1-1-1996


Norma Rotunno

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/hlps

Part of the Constitutional Law Commons

Recommended Citation
Available at: https://scholarlycommons.law.hofstra.edu/hlps/vol1/iss1/8

This Student Note is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law & Policy Symposium by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
STATE CONSTITUTIONAL SOCIAL WELFARE PROVISIONS AND THE RIGHT TO HOUSING

I. INTRODUCTION

The pervasive problem of homelessness has increasingly become a major social and economic concern in America, affecting a diverse number of persons nationwide, and, perhaps most sadly, the children of our nation. Public officials and policymakers from all levels of government have debated possible solutions to this problem through such means as enacting welfare laws and other cash assistance programs.

This note explores state constitutions as one avenue for addressing the homelessness problem. I will contend that state constitutions are an appropriate place to include provisions setting forth an obligation to aid the needy, including homeless citizens. A state constitutional provision would help to establish an imperative for state legislatures to address homelessness, and would provide an added basis on which courts could enforce and interpret state and local social welfare laws so as to maintain adequate levels of assistance to the homeless.

To support this contention, I will provide case studies from various states, some of whose constitutions contain explicit social welfare sections. In discussing the inclusion of such a provision within a state constitution, I will explore such issues as whether a constitutional social welfare provision should mandate specific levels of assistance to homeless persons, or whether, and if so, to what extent, the legislature should be given discretion to address the problem of homelessness through statutory means and through allocating responsibility to administrative agencies. I will contend that state constitutional provisions regarding social welfare should not establish specific levels of assistance by which legislatures must abide, but rather set forth a broader constitutional duty to aid the poor and homeless, to be reinforced by a heightened level of judicial scrutiny of state legislation affecting assistance to
the needy.

To aid in ensuring that a constitutional provision will play a strong role in combatting the homeless problem and go beyond mere hortatory language, I propose that, at the least, the state constitutional provision include guidelines applicable to the legislature and administrative social services agencies in the establishment and maintenance of social welfare benefit programs for the prevention of homelessness and provision of aid for housing. Guidelines should include: first, that shelter is a basic necessity and that those unable to provide for themselves are entitled to look to government for aid; second, a section mandating legislatures to adopt measures for providing aid; and third, a provision requiring periodic reassessments of the levels of assistance to the poor, using then current economic conditions as a benchmark. Although the presence of such a constitutional provision will by no means solve the problem of homelessness, it has the potential to send a strong message to the legislature to enact laws to assist the homeless and to the courts to serve as a check on the legislature to ensure that legislative compliance occurs.

II. HOMELESSNESS: ORIGINS AND SCOPE OF PROBLEM, WITH PARTICULAR EMPHASIS ON CHILDREN

A. Level and Composition of Homeless Population

The number of homeless persons in this country is difficult to estimate, much less state with precision, given their invisibility, their absence from overall Census Bureau poverty figures and their lack of a political voice. One commentator noted that the homeless population of the U.S. ranges from 250,000 to 3,000,000.1 Obtaining a clear picture of the homeless population is also difficult because of its wide diversity. According to one report from the Interagency Council on the Homeless, nationally, single men comprise 75% of the homeless, and mothers with children comprise approximately 20% of the homeless population.2 Moreover, homelessness often is only one of the major problems facing those lacking adequate shelter. Major barriers to their participation in the wider society prevent the homeless from lifting themselves out of poverty. Further, a considerable number of the homeless suffer from mental illness, making it impossible for them to engage in steady

employment, and an estimated 35% of homeless persons are drug or alcohol abusers.

The ranks of the poor, many of whom are homeless or lack adequate shelter, have been increasingly filled by children. The number of children in poverty steadily increased during the past decade. Approximately 12.4 million children live in families whose incomes are below the poverty level. As Marion Wright Edelman, founder of the Children's Defense Fund, reported, "children are the poorest age group in America." Children among the homeless poor face a myriad of problems, both physical and mental. For example, such children are likely to suffer from malnourishment and inadequate physical development due to a lack of pre and post-natal care, as well as an absence of preventive measures such as immunization. Emotionally, homeless children are likely to have a low sense of self-esteem and motivation and will lack intellectual stimulation. Homeless children are not as likely to be able to attend school regularly. These factors are directly linked to the erratic and unstable nature of homeless children's existence.

Parents of homeless children, most of whom are single females, lack the resources to avoid the above mentioned problems in raising their children. The American Bar Association's recent report, "America's Children at Risk", indicates that children who grow up in poor families "are too often separated from their families because of problems

3. Geoffrey Mort reports that the policy of deinstitutionalization during the 1960's and 1970's in New York City resulted in the creation of a sizeable number of homeless persons unable to take adequate care of themselves. Geoffrey Mort, Establishing a Right of Shelter for the Homeless, 50 BROOK. L. REV. 939, 982 (1984). Mort also notes that between 1955 and 1974, the number of persons hospitalized in mental institutions dropped from 559,000 to 215,000. Id.

4. Parker, supra note 2, at 544.

5. Chemerinsky, supra note 1, at 525.


8. Laura Vogel, Children in Poverty: Welfare and Work Together Can Make a Difference, 3 SPG. KAN. J. L. & PUB. POL’y. 173, 176 (1994). See also Hansen, 238 Cal.Rptr. at 240, n. 8 (citing study results showing that homeless children had higher incidences of developmental retardation than middle and lower class children); Massachusetts Coalition for the Homeless v. Secretary of Human Services, 511 N.E.2d 603, 612, n. 15 (Mass. 1987) (discussion of stressful situation of homeless families due to dislocation, loss of security, lack of friends and malnutrition).

9. Parker, supra note 2, at 844.

10. One estimate of the number of female-headed homeless households is as high as 80%. Parker, supra note 2, at 844.
essentially caused by poverty — not ‘bad’ parenting.”

Homelessness, or the threat of becoming homeless, in fact, is the major reason why children are placed in foster care. The adverse consequences to the social fabric of the nation is demonstrably great, and the problem requires society as a whole to address it. The strongest force at this point is society acting through government. Thus, homeless families require and should receive attention from the government to help lift them out of penury so that they may raise their children with some semblance of a stable, secure existence to become intellectually, physically and emotionally capable adults.

B. Causes of Homelessness

The origins of homelessness and the factors which perpetuate it are both complex and numerous because of the diversity of persons who are homeless and a multifaceted number of social, economic and political factors which affect the poorest members of our society. The “cyclical” nature of homelessness, with persons often finding only temporary shelter from the streets, also makes the number of homeless hard to pin down.

One factor which contributes to homelessness is the inadequacy of income from work outside of the home. As the recent Congressional debate regarding the minimum wage has brought out, a person employed full-time with a minimum wage salary has an income that falls approximately $3,000 below the poverty level. The minimum wage needs to be adjusted above the poverty level. Congress has recently passed legislation providing for an increase in the minimum wage. Proponents of an increase have cited that one large benefit from a minimum

---

11. Morales, supra note 7, at 19.
12. Nancy Morawetz, Welfare Litigation to Prevent Homelessness, 16 N.Y.U. REV. L. & SOC. CHANGE 565, 575 (1989) (“in many cases homelessness leads to the actual removal of children from their families.”). See also Mataicla v. City of Atlantic City, 524 A.2d 416, 423 (N.J. Super. Ct. App. Div. 1987). The Hansen court reported that the “loss of AFDC eligibility follows the loss of custody,” and often permanent separation. 238 Cal. Rptr. at 238. Hansen involved a challenge to a law which limited emergency shelter to children who have been “immediately removed from their homes.” Id. at 238. The court found this statutory mandate contrary to existing law, which advocated the preservation and maintenance of intact families. Id.
14. MacNeil-Lehrer Newshour, (PBS Television Broadcast, Jan. 13, 1995) (comments by Maynard Chapman, director of Colorado’s Welfare Reform project). Mr. Chapman also stated that minimum wage jobs do not pay enough to cover food, clothing and housing costs. Id.
wage increase would be its potential to get persons “off welfare,” because the increased wages will “make work pay.” As one member of Congress stated, “the best way to have welfare reform is to have a job at a decent salary.”

The problem of inadequate income levels for persons working outside the home is greatly exacerbated for mothers who must find and pay for child care while they are employed outside of the home. Some depend on relatives and friends, but many must spend a sizeable portion of their incomes on child care. For example, one recent study found that families below the poverty level spend up to one-quarter of their earnings on child care. One mother who is receiving welfare at the present time spoke of the cyclical nature of her dependence, relating that when she worked outside the home, she did not have adequate money for food because her earnings were spent on rent and child care. The lack of income caused this woman to return to welfare. In addition, a number of females bear children while still in school and must drop out in order to care for them. This precludes them from obtaining an adequate education to prepare them for future employment.

A related factor is the lack of available employment for unskilled workers in general in today’s economy. Frances Fox Piven and Richard A. Cloward have noted there is “no economically and politically practical way to replace welfare with work at a time when the labor market is saturated with people looking for jobs.”

