concerning compliance with the decree and for inspections at least three times per week by the Commissioner of the New York City Human Resources Administration of all hotels used by the city to shelter homeless men together with written reports of such inspections. Final Judgment, *supra* note 95, at 11-13.

101. N.Y. Times, Dec. 8, 1981, at B12, col. 3; N.Y. Times, Oct. 27, 1981, at B3, col. 2; N.Y. Times, Oct. 22, 1981, at B1, col. 6; N.Y. Times, Oct. 21,1981, at B1, col. 5.

102. In the past, in order to enforce a provision of the consent decree it was necessary to return to State Supreme Court and request relief. Besides being unnecessarily time-consuming, it was an expensive course of action. An administrative counsel should be established with the primary function of administering the provisions of the consent decree. Utilizing informal and flexible procedures, an administrative judge could arbitrate disputes and render an opinion within 24 hours. The counsel would either adopt or reject the recommendation of the administration law judge concerning the issue in dispute. Final decisions of the counsel would be reviewable by the supreme court, according to the substantial evidence test. The substantial

empty school to house the homeless temporarily because of overcrowding at other facilities.[103] It also was ordered to establish a comprehensive plan for shelters which adhered to the requirements of the consent decree[104] and to identify beds which could be made immediately available in order to accommodate increasing numbers of homeless applicants.[105]

The consent decree does not require the city to operate community shelters. Placement of shelters[106] is left to the discretion of city officials who favor larger institutions located far from residential communities and the greatest concentrations of homeless persons.[107] New York City officials, faced with budgetary constraints, must balance the economic burden of maintaining shelters with the impact they will have on the communities.[108] According to the city, the larger institutions

---

evidence test is used by reviewing courts to determine if an agency's action is the result of careful collection, evaluation and correlation of all the important facts and issues involved. A court could reverse an agency decision if it were determined that the agency finding was not supported by substantial evidence or was unreasonable. *See* 5 U.S.C. § 706 (2) (E) (1976). Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) (reviewing court must consider the entire record); Con Edison v. NLRB, 305 U.S. 197, 229 (1938); I.C.C. v. Union Pacific R.R., 222 U.S. 541, 547-48 (1912); Matter of Stork Rest., Inc., 282 N.Y. 256, 26 N.E. 247 (1940).

103. N.Y. Times, Oct. 27, 1981, at B3, col. 2; N.Y. Times, Oct 22, 1981, at B1, col. 6, B10, col. 3; N.Y. Times, Oct. 21, 1981, at B1, col. 5.

104. N.Y. Times Nov. 28, 1981, at 25, col. 6; N.Y. Times, Oct. 21, 1981, at B1 col. 5.

105. N.Y. Times, Nov. 28, 1981, at 25, col. 6. Plaintiffs' attorneys have charged that the city has underestimated the numbers of homeless persons who exercise their rights and that the city relies on temporary space in armories and old schools which do not comply with the specified terms of the consent decree. N.Y. Times, Dec. 8, 1981, at B12, col. 3. The sheltering of homeless persons in ill-suited temporary facilities is not a new phenomenon. When an economic depression in 1913-15 caused the homeless population to increase dramatically, there were not enough beds at the municipal lodging houses to accomodate all those applying for shelter, and provisions at these houses were inadequate. Temporary shelter was erected on a pier on the East River, but this still was inadequate and some of the homeless demanded to be sheltered in churches. Federal authorities eventually intervened and allowed New York City to use several of the buildings on Ellis Island to shelter the overflow of homeless persons. J. SCHNEIDER & A. DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1867-1940 211-14 (1969).

106. See New York City Human Resources Administration: Family and Adult Services, the Homeless in New York: The City's Program (1981), and *Homeless New Yorkers, supra* note 54, at 4, for descriptions of the various city run shelters.

107. N.Y. Times, Oct. 27, 1981, at B3, col. 2; N.Y. Times, Sept. 9, 1981, at B1, col. 1; N.Y. Times, Aug. 27, 1981, at A1, col. 2.

