

**NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY**

**Homelessness in the United States
and the Human Right To Housing**

**A Report by the
National Law Center on Homelessness & Poverty**

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EXECUTIVE SUMMARY

Homelessness, and the shortage of affordable housing that is its leading cause, are growing crises in the United States. They threaten and indeed violate basic human rights of the poorest and most vulnerable Americans.

Homelessness and the shortage of affordable housing in the U.S.: a growing crisis

- By current estimates, at least 840,000 people are literally homeless – on the street or using temporary housing – at any given day across the United States. Over the course of a year, as people transition in and out of homelessness, the number rises to between 2.5-3.5 million. Of that number, some 1.35 million are children.
- More than 3.5 million men, women, and children will experience homelessness in a given year (Urban Institute). A comprehensive national survey published in 1994 found that between 1985 and 1990, seven million Americans had experienced homelessness at some time; 6.5 percent of U.S. citizens, or 12 million people, have experienced homelessness at some point in their lifetimes.
- Many more are at risk: 14.3 million households – almost one in seven – are severely burdened by the cost of housing, with housing costs gobbling more than 50 percent of their incomes. (*The State of the Nation's Housing 2003*, Joint Center for Housing Studies of Harvard University.)
- The lack of affordable housing is a leading cause of homelessness, according to experts and to homeless people themselves. According to Harvard University's Joint Center for Housing Studies report, the gap between the numbers of low income people who need affordable housing and the total availability of that housing is now 2 million units. Higher-income renters occupy an additional 2.7 million of the available 7.9 million lowest-cost housing units, further diminishing the pool of affordable housing. As a result, according to the Harvard University report, the total shortfall in low-cost housing units available for low-income renters is 4.7 million.

Housing is a human right

International human rights law recognizes housing as a basic human right. Article 25 of the Universal Declaration of Human Rights, adopted with U.S. leadership in 1948, states that:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, **housing** and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. [Emphasis added]

The Habitat Agenda. In 1996, the Habitat II conference – an UN-sponsored conference in which the U.S. and 170 other nations participated – reaffirmed these basic principles. Part of a series of UN-sponsored conferences on global social issues, Habitat II included significant

discussion of housing and homelessness, including recognizing adequate housing as essential to the development of individuals and communities and the prevalence of problems associated with its lack.

What the right means. The Habitat Agenda states “adequate shelter means more than a roof over one’s head.” Consistent with well-established definitions, it notes that adequacy includes housing that is:

- Healthy, safe, secure, accessible and affordable and that includes basic services, facilities and amenities, and has proximity to work, social services and transportation.
- It also requires that persons be free from discrimination in housing and possess legal security of tenure.

What the right requires. As defined in human rights law, the right to housing does not require nations to immediately ensure that the right is fulfilled; rather, it imposes an obligation on countries to

- “Progressively” realize the right. This means that continuous progress be made to ensure that everyone has adequate housing – whether through private initiatives, government incentives, or direct government intervention.
- It also means, however, that governments shall not deprive people of the right to adequate housing that they already enjoy, and that they prevent private actors from violating the housing rights of others. This obligation includes not decreasing enjoyment of the right through retrogressive measures.

The Habitat Agenda states that government should:

- Provide direct assistance to disadvantaged and vulnerable groups (including homeless persons), and promote supportive services for homeless people and members of other vulnerable groups.
- Address "the specific needs and circumstances of children, particularly street children."
- The document also includes a provision that “homeless people should not be penalized for their status,” specifically added by the U.S. delegation to address the trend towards the "criminalization" of homelessness in many U.S. cities.

The right takes into account the resources available to a country. The obligation is to make fulfillment of the right a priority, and to fulfill it to the maximum extent of available resources. While the precise parameters of the human right to housing as applied to the U.S. context may not yet be fully determined, at a minimum, realization of the right in a resource-rich country such as the U.S. should at a minimum mean that:

- no one is homeless
- no one is penalized for being homeless
- no one is freezing to death on the streets.

This should not be an issue in the U.S., as many countries with far fewer resources not only abide by the right to adequate housing but have enshrined that right in their constitutions.

Recent developments signal increased focus on economic and social rights in general and housing rights in particular:

- A UN focus on the right to housing: in 2002 the UN Office of the High Commission for Human Rights and UN Habitat created a new, joint Housing Rights Program.
- Here at home, a coalition of U.S. groups formed a new network in December 2003 to focus on implementing human rights in the U.S.
- In April 2003, a national Forum on the right to housing in the U.S. was convened jointly by NLCHP and the Centre on Housing Rights and Evictions (COHRE), a Geneva-based housing rights group. Cosponsored by 14 additional national organizations, the Forum brought together some 70 participants from around the country to discuss advocacy for a human right to housing in the U.S.
- As a result of the Forum, a work group formed to further develop and work to carry out the recommendations of the group. The Forum agenda, sponsors and participants are attached at the end of this report.

This work is especially timely. Recent developments suggest that the U.S. is currently in violation of the human right to housing, and related human rights:

Many men, women and children are now literally homeless, and the numbers are growing

- At least 840,000 people are homeless at any given time. Over a year, 2.5-3.5 million are homeless; of this number, 1.35 million are children.
- Requests for emergency shelter increased in 2003 by an average of 13% in 25 cities surveyed, according to a December 2003 report by the U.S. Conference of Mayors (USCM 2003).
- There is not nearly enough emergency shelter to meet the need – in 84% of cities surveyed, emergency shelters have turned away homeless persons seeking shelter, due to a lack of resources (USCM 2003). Shelter does not fulfill the right to housing, but it can preserve life.
- The resources allocated to meeting the basic emergency needs of homeless people – as of this date just a \$23 million increase in funding is expected for FY04 – is woefully inadequate relative to the enormous resources available.

Millions of men, women and children are inadequately or precariously housed, and at imminent risk of homelessness

- Some 12.5 million households are at grave risk of becoming homeless due to high housing costs and low-paying jobs.
- There is not nearly sufficient housing to accommodate the need. In 2003, there was an increase of 83% of people requesting assistance meeting housing costs. Of 26 U.S. cities surveyed, 48% have stopped accepting applications for housing assistance programs because of the length of the waiting list; for the remaining cities, the average length of time on the waiting list to receive assistance is 24 months (USCM 2003).
- Only 34% of the nation's 9.9 million most needy renter households – those in the bottom fifth of the income distribution – receive housing assistance, according to the Harvard report.

Full time work at the minimum wage is not sufficient to pay for housing

- There is not a single American city or rural county where a household with one full-time minimum wage earner can afford a modest one-bedroom apartment, according to the National Low Income Housing Coalition.
- According to a comprehensive report by the Interagency Council on Homelessness, published in 1999, nationally 44% of homeless people (not including children in families) report working full or part time in any given month (ICH 1999). Yet they do not earn enough to pay for housing.
- According to a December 2003 survey of 25 major cities, 17% of all homeless people worked full or part-time (USCM 2003).
- According to the “Norms and Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights,” adopted August 13, 2003 by the UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, transnational corporations and other business enterprises must pay wages sufficient to ensure an “adequate standard of living for them and their families” and “[s]uch remuneration shall take due account of their needs for adequate living conditions with a view toward progressive improvement.”
- Wages that do not meet these conditions are not consistent with the norms.

Homeless people are literally freezing to death on U.S. streets and public places

- Each winter homeless people die on the streets across the country – a direct and brutal violation of the right to life guaranteed by the ICCPR, a treaty the U.S. has signed and ratified (and thus is a party to).
- To date, at least two homeless men have frozen to death in the Nation’s capital this winter alone.

Homelessness is threatening the human right to maintain one’s family

- Families make up 40% of the overall homeless population, representing an increase of 15% during 2003 (USCM 2003).
- The shortage of emergency shelter is especially severe for homeless families, and the most recent data indicate that 33% of requests by homeless families are turned away due to lack of resources (compared to 30% overall) (USCM 2003).
- Moreover, in 60% of cities surveyed, families are required to separate in order to obtain shelter, in violation of their right to maintain their family (USCM 2003).

In cities across the U.S., homeless people are criminally punished for their status

- Homeless people are being cited and sometimes arrested for “illegal lodging” in San Diego, California, even while the city’s homeless population greatly exceeds the number of available shelter spaces.
- Police have been using an anti-camping ordinance in Jacksonville Beach, Florida to harass and arrest homeless people. As part of this campaign of harassment, police routinely seize and destroy the belongings of homeless people.
- Orlando, Florida has a series of laws aimed at criminalizing homelessness, including an anti-camping law and a law that prohibits sitting or lying on the sidewalks in the downtown area. The city further targets its poorest residents by using undercover police

officers to enforce a law that prohibits people from panhandling outside of certain designated “blue-box” areas painted on sidewalks.

- According to the “Norms and Responsibilities of Transnational Corporations and Other Business Entities with Regard to Human Rights,” adopted August 13, 2003 by the UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights: “Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of ... other vulnerable groups.”
- Homeless people are a “vulnerable” group and punishing or targeting them for their status violates these norms.

Current proposals to cut back housing vouchers for low-income people would further diminish people’s access to the human right to housing – in violation of the right.

- The current draft of Administration’s 2005 proposed budget includes cuts to the already inadequate housing voucher program for poor people, according to recent news reports.
- Such cuts would further diminish people’s access to the rights – and constitute a retrogressive measure violative of the right.

Current U.S. policies do not promote the human right to housing

Many countries have incorporated a right to housing in their constitutions, or in their national legislation, or both. Such countries include Belgium, Mexico, France, U.K. Portugal, Russia, South Africa, Spain and Iran. Other constitutions suggest the general responsibility of the State to ensure adequate housing and living conditions for all, based on the rule of law. Examples include Bangladesh, Brazil, Colombia, Costa Rica, Dominican Republic, El Salvador, Finland, Guatemala, Korea (Rep. of), Netherlands, Pakistan, Philippines, Poland, Romania, Sri Lanka, Sweden, Switzerland, Turkey, Venezuela, and Viet Nam, among others.

The U.S. has not done so. Despite the 1949 Housing Act’s call for “a decent home for every American,” this promise has been badly broken. Currently, of those families and individuals poor enough to be eligible for federal housing assistance, only one-third actually receive it. Only 34% of America’s 9.9 million most needy renter households receive housing assistance. Sixty-six percent of the most-needy households – those in the bottom fifth of the income distribution – receive no assistance at all (*The State of the Nation’s Housing 2003*, Harvard’s Joint Center for Housing Studies). A Housing and Urban Development (HUD) study found that 4.9 million unassisted, very low-income households – including 10.9 million people, 3.6 million of whom are children – had “worst case needs” for housing assistance in 1999.

Federal funding for low-income housing has been dramatically reduced over the past few decades. Appropriations for housing in the pending omnibus legislation are \$36.78 billion for fiscal year 2004 – compared to the FY76 budget of \$83.6 billion (in constant 2002 dollars) in the last year of the Ford Administration (*see* National Low Income Housing Coalition). The impact of these funding cuts was severe: In FY 1976, funding subsidized or built 435,362 additional units of low income housing; by 1996, cuts had reduced this number to 8493; then up to about 135,000 in FY00. (NLIHC 2002)

According to recent news reports, the current Administration plans to propose further cuts in the housing voucher program in its FY 2005 budget proposal to Congress – a retrogressive measure that would violate the right to housing.

Recommendations

Legislation recently introduced in the House, the Bringing America Home Act (H.R. 2897), endorsed and supported by NLCHP, calls for a congressional resolution recognizing such a right. NLCHP urges Congress to adopt this resolution as a first step toward realizing the right to housing in the U.S. The National Affordable Housing Trust Fund Act of 2003, H.R. 1102 and S. 1411, currently pending in Congress, and endorsed by NLCHP, would help dedicate resources to realizing the right to housing.

States also have a role to play: several state constitutions impose an obligation to care for the needy. This care has in some cases been held to impose an obligation to provide shelter or transitional housing. But shelter is an inadequate, and expensive solution. States should instead meet these obligations by providing housing. States should recognize housing as a human right and take steps to implement it.

At the local level, cities must stop punishing homeless people for their status through “quality of life” laws that criminalize the public conduct of innocent, everyday activities like sleeping and sitting that homeless people must perform in public. Instead, cities should adopt resolutions recognizing housing as human right. Implementing that right, they should reach out to people living on the streets to offer services and housing, and should adopt local policies to increase the availability of affordable housing, including banning exclusionary zoning laws and sources of income discrimination.

PREFACE¹

The human right to adequate housing is the right of every woman, man, youth and child to gain and sustain a secure home and community in which to live in peace and dignity.²

The homelessness crisis in the United States, amply demonstrated in this report, is marked by a range of violations of internationally recognized human rights, including the human right to adequate housing. This crisis has precipitated a situation where hundreds of thousands are homeless at any given time and several million are homeless during the course of a year. Such a scale of human rights denial is a shocking testimony to the fact that planning and housing policy formulation have failed to build upon the human rights of the residents of the United States. Compounding this dire reality is the ironic fact that the U.S. is one of the wealthiest nations in the world and a proud promoter of democracy and freedoms across the world.

Another irony is the fact that the stubborn belief in policies that the U.S. espouses across the world, including the automatic reliance on the “market” and on privatisation as panacea to bring “prosperity” and “wealth” to all societies, continues domestically to have its own devastating impact on people and communities who are in search of a secure, safe and affordable place to live in peace and dignity. This report presents chilling testimony to the growing problems caused by lack of affordable housing, speculation on housing and land and privatisation of civic services – all contributing towards increasing the number of people and families being forcibly evicted and becoming homeless or inadequately housed across the country.

Such a reality is an affront to the dignity and identity of women, men, youth and children across the country. The moral, ethical and legal basis of human rights flows from the inherent dignity of individuals and the collective identity of communities. It is only such a bold approach that can provide both an incisive analysis and targeted actions to contain the widespread violations of the right to adequate housing and congruent rights occurring with regularity across the U.S. Such an approach needs to draw upon the following key principles that permeate international human rights law and practice:

- *Indivisibility of human rights:* Any response to the causes and consequences of homelessness detailed in this report must adopt an indivisibility of human rights approach. The right to adequate housing has to be seen as a congruent right along with the right to security of the person, the right to security of the home, the right to participation, the right to privacy, the right to freedom of movement, the right to information, the right to be free from inhumane and degrading treatment and the right not to be arbitrarily detained.

¹ Documents referred to in this Preface are available on www.unhchr.ch/housing.

² Definition of the Right to adequate housing proposed in my first report to the UN Commission on Human Rights (E/CN.4/2001/51). This definition is based on the recognition and articulation of the right to adequate housing in the international human rights system.