The level of welfare benefits similarly fails to provide a sustainable level of income for most persons, and often is a cause of homelessness. Payments, for instance, from the Aid to Families with Dependent Children program, the largest cash benefit assistance program, have

---

17. *Congresswoman Says Wage Increase is Welfare Reform*, NEWS AND RECORD, Feb. 14, 1995, at B2. The current minimum wage level is $8,840 per year for full-time work. *Id.*
18. *Vogel, supra note 8, at 187-88.*
20. *Id.* Ms. Gallegos recommended that the government provide supplementary aid for persons who are first starting back to work. *Id.*
22. Aid to Families with Dependent Children [hereinafter AFDC] is a cooperative federal and state program pursuant to federal statute, (42 U.S.C. § 601, et seq.) in which economic support is allocated to poor families. The states decide the appropriate level of benefits, referred to as “standards of need,” and the federal government provides one-half of this level in monetary grants
not kept up with the cost of living. Overall, the value of benefits from AFDC has decreased by one-quarter from the beginning of this decade.\(^3\) The Center on Budget and Policy Priorities reported that in 32 states the maximum AFDC payment for families with no other income source fell below the poverty line by 50%.\(^4\) States have not made up the shortfall. For example, in New Jersey, in the mid to late 1980’s, the maximum AFDC grant to a family of four was $443 per month, which added up to less than 60% of the cost of living for a family in New Jersey.\(^5\)

The inadequate levels of benefits often lead to homelessness, as housing and other subsistence expenses consume a large part of income.\(^6\) For those persons who are already homeless, the inadequate benefit levels preclude them from buying or renting an apartment or home.\(^7\) Cases in which plaintiffs have challenged the inadequacy of welfare benefits predicated upon constitutionally-based social welfare provisions are considered later in this note.

Compounding the problem of inadequate levels of assistance is the fact that the eligibility level for receiving AFDC is set at a very low point, so that many poor families are disqualified from receiving assistance.\(^8\) Emergency assistance funds, part of the AFDC program for those families who are homeless or are about to become homeless, are hard to obtain.\(^9\) Eligibility levels have also been the subject of frequent legal challenges, sometimes presenting constitutionally-based

---

\(^{23}\) Reed, supra note 21, at 12.
\(^{24}\) Shapiro & Greenstein, supra note 22, at 6.
\(^{25}\) Petition for Rulemaking, 566 A.2d 1154, 1156-57 (N.J. 1989). Massachusetts Coalition, 511 N.E.2d at 605, n. 3 (citing a study from the state's Department of Public Welfare discussing inadequacy of AFDC grants as creating acute problems, such as an increased risk of homelessness).
\(^{26}\) For example, in Massachusetts, 70% of welfare grants are spent on housing expenses by recipients. Massachusetts Coalition, 511 N.E.2d at 605, n. 3.
\(^{27}\) Florence Wagman Roisman, Establishing a Right to Housing, 428 PLI/Lit 9 * WL 20 (1992). Roisman reported that the average maximum monthly AFDC payment nationwide was $416.00 and the average rent for a two-bedroom apartment was $544.00. Id. at 20.
\(^{28}\) Shapiro & Greenstein, supra note 22, at 9.
\(^{29}\) Id.
A substantial number of homeless families are composed of women and children, and their homelessness, to a considerable extent, is perpetuated by or a direct result of the failure of fathers to pay child support. This does not count those fathers who are not married to the mother of the child and leave her with the financial responsibility of raising the child. The absence of child support from fathers has made it necessary for the government to provide extra aid to mothers and children through such programs as AFDC. As one young mother who is receiving AFDC payments stated, "if fathers helped pay child support we wouldn’t need to be on welfare." Another mother called on the government for tougher measures to track down absent fathers. This call for tougher measures has occasionally been reflected in the political arena. For example, Representative George Miller of California recently reported that the Democratic welfare reform bill contained a stringent child support section with punitive measures for fathers who refused to obey court-ordered support.

Inadequate levels of housing subsidies also work to sustain current levels of homelessness and to increase the homeless population. The federal government provides housing subsidies through Section 8 of the Housing and Community Development Act of 1974. One Section 8 provision distributes vouchers for a portion of rent to eligible low income persons, who then must seek out a landlord in the private market who is willing to participate in the program. However, several serious problems arise.

---

30. See infra notes 69-73 and accompanying text.
31. See supra note 10.
32. It Was a Wonderful Life (PBS television broadcast, Feb. 7, 1995). It is often difficult and time-consuming to enforce court-ordered child support payments, due to problems in tracking persons down. According to one Los Angeles county official, only 27% of their 300,000 cases resulted in pay to divorced women. Id. One must also consider the reality that a number of these fathers do not earn enough to pay child support. Roger Levesque, Targeting 'Deadbeat' Dads: The Problem with the Direction of Welfare Reform, 15 HAMLINE J. L. PUB. POL’Y 1, * WL 13 (1994).
33. Levesque reports that one court has found unwed fathers responsible for the children they fathered. See Orris v. Sullivan, 974 F.2d 109 (9th Cir. 1992).
35. Id. (comments of Anna Nuenes).
problems exist in the administration and enforcement of Section 8, including drastic underfunding, mistrust and non-cooperation by landlords in accepting Section 8 tenants, the government's failure to pay its share of the rental expense each month, lengthy waiting lists and difficulty in renewing participation in the program. All of these work to render persons homeless or perpetuate their homelessness.

Funding on the state level, for the most part, is meager, given the current need. In New York State, for example, Governor Pataki has recently proposed a reduction in housing allowances which would place an allowance at approximately $260.00 per month for a three person family that receives welfare benefits. It has been estimated that these reductions would affect 21,000 persons and very well may render them homeless, because this money is intended to complement the amount used to pay rent. As will be discussed later, the level of housing allowances set by the state has been challenged in court as being too low.

This raises the question of how much discretion should be left to the legislature to set benefit levels, given the existence of a constitutional provision in New York State mandating aid to the poor. The issue of legislative discretion in this area is an important and complex one which must be weighed in drafting a constitutional provision to aid the poor and homeless. This issue will be addressed in the next section.

Yet another cause of homelessness has stemmed from the deinstitutionalization movement, which resulted in the release of large numbers of mentally ill persons from state institutions, serving to increase the number of homeless persons. Their mental problems often are aggravated through drug and alcohol dependency, which is a general plague amongst other members of the homeless population, as well.

Lack of a political voice amongst the poor is yet another factor compounding the problem of homelessness. Combatting and eradicating homelessness, although addressed as a policy problem, has not been a priority within the fund-pressed state and local governments. For the most part, homeless persons are not politically organized and do not exercise their right to vote. Homeless children completely lack a

39. *It was a Wonderful Life*, supra note 32.
41. *Id.*
42. See *infra* Part V for discussion of case law.
43. See *supra* note 3.
political voice. Moreover, many legal challenges to inadequacies of benefits and shelter allowances have been unsuccessful.

In addition, there has been a disturbing trend within some local governments to address the homeless problem by sweeping homeless persons off the street through the passage and enforcement of anti-loitering and anti-begging laws. For example, the Second Circuit recently upheld a New York City Transit Authority regulation banning begging in the subways. The regulation withstood a First Amendment challenge. The majority explained that begging does not "implicate expressive conduct." This "out of sight, out of mind" approach ignores the pervasive problem of homelessness. The legislatures which passed these laws should consider reallocating their energies toward longer-term solutions, like increasing benefit levels and providing for greater economic opportunity in local areas, rather than expending funds for law enforcement officers to carry out arrests of beggars, a number of whom are homeless. As Peter Salsich points out, homeless persons who are convicted under these laws face an even harder time procuring employment.

Instead of treating the homelessness problem as one to be kept out of public view, these causes need to be examined more carefully by legislatures. For example, in the case of homeless women and children, legislatures have to become aware and act upon the problems of inadequate benefit levels, the absence of affordable child care, lack of provision made by schools for teenage mothers, and the lack of responsibility of a considerable number of fathers in providing financial support to mothers and children. The next section is devoted to considering how state constitutional mandates regarding the care and support of the poor can be one tool used to force legislatures to address and to be accountable for these pervasive problems and to focus courts on exercising greater scrutiny of laws involving aid to the homeless and

44. Representative Charles Rangel, referring to a hearing held before the Ways and Means Committee regarding aid to the homeless and needy, remarked that no needy persons attended to assert their views. MacNeill-Lehrer NewsHour (PBS television broadcast, Jan. 13, 1995).


46. Id. at 154. Regulations have also been upheld which ban homeless persons from sleeping on public property or in vehicles. See, e.g., Stone v. Agnos, 960 F.2d 893, 895 (9th Cir. 1992); Whiting v. Town of Westerly, 942 F.2d 18, 21-22 (1st Cir. 1990); Hersey v. City of Clearwater, 834 F.2d 937, 940 (11th Cir. 1987).

needy.