108. N.Y. Times, Aug. 27, 1981, at B11, col. 5; *Testimony of the Mayor of N.Y.C., supra* note 55, at 10-11.

are more financially feasible than the smaller, residential shelters,[109] but the perceived impact of the larger shelters on the surrounding community is much greater. Indeed, governmental proposals to place large shelters in or near various communities has often evoked opposition.[110]

The consent decree also requires that the city and the state provide shelter to any homeless person who applies, but because of the high percentage of mentally ill persons who comprise the homeless population,[111] many persons are unable to make rational choices about their

---

109. The city's cost estimates as of June 5, 1981 for various size facilities are as follows:

No. of beds	Total Operating cost	Start up cost	Per person cost per day
25	$433,050	$38,000	$47.46
50	$573,085	$49,500	$31.40
100	$834,460	$76,000	$22.86
400	$1,954,000	—	$13.38

Internal Memorandum from Stephen Crystal, Director of the Bureau of Management Systems, Planning, Research and Evaluation, to Robert Trobe, Deputy Administrator, Family and Adult Services, the New York City Human Resources Administration (June 5, 1981).

110. N.Y. Times, Dec. 8, 1981, at B12, col. 4 (comments of State Sen. Gary L. Ackerman); N.Y. Times, Nov. 28, 1981, at 26, col. 1 (a major general of the army objects to this use of armories); *Testimony of the Mayor of N.Y.C.*, *supra* note 55, at 10-11; ("[n]early everyone feels that more should be done for the homeless, but in someone else's neighborhood"). On several occasions the city has exacerbated this volatile situation by failing to consult with community leaders before opening a new shelter in their area or by sureptitiously opening a shelter under cover of darkness and confronting local residents with the new shelter the next morning. N.Y. Times, Dec. 2, 1981, at B8, col. 3-4. A New York State Subcommittee on Mental Health chastised the state mental health system for failing to cooperate with local communities, for opening facilities for discharged patients without community involvement and for often deliberately concealing the facts from the public. *From the Back Wards to the Back Alleys*, *supra* note 73, at 9. New York State advocates the establishment of smaller community residences for the homeless, N.Y. Times, Aug. 27, 1981, at B11, col. 5, and reportedly has some citizen support. Community Boards 2, 6 and 8 support a proposal that would place small residential facilities for the homeless in their communities. *On the Streets*, Catholic New York, Oct. 4, 1981, at 9, col. 3. *See also* PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 124; N.Y. Times, Jan. 29, 1982, at B8, col. 3; N.Y. Daily News, Feb. 19, 1982, at 4, col. 1.

111. Shelter staff members have estimated that up to 80% of their clients have serious mental problems. *Homeless New Yorkers*, *supra* note 23, at 2; PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 9-10, 44-45. In February, 1981 a team of psychiatrists and psychologists were sent to various New York City shelters by the New York State Office of Mental Health to collect data and assist those homeless who suffered from varying degrees of mental illness. They reported that of the 355 persons they saw, 190 (53%) were diagnosed as suffering from schizophrenia, 35 (10%) suffered from major affective disorders, 11 (3%) from organic brain syndrome, 33 (9%) from

own well-being.[112] These persons effectively are precluded from exercising their right to shelter because of their mental disabilities. In addition, the reputation of the shelters as crime-plagued, inhospitable, uninhabitable institutions which lack basic hygienic necessities, deters many potential applicants.[113]

B. Protective Services For Adults

In 1981, the New York State Legislature enacted a new article of the Social Service Law[114] which authorizes short term involuntary protective services for persons who are adjudged to be in imminent danger of death or serious physical harm and who lack the capacity to comprehend the nature and consequences of their condition. The law developed from a report[115] which observed that those most in need of

---

personality disorders, 2 (1%) from neurotic disorders, 18 (5%) from other psychotic disorders and 28 (8%) from a primary diagnosis of alcoholism. N.Y.S. Office of Mental Health, Shelter Outreach Project: Statistical Report (Mar. 1981).

112. Some researchers state that a common assumption of many persons who provide services to the homeless is that a substantial segment of the homeless population suffer under such severe mental disabilities that they lack the capacity to seek and obtain shelter or services. These researchers disagree with this assumption and surmise that because of the indecent, violent conditions of many of the shelters, many homeless people are in fact exercising reasonable judgment by remaining on the streets rather than accept such shelter, PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 103-04.

113. Some of the less attractive conditions which existed in the New York City shelter system included: degrading admissions processes, vermin infestation, staff violence arising out of fear inflicted on clients, harrassment, sexual exploitation, theft, assault and the large numbers of persons suffering from severe mental and physical disabilities. PRIVATE LIVES/PUBLIC SPACES, *supra* note 1, at 50-63.