- *Gender Equality:* Widespread discrimination that women face in all aspects of housing, land and property, including becoming homeless as a result of domestic violence, calls for the specific recognition of women's right to adequate housing and their rights to security of home and person. Gender-based housing policies and legislation would also need to take into account that some groups of women are even more vulnerable to homelessness and other housing rights violations – widowed, women-headed households, women victims of forced evictions and indigenous women. It is critical, therefore, that any response is steeped in the recognition that international human rights law accords to women.³
- *Non-Discrimination:* the implementation of this fundamental principle of human rights is critical as more and more people and communities are facing discrimination, segregation and ghettoisation in terms of housing and living conditions and the attendant denial of essential civic services, especially transportation and proximity to work, school and child care. The requirements flowing from the obligations of international human rights instruments for affirmative action and the retention of subsidies for vulnerable people and communities need to become a key component of any response to deal with the levels of discrimination that prevail in the United States today. Amongst all these groups particular care needs to be taken to tackle the immense crisis created by the fact that, as detailed in this report, a disproportionate percentage of children are homeless in the U.S. Urgent steps will need to be taken to ensure that no child will be subjected to discrimination with regard to her or his right to adequate housing on the grounds of his or her parents' race, colour, nationality or ethnic origin, sex, property or other status, and that special protection and assistance be provided to children living in the streets and those temporarily or permanently deprived of a family environment.⁴

A similar treatment of other key human rights principles is necessary: non-retrogression (to ensure that judicious legislation and policies are not bargained away) and the right to a remedy ensuring justiciability of the right to adequate housing and political and economic accountability (beyond justiciability) of the duty holders.

The report is a major step forward in both exposing the scale of homelessness and the devastation it causes (and the range of human rights violations) and in alerting the U.S. government to take immediate steps, flowing from their legal obligations, to remove the many obstacles that the homeless face. The human rights obligations must also be seen as prescriptions for state and third party actions that can be preventative and ensure that the phenomenon of homelessness is significantly reduced.

³ For preliminary recommendations for governments on overcoming the prevalent crisis of women's rights to housing see the preliminary study on Women and Housing presented to the UN Commission on Human Rights – E/CN.4/2003/55. The final study will be presented in 2005.

⁴ For more recommendations directed at actions to be taken by governments see “draft guidelines on discrimination and adequate housing” in my second report to the UN Commission on Human Rights- E/CN/4/2002/59 paras 37-47.

The report is also an eloquent testimony for the need of the U.S. government to bring into line domestic law and policy formulation, with international instruments it has ratified (the Covenant on Civil and Political Rights (CCPR); the Convention on Elimination of All Forms of Racial Discrimination (CERD) and the Convention against Torture (CAT)), and to move to a speedy ratification of the instruments (The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), The Covenant on Economic, Social and Cultural Rights (CESCR) and the Convention on the Rights of the Child (CRC)) that it has not ratified. I would strongly support the arguments put across in this report for the adoption of legislation that is pending in Congress – Bringing America Home Act and the National Affordability Housing Trust Fund Act – that would give legislative basis to the Right to Adequate Housing and would begin to deal with the near-humanitarian crisis of homelessness being experienced by thousands across the country.

All of the above principles also need to be woven into a programme for all sectors of society for human rights education. This serves the dual purpose of informing people and communities of their inherent human rights, and of creating a climate whereby accountability of the state and third parties to their human rights obligations can be ensured. Without people at the local level being able to know about and claim their human rights, the future realisation of the human right to adequate housing, and congruent human rights across the U.S., is bleak. This report is a valuable resource on which to base the required education and learning.

Miloon Kothari
Special Rapporteur on Adequate Housing
UN Commission on Human Rights
www.unhchr.ch/housing

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INTRODUCTION

Globally, it is estimated that between 20 and 40 million urban households are homeless⁵ and that as many as 1.3 billion people live in inadequate shelter, largely because they cannot afford to do otherwise.⁶ In the United States, it has been estimated that more than 12 million Americans have experienced homelessness during their lifetimes;⁷ currently, 4.9 million families spend more than half of their income on housing or live in substandard housing.⁸ While the extent and conditions of homelessness vary, in particular between less developed and more developed parts of the world, homelessness is a global phenomenon that is increasingly addressed in international law and policy.

The Universal Declaration of Human Rights, adopted in 1948, posits that everyone has the right to an adequate standard of living, and includes within that right the right to adequate housing.⁹ Subsequently, the International Covenant on Economic, Social and Cultural Rights elaborated on the right to housing, and is probably the most significant treaty concerned with the right.¹⁰ While the United States signed the ICESCR in 1976, it has never been ratified by the Senate.¹¹ Subsequently, other treaties have addressed aspects of the right; and the U.S. has ratified one of them. In addition, UN bodies charged with overseeing implementation of these treaties have issued guidelines further explaining the right.¹²

⁵ U.N. Centre for Human Settlements (Habitat), *The State of the World's Cities, 2001*, at 30, U.N.Doc. HS/619/01E (2001).

⁶ U.N. Centre for Human Settlements (Habitat), *The State of the World's Cities, 2001*, at 30, U.N.Doc. HS/619/01E (2001), *citing from* UNCHS (Habitat), 1999, "Basic Facts on Urbanization," Nairobi.

⁷ Bruce Link, et al., *Life-time and Five-year Prevalence of Homelessness in the United States*, 65 *American Journal of Orthopsychiatry* 347–54 (1995) [hereafter "*Homelessness in the U.S. 1995*"].

⁸ U.S. Dep't of Housing and Urban Development, *United States – Habitat II Progress Report 6*, n.14 (2001), *citing* U.S. Dep't of Housing and Urban Development, *A Report on Worst Case Housing Needs in 1999: New Opportunity Amid Continuing Challenges* (2001).

⁹ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 25(1), U.N. Doc. A/810 (1948) [hereafter "UDHR"] ("Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control").

¹⁰ *See* International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, art. 11(1), 993 U.N.T.S. 3, 5 (entered into force Jan. 3, 1976) [hereafter "CESCR"] ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.")

¹¹ Ratification/Signature Status of the International Covenant on Economic, Social and Cultural Rights, *at* http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_booiiv_booiiv_3html.

¹² *See, e.g.*, U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 4, The right to adequate housing, U.N. Doc. E/C.12/1991/4 (1991) [hereafter "General Comment No. 4"].

More recently, in 1996, as part of a decade-long series of conferences on major social issues confronting the world, the UN held a conference on human settlements, Habitat II, including a focus on the human right to housing. The U.S., along with 170 other nations, participated in the conference, which resulted in the Habitat Agenda and Istanbul Declaration. While not treaties, these documents outline commitments made by the signatory nations, and include sections focusing not just on housing but also specifically on homelessness. Five years later, in 2001, state participants reported at a special UN session on their progress in carrying out the commitments of the Agenda. Also recently, the UN's Office of the High Commission for Human Rights and UN Habitat jointly created a new Housing Rights Program, signaling increased UN focus on the right.

In the United States, the past two decades have witnessed unprecedented growth of homelessness. The lack of affordable housing is generally considered a leading cause of this growth; increasingly, housing is also viewed as a key part of any solution to homelessness. Beginning in the mid-eighties, national policy has considered homelessness a national crisis, and has responded with federal legislation and funds. Much of these resources have focused on emergency shelter, however, rather than permanent housing. Since that time, an increasing body of research and practice has pointed to the importance of housing as a more lasting and cost-effective solution. Moreover, the current Administration has made a commitment to ending "chronic" homelessness through supportive housing.

More than ever, housing is relevant to homelessness, both domestically and internationally. In the human rights context, a body of law and policy has developed that addresses (in theory) the need for housing by defining and giving content to a right to housing. Since Habitat II, at least some countries comparable to the United States have adopted new laws and policies to further the right to housing. In the U.S., a patchwork of laws address housing needs, but there is no right defined and the resources provided through existing law are by far inadequate to the need. Understanding the human right to housing, how it has been defined and implemented, and how it may be integrated into U.S. law and policy, may help advance solutions to homelessness in the U.S. at this crucial time.

This report begins with a general overview of the problem of homelessness in the United States today, and discusses the national response to this problem in the context of the 1996 Habitat Agenda. Part two conducts a comparative legal analysis of the right to housing under current domestic and international law. The paper concludes overall, that while there have been progressive steps towards a right to adequate housing in the United States, the nation falls quite far short of its commitments under international law. On a more positive note, however, it also concludes that legal avenues exist, especially at the state level, for finding such a right.

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I. HOMELESSNESS IN THE U.S.: AN OVERVIEW

Homelessness¹³ has been a visible and enduring social problem since the Great Depression. It was starting in the 1980s, however, that the problem as it exists today really developed, with homelessness becoming much more prevalent and the suffering population becoming much more diverse. The two decades since 1980 have seen dramatic increases in the number of homeless people.¹⁴

It is difficult to measure with precision exactly how much homelessness there is, in large part because of its defining characteristics. First, the affected population is by nature difficult to track. Second, homelessness is usually a temporary circumstance rather than a permanent

¹³ According to the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11301, *et seq.*, a person considered homeless is one who “lacks a fixed, regular, and adequate night-time residence ... and has a primary night time residency that is: (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations ... (B) an institution that provides a temporary residence for individuals intended to be institutionalized, or (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.” 42 U.S.C. § 11302 (a). By at least some interpretations, this definition includes not just those who are “literally homeless” (on the streets, in shelters or other programs for homeless people) but also those living doubled-up with others. *See, e.g.*, the U.S. Department of Education definition of homelessness:

- Children and youth who lack a fixed, regular, and adequate nighttime residence, and includes children and youth who are:

- sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason (sometimes referred to as *doubled-up*);
- living in motels, hotels, trailer parks, or camping grounds due to lack of alternative adequate accommodations;
- living in emergency or transitional shelters;
- abandoned in hospitals; or
- awaiting foster care placement.

- Children and youth who have a primary nighttime residence that is a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

- Children and youth who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings.

- Migratory children who qualify as homeless because they are living in circumstances described above.

at <http://www.ed.gov/programs/homeless/guidance.pdf> (as of January 14, 2004).

¹⁴ *See* National Coalition for the Homeless, “How Many People Experience Homelessness?” at <http://www.nationalhomeless.org/numbers.html> (as of January 14, 2004).

condition. People are typically “homeless” for an average of five months at a time.¹⁵ Thus, the relevant question is not simply how many homeless people there are at a particular time, but also how many people have experienced homelessness.¹⁶ Analytically, it is useful to look at homelessness as a continuum, with the literally homeless at one end and those with permanent, adequate and affordable housing at the other. In between these two extremes are those who live in overcrowded, substandard, temporary or otherwise inadequate conditions.

Although there are conflicting reports on the exact scope of homelessness, it is estimated that in the U.S., 700,000 to 800,000 people experience homeless on any given night.¹⁷ Over the course of a year, 2.5 to 3.5 million people will experience homelessness and over the course of five, 7 million will.¹⁸ A telephone interview study conducted in 1994 indicated that as many as 12 million Americans, or 6.5% of the U.S. resident population in that year, have been homeless at some point in their lives.¹⁹ There is also a tendency to underestimate the number of homeless people because of the tendency to focus on shelters. Such a focus excludes homeless people living in rural areas,²⁰ unstable housing arrangements,²¹ and those living in vehicles or makeshift housing.²²

¹⁵ U.S. Conference of Mayors, *Hunger and Homelessness Survey: A Status Report on Hunger and Homelessness in America’s Cities: A 25-City Survey* (December 2003), ii [hereafter cited as “U.S. Conference of Mayors, 2003 Report”] available at <http://www.usmayors.org/uscm/hungersurvey/2003/onlinereport/HungerAndHomelessnessReport2003.pdf> (as of January 14, 2004).

¹⁶ For a discussion of the methodological considerations in measuring the number of people who have experienced homelessness, see <http://www.nationalhomeless.org/numbers.html> (as of January 14, 2004); and Paul A. Toro et al., *Homelessness in the United States: Policy Considerations* 9–13. The latter also includes a summary of U.S. homelessness estimates.

¹⁷ See Martha Burt, *Critical Factors in Counting the Homeless*, 65 *American Journal of Orthopsychiatry* 334, 335 (1995); *Housing and Homelessness*, National Alliance to End Homelessness, 1987; and *Homelessness: Programs and the People They Serve, Findings of the National Survey of Homeless Assistance Providers and Clients: Highlights*, Interagency Council on the Homeless, December 1999. Latter two as reported on the web site of the National Alliance to End Homelessness at <http://www.endhomelessness.org/pub/tenyear/demograp.htm> (as of January 14, 2004).

¹⁸ Bruce Link, et al., *Life-time and Five-year Prevalence of Homelessness in the United States*, 65 *American Journal of Public Health* (1994) [hereafter “*Homelessness in the U.S. 1994*”].

¹⁹ Link, *Homelessness in the U.S. 1994*, *supra* note 7, at 347–54. Note that this survey may be under-representative because it focuses on adults and residents.

²⁰ This is a factor because there tend not to be shelters in rural areas, and the rural homeless population is much more likely to be staying with family. L. Aron and J. Fitchen, *Rural Homelessness: A Synopsis in Homelessness in America* (1996) [hereafter “*Rural Homelessness*”].

²¹ Such as those living in overcrowded situations with relatives, etc.

²² It is estimated that 59.2% of homeless people live in their vehicles and that 24.6% live in makeshift housing. *Rural Homelessness supra* note 2.

The faces of homelessness are now very different than they were in the past; the predominantly middle-aged white male alcoholics that populated skid rows in the post-war era have been replaced by a group “so diverse that the only common denominator is their lack of a home.”²³ They are diverse by employment status, age, gender, family situation, ethnicity, addiction and mental health. A 1999 national survey commissioned by the federal government found that 44% of homeless adults worked at some point in any given month.²⁴ Single men are estimated to be 41% of the homeless population, families with children 40%, single women 14% and unaccompanied minors 5%.²⁵

Forty-nine percent of the homeless population is African-American, 35% are Caucasian, 13% are Hispanic, 2% are Native American and 1% are Asian.²⁶ While studies in the 1980s consistently found high rates of addiction in the homeless population, these studies have been criticized for over-representing the problem by focusing on lifetime use, long-term shelter users and single men.²⁷ The U.S. Conference of Mayors has estimated that 30% of homeless people are substance abusers.²⁸ Roughly 20 to 25% of the single adult homeless population is estimated to suffer from severe and persistent mental illness,²⁹ and only 5 to 7% of the population are estimated to require institutionalization.³⁰ Approximately 15% of the homeless population is estimated to suffer from both mental illness and addiction.³¹ Ten percent of the homeless population consists of veterans.³² This very diverse group is unified by its inability to pay for housing.

²³ Langdon & Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 Col. J.L. & Soc. Probs. 305, 308 (1986).

²⁴ Interagency Council on the Homeless, *Homelessness: Programs and the People They Serve*, 5-9 (1999).

²⁵ U.S. Conference of Mayors, 2003 Report, *supra* note 15, at ii.