III. INCORPORATION OF PROVISIONS ADDRESSING THE HOMELESS PROBLEM IN STATE CONSTITUTIONS

State constitutions are appropriate places in which to incorporate provisions concerning aid to the homeless as part of a broader social welfare provision which will serve as a mandate to the legislature and compel courts to regard more seriously a state's obligation and commitment to provide for its indigent citizens. State constitutions, of course, may go beyond the federal constitution in establishing additional affirmative governmental duties and citizen rights and are an independent source of constitutional doctrine subject to the right of state courts to independently interpret their own constitutions.

A. State Constitutions as Independent Sources of Rights

Constitutional rights are generally thought of as relating to the federal constitution. Some of our state constitutions were created before our federal constitution. Although state constitutions contain a number of provisions also found in the federal constitution, state constitutions should be viewed as separate and individual guarantees of individual rights and governmental responsibilities. The federal constitution serves as a floor with regard to the establishment and enforcement of individual rights; state constitutions can and should go beyond the federal constitution when it is necessary to address state-specific concerns and crises or to affirm a state's specific commitment to liberties and rights perhaps not embraced by one federal constitution.48

One important way in which state constitutions differ from the federal constitution is in the more frequent inclusion of affirmative rights of citizens and affirmative duties for the government. A number of commentators have noted that the federal constitution sets forth a set of negative rights which serve to establish limits on the power of government in citizens' lives.49 For example, the Supreme Court has been

48. For example, a recent Hawaii decision reaffirmed the state's strong commitment to a right of privacy, which was incorporated into its constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). New York has been described as the strongest state in the area of social welfare rights. Gerald Benjamin and Melissa Cusa, Social Policy in THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK, 238 (1994). See infra note 59 and accompanying text.

49. Susan Bandes, The Negative Constitution: A Critique, 88 MICH. L. REV. 2271 (1990). Bandes challenges the "conventional wisdom" that the federal constitution should be limited to and interpreted as a document of negative liberties. Id. at 2274. Mary Ann Glendon cites the Supreme
reluctant to find an obligation in the U.S. Constitution to provide aid to the poor in the areas of housing and subsistence. In *Lindsey v. Normet*, the Supreme Court denied that the government had a duty to supply the poor housing or to supply financial assistance to the poor to procure housing. The Court denied that any positive economic rights existed in the federal constitution, stating that "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent a constitutional mandate, the assurance of adequate housing . . . [is a] legislative, not judicial function."

Similarly, in another important case, *Dandridge v. Williams*, the Supreme Court was faced with a challenge to a state law which placed a ceiling on the level of assistance a family could obtain from the government, which resulted in larger families receiving assistance below the poverty level. The Court upheld the provision, stating that it infringed on no protected federal constitutional interest. While the federal government has taken legislative steps toward the nationwide problems of homelessness and poverty, federal courts have shown no inclination to interpret the federal constitution to include an affirmative governmental duty to aid the homeless.

State constitutions, on the other hand, contain many affirmative governmental duties which have no counterparts in the federal constitution. These provisions set forth responsibilities which states owe to their citizens and include affirmative duties to provide education to children, as well as social welfare provisions in their state constitutions, the focus of this note. Several state courts have declared these constitutionally-based social welfare provisions to be "positive rights." For example, in *Tucker v. Toia*, the New York Court of Appeals held that

---

Court's articulation of the view that the federal constitution is primarily a document of negative rights in *DeShaney v. Winnebago*, 489 U.S. 189, 195 (1989), where the majority described the 14th amendment as a "limitation on the State's power to act, [rather than] a guarantee of certain minimal levels of safety and security." Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 525 (1992).

50. 405 U.S. 56 (1972).
51. Id. at 74.
53. Id. at 482, 484.
54. Id. at 486-87.
55. ALA. CONST. art. XIV; N.C. CONST. art IX. The Supreme Court held that the U.S. Constitution did not impose such a duty in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 35 (1973).
Article XVII of the New York State Constitution, which provides for aid, care and support of the needy, "imposes upon the State an affirmative duty to aid the needy."\(^{56}\) Moreover, in the New York State Constitutional Convention of 1938, proponents of the social welfare provision mentioned that it would serve as a "much needed definition" of the obligation and "responsibility of the state to those who must look to society for the bare necessities of life."\(^{57}\)

Thus, some states' constitutions have been, in James Gardner's term, "active", that is "functioning as genuinely constitutive documents for distinct state societies, [rather than] dormant, [or] serving as a reserve means of protecting the liberty of a society ... whose identity ... is national."\(^{58}\) Instead of merely reflecting national identity, states have used their powers to recognize constitutional rights which reflect the state citizens' own values and priorities and to codify the issues which they believe to be most pressing and important. For instance, in enacting Article XVII, the delegates participating in the New York State Constitutional Convention declared such aid to be necessitated by "a permanent problem of major importance" and "a concrete social obligation."\(^{59}\) As one commentator noted, states are the appropriate places for "laboratories" to experiment with social and economic change, and hopefully serve as future models of success that will persuade the U.S. Supreme Court to interpret the federal Constitution to recognize rights in this area.\(^{60}\) States which have enacted these affirmative duties in their constitutions may also serve as models for other states to adopt similar provisions.

Moreover, states may arguably be in a better position to provide these affirmative social and economic rights because they arise from

\(^{56}\) Tucker v. Toia, 43 N.Y.2d 1, 8, 400 N.Y.S.2d 728, 731 (1977).
\(^{59}\) See supra note 57 at 2126. See also Tucker, supra note 56, at 6, 400 N.Y.S.2d at 730 (quoting REVISED RECORD OF CONSTITUTIONAL CONVENTION, Vol. III, at 2126 (1938)). See also Thrower v. Perales, 523 N.Y.S.2d 933, 935 (N.Y. Sup. Ct. 1987).
problems faced within the boundaries of one state and may reflect traditions of dedication to a particular area. In addition, they apply solely to citizens of that state. Some federal courts may feel less comfortable with imposing such a duty on all fifty states through interpreting the federal Constitution to include affirmative social and economic rights. As seen in *Lindsey v. Normet*, the Supreme Court and other federal courts have expressed fear that interpreting the federal Constitution to find affirmative duties would lead to limitless demands for governmental services. Some members of Congress would agree with this argument, especially those opposed to unfunded mandates by the federal government.

In creating new affirmative rights under their own constitutions, states are reacting to those specific needs that warrant one state's special attention and concern, as well as responding to what arguably is an unduly narrow interpretation of rights under the federal constitution. Justice Brennan, a long-time supporter of using state constitutions as independent sources of rights in a climate with a conservative federal judiciary, referred to them as a "font of individual liberties." It is clear from federal precedent that problems faced by the poor and homeless have not received the attention or the hospitable reception that these pervasive and persistent issues affecting persons all over the nation need and deserve. State constitutions should play a distinct role in declaring homelessness and poverty to be social problems for which the state must provide assistance.

**B. Why State Constitutions Should Contain a Provision Explicitly Addressing the Needs of the Poor and Homeless**

Addressing the problems of homelessness and poverty within a state's constitution serves several purposes. The existence of an affirmative duty to provide aid to the poor and homeless would represent an explicit public acknowledgment of these problems and the state's responsibility in addressing them. For example, during the Constitutional Convention debates in New York, the delegates noted that including a social welfare provision would highlight and "remove from . . . doubt" the state's responsibility to its citizens in need. Such an acknowledg-

---

61. *See supra* notes 50-51.
63. *See supra* note 57, at 2126.
ment may be used in support of greater legislative action in this area.\textsuperscript{64} In fact, many social welfare provisions mention that it is the duty of the legislature to enact laws to aid the poor.\textsuperscript{65}

The role of courts is essential in enforcing a social welfare provision. A constitutional provision would lend support to the need for strong judicial scrutiny of laws which fail to meet the needs of the poor and homeless because of their substantive content or due to the way the laws are enforced. Thus, a constitutional provision will aid in giving teeth to these laws. This view is in sharp contrast to the Supreme Court's decision in \textit{Lindsey v. Normet\textemdash}, where the Court gave minimal scrutiny to the law at issue, since it did not affect a fundamental right.\textsuperscript{66}

As Gerald Benjamin relates, "[c]onstitutionalization of issues \ldots potentially gives a greater voice to courts in policy making, for they are the final arbiters of the constitution."\textsuperscript{67} The 1938 New York Constitutional Convention debates made explicit mention of the crucial role of the judiciary in enforcing Article XVII, stating that "no court may ever misread" the "concrete social obligation" established by this provision.\textsuperscript{68}