114. 1981 N.Y. Laws ch. 991, *codified at* N.Y. SOC. SERV. LAW § 473-a (McKinney Supp. 1981). This statute is intended to address situations in which an adult is confronted by an imminent risk of death or serious physical harm and refuses or is incapable of appreciating the consequences of the circumstances or where a dependent adult is being abused by relatives and lacks the capability of protecting and providing for himself. Administrative Directive from Barbara Blum, Commissioner of the Department of Social Services, to The Commissioners of Social Services, concerning 1981 N.Y. Laws, ch. 991: Short-term Involuntary Protective Services Orders (Dec. 11, 1981). Similar statutes in other states are: FLA. STAT. ANN. §§ 410.10-410.11 (Supp. 1982); KY. REV. STAT. §§ 209.010-09.150 (1977 & Supp. 1980); MD. SOC. SERV. CODE ANN. §§ 106-10 (1979); TENN. CODE ANN. §§ 14-25-101-113 (1980 & Supp. 1981); TEX. HUM. RES. CODE ANN. § 48.061 (Vernon Supp. 1982). The Florida Adult Protective Services Act was held to be constitutional in *In re* Byrne, 402 So. 2d 383, 385 (Fla. 1981).

115. REPORT TO THE GOVERNOR AND THE LEGISLATURE BY THE NEW YORK STATE TASK FORCE ON PROTECTIVE SERVICES FOR ADULTS, PROTECTIVE SERVICES FOR ADULTS (Mar. 1980). During the 1960's, it was recognized that there was little legal protection for the personal rights of mentally and physically disabled adults. However, the legislation passed by Congress in response did not meet the growing need for adult protective services during the 1970's. In 1974, Congress enacted Title XX of the Social Security Act, Social Services Amendments of 1974, Pub. L. No. 93-647, 88

protective services did not come within the ambit of existing involuntary protective provisions.[116] In addition, the common law doctrine of *parens patriae*, which authorizes social service agents to intervene on behalf of the physically disabled, was not understood and not invoked for fear of committing civil rights violations.[117] It was necessary, therefore, to provide social service officials with statutory authority to provide involuntary protective services and immunity from civil liability.[118]

The law allows a local social services official to initiate a special proceeding in order to provide protective services for an individual

---

Stat. 2337 (1974), which provided federal financial aid and required that each state provide the necessary protective services for adults. K. CARTY & D. EMLING, OFFICE OF PLANNING, BUDGET AND EVALATION, MICHIGAN DEPARTMENT OF SOCIAL SERVICES, ADULT PROTECTIVE SERVICES 2-3 (Apr. 1980); REPORT TO THE GOVERNOR AND THE LEGISLATURE BY THE NEW YORK STATE TASK FORCE ON PROTECTIVE SERVICES FOR ADULTS 1-2 (Mar. 1980); NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, PROTECTIVE SERVICES FOR ADULTS 1-2 (Mar. 1981). In 1979, the New York State Legislature passed 1979 N.Y. Laws ch. 446, which amended N.Y. SOC. SERV. LAW § 131-l (renumbered § 473 by 1981 N.Y. Laws ch. 991 § 2), and required social services officials to provide protective services, in accordance with state and federal regulations, to or for individuals without regard to income who are mentally and physically unable to care for themselves. Protective services include: arranging for medical, psychiatric, commitment, guardianship, conservatorship or other protective services when necessary to safeguard the interests of persons suffering from serious impairment; providing assistance to individuals who must relocate because of the hazardous conditions in which they dwell; coordination and planning with the courts and local social service agencies to facilitate effective dispensation of services to those with serious disabilities; and submission by each local department of social services of an annual plan for the provision of adult protective services. N.Y. SOC. SERV. LAW §§ 473(b)&(c) (McKinney Supp.1981). Section 473(3) provides authorized social service agents, in exercising their duty in accordance with the section and acting within the scope of employment, with immunity from any civil liability unless such liability arises from the willful act or gross negligence of the official. Section 473(2) requires the establishment of an inter-agency task force on protective services to study and recommend inter-agency agreements, jurisdictional guidelines and other measures to improve adult protective services on a local and county level. Among the principle recommendations of this inter-agency task force was a proposal for legislation which would permit authorized social service agents to initiate legal procedures to protect uncooperative seriously impaired adults from harm. REPORT TO THE GOVERNOR AND THE LEGISLATURE BY THE STATE TASK FORCE ON PROTECTIVE SERVICES FOR ADULTS, PROTECTIVE SERVICES FOR ADULTS ii-iii, 9-13 (Mar. 1980).

116. *Id.* at iii, 9.