²⁶ *Id.*

²⁷ The National Coalition for the Homeless criticizes these studies, *citing* Paul Koegel et al., *The Causes of Homelessness*, and noting that “the frequently cited figure of 65% is probably at least double the real rate for current addiction disorders among all single adults who are homeless in a year” at <http://www.nationalhomeless.org/who.html> (as of January 14, 2004).

²⁸ U.S. Conference of Mayors, 2003 Report, *supra* note 15, at ii.

²⁹ Koegel, *supra* note 27.

³⁰ Federal Task Force on Homelessness and Severe Mental Illness, *Outcasts on Main Street: A Report of the Federal Task Force on Homelessness and Severe Mental Illness* (1992). This report estimates that 5–7% of the homeless population should be institutionalized, while the remainder of those with mental illness could live in the community provided that they have supportive housing.

³¹ “The life of the homeless is such ‘that many chronically homeless people appear to be mentally ill when in reality they manifest symptoms reflective of their environment. The homeless who appear paranoid while living on the street ... may be quite realistic in their fear of being robbed, beaten, abused, or killed. Add to this the physiological stresses resulting from poor nutrition, lack of sleep, and exposure, and it is no wonder that many homeless people manifest some psychopathological symptoms ... Remove these problems and the symptoms may quickly abate ...’ F. Redburn & T. Buss, *Responding to America’s Homeless: Public Policy Alternatives* 79–80 (1986) *as cited in Moore v. Ganim*, 233 Conn. 557, 657 (1995) (A.J. Berdon, *dissenting*). ‘Additionally, it has been observed that homeless people often act strangely as a kind of self-defense mechanism. They wish to keep other people, including potential aggressors, away.’ Redburn, *at* 80; A. Baum & D. Burnes, *A Nation in Denial* 67 (1993),

The causes of this inability are both structural and personal. Structurally, homelessness results from inadequate incomes, a lack of affordable housing, altered and/or reduced public assistance, lack of services for some vulnerable populations³³ and poverty.³⁴ Lack of affordable housing is often cited as the greatest problem; a 1991 federal study concluded that while the poorest quarter of renters totaled eight million households, nationally there were fewer than three million affordable rental units available, a shortfall of approximately five million households.³⁵ In addition, 13.7 million households, or 14% of all households, have “critical housing needs,” meaning that they spend more than 50% of their incomes for housing or live in substandard housing.³⁶ Inadequate incomes are obviously linked to this problem and there is not a single city or rural county in the United States where a person working a regular work week at the legal minimum wage can afford the fair market rent, based on federal affordability guidelines (30% of income or less spent on rent), for a one-bedroom apartment.³⁷ Poverty generally increases vulnerability to homelessness, increasing the possibility that illness, accidents or other financial or personal crises might push one over the brink into homelessness. As the Interagency Council

as cited in Moore. Fear is rational given their victimization, ‘it is estimated that the incidence of rape (heterosexual and homosexual) is twenty times greater for the homeless than for the general population.’” R. Bingham, R. Green and S. White, *The Homeless in Contemporary Society* 109 (1987) *as quoted by Moore*, 233 Conn. at 658 (A.J. Berdon, *dissenting*).

³² U.S. Conference of Mayors, 2003 Report, *supra* note 15, at ii.

³³ Deinstitutionalization of the mentally ill began in the 1960s as a result of increasing public demands for more modern, humane treatment of psychiatric patients. Patients who did not pose an immediate threat to themselves or others were released on the understanding that they would be placed in recovery centers or community-based homes. As a result of the group’s political powerlessness and the limited funding available, however, these centers and homes unfortunately did not materialize on a mass scale, leaving patients who were unprepared to care for themselves with no place to live. John H. Whitfield, *A Guide to Finding a Right to Shelter for the Homeless*, 9 Miss. Coll. L.R. 295, 300 (1989).

³⁴ There seems to be relative consensus on these causes of homelessness and they are cited, in whole or in part, in a number of different sources, including: U.S. Conference of Mayors, 2003 Report, *supra* note 15 at ii; John M. Quigley et al., Institute of Business and Economic Research – Fisher Center for Real Estate and Urban Economics, *The Economics of Homelessness: The Evidence from North America 1* (2000) (“simple economic principles governing the availability and pricing of housing and the growth in demand for the lowest quality housing explain a large portion of the variation in homelessness among U.S. metropolitan housing markets. Further, rather modest improvements in the affordability of rental housing or its availability can substantially reduce the incidence of homelessness in the U.S.”); Priority: Home!, *The Federal Plan to Break the Cycle of Homelessness* 25–33 (1994) (emphasizing a multiplicity of causes, structural and personal, including poverty, changes in the labor market, declines in income assistance, a lack of affordable housing, changes in family structure, and drugs, disabilities and chronic health problems); and National Law Center on Homelessness & Poverty, *Homelessness and Poverty in America: Causes*, at http://www.nlchp.org/FA_HAPIA/causes.cfm (as of January 14, 2004), among others. *See, in contrast*, Carl F. Horowitz, The Heritage Foundation, *Washington’s Continuing Fiction: A National Housing Shortage* (1990) available at <http://www.heritage.org/library/categories/healthwel/bg783.html>.

³⁵ Priority: Home!, *supra* note 34, at 28.

³⁶ Stegman et al., *Housing America’s Working Families at* http://www.huduser.org:80/periodicals/urm/urm_12_2000/urm1.html (as of January 14, 2004).

³⁷ National Low Income Housing Coalition, *Out of Reach 2003: America’s Housing Wage Climbs* (2003) available at <http://www.nlihc.org/oor2003/>.

on Homelessness has noted, “[s]tudies leave no question that extreme poverty is the virtually universal condition of clients who are homeless, and that this poverty is one reason they cannot maintain themselves in housing.”³⁸ Obviously, lasting solutions to the problem of homelessness will necessarily address structural causes; the “resolution [of homelessness] will require tackling the enduring roots of poverty.”³⁹

These structural trends are exacerbated by individual vulnerabilities,⁴⁰ such as substance abuse and mental illness or other factors like domestic violence⁴¹ and low levels of education. All of these structural and non-structural factors increase not only a person’s risk of experiencing homelessness but also the likelihood that it will persist.⁴² It seems to be categorically false that any but a very few homeless people are so “by choice.”⁴³ The fall into homelessness may be caused both by uncontrollable external forces and poor personal or financial decisions.⁴⁴

Homelessness obviously has a devastating effect. Both the physical and mental health of homeless people are often at risk. A 1996 survey revealed that 40% of homeless clients had gone a full day without eating within the last 30 days.⁴⁵ 45% report one or more chronic health

³⁸ Interagency Council on the Homeless, *Homelessness: Programs and the People They Serve – Findings of the National Survey of Homeless Assistance Providers and Clients* (Summary) 13 (1999). [Hereafter “*ICH, Homelessness: Programs and People.*”]

³⁹ Priority: Home! *supra* note 34 at 17.

⁴⁰ See Takahashi, 20 *Progress in Human Geography* 291, 293 (1996) (“Structural trends have exacerbated individual vulnerability to becoming homeless, resulting in a growing population at risk.”).

⁴¹ 36% of cities surveyed by the U.S. Conference of Mayors in 2003 identified domestic violence as a primary cause of homelessness. U.S. Conference of Mayors, 2003 Report, *supra* note 15, at 72.

⁴² Priority: Home!, *supra* note 34 at 25–26 and *Homelessness: Programs and People*, *supra* note 33, at 13.

⁴³ See Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 *Yale L. & Pol’y Rev.* 1, 11 (1996) (“[S]ome commentators state that homelessness is a ‘choice,’ and that homeless people simply prefer living outdoors as a ‘lifestyle’; this appears to be a view espoused by some politicians and pundits, as opposed to social scientists or others who have studied the issue ... such views speak more to solutions: what should be done and who should do it. Insofar as they make statements about causation – such as attributing homelessness in general to ‘choice’ – they do not appear to be based on any empirical evidence.”). In the early 1980s, the Reagan Administration took the view that homeless people are so by choice: “What we have found in this country, and we’re more aware of it now, is one problem that we’ve had, even in the best of times, and that is the people who are sleeping on the grates, the homeless who are homeless, you might say, by choice.” Ronald Reagan quoted in the *Boston Globe*, Feb. 1, 1984 at 2, col.3.

⁴⁴ For a discussion of personal agency in homelessness and its effects on adjudication on behalf of homeless people, see Wes Daniels, “*Derelicts, Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*,” 45 *Buffalo L. Rev.* 687 (1997). “Judges seem to think, and lawyers seem to believe they have to convince judges that homelessness is either ‘voluntary’ or ‘involuntary.’ This is a false dichotomy. For most homeless people, there are significant elements of both agency and compulsion in the decisions they make. It may be that for many homelessness is at some level ‘voluntary.’ But the range of choices available to homeless individuals may be so narrow and so unsatisfying that a condition many of us cannot imagine being freely chosen is indeed the least of all possible evils.” *Id.* at 716.

⁴⁵ *ICH, Homelessness: Programs and People*, *supra* note 38, at 22.

conditions and 26% report one or more acute infectious conditions such as bronchitis.⁴⁶ The Interagency Council on the Homeless reported in 1991 that “the death rate for homeless males in each age group is roughly five times that of non-homeless males.”⁴⁷ It has also been suggested that the daily stresses of homelessness may contribute to mental illness.⁴⁸ Safety and security are also major concerns. Since becoming homeless, two in five homeless people have been faced by the common threat of robbery and theft, 22% report being physically assaulted and 7% report being sexually assaulted at least once since being homeless.⁴⁹

Second, homelessness also contributes to the break down of families, which can be the vital source of support in many peoples’ lives. In the U.S. Conference of Mayors’ 25-city survey, 60% of cities surveyed reported that families may have to break up in order to be sheltered.⁵⁰ Finally, homeless children suffer a number of additional harms. “As many as one third of homeless children may not be attending school on a regular basis.”⁵¹ In addition to these educational disruptions, they may also suffer “serious emotional and developmental problems that can persist long after their families find permanent housing.”⁵²

Homelessness also has serious deleterious effects on society as well as on homeless individuals and their families. Broken down families, for example, affect social cohesion. There are serious economic effects as well. First, there is the likelihood of current reduced productivity for currently homeless working people and future reduced productivity for uneducated or poorly educated homeless children. Second, allowing homelessness to continue may be less cost-effective than providing housing, as homeless people tend to use the most expensive public systems, such as emergency rooms and jail cells. A home in supportive housing is estimated to cost far less than a city shelter cot, a city hospital bed, a state psychiatric bed, a city jail cell or even a state prison cell.⁵³ Both city governments and courts, including those who have ultimately held against a right to shelter or initiatives promoting such a right, have recognized the validity of these economic considerations.⁵⁴

⁴⁶ ICH, *Homelessness: Programs and People*, *supra* note 38, at 23.

⁴⁷ Interagency Council on the Homeless, Annual Report 34 (1990), *as quoted in Moore v. Ganim*, 233 Conn. 557, n11 (1995).

⁴⁸ *Id.*

⁴⁹ ICH, *Homelessness: Programs and People*, *supra* note 38, at 22.

⁵⁰ U.S. Conference of Mayors, 2003 Report, *supra* note 15, at 57.

⁵¹ Priority: Home! *supra* note 34, at 24, citing an unspecified U.S. Department of Education report from 1992.

⁵² Priority: Home! *supra* note 34, at 24.

⁵³ <http://www.csh.org/ny.html> on August 2, 2001.

⁵⁴ *See, e.g., Tilden v. Hayward*, 1990 WL 131162, at 18 (Del. Ch. 1990) (“It has been shown time and again that it is more economical to house an intact family than to provide child protective services for a single child.”). *See also*, the summary statement for the D.C. Overnight Shelter Initiative, “Initiative 17” as quoted in Florence

Homelessness also results in a *de facto* exclusion of a significant portion of the population from participation in democratic life.

II. THE HABITAT AGENDA AND THE NATIONAL RESPONSE⁵⁵

A. *Habitat I*

Government representatives from 132 nations met in Vancouver, British Columbia in 1976 to participate in the first United Nations Conference on Human Settlements, Habitat I. The conference produced the Vancouver Declaration on Human Settlements⁵⁶, which expressed international concern over the “extremely serious condition of human settlements,” focusing on housing as a component of equitable development and as an integral part of human rights.

The Declaration emphasizes that environmental concerns, planning and development, transportation, infrastructure and services, and participatory decision-making are essential to achieving the goal of adequate housing for everyone. The Declaration states that “adequate shelter and services are a basic human right,” and reflects the view that this right intersects with and is dependent upon the fulfillment of other human rights.⁵⁷ Further, it places the obligation for fulfillment of these rights on governments, which are to satisfy this commitment by means ranging from “direct assistance to the least advantaged through guided programmes of self-help and community action.”⁵⁸

Habitat I led to the creation of the United Nations Centre for Human Settlements (UNCHS - Habitat), a specialized UN agency intended to “promote socially and environmentally sustainable

Wagman Roisman, National Support Center for Low Income Housing, *Establishing a Right to Housing: An Advocate's Guide*, n11 (1991) [hereafter “Roisman, Establishing A Right to Housing”]:

The District of Columbia, in recognition that:

All persons have a right at all times to overnight shelter adequate to maintain, support, and protect human health;

The costs of providing adequate and accessible shelter to all in need are outweighed by the costs of increased police protection, medical care, and suffering attending the failure to provide adequate shelter; and

It is in the best interest of the District to provide overnight shelter for the homeless, hereby establishes in law the right to adequate overnight shelter, and provides for identification of those in need of shelter and provision of such shelter.

⁵⁵ Note that the March 1998 Law Center paper entitled *Habitat II and U.S. Implementation: Background and Overview* provides a more complete discussion of the background to these conferences, the content of the Habitat Agenda and the Meeting America's Housing Needs (MAHN) dialogues. See National Law Center on Homelessness and Poverty, *Habitat II and U.S. Implementation: Background and Overview* (March 1998).

⁵⁶ Vancouver Declaration on Human Settlements and Plan of Action, UN Doc. A/CONF.165/PC.1/INF.8 (1976).

⁵⁷ *Id.* at para 8.

⁵⁸ *Id.*

human settlements development and the achievement of adequate shelter for all.”⁵⁹ The agency, which became operational in 1977, initially focused on promoting the Vancouver Declaration’s plan of action and on monitoring the implementation of housing policies worldwide. It was later responsible for the coordination of the second UN Conference on Human Settlements, Habitat II.