In some states, courts have cited their own constitutional provisions to implement the laws denying or limiting assistance levels or discriminating against certain groups in allocating funds. We have already seen the New York Court of Appeals refer to the New York State Constitution in \textit{Tucker v. Toia\textemdash} in striking down an eligibility barrier to a Home Relief Program based upon age.\textsuperscript{69} Similarly, Montana courts, faced with a challenge to eligibility levels, cited the Montana Constitution, which provided for assistance to the poor.\textsuperscript{70} The Kansas Constitution includes a section requiring the state to aid those in need,\textsuperscript{71} which its highest court recently interpreted. In \textit{Bullock v. Whiteman\textemdash}, the Kansas Supreme Court pointed to the mandatory nature of the section's language, and cited both the New York and Montana courts' similar

\textsuperscript{64} See infra part IV.
\textsuperscript{65} See infra notes 97-98.
\textsuperscript{66} See infra notes 105-107 and accompanying text.
\textsuperscript{67} Benjamin & Cusa, supra note 48, at 233.
\textsuperscript{68} See supra note 57, at 2126.
\textsuperscript{69} Tucker, 43 N.Y.2d at 5, 400 N.Y.S.2d at 729.
\textsuperscript{70} Deaconess Medical Center of Billings v. Dept. of Social and Rehabilitative Services, 720 P.2d 1165, 1168 (Mont. 1986) (citing MONT. CONST. art. XII, § 3(3)). See also Butte Community Union, 712 P.2d at 1311.
\textsuperscript{71} KAN. CONST. art. 7, § 4.
\textsuperscript{72} 865 P.2d 197 (Kan. 1993).
interpretation of their constitutions' language. Although the existence of a constitutional provision which addresses aid to the poor does not necessarily guarantee that courts will interpret it to fully account for the needs of the poor and homeless, its existence certainly produces a greater chance that some courts will follow and apply it in challenges to social welfare laws and programs.

On the other hand, courts are reluctant to find any constitutional protection for the needy and homeless absent an explicit constitutional provision directing such assistance. This is another argument for including such guarantees in a state constitution. Courts have not been receptive to claims of a right to shelter based on general constitutional phrases guaranteeing liberty and happiness to citizens of the state. Three recent cases illustrate this point.

In New Jersey, plaintiffs, whose state shelter allowances were cut off, argued that the New Jersey constitution provided a right to shelter through its constitutional guarantee of "inalienable rights," such as "life and liberty," "acquiring and possessing property," and "pursuing and obtaining safety and happiness." The Court denied that any constitutional right existed to government funded housing, declaring that the cited provisions guaranteed "freedom from undue interferences, not an assurance of government funding." Also in New Jersey, mothers challenged AFDC limitations because they would have the effect of rendering them homeless. In addition to the provision relied on in the case previously discussed, these plaintiffs also relied upon a provision in the New Jersey Constitution guaranteeing "natural and unalienable rights, among which are those of... life and liberty [and] property... and of pursuing and obtaining safety and happiness."

These plaintiffs also failed. Finding no explicit provision in the

73. Id. at 202. In addition to New York, Montana and Kansas, other states' constitutions also contain provisions regarding aid to the poor, many of which have not been the subject of litigation. For example, the following states' constitutions provide that government deliver maintenance and aid to the poor: Ala. Const. art. IV, § 88; Alaska Const. art. VII, § 5; Mich. Const. art. IV, § 51; Mo. Const. art. IV, § 37; N. C. Const. art. XI, § 4; Wyo. Const. art. VII, § 20; Calif. Const. art. XVI, § 11; Ind. Const. art. IX, § 3; La. Const. art. XII, § 8; Md. Const. art. IX, § 14; Okla. Const. art. XXV, § 1; Tex. Const. art. III, § 31-a. See APPENDIX, infra, for texts of selected social welfare provisions from the constitutions of fourteen states.
75. Id. at 994 (citing Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982)).
77. Id. at 66 (citing N.J. Const. art. I, para. 1).
constitutional convention rejecting such an addition to the New Jersey Constitution, the majority found no mandate for the state government to provide public assistance. The dissent pointed to the state’s “parens patriae” obligation, which was based on the constitutional provision relied on by plaintiffs, as a basis for invalidating this legislative limitation on aid. The dissent’s interpretation differed markedly from the majority opinion in its willingness to establish a standard for judicial review of legislative determinations regarding aid and assistance. The dissent’s view also represents a broad interpretation of a state’s duty to its citizens within a generally worded constitutional section. This approach, however, remains a dissenting one.

In a similar vein, an Ohio court denied assistance to plaintiffs seeking funds to procure housing. Plaintiffs had been the victims of “drastic cuts” in general assistance program funds, and, as the Court described, “liv[e] on the edge of a society in which housing and employment are often commodities available only to those with the resources, education, and ability to acquire them.” Plaintiffs relied upon the portion of the Ohio Constitution which guaranteed “inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.” Plaintiffs placed particular reliance on the word “safety,” contending that it “incorporate[d] the right of destitute citizens to receive minimal assistance sufficient in amount and type to prevent homelessness.” While acknowledging the “tremendous impact” a denial of such a right would have on plaintiffs, the Court rejected plaintiffs’ reading of the state constitution as imposing an affirmative duty on the government to aid and assist its citizens in maintaining a level of subsistence. The Court read this constitutional provision to consist solely of “an aspirational statement of natural law rights . . . which the state [may not restrict].” Like the U.S. Supreme Court in Lindsey and DeShaney, the Daugherty Court feared that such a duty would “potentially thrust upon the back of state government the

78. Id. at 67.
79. Id. at 79.
81. Id. at 1377.
82. Id.
83. Id. at 1378.
84. Id. The Court added that the state constitution imposed no duty on the state to furnish assistance for the happiness or safety of its citizens. Id. at 1379.
affirmative duty and responsibility for providing for practically every aspect of its citizens' lives,” leading to a state of “legislative chaos.”85 The Court readily distinguished the explicit nature of Montana's mandate in its constitution to aid the poor from the absence of such language in Ohio's constitution.86

Delaware recently was faced with a class action claim that the state violated plaintiffs' substantive due process rights by failing to furnish adequate levels of welfare assistance.87 In denying any right to financial assistance to obtain and keep housing, the Court noted the absence of any provision to care for the needy, and pointed to the New York State Constitution as an example of a constitution which included such a provision. Its absence in Delaware precluded any constitutionally-based relief to plaintiffs.88 The Court further stated that if the drafters of the Delaware Constitution had wished to impose such an “affirmative obligation” they would and could have done so, pointing to provisions in the constitution where affirmative duties were created.89

Political powerlessness of the homeless and poor, particularly children, is another reason an explicit constitutional provision is necessary. Legislative priorities and changes in appropriations make regular assistance to these groups uncertain and tenuous. Too often, legislatures fail to appropriate adequate funds to sustain programs for the poor and homeless.90 Without some constitutional limitation, legislatures have unfettered leeway to enact spending cuts in these areas. Codifying obligations within a constitution gives them greater permanence than statutes. Mary Ann Glendon, in discussing European and Asian constitutions, has stated that: “[T]he constitutional status of social

85. Id. Governmentally-based affirmative duties to citizens only exist when a person is taken into custody by government officials. Id. at 1380. This is yet another example of the reluctance of some courts to read the constitution to restrict the number of positive rights of citizens and maintain the overall tenor of the constitution as a document of negative liberties.

86. Id. at 1381. The Court went on to cite the U.S. Supreme Court's refusal to hold that welfare benefits are a fundamental right, to support the conclusion that the state is under no obligation to provide assistance to poor families who are homeless or about to become homeless. Id. (citing Dandridge v. Williams, 397 U.S. 471 (1970)). Montana's constitutional provisions have no bearing on Ohio, the Court concluded. Id. at 1382.


88. Id. at * 16.

89. Id. The Tilden Court, for instance, cited the provision in its constitution mandating the formation and maintenance of public education. Id. (citing DEL. CONST. art. X, s 2).

90. See, e.g., Berrios v. Department of Public Welfare, 583 N.E.2d 856, 861 (Mass. 1992) (power of legislature to cut funding to agencies providing aid to the needy); L.T., 633 A.2d at 975 (legislature has power to cut appropriations to needy absent a clear mandate by law or constitution).
and economic rights seems likely to have reinforce[d] welfare commitments by influencing the terms, the categories and the tone of public, judicial, and legislative deliberation about rights and welfare.\textsuperscript{91}

A constitutional provision, to some extent, may serve as a check on these cuts in appropriations, especially if it mandates periodic reassessment of benefit levels in light of changes in the cost of living. The presence of a constitutional provision will serve at least as a mechanism for courts to check legislative action that unduly ignores or fails to comply with such a constitutional mandate. As mentioned above, courts are obligated to follow the tenets of their state constitutions, but absent a constitutional provision directly addressing the state’s dedication to dealing with these problems, courts are reluctant to interpret general constitutional provisions to require such aid. As the concurring judge in \textit{Daugherty} remarked, “[o]ur task is not to determine whether the legislation under review is wise, or even consonant with what we consider to be the norms of a civilized society, but merely to determine whether it has a rational basis.”\textsuperscript{92} The presence of an explicit constitutional provision would give courts the role of exercising greater scrutiny in this area.