117. *Id.* at 10-11, 30 & Add. Bl. The report stressed the importance of permitting authorities to act when swift action was necessary to prevent harm from occurring to a person in need of help. *Id. See* notes 126-38 and accompanying text for a discussion of the *parens patriae* doctrine. The reluctance of authorities to act on behalf of homeless street dwellers is well documented. *See* N.Y. Times, Jan. 31, 1982, § 1, at 34, col. 3; N.Y. Times, Jan. 27, 1982, at Al, Col. 1. *But see* N.Y. Times, Feb. 5, 1982, at B3, col. 1.

118. 1979 N.Y. Laws ch. 446, § 1311(3). REPORT TO THE GOVERNOR AND THE LEGISLATURE BY THE STATE TASK FORCE ON PROTECTIVE SERVICES FOR ADULTS, PROTECTIVE SERVICES FOR ADULTS 10-11 (Mar. 1980).

who faces a risk of imminent death or serious physical harm and who lacks the capacity to comprehend the probable consequences of remaining in that situation.[119] The protective service is valid for 72 hours, with a 72 hour extension possible. The person who allegedly is in need of these services must be given notice, an opportunity to be heard, and the effective assistance of counsel before the imposition of services.[120] The legislation was intended[121] to provide local social service agents with the legal means for dispensing, without fear of legal liability, limited relief to uncooperative but needy persons and to protect the due process rights of the homeless person.[122]

---

119. N.Y. Soc. Serv. Law § 473-a(1)(a)(i). The local official must prove by clear and convincing evidence that the person is indeed in danger and incapable of comprehending the severity of his or her plight. *Id.* § 473-a(9).

120. *But see In re* Byrne, 402 So. 2d 383, 385 (Fla. 1981) (the requirements for civil commitment proceedings are inapplicable to life-threatening emergency situations).

121. Governor's Memorandum (N.Y.A., 7585A, 204th Sess.), *reprinted in* [1981] N.Y. Laws 2641 (McKinney).

122. The provision of involuntary services of any kind is a serious matter. This bill does, however, address and accomodate the concerns expressed by groups interested in the safeguarding of civil liberties; it represents a sincere attempt to balance the individual's rights of self-determination and privacy with the obligation of the State to preserve and protect the life and health of its citizens.

Governor's Memorandum (N.Y.A. 7585 A, 204th Sess.), *reprinted in* [1981] N.Y. Laws 2641 (McKinney). *See* Report to the Governor and the Legislature by the State Task Force on Protective Services for Adults, Protective Services for Adults 9-11 (Mar. 1980); New York State Department of Social Services, Protective Services for Adults 20 (Mar. 1981). The Florida Adult Protective Services Act., Fla. Stat. Ann. §§ 410.10-410.11 (Supp. 1982), authorizes health services officials "to take elderly persons into custody and transport them to a medical or protective service facility in an emergency situation without their consent," *In re* Byrne, 402 So. 2d 383, 384 (Fla. 1981), "if they are likely to incur a substantial risk of life-threatening physical harm or deterioration if not immediately removed from the premises. . . ." Fla. Stat. Ann. § 410.104(2). The law withstood a due process constitutional challenge for several reasons. *Id.* First, two government agents from different agencies "must personally observe the emergency situation," and, subject to a 48 hour waiting period to determine whether there is probable cause for protective services, a court order is necessary to impose relocation. *Id.* A substantial risk of life-threatening harm or deterioration must be proved. *Id.* The purpose of the statute is not to impose incarceration, but to free persons from dangerous or oppressive conditions. *Id.* Finally, the statute applies only in emergency situations. *Id.* The court concluded that "[d]ue process . . . is not offended by a temporary loss of liberty when a person's life may be threatened." *Id.* at 385-86. *See* Fhagen v. Miller, 29 N.Y.2d 348, 278 N.E.2d 615, 328 N.Y.S.2d 393, *cert. denied*, 409 U.S. 845 (1972). In an emergency situation, careful consideration of the possible benefits that may be received by the individual is not possible. Indeed, the balancing would involve weighing the deprivation of liberty against the potential harm that may occur if the individual is not taken into custody. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1221 n.106 (1974).

There are several shortcomings to this law. An order authorizing protective services may be initiated by social services officials and not police officers, who are closer to the problem on a more continuous basis.[123] In addition, it presumes that those requiring assistance remain stationary, which is not always true of a homeless street dweller. In all cases a protracted procedure, including a pre-custodial hearing, is necessary to protect the due process rights of the person involved.[124] Finally, the Protective Services Law does not permit the use of an "exigent circumstances"[125] rationale to aid someone in immediate danger of harm.