B. Habitat II and the Habitat Agenda

Recognizing adequate housing as essential to the development of individuals and communities and the prevalence of problems associated with its lack, the second UN Conference on Human Settlements, Habitat II, was convened in Istanbul, Turkey in June 1996. The conference resulted in the Habitat Agenda, “a global call to action,” in the form of an international, non-binding declaration of commitment to the twin themes of “adequate shelter for all” and “sustainable human settlements development in an urbanizing world.” The conference also produced the Istanbul Declaration, which broadly declared the signing governments’ endorsement of these two goals. In contrast to the Vancouver Declaration, primarily an expression of concern, the Istanbul Declaration and Habitat Agenda are much more developed and specific,⁶⁰ including a Global Plan of Action for the implementation, monitoring and evaluation of the Agenda.⁶¹

The Habitat Agenda, like the Vancouver Declaration that preceded it and the New York Declaration that followed it, is not a treaty. Rather it represents voluntary and non-binding commitments negotiated and agreed to by the international community.⁶² States cannot be brought to an international tribunal for failure to adhere to the Habitat Agenda or the associated Declarations. These commitments remain significant despite their voluntary nature, however, and some scholars suggest that voluntary commitments (or “soft law”) can be as or even more effective than legally binding agreements.⁶³ Failure to adhere to such commitments can expose states to public criticism both at home and abroad. Further, courts in the United States could use the Habitat commitments as a tool to help interpret provisions of domestic law.

Like the Vancouver Declaration, the Habitat Agenda reaffirms that “all human rights – civil, cultural, economic, political and social – are universal, indivisible, interdependent and interrelated.”⁶⁴ But the Habitat Agenda also states that there is a “right to adequate housing,”⁶⁵

⁵⁹ UN-Habitat Web Site, About UN-Habitat, at <http://www.unchsh.org/about/mandate.asp> (as of January 14, 2004).

⁶⁰ This is not to suggest that the Habitat Agenda is necessarily sufficiently specific or developed for its stated purposes, just that it is more so relative to the Vancouver Declaration.

⁶¹ Report of the United Nations Conference on Human Settlements (Habitat II), Istanbul, June 3-14, 1996, U.N. Doc. A/CONF.165/14, at paras. 53-241 (1996) [hereafter Habitat Agenda].

⁶² The international instruments associated with the right to housing and their interaction are discussed in greater detail in Section IV, *infra*.

⁶³ See, e.g., Sir Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 Am. J. Int’l L. 443 (1983); Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 Mich. J. Int’l L. 420 (1991); and *A Hard Look at Soft Law: A Panel*, 82 Am. Soc’y Int’l L. 371 (1988).

⁶⁴ Habitat Agenda, *supra* note 61, at para. 26.

and creates an obligation on states to “take appropriate action in order to promote, protect and ensure the full and progressive realization” of this right.⁶⁶ As discussed in detail later in this report,⁶⁷ the right to housing does not create a positive duty on the state to provide a home to every individual.⁶⁸ Further, the right does not require states to act to fulfill it immediately;⁶⁹ rather, they are charged by the Habitat Agenda with “progressive realization” of the right.⁷⁰ Decisions of some international courts in Europe suggest that states may be required to regulate markets to ensure housing affordability⁷¹ and they may have to take measures to ensure that housing conditions are not intolerable.⁷²

Second, Habitat II was more inclusive. Unlike the Vancouver conference, which included only government representatives, Habitat II brought together national governments from 171 countries (39 more than Habitat I) as well as representatives from local governments, the private sector and non-governmental and community-based organizations. This inclusiveness reflected the belief that participation from a number of different sectors was key to achieving sustainable human settlements and adequate shelter for all. As stated in the Habitat Agenda itself:

Partnerships among countries and among all actors within countries from public, private, voluntary and community-based organizations, the cooperative sector, non-governmental organizations and individuals are essential to the achievement of

⁶⁵ Note that the U.S. delegation conceded the inclusion of a reference to a right to housing in the Agenda in return for the language stating such a right would largely be realized through market mechanisms.

⁶⁶ Habitat Agenda, *supra* note 61, at para. 61.

⁶⁷ The parameters of the right to housing are discussed further in Section IV, *infra*.

⁶⁸ NLCHP, Habitat II and U.S. Implementation, *supra* note 55, at 8 (March 1998). *See also*, Centre on Housing Rights and Evictions Web Site, *Common Myths about Housing Rights*, available at <http://www.cohre.org/hrbody6.html> (on June 26, 2001) (“The right to housing has never been interpreted under international law to mean that States must provide housing, free of charge to all who request it”).

⁶⁹ *See Common Myths about Housing Rights*, *supra* note 68 (“[I]t would be ideal if States could fulfill all aspects of the right to housing immediately. International law has recognized the impracticality of this and has responded by interpreting this right to mean that States parties will have some legal obligations that must be undertaken immediately and others that are more long-term or progressive in nature”).

⁷⁰ They are of course required to make some efforts to fulfill this right. *See Common Myths about Housing Rights*, *supra* note 68 (“This does not mean, however, that States can indefinitely defer efforts to ensure the enjoyment of the rights in the Covenant.”).

⁷¹ *Case of James and others v. U.K.*, 98 Eur. Ct. H.R. (Ser. A) (1986) (rent control programs’ infringement on property rights justified because housing is a “prime social need, the regulation of which cannot entirely be left to play of market forces.”). *See also*, *Mellacher and Others v. Austria*, 169 Eur. Ct. H.R. (Ser. A) (1989) (social interest in assuring affordable housing outweighed property interests of landlords claiming government-regulated rent reductions violated their right to peaceful enjoyment of possessions).

⁷² *Guzzardi v. Italy*, European Commission on Human Rights, Application No. 7367/76. Report of December 7, 1978, at 34.

sustainable human settlements development and the provision of adequate shelter for all and basic services. Partnerships can integrate and mutually support objectives of broad-based participation through, *inter alia*, forming alliances, pooling resources, sharing knowledge, contributing skills and capitalizing on the comparative advantages of collective actions. The processes can be made more effective by strengthening civil organizations at all levels. Every effort must be made to encourage the collaboration and partnership of all sectors of society and among all actors in decision-making processes, as appropriate.⁷³

The Secretary-General at the time, Boutros Boutros-Ghali, praised this participatory element of the conference, calling it one of the “main innovations”⁷⁴ of Istanbul and noting that “Habitat is the first U.N. conference to have given, as part of its official machinery, a platform to representatives of civil society.”⁷⁵ In participating countries around the world, including the United States, preparatory committees began meeting more than a year before Habitat II.⁷⁶ These meetings included “business leaders, community activists, governmental officials and academics”; there were also community-based meetings that allowed citizen contributions to the dialogue.⁷⁷ In addition, a number of mayors attended the conference.⁷⁸ In the United States, the Meeting America’s Housing Needs (MAHN) project, a collaborative effort organized by U.S. NGOs, continued the participatory dialogue after the conference, bringing together interested

⁷³ Habitat Agenda, *supra* note 61, at para. 33. Note that broad-based participation in achieving adequate shelter for all is a major theme both in the official agreements and in this report. In the former case, it is mentioned throughout the Habitat Agenda, the Istanbul Declaration and the Declaration on Cities and other Human Settlements in the New Millennium.

⁷⁴ “‘City Summit’ Ends with Leaders’ Commitment to Improve Living Standards,” UN Press Release, U.N. Doc. HAB/IST/25, p.9 (June 15, 1996), *as cited in* Janet Ellen Stearns, *Voluntary Bonds: The Impact of Habitat II on U.S. Housing Policy*, 16 St. Louis U. Pub. L. Rev. 419, n21 (1997).

⁷⁵ Implementation and follow-up to the outcome of the United Nations Conference on Human Settlements (Habitat II): Report of the Secretary-General, U.N. GAOR, 51st Sess., Agenda Item 96(e), U.N. Doc. A/51/384, at P 2c (1996) as cited in Stearns, *supra* note 74, at n22.

⁷⁶ Stearns, *supra* note 74, at 425.

⁷⁷ *Id.*

⁷⁸ Mayor Kurt Schmoke of Baltimore, who attended Habitat II, stated that “We have had representatives from both democratic and republican parties, mayors from cities throughout the country and we just wanted people to know that we feel how important this conference is. It is the beginning of a new era with local government officials being listened to in the development of UN documents and we see this as kind of the wave of the future. There will be more and more of these conferences in which we try to solve local problems through these international forums.” Joan M. Veon, Transcript of Interviews from Rio+5, Istanbul and Annapolis *at* <http://www.ninehundred.net/~jveon/USA-EXCE.html> (as of January 14, 2004).

stakeholders in an effort to identify and address areas of conflict, identify areas of collaboration, and make voluntary commitments to help achieve the goals of the Habitat Agenda.⁷⁹

A third related difference between the agreements reached in Vancouver in 1976 and in Istanbul two decades later is the “enabling approach” propounded in the Habitat Agenda. While the Agenda does make clear that it is the state’s responsibility to ensure the coherence of housing policy, to guarantee the implementation of that policy within the human rights framework and to provide special assistance to groups that cannot participate in the housing market, it also emphasizes that the realization of the right to adequate housing is not dependent on the state alone. The enabling approach therefore calls on government to facilitate and promote public-private partnerships for housing development and services. This approach is intended to tap into the comparative strengths of each sector of society, while balancing out their competing interests.

The nature of state responsibility for housing and human settlements is laid out throughout the Habitat Agenda,⁸⁰ particularly in the Global Plan of Action.⁸¹ National governments are charged with taking “appropriate action,” including but not limited to “adopting policies aimed at making housing habitable, affordable and accessible, including for those who are unable to secure adequate housing through their own means.”⁸² Adequate and affordable housing is supposed to be achieved chiefly through market-based forces as “the primary housing delivery mechanism.”⁸³ Signing governments also committed themselves, however, to intervention in the event of market failures⁸⁴ and in order to service groups that are “insufficiently served by markets.”⁸⁵ States are charged not only with implementation but also with monitoring and evaluation and follow up actions as well. The Agenda links these responsibilities to both the inadequately housed and the

⁷⁹ More specifically, the MAHN established four broad areas for dialogue: housing affordability, discrimination, housing supply and the economic viability of communities. *See* NLCHP, Habitat II and U.S. Implementation, *supra* note 55, at 11.

⁸⁰ Homelessness is also addressed in the Istanbul Declaration on Human Settlements. *See* The Istanbul Declaration on Human Settlements, United Nations Conference on Human Settlements (Habitat II), UN GAOR, UN Doc A/Conf.165/14, at para. 4 (1996).

⁸¹ Habitat Agenda, *supra* note 61, at paras. 53–241.

⁸² Habitat Agenda, *supra* note 61, at para. 61.

⁸³ Habitat Agenda, *supra* note 61, at para. 63 (“A second fundamental objective of this chapter is to enable markets – the primary housing delivery mechanism – to perform their function with efficiency. Actions to achieve this objective and at the same time contribute to social goals, including, where appropriate, market-based incentives and compensatory measures, are recommended.”).

⁸⁴ Habitat Agenda, *supra* note 61, at para. 72(g) (“Periodically assess how best to satisfy the requirement for government intervention to meet the specific needs of people living in poverty and vulnerable groups for whom traditional market mechanisms fail to work.”).

⁸⁵ Habitat Agenda, *supra* note 61, at para. 71 (“Government interventions are required to address the needs of disadvantaged and vulnerable groups that are insufficiently served by markets.”).

homeless and directs that the state should work in consultation with the affected population to address these problems.⁸⁶

Other points in the Habitat Agenda also address homeless people and the obstacles they face. The Habitat Agenda recognizes homelessness as among the “most serious problems confronting cities and towns and their inhabitants,”⁸⁷ notes that it threatens “standards of health, security and even life itself,”⁸⁸ and states that “special attention should be given to the circumstances and needs of ... people who are homeless.”⁸⁹ The Agenda also states that there shall be “[no] discrimination of any kind ... as to birth or other *status*,” [emphasis added] which would compromise “equal access to housing, infrastructure, health services, adequate food and water, education and open spaces,”⁹⁰ a statement relevant to those laws which would punish homeless people based on their status. In addition, a number of the Agenda’s fourteen commitments to “adequate shelter” are directly applicable to homeless people.⁹¹ Further, the Agenda states that special attention should be paid to particular sub-groups of homeless people, including children⁹² and people with mental and/or physical disabilities,⁹³ among others.⁹⁴

As a result of the Istanbul conference, UNCHS became the lead United Nations agency for the implementation of the Habitat Agenda.

⁸⁶ Governments’ actions include but are not limited to, “effective monitoring and evaluation of housing conditions, including the extent of homelessness and inadequate housing, and, in consultation with the affected population, formulating and adopting appropriate housing policies and implementing effective strategies and plans to address those problems.” *Id.* at para 61 (d).

⁸⁷ *Id.* at para. 6.

⁸⁸ *Id.* at para. 11.

⁸⁹ *Id.* at para. 38.

⁹⁰ *Id.* at para. 27.

⁹¹ *See, e.g., id.* at para. 40(c) (“Promoting access for all people to safe drinking water, sanitation and other basic services, facilities and amenities, especially for people living in poverty, women and those belonging to vulnerable and disadvantaged groups”), para 40(e) (“Promoting broad, non-discriminatory access to open, efficient, effective and appropriate housing financing for all people, including mobilizing innovative financial and other resources – public and private – for community development.”), para. 40(h) “Increasing the supply of affordable housing, including through encouraging and promoting affordable home ownership and increasing the supply of affordable rental, communal, cooperative and other housing.”), and para. 40(l) (“Promoting shelter and supporting basic services and facilities for education and health for the homeless.”).

⁹² Paragraphs addressing children’s needs include 13, 36, 38, 40(k), 51, 94. *Id.* at paras. 13, 36, 38, 40(k), 51, 94.

⁹³ Paragraphs addressing disability include 16, 38, 40(g), 40(j), 40(l), 41(m), 69(c), 78. *Id.* at 16, 38, 40(g), 40(j), 40(l), 41(m), 69(c), 78.

⁹⁴ Children and the mentally and/or physically disabled may also be considered “vulnerable” and “disadvantaged” people. *See, e.g., id.* at paras. 18, 30, 34, 38, 93–98.

C. Istanbul +5 and the Declaration on Cities and Human Settlements

The Special Session of the General Assembly for an Overall Review and Appraisal of the Implementation of the Habitat Agenda (Istanbul +5) was held at the United Nations in New York City in June 2001. Istanbul +5 was intended to examine implementation at the five-year mark of the Habitat Agenda and to reaffirm the international community's commitment to the Agenda's principles. Country reports, based on twenty key commitments and strategies selected from the Habitat Agenda, were to form the basis for this review. The conference resulted in the Declaration on Cities and other Human Settlements in the New Millennium,⁹⁵ which was intended to do four things: renew Habitat II commitments, recognize progress in implementing the Agenda, recognize gaps and obstacles in implementation and lay out a future plan of action. In the context of homelessness, there are at least two key distinguishing features of Istanbul +5.