The next section assesses how a constitutional social welfare provision should be drafted to effect the maximum amount of protection to those groups for whose protection it is adopted — the poor and homeless — and, at the same time, give the legislature and administrative agencies leeway to enact policies which reflect the changing needs of these groups.

\textbf{IV. HOW EXPLICIT SHOULD STATE CONSTITUTIONAL PROVISIONS BE REGARDING AID TO THE POOR?}

What should a constitutional provision covering aid and assistance to the poor and homeless contain? Drafting a constitutional provision raises a multitude of questions. What level of detail is appropriate for a constitutional provision? Should a constitutional provision mandate goals for the legislature? If so, how much discretion should the legislature have? Should a constitutional provision setting forth affirmative rights to the poor include specific levels of benefits or caps on the level of benefits for aid and assistance? To what extent should the judiciary play a role in compelling the legislature to satisfy the constitu-
tional requirements? What level of scrutiny should the judiciary exercise when reviewing statutes which implicate this constitutional provision?

Unlike legislation, constitutional provisions should be general because of a constitution’s role as a more overarching document whose tenets are designed to meet the needs and goals of a state over a long period, rather than dealing with narrower issues of more immediate concern. This role of the state constitution is reflected, in large measure, in the special procedures for constitutional amendments. For instance, New York’s constitutional provision on social welfare was enacted during the Great Depression to deal with the pressing problems of that time and to provide that such assistance “would meet the social exigencies not only of the present but of the years to come.”

Thus, by including this social welfare obligation in its constitution, its drafters explicitly recognized they were dealing with a problem of more-or-less permanent state concern.

State constitutions, for the most part, are more detailed documents than the federal constitution. G. Alan Tarr concluded that many state constitutions contain what he terms “statutory material” as a result of feelings of mistrust of state legislatures. Tarr also mentions the greater facility with which state constitutions may be amended when compared with the federal constitution’s amendment process. Some critics argue that these features undermine the idea that a constitution should be a unified document which sets forth the “fundamental values” of a state. Social welfare provisions in state constitutions, for the most part, contain few or no specifics. Whether this is due to a view of the proper role of the constitution or a reluctance to make long-range or perhaps any commitments in this regard is problematic. The question of the proper balance between detail and general principle concerning homelessness in a constitution is the subject of this section.

If we examine the phrasing of a sampling of state constitutional social welfare provisions, we see broadly worded sections designed to serve as goals the legislature is to follow by taking steps, which, in its judgment, will best meet these goals over the long term. Some

93. See supra note 57, at 2125. See also Tucker, 43 N.Y.2d at 6, 400 N.Y.S.2d at 730.
95. Id. at 1182. James Gardner notes that Louisiana has changed its constitution eleven times. Gardner, supra note 58, at 1027.
96. Gardner, supra note 58, at 1029. As will be set forth shortly, state constitutional social welfare provisions regarding aid to the poor are not at all specific. See infra note 97-101 and accompanying text.
provisions are broader in scope than others. For example, the Oklahoma, Missouri, South Carolina and Michigan constitutions proclaim the general welfare of their citizens to be a matter of “public concern,” and call for the legislature to establish agencies to address this concern.97 Similarly, some provisions’ wording is geared almost exclusively toward giving the legislature complete discretion in this area. For example, California’s constitution, rather than articulating aid to the poor as an important state goal, instead emphasizes that the legislature has the power to “amend, alter or repeal any law [regarding] relief from hardship or destitution.”98 Montana framed its constitutional provision regarding economic assistance to the poor in discretionary terms, expressly leaving the decisions regarding eligibility and duration of benefits to the legislature.99

In even broader terms, Hawaii, in the preamble to its constitution, enunciates the goal of preserving its citizens’ quality of life.100 Illinois also sets forth the sweeping goals of eliminating poverty and attaining economic justice in its preamble.101 The general nature of these provisions makes it more difficult to argue that the state has established an affirmative duty to provide aid to the needy and to procure subsistence needs such as shelter. Rather, these are the goals that a legislature may act upon whenever and however it chooses.

Other states, such as Texas, impose monetary limits within their constitution on the amount of aid to be provided by the legislature for social welfare assistance. Compared to other state provisions, the Texas Constitution contains considerable language limiting the amount of aid:

The Legislature shall have the power, by the General Laws, to provide, subject to the limitations herein contained and other such limitations . . . as may by the Legislature be deemed expedient, for assistance grants to needy dependent children . . . and caretakers [and] needy persons who are totally and permanently disabled. . . . The Legislature may prescribe such other eligibility requirements for participation in these programs as it deems appropriate and may make appropriations out of state funds for such purposes. The maximum paid out of state funds for assistance grants, to or on behalf of needy dependent children

97. OKLA. CONST. art. XXV, § 1; MO. CONST. art. IV, § 37; S. C. CONST. art. XII, § 1; MICH. CONST. art. IV, § 51.
98. CALIF. CONST. art XVI, § 11.
99. MONT. CONST. art. XII, § 3.
100. HAW. CONST. Preamble.
101. ILL. CONST. Preamble.
and their caretakers shall not exceed the amount of Eighty Million Dollars ($80,000,000) during any fiscal year.\textsuperscript{102}

The drafters of the Texas provision recognized that limits need to be imposed on expenditures in establishing the structure of the state’s welfare system, and that economic rights for a state’s citizens are not absolute, but are subject to the fiscal constraints of a state’s budget. Indeed, Texas’s provision does not mandate state assistance, rather it confers the power upon the legislature, which has full discretion to decide whether aid should be granted.

Some state provisions appear, on their face at least, to offer greater protection to the poor than those of other states. Some are stated in mandatory terms. New York, for example, sets forth that aid, care and support of the needy shall be provided by the state.\textsuperscript{103} Similarly, Kansas, Alabama and Alaska all include the term “shall” in their public welfare provisions, addressed to the state legislature.\textsuperscript{104} Such provisions potentially offer greater protection to the poor and homeless, for they force the legislature to face the issues and begin to implement solutions. The mandatory nature of the provision may serve as a stronger means of preventing legislative inaction or negative action in this area. This has been the case to some extent in New York, where the courts have cited the state’s constitutional provisions as affecting their decisions.\textsuperscript{105}

Is it necessary to supplement the mandatory language with language making aid and assistance to the needy a fundamental right? Use of fundamental rights language would provide a state’s poor residents with a specific enforceable right. It is interesting to note that the following proposal was among the amendments to the New York State Constitution in 1938 offered during the constitutional convention. The proposal would have established such a right:

\begin{quote}
The legislature shall provide that the essentials of food, clothing and shelter shall be a fundamental right of and be guaranteed to the people of the state, regardless of citizenship or duration of residence.\textsuperscript{106}
\end{quote}

Use of the fundamental rights language, or language making it clear that

\begin{flushright}
102. TEX. CONST. art. III, § 51-a.
103. N.Y. CONST. art. XVII, § 1.
104. KAN. CONST. art VII, § 4; ALA. CONST. art. IV, § 88; ALASKA CONST. art. VII, § 5.
105. See infra notes 128-33 and accompanying text.
\end{flushright}
aid or assistance is guaranteed by the state, provides added protection to those who are in need of aid and assistance for it gives courts a duty to subject to strict scrutiny their examination of a law's constitutionality.\textsuperscript{107}

In drafting a constitutional provision, a compromise must be struck between creating a provision which is so detailed that it completely ties the legislature’s hands and risks becoming obsolete with changing times and needs and creating a provision so general that it gives the legislature unlimited or practically unlimited discretion to enact (as well as cut back or revoke) laws, and even completely to ignore the constitutional provisions. An effective constitutional provision designed to assure aid to the homeless should prescribe clearly stated legislative obligations, but it should not be so specific as to prescribe fixed levels of aid or benefits. The greater the affirmative duty placed on the legislature by the provision, the greater the responsibility the legislature will face and the greater role the courts will play in determining whether the legislature acted in accord with the constitution.

To aid in ensuring that the needs of the homeless are given priority in a state’s functions, a state constitutional provision should contain several elements. First, shelter should be mentioned as one of the basic necessities for which aid should be provided and be so defined that it provides a baseline for the legislature to enact laws to provide both monetary benefits and government-provided shelter. Second, the provision should be phrased in mandatory terms. Third, the constitutional section should mandate regular reassessments of eligibility levels and levels of assistance to ascertain whether they meet current economic needs. These three elements are necessary to give content to a constitutionally pronounced need to assist the homeless. Each of these elements will be discussed in light of recent judicial challenges to state constitutional social welfare provisions.

Another question which should be addressed pertains to the scope of the provision. A provision for aid to the poor and homeless should cover not only financial assistance, but also should cover employment opportunity, health care and civil rights. These areas are important and constructive in order to increase the standard of living in a state and promote individual self-sufficiency. Several proposed amendments to the

\textsuperscript{107} See infra note 133 for discussion of the standard of review of the Supreme Court of Montana’s analysis of the proper standard of judicial review of the constitutionality of the state legislature’s welfare laws.
New York State Constitution, for example, covered issues which took a more holistic approach than now appears in state constitutions . . .