---

123. N.Y. Soc. Serv. Law § 473-a(4) (a) (McKinney Supp. 1981). *See* N.Y. Times, Jan. 27, 1982, at B6, col. 1. *See* note 152 *infra*.

124. Upon referral of a homeless person's case, a Protective Services for Adults (PSA) case worker makes an investigation and evaluation of the adult in question. If this adult is in need of protective services, efforts must be made to provide the necessary services voluntarily and in accordance with the doctrine of treatment in the least restrictive alternative manner. N.Y. Times, Feb. 2, 1982, at B1, col. 5; N.Y. Times, Jan. 27, 1982 at 1, col. 3. *See* notes 39-45 *supra* and accompanying text for "least restrictive alternative" discussion. If this person, who allegedly requires protective services, refuses such services and is an endangered adult as defined by N.Y. Soc. Serv. Law § 473-a 1 (a) (McKinney Supp. 1981), then the caseworker must make reasonably diligent efforts to obtain and commit to writing all the circumstances surrounding the need for protective services, including detailed information on the refusal of voluntary services. This report must then be reviewed by a supervisor. Should the supervisor agree with the caseworker's determination, the information is given to the agency or county attorney who, after reviewing the legal sufficiency of the evidence, prepares the appropriate court petition, which then must be approved and signed by the commissioner of the agency or his designee and submitted to the court. The court then issues an order to show cause, returnable within 48 hours, why appropriate protective services should not be executed on behalf of the allegedly endangered adult. Within the 48 hour period, a hearing is held to determine if the material allegations of the petition have been proven by clear and convincing evidence. Administrative Directive from Barbara Blum, Commissioner of the New York State Department of Social Services, to the Commissioners of Social Services, concerning Short Term Involuntary Protective Services Orders 4-8 (Dec. 11, 1981).

125. Mincey v. Arizona, 437 U.S. 385, 394 (1978) (the serious nature of an offense under investigation does not by itself create exigent circumstances absent an emergency situation threatening life or limb or an indication that evidence would be lost, removed or destroyed before a search warrant could be obtained); Cupp v. Murphy, 412 U.S. 291, 296 (1973) (warrantless search upheld based on the rationale of exigent circumstances in order to prevent the destruction of evidence in a murder case); Vale v. Louisiana, 399 U.S. 30, 34-35 (1970) (exigent circumstances exception may authorize a warrantless search where evidence is in the process of being destroyed); United States v. Haley, 581 F.2d 723 (8th Cir. 1978), *cert. denied*, 439 U.S. 1005 (1978); United States v. McKinney, 477 F.2d 1184 (D.C. Cir. 1973); United States v. Rubin, 474 F.2d 262 (3d Cir. 1973), *cert. denied*, 414 U.S. 833 (1973); United States v. Doyle, 456 F.2d 1246 (5th Cir. 1972); People v. Mitchell, 39 N.Y.2d 173, 347 N.E.2d 607, 383 N.Y.S.2d 246 (1976); State v. Sanders, 8 Wash. App. 306, 506 P.2d 892 (1973); People v. Sirhan, 7 Cal. 3d 369, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972),

IV. Vehicles to Effectuate Change

Progressive legal measures such as the consent decree and the New York Protective Services Law have been implemented to deal with the plight of the homeless. These recent responses indicate an awareness of the severity of the problem and a willingness to employ innovative and creative strategies to alleviate it. However, further efforts are necessary. The doctrine of *parens patriae* allows state legislatures to enact provisions which could improve the condition of the homeless by enhancing the effect of the recent legal responses.[126]

Parens patriae is the inherent power, vested in the state, to protect the person and property of someone suffering under a disability.[127] The courts and commentators are generally in accord when they view *parens patriae* as a concept wholly separate from the police powers of the state.[128] Measures enacted under the *parens patriae* power are "parental" in nature rather than criminal and the penalties and

---

cert. denied, 410 U.S. 947 (1973). *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 260.5 (1975).

> An officer who has reasonable cause to believe that premises or a vehicle contain
>
> 1. individuals in imminent danger of death or serious bodily harm;
>
> . . . may, without a search warrant, enter and search such premises and vehicles, and the individuals therein, to the extent reasonably necessary for the prevention of such death, bodily harm or destruction.