First, the broad-based participation that characterized the dialogue and output of Habitat II was narrowed. While the New York Declaration itself reaffirms the importance of partnership,⁹⁶ the actual levels of non-governmental participation in Istanbul +5 and in the two preparatory meetings leading up to the conference belie this claim. At the preparatory committee meetings, a draft declaration and a draft compilation report for the conference were prepared. Certain paragraphs were fully agreed in Nairobi, with others set aside for review at the actual conference in New York. During the preparatory committee meetings, the United States voiced its opposition to NGO participation both in the drafting committee and in the plenary session of Istanbul +5. While NGO protests led to them being allowed to observe all drafting committee meetings and make presentations at committee-determined "public sessions," it appears that they were not able to directly influence the content and language of the draft declaration, which largely set the tenor and scope of discussion for New York.

The second salient feature of the Istanbul +5 process may be the result of the first. Perhaps foremost, the New York Declaration does not explicitly contain one of the defining characteristics of the Agenda it was intended to reaffirm, namely the "right to adequate housing." This right is included in the Universal Declaration of Human Rights, the Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and a number of other international conventions, declarations and recommendations.⁹⁷

⁹⁵ The Declaration on Cities and Human Settlements in the New Millennium (2001) (cited hereafter as "New York Declaration").

⁹⁶ See, e.g., *id.* at para. 14 ("We [a]ppreciate the important contribution made by local authorities worldwide in the implementation of the Habitat Agenda through concerted efforts and strengthened partnerships between Governments at all levels, resulting in the improved condition of human settlements, including improved urban governance. Broad-based participation in decision-making, together with accountability, simplicity of procedures and transparency, is imperative to prevent corruption and to promote public interests").

⁹⁷ United Nations Office of the High Commissioner for Human Rights Web Site, Legal Sources of the Right to Adequate Housing, available at <http://193.194.138.190/housing/i2echou.htm>. Note that the sources of this right in international law are discussed further in Section II below.

The right's textual exclusion does not necessarily imply its rejection. As noted, there are a number of other international instruments that support a right to adequate housing and signatories to the Habitat Agenda have "reaffirm[ed] that all human rights – civil, cultural, economic, political and social – are universal, indivisible, interdependent and interrelated,"⁹⁸ implying the continued existence and their continued support for a right to adequate housing even after the New York Declaration. In addition, the New York Declaration does refer to the Istanbul Declaration and Habitat Agenda (both of which include the "right to adequate housing")⁹⁹ as "the basic framework for sustainable human settlements development in the years to come."¹⁰⁰ Nevertheless, the fact that the right to adequate housing was not expressly reaffirmed may indicate a retreat by many governments, at least among some key nations – the United States prominently included in this group – to a possible reduced commitment to providing adequate housing for the poor through a rights-based approach.

The decreased access at the Preparatory Committee meetings and the absence of an explicit right to housing raised objections on the part of many non-governmental organizations. The Housing and Land Rights Committee of the Habitat International Coalition (HIC), an international non-profit coalition of organizations and individuals working in the human settlements field, convened a protest and issued a press release "strongly ... protest[ing] both the process and outcome of the present special session."¹⁰¹ Thirty-two NGOs also signed on to the press release, which claimed a "degradation of civil society's role"¹⁰² and the "abandonment of human rights" in the New York Declaration.¹⁰³ Istanbul +5, they said, was neither a "fair assessment" of progress, nor an "inclusive process."¹⁰⁴ There were other commentators, however, including NGOs, that disagreed with this assessment, arguing that they were satisfied with their

⁹⁸ Habitat Agenda, *supra* note 61, at para. 26.

⁹⁹ See The Istanbul Declaration on Human Settlements, *supra* note 80, at para. 8 ("We reaffirm our commitment to the full and progressive realization of the right to adequate housing as provided for in international instruments.") and Habitat Agenda, *supra* note 61, at para. 26 ("We reaffirm our commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments.").

¹⁰⁰ New York Declaration, *supra* note 95, pmb.

¹⁰¹ Press Release, Habitat International Coalition – Housing and Land Rights Committee, "Back to the Future" (June 7, 2001) (on file with author).

¹⁰² *Id.* ("The dilution of the role of NGOs and their exclusion from the drafting negotiations have far-reaching implications and set a dangerous precedent that contradicts the goals and spirit of the United Nations, and contradicts the Secretary-General's vigorous promotion of partnerships in the UN's work. Such exclusion also risks reversing all the gains made since 1994 with respect to the process and substance towards implementing the Habitat Agenda. Civil society and nongovernmental organizations embody a resource of practical and community-based experience and independent analysis aimed at problem solving in this field of human settlements. We have been contributing to development [sic] and upholding human rights standards in the spirit and continuity of the social forces that have authored them – long before States codified those principles in international law.")

¹⁰³ *Id.* ("The New York Declaration, as it stands, is evidence of a failure to live up to the noble standards we jointly set for ourselves five years ago.")

¹⁰⁴ *Id.*

participation and convinced that they had impacted the declaration.¹⁰⁵ While UNCHS Executive Director Anna Tibaijuka “appeared content” with the Declaration,¹⁰⁶ other UN-affiliated commentators were less sanguine. Virginia Dandan, the Chair of the UN Committee on Economic, Social and Cultural Rights, called the session “a step backwards from the Habitat Agenda,” and added “states are going back on their own commitments.”¹⁰⁷ Miloon Kothari, the UN Special Rapporteur on Adequate Housing, called the draft declaration “very soft” for the absence of housing as a human right.¹⁰⁸

D. Habitat II, Istanbul +5 and the United States

The United States clearly played an important role at both the Habitat II and Istanbul +5 conferences. These roles differed significantly, however, and the U.S. influence and emphases were quite different at the two conferences, as were the levels and form of participation in dialogue and representation. The latter may have been due in part to the nature of the conferences; the 1996 conference was a landmark opportunity to address human settlements and to set associated benchmarks whereas the 2001 conference was intended as more of an opportunity for measurement against those benchmarks. This difference alone, however, does not seem like an adequate explanation, and the decreased participation may reflect policy as well.

Habitat II was preceded by extensive preparation in the U.S., and included the involvement of broad constituencies. A National Preparatory Committee was appointed to ensure the full inclusion of the public, private and non-profit sectors. In addition to collecting best practices and raising public awareness about Habitat II, this group helped to develop a framework for the national report for the conference and a national plan of action following the conference.¹⁰⁹ The U.S. delegation for Habitat II also appears to have reflected this policy of inclusion. The delegation of forty-two people was made up of mayors, business people, governmental representatives and community leaders. The Department of Housing and Urban Development (HUD) also convened a number of broad-based meetings preceding and following the conference and it was reported by at least one member of the NGO forum that their influence on the delegation was “substantial.”

¹⁰⁵ As reported in the June 11, 2001 UN Times, “NGO representatives Norelle Townshend and Nicky Nzioki, co-chairs of the international facilitating group for Istanbul +5, said they were both satisfied with the participation of NGOs at the event and that they believed they had an enormous amount of input into the declaration. They also said the special session was innovative in its attempt to include participation of NGOs in various forms, although there were several closed committees where the bulk of negotiations over the final document took place.”

¹⁰⁶ Scott Hartmann, Istanbul +5: Drawn-Out Talks Yield Declaration On Settlements, UN Wire, June 11, 2001 at <http://www.unfoundation.org/unwire/2001/06/11/index.asp#15204>.

¹⁰⁷ Scott Hartmann, Istanbul +5: Right to Housing A Contentious Issue At UN Session, UN Wire, June 8, 2001 at <http://www.unfoundation.org/unwire/2001/06/08/index.asp#15150>.

¹⁰⁸ Associated Press, U.N. Human Rights official laments retreat on right to housing, at http://abcnews.go.com/wire/World/ap20010606_319.html (as of November 2, 2001).

¹⁰⁹ See HUD, First Meeting of the U.S. National Preparatory Committee for Habitat II, April 12, 1995, at <http://www.huduser.org/publications/econdev/habitat/prep1.html> (as of January 14, 2004).

In contrast, five years later at Istanbul +5, the U.S. appeared to demonstrate an aversion to NGO participation generally during the Preparatory Committee meetings. First, the U.S. did not favor participation of NGOs or local authorities in the Drafting Committee for the New York Declaration. This was apparently consistent with UN procedural rules but contrary to what had become a “common practice” of allowing greater participation of NGOs as observers and in notable contrast with the “unprecedented inclusion of many different actors” that had been a hallmark of the Habitat II conference.¹¹⁰ This move was the subject of disappointment on the part of NGOs and some other countries, one of which stated that it could “kill the spirit of Istanbul” as a “partners’ agenda.”¹¹¹ Second, the U.S. also disfavored assured participation of speakers other than member governments (which would exclude local authorities, NGOs and UN organizations) during the Conference itself. The U.S. joined China and Iran in voting for the U.S. motion for exclusion of NGOs from the plenary.¹¹² This attitude towards participation of NGOs at the preparatory committees and Istanbul +5 conference is also in stark contrast to that evidenced in relation to Habitat II.

There was also a shift in emphasis regarding the “right to housing.” At the start of the Habitat II process, the U.S. took a strong position opposing any inclusion of the term “right to housing.” However, following NGO advocacy, this position was substantially modified. At the first press briefing for Habitat II, a U.S. delegate stated that, “we recognize that there is a right to adequate housing as a component to existing human rights derived from the Universal Declaration of Human Rights that speaks about an adequate standard of living that should be realized.”¹¹³ As explained by David Hales, the Deputy Assistant Administrator of Global Programs for the U.S. Agency for International Development, while there was no substantive disagreement on the goal of adequate shelter for all, the U.S. was concerned about the legal implications of an explicit right to housing. “If at an international level we agree to housing as a right, this implies that a third party could be called in to adjudicate and intervene if such rights are being violated. This could also imply sanctions against a country not upholding the right. What we are saying is that we should not confuse clearly established rights with needs and aspirations and goals.”

At the Istanbul +5 conference, there was greater ambiguity – and indications of opposition – in the U.S. position on the right to housing. In his speech to the General Assembly, Mel Martinez, the Secretary of the U.S. Department of Housing and Urban Development, stated that in America, “the fundamental right to own property, including a home, is a foundation of our society.”¹¹⁴ Other sources reported that Mr. Martinez argued that while the U.S. is “strongly

¹¹⁰As reported in International Institute for Sustainable Development, Earth Negotiations Bulletin, Feb. 26, 2001 at 10 *at* <http://www.iisd.ca/download/pdf/enb1143e.pdf> (as of January 14, 2004).

¹¹¹ *Id.*

¹¹² As reported at International Institute for Sustainable Development Web Site, Istanbul +5 PrepCom II *at* <http://www.iisd.ca/habitat/Istanbul+5/prepcom2/> (as of January 14, 2004).

¹¹³ The Women’s International Media Group, Inc. Web Site, Monday, June 3 - First US Delegation Press Briefing in Istanbul at Habitat II *at* <http://www.womensgroup.org/USPRESSB.html> (as of January 14, 2004).

¹¹⁴ Speech by Mel Martinez, Secretary of the U.S. Department of Housing and Urban Development, as prepared for delivery, *at* http://www.un.int/usa/01_080.htm (as of January 14, 2004) (hereafter “Martinez Istanbul+5 Speech”).

committed” to “the Habitat Agenda and the equal and nondiscriminatory right to credit, but not a legal right to housing.”¹¹⁵

However, Mr. Southwick, the U.S. representative at the preparatory meetings for the Special Session, stated that the U.S. supported adequate housing as a component of a right to an adequate standard of living.¹¹⁶ While similar to the position of the U.S. at Habitat II, this formulation contained a crucial difference: the omission of a *right* to adequate housing. According to Mr. Southwick, “we don't like the sloganeering aspect of the rights debate, which everyone knows is very big in the United Nations right now. There seems to have been a right created for just about everything you can think of.”¹¹⁷ That attitude, he continued, tended to create entitlements, which in itself did not necessarily create housing. “Economy, good governance, rule of law and democracy were the kinds of things that created housing”, Mr. Southwick said.¹¹⁸ The Earth Times reported that a Senior State Department lawyer approached the Special Rapporteur on the Right to Adequate Housing at a meeting in February and “told him bluntly the U.S. government would prefer it if he did not mention housing as a right, let alone as a human right in his address to delegates.”¹¹⁹

¹¹⁵ U.S. Denies Right to Housing, UN Wire, June 8, 2001 at <http://www.unfoundation.org/unwire/2001/06/08/index.asp#15150> (as of October 27, 2001).

¹¹⁶ <http://www.un.org/News/briefings/docs/2001.USPC.06072001.doc.htm> (as of October 29, 2001).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ The article continued, stating that:

Miloon Kothari, the Special Rapporteur on the Right to Adequate Housing under the UN Commission on Human Rights, was flabbergasted: ‘It made me wonder whether they would sabotage or weaken this very important issue at the Habitat summit in New York next month.’ The June 6-8 summit will review progress since the last Habitat summit in Istanbul five years ago. He decided to ignore the advice. He told his audience that the right to adequate housing had been recognized as a ‘cornerstone, fundamental right’ in the UN human rights system. Realization of that right, he said, remained far from a reality for the majority of poor and vulnerable people around the world.

Kothari added: ‘A member of the U.S. delegation approached me again, this time after my speech. Bristling with anger, he told me in front of other delegates that I was exceeding my mandate... It was a bullying and arrogant approach and I said I was upholding the agenda.’

When this reporter at the time asked the leader of the U.S. delegation, E. Michael Southwick, a former U.S. Ambassador to Kenya who is now Deputy Assistant Secretary of State at the Bureau of International Organization Affairs at the State Department, for his side of the story, he was furious. ‘Mr. Kothari was very out of line here,’ he said. ‘There is no international definition of a right to housing, but a right to an adequate standard of living. Is there a legally enforced right to housing? Can you sue to get it? We say it is important to have political

The U.S. approach to achieving the goal of adequate housing for all was stated by Mel Martinez, in his statement reviewing and appraising the U.S. implementation of Habitat II before the General Assembly, and focused on homeownership, property rights, free markets and limited government intervention.¹²⁰ Martinez discussed the “four cornerstones” of housing in the U.S.: access to credit (with secondary markets being especially important), limited federal government intervention (with a focus on local efforts, with the intent being to bring people into the mainstream housing market through programs and tax incentives), local involvement by individuals and a strong legal system.¹²¹ Martinez advocated a partnership approach consistent with the Habitat Agenda, where the private, public and non-profit sectors would work together to achieve adequate housing solutions. His speech also touched on President Bush’s commitment to working with community-based and non-governmental organizations, with a special emphasis on faith-based groups, “to lift up the neediest among our citizens.”¹²²

Finally, he referred to the plight of homeless people by saying that, “we are redoubling our efforts to ... keep the inventory of federally assisted housing strong and viable, and shelter the homeless and lead them toward self-sufficiency.”¹²³

III. THE RIGHT TO HOUSING

This section discusses the right to housing in the United States in the context of the Habitat Agenda and the recent New York Declaration and then conducts a comparative legal analysis of the issue under domestic and international law.