The state shall foster the public health and general welfare of its citizens. To this end it shall, through legislative and executive action, and to the greatest extent possible through a partnership of public agencies and voluntary organizations, induce conditions to provide care for the helpless, the needy, and the sick; protection against physical and mental illness; maximum realization of the individual’s self dependence; freedom from discrimination, unemployment, and the anxieties of old age.\textsuperscript{108}

Including a wider scope of issues within a social welfare provision helps to accentuate the need for the legislature to simultaneously address the problems of homelessness, unemployment and societal discrimination to help create a better standard of living for the poor.

\textbf{A. PROPOSED CONSTITUTIONAL PROVISION}

The following is a proposed provision designed to address the issues previously considered.

\textit{I. Preamble}

Aid, care and support to the needy citizens of this state are matters of paramount concern to ensure the maintenance of an adequate standard of living for all citizens of this state.

The state shall guarantee eligible persons with aid for basic subsistence needs, including food and shelter.

In conjunction with these ends, the legislature shall enact policies and measures to promote economic well-being through, for example, decreasing unemployment, combatting workplace discrimination, providing facilities or funding for child care and increasing the minimum


\begin{quote}
It is the responsibility of a democratic government to do its utmost toward provision of a decent life for all of the people; for the government of the state of New York is charged to do all within its power and means to the following ends: [these ends included not only provision of housing and food, but also medical care, education, employment at a reasonable wage and freedom from discrimination].
\end{quote}
wage on a regular basis to keep up with the cost of living.

2. Shelter

Shelter provided by the state shall satisfy standards of adequacy and must include safe and sanitary shelter, together with necessities such as electricity, running water and heat.

If the state provides money grants to procure shelter, those grants shall be regularly reassessed to ascertain whether or not they comport with current economic conditions to allow recipients to obtain shelter which meets the adequacy standards required for shelter provided by the state.

3. Eligibility Levels

The legislature shall make provision to regularly reassess the levels at which persons are eligible for government grants and aid for shelter, taking into account current economic conditions.

The legislature shall make changes in appropriations and levels of assistance in response to this reassessment.

No benefits shall be denied, terminated or reduced except in accordance with due process of law, including the opportunity for a fair hearing before such action is taken.

B. Necessity of Including and Defining Shelter as a Component of a Constitutional Social Welfare Provision

Shelter should be included as a subsistence need within a broader social welfare provision in a state’s constitution. No state constitutional social welfare provision, such as those surveyed above, has included the terms housing or shelter in its guarantees. At least one legislator, however, had proposed that shelter be included in New York State’s constitutional provision. This proposed amendment, presented at the 1938 constitutional convention, read as follows:

The legislature shall provide that the essentials of food, clothing and shelter shall be a fundamental right of the people of the state.109

Similarly, during New York’s 1967 constitutional convention, there were proposals to amend the 1938 social welfare provision to include shelter as part of the guarantee of aid and assistance to the needy. One proposal not only called for housing to be explicitly included in the provision, but

109. See supra note 106.
also called for "decent housing within the financial means of each person."¹¹⁰ A standard of quality thereby would be incorporated in the provision for housing, and the legislature and administrative agencies would be required to adhere to that standard.

The inclusion of the term shelter in a state constitutional social welfare provision will have a twofold effect. First, it will accentuate the state's recognition of the problem of homelessness and constitutionalize the state's professed desire to take on the task of combatting homelessness. Second, it will bolster legal arguments that in providing assistance to the poor, a portion of that assistance should be in the form of housing or subsidies to obtain housing.

The problem with relying on the term shelter alone is that shelter is extremely general and may range from unsafe, barely adequate lodging in a homeless shelter or welfare hotel to clean, safe and private lodging. Shelter should be given some meaning within the constitution at least to establish a minimum level of adequacy which a state shall provide to its residents.

There has been considerable litigation in reference to the level of adequacy which government shelter should meet.¹¹¹ Most courts are reluctant to define what level and type of shelter suffices to meet the subsistence needs of homeless citizens. For example, in Fountain v. Kelly,¹¹² plaintiff homeless families unsuccessfully claimed a private right of action to compel the District of Columbia to provide them with housing in dwellings other than homeless shelters.¹¹³ Plaintiffs complained of being "'warehoused' in overcrowded hotel shelters . . . often without cooking facilities, refrigerators, or separate sleeping quarters for adults and children . . . to the severe detriment of their children's physical and mental well-being."¹¹⁴ Plaintiffs demanded that specified minimum housing standards be satisfied, and the standards should include an apartment unit with cooking facilities, sleeping quarters and


¹¹¹. A related question is whether the government is providing adequate funding for persons to secure their own shelter. This will be discussed subsequently, infra notes 139-148.


¹¹³. Id. at 685.

¹¹⁴. Id.
bathroom facilities. The Court held that no entitlement to shelter was created by the District of Columbia law, although the law did require the establishment of emergency housing units for homeless families. Although this case involved a statute, rather than a constitutional provision, it illustrates the need to include some standards of adequacy in a provision that deals with an obligation to provide shelter. It is often an administrative agency which has the task of defining standards, and its decision is largely determined by the availability of funding and the policy priorities of the particular time. As an example, in *Berrios v. Department of Public Welfare,* the Court deferred to the administrative agency's narrow definition of shelter as embracing only temporary shelter. Providing a clear, definite standard in the constitution would help to avoid these scenarios.

Other courts utilized their constitutions to impose a minimum level of quality on shelter in the context of homeless plaintiffs' legal challenges. In *Callahan v. Carey,* a New York court established minimum necessities for shelter applicants, which were to include clean bed clothes, secure conditions and a locker in which to store their belongings. The trial court cited Article XVII of the New York State Constitution as a source of its holding.

The New York Court of Appeals affirmed the need to meet a minimum standard of adequate shelter in *McCain v. Koch.* Plaintiffs, consisting of homeless families with children, argued that a common sense interpretation of Article XVII of the New York State Constitution required the government to provide shelter. Within the meaning of shelter, plaintiffs argued this mandated adequate shelter with "minimum standards of decency and habitability." Plaintiffs went on to de-

115. Id.
116. Id. at 686.
118. Id. at 862. One author has pointed out that a serious delegation problem could arise when a legislature allows an administrative agency to determine the way in which constitutionally-mandated rights are to be specifically implemented. Morawetz, supra note 12, at 572, n. 36.
120. Id.
121. Id.
124. Id. Plaintiffs also cited a delegate at the constitutional convention who spoke, at the time Article XVII was added to the New York Constitution, of minimum standards of habitability in
scribe the "squalid," "filthy," "cold," and "rodent infested" conditions which prevailed in the emergency housing provided to them by the City of New York.\textsuperscript{125}

The McCain court did not explicitly base its opinion upon the New York State Constitution, but stated that "whether or not plaintiffs have any right to shelter under the state or federal constitution or statutory law, [the Supreme Court] . . . had the power to require the city, once they undertook to provide housing, to make that shelter minimally habitable."\textsuperscript{126} Although not constitutionally based, this case is a good example of how a court can enforce and even establish minimum standards.\textsuperscript{127} However, had the administrative agency chosen not to establish minimum standards of habitability, it is arguable that the court would have deferred to its decision not to do so, in the absence of a constitutional mandate. Including standards in a constitution at least provides assurance that minimum standards exist for shelter and that there is some measure of stability and permanence concerning the obligations to provide shelter.

\section*{C. Necessity of Phrasing Constitutional Social Welfare Provision in Mandatory Terms}

The use of mandatory terms like "shall" within a constitutional provision serves several purposes. First, it reaffirms a state's commitment to the issue of aid to the poor and homeless. Second, it directs the legislature to this important issue, and it sends the message that a legislature should take meaningful steps toward addressing it. It also has the potential of elevating a constitutional provision's purpose from a precatory or merely idealistic goal to a mandate for legislative action. The legislature must abide by this mandate or be subject to judicial challenge for failure to comply with an affirmative, constitutionally-based

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{125} Brief, supra note 123, at 41.
\item \textsuperscript{126} McCain, 70 N.Y.2d at 118, 517 N.Y.S.2d at 922. The Court noted that the administrative agency had already defined minimum levels of habitability for emergency shelter provided to homeless citizens and that the only issue in the present case was one of enforcement. \textit{Id.} at 119, 922.
\item \textsuperscript{127} After this article was completed, the New York Court of Appeals held that when an agency establishes minimum standards for housing, a court's role is limited to ensuring that those minimum standards are enforced. \textit{Mixon v. Grinker}, N.Y.L.J., June 12, 1996, at 31 (Court of Appeals). \textit{Mixon} was distinguished from \textit{McCain}, upon which plaintiffs relied, on the grounds that in \textit{McCain}, there were \textbf{no} agency guidelines. \textit{Id.} Therefore, it was appropriate for the Court in \textit{McCain} to establish minimum guidelines. \textit{Id.} On the other hand, in \textit{Mixon}, where agency guidelines existed, the Court's role was substantially limited to that of review.
\end{itemize}
\end{footnotesize}
duty. Courts have recognized the mandatory nature of social welfare provisions. For example, in *Jiggets v. Grinker*, the New York Court of Appeals pointed out that “provision of assistance to the needy is not a matter of legislative grace, but is specifically mandated by the New York State Constitution.”