126. "[T]he state has the authority to exercise its *parens patriae* power when it appears . . . persons [approximating legal incompetency] are incapable of caring for themselves." *In re* Byrne, 402 So. 2d 383, 386 (Fla. 1981). Emergency imposition of protective services under *parens patriae* would be appropriate where there is probable cause to believe that the individual will suffer severe physical injury if not immediately detained and that the person is incapable of evaluating that danger. *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1221 n.106 (1974). *See also id.* at 1245 n.231 (stricter standard must be met when invoking police power).

127. "The doctrine of parens patriae . . . may be defined as the inherent power and authority of a Legislature of a state to provide protection of the person and property of persons *non sui juris*, such as minors insane and incompetent persons." McIntosh v. Dill, 86 Okl. 1, 9, 205 P. 917, 925 (1922); Warner Bros. Pictures v. Brodel, 179 P.2d 57, 64 (Cal. Dist Ct. App. 1947). This doctrine is of ancient origin having been observed in the Roman Law of the Twelve Tables and it was adopted in England as the direct prerogative of the King. *In re* Sariyanis, 173 Misc. 881, 883, 19 N.Y.S.2d 431, 434 (Sup. Ct. Kings County 1940); Matter of Colah, 3 Daly 529 (N.Y. Common Pleas 1871). The King had custody because his subject was incapable of adequately governing himself or his lands. Tourson's Case, 8 Co. Rep. 17a, 77 E.R. 730, 731 (1610) ("*jure protectionis suai Regiae*"). Upon achieving independence, the prerogative of the crown passed to the people of the United States. *In re* Turner, 94 Kan. 115, 120, 145 P. 871, 872 (1915); Matter of Colah, 3 Daly 529, 537 (N.Y. Common Pleas 1871); Helton v. Crawley, 241 Iowa 296, 41 N.W.2d 60 (1950).

128. O'Connor v. Donaldson, 422 U.S. 563, 582-83 (1975) (Burger, J., concurring); McIntosh v. Dill, 86 Okl. 1, 10, 205 P. 917, 925 (1922); *In re* Turner, 94 Kan.

stigma of criminal actions do not attach. The state has both a right and a duty to do whatever is most conducive to the interests of one suffering from a disability.[129] *Parens patriae* dictates that a state must intervene to protect those who are unable to make vital decisions in their best interest. The state's duty includes providing for the physical well-being of the disabled and applying the available scientific and medical resources to restore both sound mind and body.[130] It extends to situations where a person could become a danger to himself or others and therefore is in need of protective custody.[131] Nevertheless, the individual's right to be free must be balanced with his need for treatment.[132]

The *parens patriae* power has been invoked in a variety of situations, but principally it has been used to administer care and services to incompetents,[133] minors[134] and the insane. Courts have exercised this aspect of the *parens patriae* power to order the removal of a respirator from a patient deemed incompetent to assert his own rights.[135] In addition, courts have invoked the *parens patriae* power in the administration and application of charitable gifts and trusts,[136]

115, 120, 145 P. 871, 873 (1915); Bartol, *Parens Patriae Poltergiest of Mental Health Law*, 3 L. & Pol'y Q. 191, 195 (1981); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207-22 (1974).

129. Warner Bros. Pictures, Inc. v. Brodel, 179 P.2d 57, 70 (Cal. Dist. Ct. App. 1947); Matter of Colah, 3 Daly 529, 537 (N.Y. Common Pleas 1871); Smith v. Smith 3 Ark. 304, 26 E.R. 977 (1745).

130. Matter of Colah, 3 Daly 529, 537 (N.Y. Common Pleas 1871). "In respect to his person, that he is maintained as comfortably as his unfortunate situation will [permit] of" and that "everything is done that can be done by care, skill and medical treatment, to promote his general health, or which will or may contribute to restoration of his reason." *Id.*

131. Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955).

132. *In re* Weberlist, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 783, 786 (Sup. Ct. N.Y. County 1974); *In re* Turner, 94 Kan. 115, 120, 145 P. 871, 873 (1915).