A. *Homelessness and Housing*

Insufficient shelter, supportive housing and permanent affordable housing are critical problems for homeless people. The short supply of shelter forces many homeless people into public areas, which, in addition to subjecting them to the health and safety hazards of living outdoors, also often results in their running afoul of criminal laws. The limited availability of supportive housing may force those with mental illness to choose between institutionalization and homelessness. A lack of permanent affordable housing is both a key cause of and a major impediment to escaping homelessness: This shortage means that 4.6% of households or 4.9

rights so that you can get democracy and civil rights and good government.’

Roman Rollnick, *Does America alone have the monopoly to define what is right for the World?*, Earth Times, May 20, 2001, at http://www.earthtimes.org/may/humanrightsdoesamericamay20_01.htm (as of October 27, 2001).

¹²⁰ Martinez Istanbul+5 Speech, *supra* note 114.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

million families have “worst case housing needs,” meaning that they spend more than half of their income on housing or live in substandard housing.¹²⁴

Emergency shelters do not provide sufficient space to meet the needs of homeless people. In a 2002 report including results of a survey of the fifty most populous cities in the United States, it was determined that almost none of them has sufficient shelter beds or transitional housing slots to accommodate their homeless residents.¹²⁵ In San Francisco, for example, where the number of homeless people is estimated by the city at 9,515, there are 2,256 emergency shelter beds and 1,219 transitional housing slots, leaving 6,040 homeless people without these services on a given night.¹²⁶ Further, residents are usually required to leave during the day.

The “housing first” model, emphasizing housing in addressing homelessness, is increasingly being adopted by service providers.¹²⁷ Similarly, supportive housing combines affordable housing with physical and mental health care, employment assistance and addiction services, making those services available where tenants reside.¹²⁸ Housing is not only more humane but also considerably more cost-effective than homelessness, as homeless people tend to use the most expensive public systems, such as emergency rooms and jail cells. According to the Corporation for Supportive Housing (CSH), a home in supportive housing costs only \$34 per day, as compared with a city hospital bed at \$600-1600 per day, a state psychiatric bed at \$350 per day, a city jail cell at \$112 per day, a state prison cell at \$79 per day or even a city shelter cot, which is twice as expensive as a home in supportive housing, at \$68 per day. From a more macro perspective, the *New England Journal of Medicine* has reported that New York taxpayers annually spend \$100 million on avoidable hospital costs associated with homelessness.¹²⁹ The Istanbul Declaration, the Habitat Agenda and the Declaration on Cities often use “shelter” and “housing” interchangeably;¹³⁰ however, it is apparent there that the focus is on permanent adequate housing rather than temporary shelter.¹³¹ While the international documents at times

¹²⁴ U.S. Dep’t of Hous. and Urban Dev., *United States – Habitat II Progress Report 6*, n.14 (2001), citing U.S. Dep’t of Hous. and Urban Dev., *A Report on Worst Case Housing Needs in 1999: New Opportunity Amid Continuing Challenges* (2001).

¹²⁵ See National Law Center on Homelessness and Poverty, *Out of Sight – Out of Mind?*, 2, 4–5 (January 1999).

¹²⁶ *Id.* at 4. San Francisco is not an anomaly; similar analyses in a number of other cities demonstrate similarly high ranges.

¹²⁷ See, e.g., http://www.beyondshelter.org/aaa_initiatives/ending_homelessness.shtml (as of January 14, 2004); <http://www.endhomelessness.org/networks/housingfirst/intro.htm> (as of January 14, 2004).

¹²⁸ Much of the information on supportive housing is drawn from the homepage of the Corporation for Supportive Housing, at <http://www.csh.org> (as of January 14, 2004).

¹²⁹ S.A. Salit, *New England Journal of Medicine* (June 11, 1998).

¹³⁰ For example, the Istanbul Declaration includes the use of both terms throughout, and the Habitat Agenda notes a “right to adequate housing” under the subheading “Adequate shelter for all.”

¹³¹ Each of these terms is central to the definition of the ultimate goal. “Universal” means that housing characterized by the other three qualities is available to everyone. “Permanent” is meant to point out the inadequacy

use the terms interchangeably, the right to adequate housing clearly means permanent housing, not temporary shelter.¹³² In U.S. law and policy, the terms themselves are also clearly very different.¹³³ “Shelter” implies the barest minimum: not a “private apartment” but “merely a simple cot sheltered from the elements.”¹³⁴ It is by definition a last resort: a form of emergency assistance that is therefore by implication inadequate as a permanent solution. While shelter can be essential as a measure to relieve the most extreme human suffering, it is in itself clearly not enough.¹³⁵

B. Housing as a Human Right

International human rights law takes a variety of forms and can derive from several sources. Treaties (also called conventions or covenants) are documents that are binding on the countries that ratify them. (However, further action may be necessary to make them part of that country’s national law.) Declarations, resolutions and recommendations are non-binding statements of intent. Practices can become binding law (known as customary international law) where there is evidence of uniform and consistent usage among the states.

of solutions that do not address transitory homelessness, which is characteristic of the experience of much of the homeless population, or homelessness vulnerability generally. “Adequacy” is defined by a number of elements:

Adequate shelter means more than a roof over one’s head. It also means adequate privacy; adequate space; physical accessibility; adequate security; security of tenure; structural stability and durability; adequate lighting, heating and ventilation; adequate basic infrastructure, such as water-supply, sanitation, and waste-management facilities; suitable environmental quality and health-related factors; and adequate and accessible location with regard to work and basic facilities

The Habitat Agenda, *supra* note 61, at para. 60.

¹³² The Istanbul Declaration states that their objective is “that of building together a world where everyone can live in a safe home with the promise of a decent life of dignity, good health, safety, happiness and hope.” *Id.* at para. 15. The Habitat Agenda notes in the Preamble that “access to safe and healthy shelter and basic services is essential to a person’s physical, psychological, social and economic well-being ...” Habitat Agenda, *supra* note 56, pmb1. Finally, the Declaration on Cities does so by reaffirming commitment to the “goals and principles” of the other two documents. New York Declaration, *supra*, note 95, pmb1 and para. 1–6.

¹³³ See, e.g., *McCain v. Koch*, 70 N.Y.2d 109, 118 (“[W]hether or not plaintiffs have any right to *shelter* under State or Federal constitutional or statutory law, [the] Supreme Court had the power to require defendants, once they undertook to provide *housing*, to make that *shelter* minimally habitable”) [emphasis added], as quoted in Roisman, Establishing A Right to Housing, *supra* note 54, at 47 n326.

¹³⁴ *Moore v. Ganim*, 233 Conn. 557 (1995).

¹³⁵ See Roisman, Establishing a Right to Housing, *supra* note 54, at 47–51. Professor Roisman, recognizing a right to permanent housing as the advocate’s goal, and the right to shelter as a potentially necessary first step, outlines three complementary ways of achieving this transformation. One way is to establish a right to shelter and to strengthen standards under that right until the shelter meets the standards of permanent housing. A second way to effect this change is to make assistance in securing permanent housing an indispensable part of the right to shelter. Finally, she suggests that the right to shelter should be defined as the right to temporary emergency shelter, and that subsequent placement in permanent housing is part of that right.

The International Bill of Rights consists of three instruments: the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). The Universal Declaration, which is not by its terms binding, recognizes economic, social and cultural rights as well as civil and political rights. It states in part:

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.¹³⁶

The ICESCR is the primary treaty establishing economic, social and cultural rights; the ICCPR is the primary treaty establishing civil and political rights. The U.S. has ratified the Universal Declaration and the ICCPR; it has signed but not ratified the ICESCR.

Other treaties, binding on the states that ratify them, recognize the right to housing. In addition, customary international law, also binding, may be a source of the right; some have argued that the Universal Declaration has attained that status. Non-binding documents recognize the right as well. Economic, social or cultural rights create “multi-layered” obligations on states. According to the Maastricht Guidelines, these include the obligations to *respect*, to *protect*, to *promote*, and to *fulfill* those rights.¹³⁷

This section reviews the right to adequate housing under international law, discusses the place of the U.S. with regard to that right, and then sketches the right’s possible boundaries.

1. Human Rights Law and the Right to Housing

The right to adequate housing is clearly established under international human rights instruments. The ICESCR is the most explicit and probably the most significant of these treaties in establishing a right to adequate housing. As the Committee on Economic, Social and Cultural Rights, which monitors the CESCER, has stated, “[a]lthough a wide variety of international instruments address the different dimensions of the right to adequate housing article 11(1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions.”¹³⁸ That article states that “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate

¹³⁶ Universal Declaration of Human Rights, art. 25(1), Dec. 10, 1948.

¹³⁷ See *id.* at 113; see also Maastricht Guidelines on Violations of Economic, Social & Cultural Rights, Maastricht, 1997 at http://www.umn.edu/humanrts/instreet/Maastrichtguidelines_.html (as of January 14, 2004) (further detailing states’ obligations as to economic, social and cultural rights and exploring what it means when a state violates such rights).

¹³⁸ General Comment No. 4, *supra* note 12, at para. 3.

food, clothing and housing and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”¹³⁹

In addition to the ICESCR, other legally binding international documents recognize the right to housing.¹⁴⁰ They include the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁴¹ the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁴² the Convention on the Rights of the Child,¹⁴³ the Convention Relating to the Status of Refugees,¹⁴⁴ the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families,¹⁴⁵ and the International Labour Organization Convention No. 117 concerning Social Policy.¹⁴⁶ While these treaties are not explicitly concerned with the right

¹³⁹ See CESCR, *supra* note 10, at art. 11(1).

¹⁴⁰ These are binding on countries that have signed and ratified them. Signature means that country representatives have signed the treaty and ratification means that that country’s government or head of state has approved that signature. Treaties state whether ratification is necessary for entry into force.

¹⁴¹ International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, art. 5(e)(iii) (Article 5: “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: ... (e) in particular ... (iii) the right to housing”).

¹⁴² International Convention on the Elimination of All Forms of Discrimination Against Women, art. 14(2)(h) opened for signature Dec. 18, 1979 (Article 14(2): “States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right ... (h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications”).

¹⁴³ Convention on the Rights of the Child, arts. 16(1) and 27(3), opened for signature Nov. 20, 1989 (Article 16(1): “No child shall be subject to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation”; and Article 27(3): “States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing”).

¹⁴⁴ Convention relating to the Status of Refugees, art. 21, opened for signature July 28, 1951 (Article 21: “As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances”).

¹⁴⁵ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 43(1)(d), opened for signature Dec. 18, 1990 (Article 43(1): “Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to ... (d) Access to housing, including social housing schemes, and protection against exploitation in respect of rents”).

¹⁴⁶ International Labour Organization Convention No. 117 concerning Social Policy, arts. 2, 4(d) and 5(2) (Article 2: “The improvement of standards of living shall be regarded as the principal objective in the planning of economic development”; Article 4: “The measures to be considered by the competent authorities for the promotion of productive capacity and the improvement of *standards of living* of agricultural producers shall include ... (d) the supervision of *tenancy* arrangements and of working conditions with a view to securing for *tenants* and labourers the

to housing, they support the right, either explicitly (in some cases for particular groups) or by supporting the right from which it is derived, namely the right to an adequate standard of living.

The 1994 International Covenant on Civil and Political Rights (ICCPR),¹⁴⁷ which has been signed and ratified by the United States, recognizes and protects civil and political rights. Arguably, these rights and the right to housing (as well as other economic, social and cultural rights) are “interdependent,” and thus the ratification of the ICCPR would provide support for recognition of the right to housing.¹⁴⁸ Nonetheless, while the United States is bound to follow this Covenant, it has not signed onto the Additional Protocol that allows for individual complaints to be brought before the Human Rights Committee for violations of the ICCPR.¹⁴⁹

Regional covenants and conventions are also a source of binding international law. Because the United States has not ratified the American Convention on Human Rights nor the 1988 Additional Protocol to the American Convention on Human Rights, advocates must look to the American Declaration on the Rights and Duties of Man to which the United States is bound because it is a member of the Organization of American States (OAS).¹⁵⁰ Article XI of the American Declaration of the Rights and Duties of Man specifically states that “[E]very person has the right to the preservation of his health through sanitary and social measures relating to . . . housing . . . to the extent permitted by public and community resources.” This report does not address the right to adequate housing in the context of regional instruments.

Customary law is another potential source of binding international law. The International Court of Justice has ruled that a practice attains the status of customary international law where there is evidence of uniform and consistent usage among the states.¹⁵¹ There are no citations to the “right to housing” as a customary norm in United States case law; however, there are at least fifty-two other nations who have included such a right in their constitutions.¹⁵² And there is at

highest practicable *standards of living* and an equitable share in any advantages which may result from improvements in productivity or in price levels” [emphases added]; Article 5(2): “In ascertaining the *minimum standards of living*, account shall be taken of such essential family needs of the workers as food and its nutritive value, *housing*, clothing, medical care and education”) [emphases added].

¹⁴⁷ International Covenant on Civil and Political Rights, art. 12(1) and 17 (Article 12(1): “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and *freedom to choose his residence*” [emphasis added]; and Article 17: “1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, *home* or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks” [emphasis added].

¹⁴⁸ Such permeable rights might include the right to equality and the right to be free from discrimination based on race or gender.

¹⁴⁹ See Hurst Hannum, *Guide to International Human Rights Practice* 41 (2nd ed. 1992).

¹⁵⁰ Case 9647 (United States) Res. 3/87 of 27 March 1987, 1986-1987 Annual Report of the Inter-American Commission on Human Rights, OEA/Ser. L/L/V/II.71, doc. 9, rev. 1 (Sept. 22, 1987), at 147.

¹⁵¹ The Asylum Case, I.C.J. Reports 266, 276-77 (1950).

¹⁵² COHRE Report 35-48 (1994).

least an argument that the right to housing has reached this status as it expressly appears in almost every international covenant and declaration.¹⁵³ The right to housing, as stated in the Committee on Economic, Social and Cultural Rights General Comments 4 and 7 should apply as a guideline to all governments, including the United States government.¹⁵⁴ Further, in Articles 55 and 56 of the Charter of the United Nations, all States agreed to work towards the realization of economic, social and cultural rights.¹⁵⁵

Among those instruments that typically do not create legally binding obligations are declarations, recommendations and resolutions.¹⁵⁶ The former two are usually statements of intent that can be

¹⁵³ See, e.g., International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, art. 5(e), S. Exec. Doc. C, 95-2 (1978), 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) [hereafter CERD]; Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/Res/44/25, at art 27 (1989) [hereafter CRC]; the United Nations Declaration of the Rights of the Child, G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16) at 19, 24th Sess., U.N. Doc. A/4354, at prin. 4. (1959) (this Declaration was the precursor to the CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted Dec. 18, 1990, G.A. Res. 45/158 (1990), opened for signature May 22, 1991, at art. 43; Charter of the Organization of American States, April 30, 1948, art. 31, 33 I.L.M 981, 989 (entered into force Dec. 13, 1951, amended 1967 (Protocol of Buenos Aires), 1985 (Protocol of Cartagena de Indias), Dec. 14, 1992 (Protocol of Washington), and June 10, 1992 (Protocol of Managua)); the American Declaration on the Rights and Duties of Man, O.A.S. Official Rec., OEA/ser.L/V./II.23, doc.21 rev.6, at art. XI (1948); and the American Convention on Human Rights, signed Nov. 22, 1969, 1144 U.N.T.S. 123, at arts. 21, 26; United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Children and the Right to Adequate Housing, Aug. 23, 1994, U.N. Res. 1994/8; International Labour Organisation Recommendation No. 115 on Worker's Housing; Convention Relating to the Status of Refugees; United Nations Draft Declaration on the Rights of Indigenous Peoples; United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forced Evictions, Aug. 26, 1994, U.N. res. 1994/39; U.N. Commission on Human Settlements, The Human Right to Adequate Housing, May 5, 1993, U.N. res. 14/6; and United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Realization of Economic, Social and Cultural Rights: The Right to Adequate Housing, Note by the Secretariat, July 10, 1996, E/CN.4/Sub.2/1996/10.