The inclusion of mandatory language within a constitutional social welfare section, as well as the level of specificity within the provision, are inextricably linked to the degree to which the legislature will play a role in this area. The use of discretionary language as to when and how a state’s concern about these pressing issues will be addressed by the legislature is not adequate. The legislature should be alerted through the use of mandatory language in the constitution that homelessness and the provision of adequate levels of welfare aid must be legislative priorities. This is especially true in light of the political powerlessness and low voter participation rate of low income groups. The proposed constitutional provision is designed to ensure that legislation is enacted to help lessen the problem of homelessness. Use of mandatory language would serve two goals: to mandate the creation of laws to address the problems in this area and to ensure that these laws, once enacted, are enforced.

The New York State Constitution illustrates the use of a constitutional provision with mandatory language. As previously noted, the New York Court of Appeals in *Jiggets v. Grinker*, when faced with a challenge to the adequacy of a Department of Social Services shelter allowance, cited the New York State Constitution as “specifically mandat[ing]” provision of aid, care and support to the needy. The relevant Social Services law, which also used the mandatory term, “shall,” concerning the adequacy of benefit levels, was found to impose a duty on the Social Services Commission to set the level of shelter allowances to comport with the prices of New York City housing. The Court’s recognition that the language of a constitutional provision was mandatory is a significant example of how mandatory language can

---


129. See supra note 44 and accompanying text.

130. See supra note 128.

131. Id. at 415-16.

132. Id. (citing N.Y. Soc. Svces. Law § 350(1)(a)).
be used by the Court to compel adherence to realistic standards.

Similarly, the Supreme Court of Montana, in analyzing a law which cut off welfare aid to certain beneficiaries, recognized that its constitution's social welfare provision contained mandatory language which established a "constitutionally-mandated duty upon the legislature to provide economic assistance . . . for the misfortunate." The presence of such language imposes an obligation on the legislature which, if ignored, gave Montanans a "constitutional right for redress in the courts."

Accompanying the use of mandatory language, there should also be some guarantee that once assistance is furnished to an eligible recipient, that it is not arbitrarily taken away or reduced. One New York proposal to amend its social welfare section during the 1967 convention included, among other things, a statement that "[n]o such grant of financial assistance shall be denied, terminated or reduced except in accordance with due process of law, including the opportunity for a fair hearing before such action is taken." The United States Supreme Court, in Goldberg v. Kelly, echoed a similar view in 1970. The Court held that welfare recipients have a property interest in the continued receipt of welfare benefits which could not be terminated in the absence of due process. In response to this Supreme Court ruling, states have provided opportunities for hearings before benefits are reduced or taken away. The inclusion of such language will further guarantee sustained aid and assistance to those who need it by serving as a check on government action.

133. Butte, 712 P.2d at 1314 (Sheehy, concurring). The majority applied a "middle tier test" in analyzing the constitutionality of the welfare benefit provision, in which the state had the burden of proving that the classification was both reasonable and based upon an important governmental interest. Id. However, shortly after this decision was rendered, the Montana legislature voted "to restore to the legislature" the power to set eligibility levels for services and programs for the poor. Montana Legislative Council, Compiler's Comment, at 71 (Montana Code Ann. 1994). The proposal was approved on November 18, 1988, and essentially overruled Butte by shifting the standard of review of the courts in the area of welfare legislation to a rational basis standard. Id.

134. Id.


137. Id. at 266.

138. New York State, for example, has instituted a "Fair Hearing" system, which furnishes recipients of public assistance, food stamps, medicaid and other services provided by the government, with the opportunity for a hearing before an Administrative Law Judge if the recipient's benefits have been denied, decreased or discontinued. Nassau/Suffolk Law Services Committee, Inc., A Guide to Fair Hearings.
V. HOW A CONSTITUTIONAL SOCIAL WELFARE PROVISION SHOULD ADDRESS LEVELS OF FUNDING FOR PUBLIC ASSISTANCE TO THE NEEDY AND HOMELESS

The most pressing and difficult issue in attempting to lower the incidence of poverty and homelessness is that of determining the level of funding. A state legislature's commitment to the poor and homeless is measured by its willingness to appropriate funds for welfare benefits and grant measures in light of competing programs and other calls on necessarily finite resources. Unfortunately, it is all too easy for some legislators to lose sight of the ever present problems of poverty and homelessness in deciding where to sustain or increase funding. This is due in part to the relative powerlessness of the poor and homeless vis-a-vis other constituents. Many government-sponsored social welfare programs are significantly underfunded, and the level of benefits often is inadequate to sustain their recipients. The purpose of this section is to explore how a state constitution can address the vital issue of funding for social welfare programs.

Although the social welfare provisions mentioned previously recognize that the state should play a role in aiding the poor, the important questions of eligibility and benefit levels, when mentioned at all, are left entirely to the discretion of the legislature. For example, the New York State Constitution mandates aid, care and support of the needy, but adds that aid is to be provided “in such a manner and by such means as the legislature may from time to time determine.” The Texas Constitution similarly leaves funding to the discretion of the legislature in its social welfare provision, and, in addition, places a cap on the amount of monetary aid which may be appropriated to programs and benefits for the poor.

Courts in which recipients of state welfare aid have challenged the eligibility standards and level of benefits have consistently recognized the discretionary power of the legislature to establish these standards. The opinion of the New York Court of Appeals in Bernstein v. Toia dealt with the question directly and clearly. It held that the state would be violating Article XVII of the New York constitution if it simply refused

139. See supra notes 22-29.
140. See supra notes 97-104.
141. N.Y. CONST. art. XVII.
142. See supra note 102.
STATE CONSTITUTIONAL PROVISIONS

...to aid those persons who fell into the classification of "needy," but the "absolute sufficiency" of aid given to those eligible is a determination left completely to the legislature.  

In another New York decision, Jiggets v. Grinker, recipients of Aid to Families with Dependent Children claimed that the state allowances for shelter did not cover their monthly rent. In this instance, the legislature enacted a law which mandated that shelter allowances be "adequate." The Court cited a number of other provisions of the Social Services Law which, in contrast, employed discretionary language regarding public assistance in support of its conclusion that the intent of the legislature in this instance was to provide special protection through a mandatory level of assistance. Thus the Court concluded that the mandate of adequacy "imposed a duty on the Commissioner [of Public Welfare] to establish a schedule reasonably calculated for that purpose." Although the Court cited the New York State Constitution's mandate to aid the poor, its decision to increase funding for shelter to adequate levels turned on the legislature's use of mandatory language in the statute. Had the legislature failed to use mandatory language in the provision of shelter allowances, the Court's decision probably would have come out differently. Other states whose constitutions do not contain a social welfare provision have been faced with similar challenges to the adequacy of benefit levels. Unless the legislature has mandated the

143. Bernstein, 402 N.Y.S.2d at 348. Legislative discretion in funding levels was most recently affirmed in Crawford v. Perales, 612 N.Y.S.2d 573 (1st Dept. 1994)), where petitioner challenged the standards of shelter assistance as directly violative of the New York State Constitution, Article XVII. Id. at 575. The Court stated that the New York State Constitution "does no more than authorize the legislature to provide funds for the care of the needy." Id.

144. See supra note 128.

145. Id. at 95.

146. Id.

147. Id. at 95, 96, 97.

148. Id. at 97.

149. Id.

150. See also Perales v. Grinker, supra note 127 (citing administrative agencies' use of mandatory language in its regulation as determinative).

151. See, e.g., Berrios v. Department of Public Welfare, 583 N.E.2d 856, 863 (Mass. 1992) (referring to the legislature's power to restructure the emergency assistance benefits program despite the fact that such action would cause "substantial hardship" to recipients); In the Matter of Petition for Rulemaking, 566 A.2d 1154, 1162 (N.J. 1989) ("extent to which statutory standards are implemented must be left to the legislature"); Franklin v. N.J. Department of Human Services, 543 A.2d 56, 62, 68 (N.J. Super. Ct. App. Div. 1988) (legislature, not constitution, sets duty to allocate resources such as public assistance); Tilden v. Hayward, Civ. No. 11297, 1990 WL 131162, at *6 (Del. Ch. Sept. 10, 1990); Bouvier v. Wilson, 431 A.2d 465, 468 (Vt. 1981) (legislature is...
level of aid in its statute, courts have deferred to legislative and agency determinations of benefit levels despite the presence of a constitutional provision mandating aid.