133. Sporza v. German Sav. Bank, 192 N.Y. 8, 84 N.E. 406 (1908); *In re* Sariyanis, 173 Misc. 881, 19 N.Y.S.2d 431 (Sup. Ct. Kings County 1940) (repatriation of incompetent); *In re* Sallmaier, 85 Misc. 2d 295, 378 N.Y.S.2d 989 (Sup. Ct. Queens County 1976) (total reliance on *parens patriae* in directing sterilization of an incompetent in order to protect an individual who was not able to make decisions in his own best interests). *But see* application of D.D., 90 Misc. 2d 236, 394 N.Y.S.2d 139 (Surr. Ct. Nassau County 1977), which expressly refused to follow *Sallmaier*. *See also In re* Guardianship of Eberhardy v. Circuit Court of Wood Co., 97 Wis. 2d 654, 294 N.Y.2d 540 (Wis. Ct. App. 1980).

134. *In re* Turner, 94 Kan. 115, 145 P. 871 (1915); Johnson v. State, 18 N.J. 422, 114 A.2d 1 (1955).

135. Eichner v. Dillon, 73 A.D.2d 431, 451, 426 N.Y.S.2d 517, 534 (2d Dep't 1980).

136. Mormon Church v. U.S., 136 U.S. 1 (1890). The king "disposes of the fund to such uses, analagous to those intended, as seems to him expedient and wise." *Id.* at 51-52. In England, when a gift intended for specific uses was declared void or where

and to permit states to recover for damages to quasi-sovereign interests[137] separate from any recovery for injuries to individual state residents.[138]

Several provisions of New York State's Mental Hygiene Law were enacted, in part, pursuant to the state's power of *parens patriae*. They provide that treatment and care shall be accorded to those unable to care for themselves or who suffer from a disability.[139] The law includes provisions which authorize a hospital director,[140] a community services director,[141] or a peace officer,[142] to retain or take into custody persons who appear mentally ill and are conducting themselves in a manner which is likely to result in serious harm to themselves or others. In addition, persons who appear to be incapacitated by alcohol,[143] or who admit to being drug-dependent,[144] can be temporarily institutionalized for observation, examination or treatment.

---

a charitable trust failed, the king, as *parens patriae*, applied the corpus of the gift or trust to a use which was congruous with the general intent of the settlor, testor or donee. This principle of substitution in accordance with the general intent of the settlor, testator or donee of a charitable gift or trust has become known as cy-pres. *Id.* at 55-56. This power arose in part from the court of chancery's power over trusts, but more importantly from the right of the sovereign to act for the interests of intended recipients of a gift who were incapable of asserting their rights. *Id.* at 56, 58.

137. The health, comfort and welfare of the populace, as well as interstate water rights, pollution-free interstate waters and the state's economy are classified as quasi-sovereign interests. This type of *parens patriae* suit may not be substituted for a class action. Note, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411 (1970).

138. Georgia v. Pennsylvania R.R., 324 U.S. 439 (1945) (injunctive relief based on *parens patriae* for injury to state's economy); Kansas v. Colorado, 206 U.S. 46 (1907) (state as *parens patriae* may sue for injury to interstate water way); Louisiana v. Texas, 176 U.S. 1 (1900) (state suit as *parens patriae* seeking injunctive relief for injury to economy). *Contra* Hawaii v. Standard Oil Co., 405 U.S. 251, 262-64 (1971) (permitted suit by state in its proprietary capacity for damages due to antitrust violations, but rejected claim of state to sue as *parens patriae* for damages to its economy). *See generally* Note, *State Protection of Its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOC. PROBS. 411 (1970). *See also* West Va. v. Pfizer and Co., 440 F.2d 1079, 1089 (2d Cir. 1971), *cert. denied*, 404 U.S. 871 (1971).

139. *In re* Weberlist, 79 Misc. 2d 753, 756, 360 N.Y.S.2d 783, 786 (Sup. Ct. N.Y. County 1974); People v. La Burt, 27 Misc. 2d 584, 211 N.Y.S.2d 963, 965, *aff'd*, 14 A.D.2d 560, 218 N.Y.S.2d 783 (2d Dep't 1961). *See also* Bartol, *Parens Patriae Poltergeist of Mental Health Law*, 3 L. & Pol'y Q. 191 (1981). The author argues against the unlimited use of the *parens patriae* rationale in civil commitment cases. Instead, greater emphasis should be placed on the police power rationale.

140. N.Y. MENTAL HYG. LAW § 9.39 (McKinney 1978).

141. *Id.* § 9.45 (Mckinney Supp. 1981).

142. *Id.* § 9.41 (Mckinney Supp. 1981).

143. *Id.* § 21.09(b) (McKinney Supp 1981).

144. *Id.* § 23.07(a) (McKinney Supp 1981).