¹⁵⁴ See General Comment No. 4, *supra* note 12; U.N. Doc. E/C.12/1991/4 (1991) [hereafter "General Comment No. 4"]. U.N. Committee on Economic, Social, and Cultural Rights, General Comment No. 7, The right to adequate housing (art 11.1 of the Covenant): forced evictions, U.N. Doc.E/C.12/1997/4 (1997) [hereafter "General Comment No. 7].

¹⁵⁵ U.N. Charter, arts. 55–56. Article 55 states that:

- [w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
- a. higher standards of living, full employment, and conditions of economic and social progress and development;
 - b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
 - c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id. at art. 55. Article 56 states that: “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” *Id.* at art. 56.

¹⁵⁶ Resolutions of the Security Council also have the force of binding law. Universal Declaration of Human Rights, art. 25(1), Dec. 10, 1948 (“Everyone has the right to a standard of living adequate for the health and well-

signed but not ratified by states, while the latter are usually issued by UN bodies and cannot be signed by states. There are important exceptions to this general rule. Declarations and recommendations can become binding law if their content is widely accepted by the international community, after which they are customary international law. The Universal Declaration of Human Rights is an important example of a declaration that arguably has become binding law.¹⁴⁸ Examples of such documents include: the Declaration on the Rights of the Child,¹⁵⁷ International Labour Organization Recommendation No. 115 concerning Worker's Housing,¹⁵⁸ the Declaration on Social Progress and Development,¹⁵⁹ the Declaration on the Rights of Disabled Persons,¹⁶⁰ the United Nations Educational, Cultural and Scientific Organization Declaration on Race and Racial Prejudice,¹⁶¹ International Labour Organization Recommendation No. 162

being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control”).

¹⁵⁷ Declaration on the Rights of the Child, *supra* note 143, at prin. 4 (“The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end special care and protection shall be provided to him and his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services”).

¹⁵⁸ International Labour Organization Recommendation (No. 115) concerning Worker's Housing (1961), at para.2 (“It should be an objective of national [housing] policy to promote, within the framework of general housing policy, the construction of housing and related community facilities with a view to ensuring that adequate and decent housing accommodation and a suitable living environment are made available to all workers and their families. A degree of priority should be accorded to those whose needs are most urgent.”).

¹⁵⁹ Declaration on Social Progress and Development, G.A. Res. 2542, U.N. GAOR, 24th Sess., arts. 6, 10(f) (1969). “Social development requires the assurance to everyone of the right to work and the free choice of employment. Social progress and development require the participation of all members of society in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.” *Id.* at art. 6. “Social progress and development shall aim at the continual raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals: ... (f) The provision for all, particularly persons in low-income groups and large families, of adequate housing and community services.” *Id.* at art 10(f).

¹⁶⁰ Declaration on the Rights of Disabled Persons, G.A. res. 3447 (XXX), 30 U.N. GAOR Supp. (No. 34), U.N. Doc. A/10034, at art. 9 (1975) (“Disabled persons have the right to live with their families or with foster parents and to participate in all social, creative or recreational activities. No disabled person shall be subjected, as far as his or her residence is concerned, to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom. If the stay of a disabled person in a specialized establishment is indispensable, the environment and living conditions therein shall be as close as possible to those of the normal life of a person of his or her age.”).

¹⁶¹ United Nations Educational, Cultural and Scientific Organization Declaration on Race and Racial Prejudice, E/CN.4/Sub.2/1982/2/Add.1, annex V, at art. 9(2) (1982) (“Special measures must be taken to ensure equality in dignity and rights for individuals and groups wherever necessary, while ensuring that they are not such as to appear racially discriminatory. In this respect, particular attention should be paid to racial or ethnic groups which are socially or economically disadvantaged, so as to afford them, on a completely equal footing and without discrimination or restriction, the protection of the laws and regulations and the advantages of the social measures in

concerning Older Workers, the Declaration on the Right to Development,¹⁶² the United Nations Global Strategy for Shelter to the Year 2000,¹⁶³ Agenda 21,¹⁶⁴ the Vienna Declaration and Programme of Action,¹⁶⁵ the Copenhagen Declaration and Programme of Action,¹⁶⁶ the Beijing Declaration and Platform for Action¹⁶⁷ and, of course, the Habitat documents: the Vancouver

force, in particular in regard to housing, employment and health; to respect the authenticity of their culture and values; and to facilitate their social and occupational advancement, especially through education.”).

¹⁶² International Labour Organization Recommendation (No. 162) concerning Older Workers (1980) at para. 5(g) (“Older workers should, without discrimination by reason of their age, enjoy equality of opportunity and treatment with younger workers as regards, in particular ... (g) access to housing, social services and health institutions, in particular when this access is related to occupational activity or employment.”).

¹⁶³ Global Strategy for Shelter to the Year 2000, G.A. Res. 43/181, U.N. GAOR, Point 13 (1998) (“The right to adequate housing is universally recognized by the community of nations ... All nations without exception, have some form of obligation in the shelter sector, as exemplified by their creation of ministries or housing agencies, by their allocation of funds to the housing sector, and by their policies, programmes and projects. All citizens of all States, poor as they may be, have a right to expect their Governments to be concerned about their shelter needs, and to accept a fundamental obligation to protect and improve houses and neighbourhoods, rather than damage or destroy them.”).

¹⁶⁴ Agenda 21 at Ch. 7(6), (9)(b) and (c) and (30)(f) (Ch. 7(6) (June 1992), *available at* <http://www.un.org/esa/sustdev/documents/agenda21/index.htm> (as of January 14, 2004): “Access to safe and healthy shelter is essential to a person’s physical, psychological, social and economic well-being and should be a fundamental part of national and international action. The right to adequate housing as a basic human right enshrined in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights”; Ch 7(9)(b): “All countries should adopt and/or strengthen national shelter strategies, with targets based, as appropriate, on the principles and recommendations contained in the Global Strategy for Shelter to the Year 2000. People should be protected by law against unfair eviction from their homes and land”; Ch. 7(9)(c): “All countries should, as appropriate, support the shelter efforts of the urban and the rural poor, the unemployed and the no-income group by adopting and/or adapting existing codes and regulations, to facilitate their access to land, finance and low-cost building materials and by actively promoting the regularization and upgrading of informal settlements and urban slums as an expedient measure and pragmatic solution to the urban shelter deficit”; Ch. 7(30): “All countries should consider developing national land-resource management plans to guide land-resource development and utilization and, to that end, should ... establish appropriate forms of land tenure that provide security of tenure for all land users, especially indigenous people, women, local communities, the low-income urban dwellers and the rural poor.”.

¹⁶⁵ Vienna Declaration and Programme of Action (June, 1993), at para. 31 (“The World Conference on Human Rights calls upon States to refrain from any unilateral measure not in accordance with international law and the Charter of the United Nations that creates obstacles to trade relations among States and impedes the full realization of the human rights set forth in the Universal Declaration of Human Rights and international human rights instruments, in particular the rights of everyone to a standard of living adequate for their health and well-being, including food and medical care, housing and the necessary social services. The World Conference on Human Rights affirms that food should not be used as a tool for political pressure.”).

¹⁶⁶ Copenhagen Declaration and Programme of Action (March, 1995), at para. 19 (“Poverty has various manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion.”).

¹⁶⁷ Beijing Declaration and Platform for Action (September, 1995), at para. 31 (“Many women face particular barriers because of various diverse factors in addition to their gender. Often these diverse factors isolate or marginalize such women. They are, inter alia, denied their human rights, they lack access or are denied access to

Declaration of Human Settlements, the Istanbul Declaration on Human Settlements and the Habitat Agenda.¹⁶⁸

2. The “Right to Adequate Housing” and the United States

As noted above, official statements have differed in their treatment of the right to adequate housing, what fulfillment of that right would entail and what it is to which the United States has committed itself.¹⁶⁹

At the very least, the United States has voluntarily committed itself to fulfilling the right to adequate housing and there are arguments that the nation has a legally binding obligation to do so as well. The most prominent sources of the U.S. voluntary commitment are the Istanbul Declaration on Human Settlements and the Habitat Agenda, which state quite explicitly both the existence of such a right and the government commitment to the “full and progressive realization of the right.”¹⁷⁰ It could be argued that treaties to which the U.S. is a party, the Convention on the Elimination of All Forms of Racial Discrimination, for example, also support the existence of this commitment. This is especially so if all human rights are seen as “universal, indivisible, interdependent and interrelated,” as the U.S. has apparently conceded.¹⁷¹

The existence of a legally binding obligation to fulfill the right to housing is more difficult to establish and appears to have been disputed officially,¹⁷² but arguments for its existence are not without merit. The United States has signed but not ratified the CESCRC, arguably the most important of the binding international instruments recognizing a right to adequate housing, and it seems unlikely that the U.S. will ratify it in the foreseeable future.¹⁷³ Of the above listed treaties, the U.S. also has not signed the International Convention on the Protection of the Rights of All Migrant Workers or Members of Their Families and the Convention relating to the Status of Refugees and has not ratified the Convention on the Elimination of All Forms of Discrimination Against Women or the Convention on the Rights of the Child.

education and vocational training, employment, housing and economic self-sufficiency and they are excluded from decision-making processes. Such women are often denied the opportunity to contribute to their communities as part of the mainstream.”).

¹⁶⁸ See discussion of the relevant provisions from these documents in Section I, *supra*.

¹⁶⁹ See Section II, D, “Habitat II and the United States,” *supra*.

¹⁷⁰ Habitat Agenda, *supra* note 61, at para. 26.

¹⁷¹ *Id.*

¹⁷² Press Conference on Habitat by United States, June 7, 2001, at <http://www.un.org/News/briefings/docs/2001/USPC06072001.doc.htm> (as of January 14, 2004) (“The United States was not saying that the right to housing was legally binding: its position was that through good governance, democracy, economic management and rule of law, conditions could be created where people could attain adequate housing.”).

¹⁷³ Louis Henkin et al., *Human Rights* 1112 (1999).

Despite this, there are arguments that the U.S. does have an obligation to fulfill the right to adequate housing. First, U.S. ratification of the International Covenant on Civil and Political Rights, legally binding counterpart to the CESCR, might support such an obligation under the theory of indivisibility of rights. Second, U.S. signature of the Universal Declaration of Human Rights, with its recognition of a “right to a standard of living adequate for the health and well-being of himself and his family, including ... housing,”¹⁷⁴ might do so as well.¹⁷⁵

3. Parameters of the “Right to Adequate Housing”

Accepting that a right to adequate housing exists under international law and that the U.S. has at least made a voluntary commitment to fulfill that right, it is next important to look at the boundaries and the content of the right. The right to adequate housing does not merely mean “having a roof over one’s head.”¹⁷⁶ The Committee on Economic, Social and Cultural Rights examined this right in its General Comment No. 4. In fleshing out the seven core principles behind that right, the Committee explains how States that have ratified the CESCR are expected to fulfill their obligations. The Committee explained that despite the fact that “adequacy” was “determined in part by social, economic, cultural, climatic, ecological and other factors,” that there were nevertheless certain aspects of the right that had to be taken into account regardless of context. People must have legal security of tenure;¹⁷⁷ available services, materials, facilities, and infrastructure;¹⁷⁸ housing must be affordable,¹⁷⁹ habitable,¹⁸⁰ and accessible;¹⁸¹ housing must be

¹⁷⁴ UDHR, *supra* note 9, at Article 25(1).

¹⁷⁵ The official U.S. position on the UDHR, at least during the 2001 housing conference in New York, appears to be that adequate housing is a component of the right to an adequate standard of living but that there is no legally enforceable right to housing itself. See Press Conference on Habitat by United States, July 6, 2001 at <http://www.un.org/News/briefings/docs/2001/USPC06072001.doc.htm> (as of January 14, 2004).

¹⁷⁶ General Comment No. 4, *supra* note 12, at para. 7.

¹⁷⁷ *Id.* at para. 8(a). (“All persons should possess legal protection against forced eviction, harassment and other threats. States are therefore required to take immediate measures to confer legal security of tenure for those lacking such protection, following genuine consultation with affected persons and groups.”).

¹⁷⁸ *Id.* at para. 8(b). (“All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services.”).

¹⁷⁹ All costs associated with housing should be at a level sufficient to ensure that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing subsidies should be available for those unable to obtain affordable housing, and tenants have to be protected from unreasonable rent levels. *Id.* at para. 8(c) as interpreted at <http://www0.un.org/cyberschoolbus/habitat/background/bg4.asp> (as of January 14, 2004).

¹⁸⁰ *Id.* at para. 8(d). (Adequate housing implies that inhabitants are provided with adequate space, and protected from the elements and other threats to health such as structural hazards and disease. Physical safety of the occupants must be guaranteed.)

¹⁸¹ *Id.* at para 8(e) (“Adequate housing must be accessible to those entitled to it.”). Disadvantaged groups such as the elderly, children, physically disabled persons, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be assured of some degree of priority consideration in the housing sphere. *Id.*

located in a place that has access to employment options, health and child care centers;¹⁸² and the way the housing is constructed must be culturally adequate.¹⁸³

A national government's obligation in fulfilling the right to adequate housing is to some extent contingent on circumstances. Under the Covenant on Economic, Social and Cultural Rights, States Parties are bound to "take steps" to the "maximum of [their] available resources" to "progressively" but "fully" realize the right to adequate housing "by all appropriate means, including the adoption of legislative measures."¹⁸⁴ "Maximum of available resources" has been defined as requiring that States show that "every effort has been made to use all resources that are at its disposal in an effort to satisfy, *as a matter of priority*," its obligations [emphasis added].¹⁸⁵

However, comments by the Committee on Economic, Social and Cultural Rights as well as the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (hereafter "Special Rapporteur") have clarified somewhat the very general statements of treaties and declarations. The Special Rapporteur, who was appointed by the Subcommission on Prevention of Discrimination and Protection of Minorities, stated in his final report to the Subcommission: "The legal recognition and obligations inherent in housing rights, at the most basic level do not imply the following:

- (a) That the State is required to build housing for the entire population;
- (b) That housing is to be provided free of charge by the State to all who request it;
- (c) That the State must necessarily fulfil all aspects of this right immediately upon assuming duties to do so;
- (d) That the State should exclusively entrust either itself or the unregulated market to ensuring this right to all;
- (e) That this right will manifest itself in precisely the same manner in all circumstances or locations.¹⁸⁶

The Special Rapporteur also noted, however, that these findings should be somewhat qualified to ensure that States do not "misinterpret and abrogate" responsibility and therefore that the recognition of housing rights does imply:

¹⁸² *Id.* at para. 8(f).