Deference to the legislature certainly is proper in the absence of any constitutional or statutory mandate to reassess benefit levels periodically, given a legislature's constitutionally-based spending power. However, considering some legislatures' unwillingness to appropriate increased amounts of funding or to sustain current levels of funding for these programs, a constitutional provision is needed to stress the importance of adequate funding in this area and to give the needy and the courts the power to force legislatures to address and meet the problem of inadequate benefit levels.

Although many decisions have explicitly recognized that state benefit levels were too low or eligibility levels too strict, their role in directing the legislature to increase funding is limited. In a number of instances, deference to the legislature has led to or perpetuated the underfunding of programs designed to aid the poor, since levels of aid have not kept up with the ever increasing cost of living. Inclusion in a constitution's social welfare provision of a section which would mandate the legislature or some other appointed body, such as a commission or agency, to regularly assess the levels of benefits and eligibility for benefits, would provide some added measure of protection for the poor and homeless.

A separate section addressing funding is needed within a constitutional social welfare provision to give effect to the affirmative public benefits which the constitution is designed to embrace in its goal of aiding the needy. During New York's constitutional convention of 1967, a proposal was made to add to the extant social welfare provision a section addressing the issue of maintaining benefit levels on a par with the cost of living. The proposal called for:

a minimum standard of income, to be based on the Consumer Price Index, of all items, established by the U.S. Bureau of Labor Statistics, to be guaranteed every resident of the State. Such a minimum standard of income shall be revised at least every five years based on

---

152. See, e.g., Bouvier, 431 A.2d at 469 (court acknowledged the problem of underfunding of benefits to the poor); L.T. v. New Jersey Department of Human Services, 624 A.2d 990, 996, n.2 (N.J. Super. Ct. App. Div. 1993) (court's calculation of grant level as meeting only 25% of the statutory "standard of need to maintain a safe and decent life").
such then current consumer price.\textsuperscript{153}

This proposal, if passed, would have furnished much greater guidance to the legislature in this area than the language in the current New York provision, which gives the legislature discretion to provide assistance as it shall "from time to time determine."\textsuperscript{154}

A court would not be acting in excess of its powers if it directed some entity, such as a legislature, an agency or a commission, to reevaluate benefit levels or to review a reevaluation, since the court would not be setting the levels. Rather, a court would be empowered by such a provision to order another entity, such as a legislature or a commission, to examine the current level of benefits, grants or eligibility requirements, instead of leaving the issue of sufficiency of aid entirely within the purview of the legislature. Courts are capable of recognizing when benefit levels are not adequate to support persons under current economic conditions, when faced with such claims.\textsuperscript{155}

It is not enough, however, to rely upon plaintiffs to bring claims regarding underfunding or inadequate benefit levels to trigger a reassessment of benefit levels by the legislature. In addition to a constitutional provision that addresses the reassessment of benefit levels, other measures must be taken to work in tandem with this provision. Legislatures should enact statutes or appoint commissions which require them to regularly reexamine whether or not the level of benefits to the poor comports with current economic conditions and to make changes in appropriations in response to this examination. At least one state, Massachusetts, has enacted a law which imposes a duty on the Commissioner of the state's welfare agency to conduct an annual review of its budgets to ascertain whether or not the funds allocated for benefits are sufficient to "permit AFDC recipients to live in homes of their own."\textsuperscript{156} If an administrative agency's study concludes that there are inadequate levels of funding for the next year, the agency must bring this to the legislature's attention.\textsuperscript{157} The legislature is then responsible for appropriating adequate funds or for taking some other measure to address

\textsuperscript{154} N.Y. CONST. art. XVII, § 1.
\textsuperscript{155} \textit{See supra} note 152.
\textsuperscript{156} Mass. G.L. c. 18 § 2(B)(g)(4).
\textsuperscript{157} Massachusetts Coalition v. Secretary of Human Services, 511 N.E.2d 603, 611 (Mass. 1987).
the problem.\textsuperscript{158} Although an administrative agency may complete a study comparing the amount of money allocated to aid programs for the poor with the cost of living, the legislature, at times, may not follow through with necessary additional funding to provide for the updated levels of aid.\textsuperscript{159} The presence of mandatory language in a state's constitution which establishes a legislative duty to reassess benefit levels would give the legislature a firm duty to act and would give courts a tool to aid in the enforcement of laws such as the just described Massachusetts statute. Placing such an obligation within a state constitution serves not only to memorialize the more general goal of aid to the poor and homeless, but also to address the very practical issues of sustaining levels of aid.

VI. CONCLUSION

Although the persistent and pervasive problem of homelessness will not be eradicated merely through amending a state's constitution to include social welfare provisions, a constitution is an appropriate place to assert such fundamental goals of a state and to provide legislative direction toward those goals. In addition to imposing a duty on the legislature to enact laws regarding homelessness and to create agencies to help enforce these laws, a constitutional provision should include standards for the level of funding, as well as provision for periodic reassessment of funding and benefit levels. These are essential if the right to shelter is to be a positive, rather than a negative, right.

On a broader level, a social welfare provision should address the right to shelter along with other issues, such as promoting employment opportunities, providing adequate and affordable medical care and child care, and decreasing employment discrimination. Focusing on these issues together will provide one tool in solving immediate problems and attaining a better standard of living for all citizens in the long run.

\textsuperscript{158} Id.

\textsuperscript{159} This problem was faced by the Court in \textit{Massachusetts Coalition}. The Court reiterated the statutory obligation binding the legislature, discussed above. \textit{Id.} at 610-11.
APPENDIX

SELECTED SOCIAL WELFARE PROVISIONS IN
STATE CONSTITUTIONS

ALA. CONST. art. IV, § 88
“[I]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for maintenance of the poor.”

ALASKA CONST. art. VII, § 5
“The legislature shall provide for public welfare.”

CAL. CONST. art. XVI, § 11
“The Legislature, or the people by initiative, shall have the power to amend, alter or repeal any law relating to the relief of hardship and destitution, whether such hardship and destitution results from unemployment or from other causes, or to provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes, either directly by the State or through the counties of the State and to grant such aid to the counties therefor, or to make such provision for reimbursement to the counties by the State, as the Legislature deems proper.”

IND. CONST. art. IX, § 3
“The counties may provide farms, as an asylum for those persons who, by reason of age, infirmity or other misfortune, have claims upon the sympathies and aid of society.”

KAN. CONST. art. VII, § 4
“[T]he state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon . . . society.”

MICH. CONST. art. IV, § 51
 “[T]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws [in reference to] the promotion of public health.”

MO. CONST. art. IV, § 37
“The health and general welfare of the people are matters of primary public concern; and to secure them there shall be established a department of social services in charge of a director . . . by and with the advice and consent of the senate, charged with promoting improved health and other social
services to the citizens of the state . . .”

MONT. CONST. art. XII, § 3

“[The] state shall establish and support institutions and facilities as the public good may require.”

“[The] legislature may provide such employees assistance and social and rehabilitative services for those who, by reason of age, infirmities or misfortune are determined by the legislature to be in need . . .”

“[The] legislature may set eligibility criteria for programs and services [as well as the] duration and level of benefits.”

N.M. CONST. art. IX, § 14

“Nothing [in this provision] shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.”

N.C. CONST. art. XI, § 4

“Beneficent provision for the poor, the unfortunate, and the orphan[ed] is one of the first duties of a civilized and Christian state. Therefore the General Assembly shall provide for and define the duties of a Board of Public Welfare.”

N.Y. CONST. art XVII, § 1

“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such a manner and by such means, as the legislature may from time to time determine.”

OKLA. CONST. art. XXV, § 1

“[T]o promote the general welfare of the people of the State of Oklahoma and for their protection, security and benefit, the Legislature and the people . . . are hereby authorized to provide appropriate legislation for the relief and care of . . . needy persons who, on account of their immature age, physical infirmity . . . or other cause, are unable to provide or care for themselves. [T]he Legislature or the people . . . are further authorized, in co-operation with and under any plan authorized by the Federal Government for State participation, to provide by appropriate legislation for the relief and care of aged or needy persons.”

TEX. CONST. art. III, § 51-a

“[The] Legislature shall have the power, by General Laws, to provide, subject to the limitations herein contained and other such limitations . . . as may by the Legislature be deemed expedient, for assistance grants to needy dependent children
and . . . caretakers, [and] needy persons who are totally and permanently disabled.”

“[The] Legislature may prescribe such other eligibility requirements for participation in these programs, as it deems appropriate and may make appropriations out of state funds for such purposes. The maximum amount paid out of state funds for assistance grants, to or on behalf of needy dependent children and their caretakers, shall not exceed the amount of Eighty Million Dollars ($80,000,000) during any fiscal year.”

WYO. CONST. art. VII, § 20

“As the health and morality of the people are essential to their well-being and to the peace and permanence of the state, it shall be the duty of the legislature to protect and promote these vital interests by such measures for the encouragement of temperance and virtue.”

Norma Rotunno