The theory of *parens patriae* provided a foundation for the recently enacted New York Protective Services for Adults Law of the Social Services Law which authorizes involuntary protective services for adults judged to be in imminent danger of death or serious physical harm.[145] Therefore, the New York State Legislature has recognized that people whose various disabilities render them unable to care for themselves should neither be funneled into the criminal justice system nor be abandoned. Subjecting these persons to criminal sanctions has been deemed to be a poor and often unconstitutional solution, while abandoning them is unlawful. Instead, state agents closest to the problem should take such persons into custody and channel them into treatment facilities designed to alleviate their specific malady.

Although the consent decree requires that the city establish intake centers in order to contact those homeless individuals who shy away from the bleak and dehumanizing city run shelters,[146] the city does not have to actively seek homeless persons to apprise them of their rights to shelter and the improved conditions of the city run facilities. It appears that word of mouth is supposed to be sufficient. While the city has implemented a limited effort in this regard, geared mainly toward "shopping bag ladies,"[147] it is neither of sufficient scale nor funding to have a significant effect on the overall homeless problem. The state legislature, therefore, should create an organized program designed to seek out homeless persons and inform them of their rights, the locations of various intake centers and available assistance.[148]

In addition, in order to address the problem of homeless persons precipitously discharged from state mental institutions,[149] legislation is necessary to authorize peace and police officers to take into custody a homeless person who appears to suffer from mental illness and is incapable of caring for himself.[150] Such a person could be transported to the closest designated intake center where a brief psychiatric and

---

145. 1981 N.Y. Laws ch. 991; N.Y. Soc. Serv. Law § 473-a (Art. 9B) (McKinney Supp. 1981).

146. Private Lives/Public Spaces, *supra* note 1, at 103-04.

147. N.Y. Times, Aug. 27, 1981, at B11, col. 4.

148. The program would coordinate private and public social workers with former members of the homeless population to help homeless individuals take advantage of the rights and benefits legally guaranteed to them.

149. From the Back Wards to the Back Alleys, *supra* note 73, at 5, 17 (1978).

150. Peace and police officers could take custody of the person of someone in imminent danger of death or serious injury pursuant to their special duties as enunciated by the Mental Hygiene Law, if they have articulable reasons. *See* note 122 *supra*.

medical examination would be possible.[151] This legislation would enhance the effect of the consent decree because the state agent, who is closest to the problem on a continuous basis, could take quick and appropriate action without fear of incurring legal liability.[152]

V. Conclusion

Few people subscribe to the belief that there is a definite final solution to the long standing problem of homelessness. Most courses of action pursued have been fraught with inconsistencies, inadequacies and erroneous presumptions. It is imperative to enact specific legislation which rectifies the errors of the past. While the consent decree and the New York Protective Services Law represent important new approaches to coping with the particular problems of today's homeless population, further legal steps must be taken to provide adequate services for those who are incapable of caring for themselves. As long as a large proportion of the homeless population consists of the mentally ill and the aged, local governments will need an expedient means by which they can provide protective services on an emergency basis. The doctrine of *parens patriae*, combined with the policies behind several provisions of the Mental Health and Social Services Law, constitutes a legal basis for such a law and should be invoked to that end.

Mark Malone

---

151. If the diagnosis indicated that the person was incapable of making rational decisions, then he or she could be transferred to the appropriate mental health facility. If it were determined that this person was not in immediate need of hospitalization, then he or she would be given an opportunity to seek shelter and participate in an appropriate mental health care program.

152. According to a report prepared by the Bureau of Management Systems, Planning Research and Evaluation, the New York City police were one of the three leading sources of referral to city shelters. BUREAU OF MANAGEMENT SYSTEMS, PLANNING, RESEARCH AND EVALUATION, SHELTER CARE CENTER FOR MEN REFERRAL SOURCES AND CLIENT PROFILE, (Mar. 1979). The state agent could transport the homeless person to a shelter. It also is important that private and charitable institutions be more fully involved by the city and state to help alleviate the plight of the homeless. N.Y. Daily News, Feb 19, 1982, at 4, col. 1; N.Y. Times, Feb. 16, 1982, at Bl, col. 4; Catholic New York, Feb. 7, 1982, at 3, col. 1; Balt. Morning Sun, Nov. 2, 1981, at D1, col. 1. Such actions would be fiscally prudent because various religious groups have displayed the ability to be fiscally efficient when providing services for the homeless. *On the Streets*, Catholic New York, Oct. 4, 1981, at 8-9.