¹⁸³ This discussion includes clarifications only for those areas deemed relevant to a comparative analysis of international and U.S. domestic law. A more in-depth discussion of this issue can be found at United Nations High Commissioner for Human Rights, Fact Sheet No. 21, The Human Right to Adequate Housing, at <http://www.unhcr.ch/html/menu6/2/fs21.htm> (as of January 14, 2004) (interpreting the findings of the Committee on Economic, Social and Cultural Rights) (hereafter "Fact Sheet No. 21").

¹⁸⁴ CESCR, *supra* note 10, art 2(1).

¹⁸⁵ Fact Sheet No. 21, *supra* note 183.

¹⁸⁶ Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur's Report on The Right to Adequate Housing, U.N. Doc. E/CN.4/Sub.2/1995/12 (1995), at para. 11.

(a) That once such obligations have been formally accepted, the State will endeavor by all appropriate means possible to ensure everyone has access to housing resources adequate for health, well-being and security, consistent with other human rights; (b) That a claim or demand can be made upon society for the provision of or access to housing resources should a person be homeless, inadequately housed or generally incapable of acquiring the bundle of entitlements implicitly linked with housing rights; (c) That the State, directly upon assuming legal obligations, will undertake a series of measures which indicate policy and legislative recognition of each of the constituent aspects of the right in question.¹⁸⁷

C. U.S. Law and the Right to Housing

While a “right to housing” is well established under international law, in terms of “purely” domestic law, the existence of such a right is at least less certain. Under federal constitutional law, it is not clear whether a right to housing exists, and it seems unlikely that such a right would be found were it to be adjudicated before the current Supreme Court. While a right to housing, subject to a number of limitations, may have been developing under federal statutory law, this process appears to have been halted or at least postponed by changes made to public assistance programs in 1996. However, there is significant evidence of such a right under a number of state constitutions and the right may be further developing across the United States through state statutes and case law.¹⁸⁸

This section considers whether domestic law as it relates to housing and homelessness is congruent with international human rights law as outlined above.

1. Federal Law

The Constitution does not mention a right to housing.¹⁸⁹ Moreover, the prevailing view of our Constitution appears to be one of negative liberties rather than affirmative duties, which would

¹⁸⁷ *Id.*

¹⁸⁸ Roisman, *Establishing a Right to Housing*, *supra* note 54, at 1.

¹⁸⁹ *See, e.g.*, Geoffrey Mort, *Establishing A Right to Shelter for the Homeless*, 50 *Brook. L. Rev.* 939, n23 (“Nowhere in the United States Constitution is such a right [to housing] even implied, and few, if any, cases have attempted to assert this position.”). *See also* Christine Robitscher Ladd, *Note: A Right to Shelter for the Homeless in New York State*, 61 *N.Y.U. L. Rev.* 272 (1986) (“There is no affirmative right to shelter under the federal Constitution”). *Id.* at n7, characterizing *Lindsey v. Normet*, 405 U.S. 56, 74 (1972), as standing for this proposition.

The fact that such a right is not explicit does not foreclose the possibility of its existence. The Supreme Court has found a number of rights to be implicit in the Constitution, including the “right to privacy” and the “right to travel.” *Noted in* Alexander Tseisis, *Eliminating the Destitution of America’s Homeless: A Fair, Federal Approach*, 10 *Temp. Pol. & Civ. Rts. L. Rev.*, 103, 122–23 (2000).

seem to run counter to finding a governmental duty to provide housing.¹⁹⁰ Nor is there any stated legislative recognition of a right to housing, and recent legislative changes have arguably undermined provisions in existing federal statutes. Nonetheless, some scholars and commentators have made arguments in support of such a right, and current federal laws and programs may be viewed as steps on which such a right could be built. But while long-term progress is possible, the immediate prospects for such recognition or creation of a right to housing seem challenging at best.¹⁹¹

a. U.S. Constitution

Lindsey v. Normet,¹⁹² a case often cited for the proposition that there is no right to housing under the U.S. Constitution,¹⁹³ addressed whether three provisions of the Oregon Forcible Entry and Wrongful Detainer (FED) Statute violated either the Due Process or Equal Protection Clauses of the Fourteenth Amendment. In response to the homeless plaintiffs' claim that the "need for decent shelter" and the "right to retain peaceful possession of one's home"¹⁹⁴ are fundamental interests for the poor and that a higher level of constitutional scrutiny than minimum rationality was therefore mandated, Justice White stated 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, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions."¹⁹⁵

There are at least two reasons why *Lindsey* should not be cited as making a categorical determination on the existence of a right to housing. First, at issue in that case was not the right to *any* shelter or housing but rather the right to housing meeting a certain level of *quality* and

¹⁹⁰ See, e.g., Judge Richard Posner's comment that "the Constitution is a character of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982). See also, Lawrence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependency*, 99 Harv. L. Rev. 330, 330 (1985) ("[T]he rights protected by the United States Constitution ... are ... usually understood ... to impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs."). For an apparently contrary view, see Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 Colum. L. Rev. 1103, 1111–15 (1986) (arguing that affirmative duties on government are very much a part of the Constitution).

¹⁹¹ It is important to note here that the constitution/statute/administrative program distinction is somewhat artificial and is being drawn for organizational clarity. There is obviously important interplay between these categories, and statutes, in particular, cannot be properly looked at separate from the relevant constitution(s).

¹⁹² 405 U.S. 56 (1972).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 73.

¹⁹⁵ *Id.* at 74.

habitability. The homeless plaintiffs were citing the “need for *decent* shelter”¹⁹⁶ [emphasis added]; the majority declined to find a “constitutional guarantee of access to dwellings of a *particular quality*”¹⁹⁷ [emphasis added]. Justice Douglas’ dissent also focuses on the quality of housing rather than the right to any housing, quoting a passage about housing adequacy and then making reference to that adequacy as the “vital interest ... at stake.”¹⁹⁸ While some courts and commentators have read *Lindsey* as focusing on the “right to housing,” others have not. The Fifth Circuit, in *United Farmworkers of Florida Housing Project v. Delray Beach*, for example, stated that “we should note here that the farmworkers’ appeal is not based primarily upon a claim of denial of a fundamental right to *decent* housing, see *Lindsay v. Normet*.”¹⁹⁹

Further, the focus of the Court was on the terms of the lease; the Court apparently assumed that a right to “decent shelter” implied that that shelter would also be free. But, as explained above, human rights law does not necessarily require that housing be provided at no cost to all. Nor would it necessarily invalidate the specific provisions of a lease. Thus, it is possible to interpret *Lindsey v. Normet* as not relevant to the constitutional status of the right to housing as that housing is defined and understood in human rights jurisprudence.

A number of constitutional scholars, writing both before and after *Lindsey*, suggest that the document should or may be interpreted to provide a right to minimum subsistence. Such a right is often defined as including not only housing but also food, livelihood, medical care and other basic services. Commentators come to this conclusion by way of a number of different constitutional theories. Charles Black, for example, using the Ninth Amendment²⁰⁰ as legitimating a search for unenumerated rights, argues that the Declaration of Independence and the preamble to the Constitution’s “general welfare” clause²⁰¹ support a “a constitutional right to a decent material basis for life.”²⁰² Akhil Amar finds a federal government duty “to provide all

¹⁹⁶ *Id.* at 73.

¹⁹⁷ *Id.* at 74.

¹⁹⁸ *Id.* at 84, quoting Judge Wright in *Javins v. First National Realty Corp.*, 138 U.S. App. D.C. 369, 372 (D.C. Cir. 1970) (“When American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well known package of goods and services – a package which includes not merely walls and ceiling, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance. This vital interest that is at stake may, of course, be tested in so-called summary proceedings.”).

¹⁹⁹ 493 F.2d 799 (1974)

²⁰⁰ U.S. Const. amend. IX. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

²⁰¹ “We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, *promote the general welfare*, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America” [emphasis added]. U.S. Const. pmbl.

²⁰² Black, *supra* note 190, at 1105. Black finds that the Declaration of Independence supports such a right because poverty “is overwhelmingly, in the whole world, the commonest, the grimmest, the stubbornest obstacle we know to the pursuit of happiness.” *Id.* at 1106. He finds such a right in the preamble’s declaration that the Constitution’s purpose is to “promote the general welfare.” *Id.*

individuals with a minimum level of sustenance and shelter”²⁰³ in the Thirteenth Amendment.²⁰⁴ Frank Michelman contends that the government has an affirmative obligation to meet the subsistence needs of the poor²⁰⁵ under the Equal Protection clause of the Fourteenth Amendment.²⁰⁶ Finally, Laurence Tribe states that “the day may indeed come when a general doctrine under the Fifth and Fourteenth amendments recognizes for each individual a constitutional right to a decent level of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, work and schooling”²⁰⁷

b. Federal Statutes

Prior to 1996, the federal-state Aid to Families with Dependent Children (AFDC) program, including the Emergency Assistance and Special Needs Programs, offered states the opportunity to require federal contributions for the support and maintenance of families with dependent children, and to improve their housing conditions in particular.²⁰⁸ Established under Title IV-A of the Social Security Act of 1935, the program was designed to encourage “the care of dependent children *in their own homes or in the homes of relatives* by enabling each State to furnish financial assistance and rehabilitation and other services ... to needy dependent children and the parents or relatives with whom they are living”²⁰⁹ Advocacy efforts involving AFDC focused on setting more realistic standards of need and associated benefit levels as well as securing “actual shelter, housing or housing assistance.”²¹⁰ There were significant advocacy and litigation successes as regards both approaches.²¹¹

²⁰³ See Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 Harv. J.L. & Pub. Pol’y 17, 18–19 (1992), describing Akhil R. Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 Harv. J.L. & Pub. Pol’y 37, 39 (1990).

²⁰⁴ U.S. Const. amend. XIII. (“Neither slavery nor involuntary servitude ... shall exist within the United States, or any place subject to their jurisdiction Congress shall have the power to enforce this article by appropriate legislation.”)

²⁰⁵ Professor Michelman’s argument is based on his understanding of John Ely’s case that the Constitution is meant to be “representation reinforcing,” and he contends that effective political participation will not come from a person without a certain level of subsistence. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659, 666–79, n1; John H. Ely, *Democracy and Distrust: A Theory of Judicial Review*, 77–104 (1980).

²⁰⁶ U.S. Const. amend. XIV, § 1. (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall ... deny to any person within its jurisdiction the equal protection of the laws.”)

²⁰⁷ See Laurence H. Tribe, *American Constitutional Law* 779 (2d Ed. 1988), as quoted in Moore.

²⁰⁸ The following description of AFDC and its relationship to the “right to housing” relies heavily on Roisman, *Establishing a Right to Housing*, *supra* note 54, at 13–29.

²⁰⁹ 42 U.S.C. § 601, as cited in Roisman, *Establishing a Right to Housing*, *supra* note 54, at 13.

²¹⁰ *Id.* at 17.

²¹¹ *Id.*

In the context of the right to housing, two aspects of AFDC are significant. First, it was an entitlement program; if families with dependent children had incomes and resources below the standard of need, they were guaranteed some, however inadequate, funding.²¹² Second, although AFDC was an entitlement to public assistance generally, close links can be drawn between the program and housing, as noted above.²¹³ Therefore, despite its shortcomings, AFDC could have been a route to fulfilling U.S. obligations under the Habitat Agenda and under international law, at least for households eligible for assistance.²¹⁴ Its repeal was an unfortunate development and possibly a backward step in that regard.

The Temporary Assistance for Needy Families program (TANF)²¹⁵ replaced the AFDC, Emergency Assistance and Special Needs programs in 1996 as Title I of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA).²¹⁶ TANF provides block grants (fixed lump sums) to the states and allows states, subject to statutory limitations, broad discretion in the administration and design of welfare programs. States can determine who is eligible for assistance, what levels of what types of benefits they will receive, and how long they will receive those benefits, among other things.²¹⁷ While TANF is directed at a similar group, namely families with dependent children, it is a significantly different program. First, and most importantly for purposes of a right to housing, it is not an entitlement program.²¹⁸ While progress under AFDC might have moved towards a right to housing, expansion of benefit levels under TANF or the inclusion of housing assistance would likely be a shaky foundation for a right to housing.

²¹² 436 U.S. 725, 740, *as quoted in* Roisman, *Establishing a Right to Housing*, *supra* note 54 at 18.

²¹³ *See* note 57, *supra*.

²¹⁴ “If the public assistance benefit to which AFDC recipients are entitled were held to include housing, or housing assistance, that would create an entitlement to housing or housing assistance for AFDC-eligible households.” *Id.* at 18.

²¹⁵ Personal Responsibility and Work Opportunity Reconciliation Act (1996).

²¹⁶ Personal Responsibility and Work Opportunity Reconciliation Act (1996).

²¹⁷ As described in Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 *Colum. L. Rev.* 552, 561 (1999). This article also makes the interesting argument that given the risk of the “tyranny of the majority,” decentralization of fundamental redistributive questions to the states, TANF is likely to produce consequences inconsistent with its stated purpose of “providing assistance to needy families so that children may be cared for.” *Id.* at 554-5. The author argues that the federal government should therefore be “more interventionist by including more national standards or incentives that direct state action” but that beyond that, decentralization’s potential benefits exceed its risks to the poor. *Id.* at 555.

²¹⁸ Personal Responsibility and Work Opportunity Reconciliation Act, § 401 (b) (1996) (“NO INDIVIDUAL ENTITLEMENT – This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part”).

c. Federal Administrative Programs

There are also a number of federal programs²¹⁹ related specifically to housing that may help address U.S. fulfillment of the right to adequate housing.²²⁰ These programs, administered by the Department of Housing and Urban Development (HUD), include the Public Housing Program,²²¹ the Housing Choice Voucher Program (Section 8),²²² the HOME Program²²³ and supportive housing for particular vulnerable groups, including those for the elderly (Section 202)²²⁴ and those for persons with disabilities (Section 811).²²⁵ These programs do not create entitlements; rather, they are “discretionary” programs that provide assistance only to the degree that they are funded.

On the positive side, these programs serve a vitally important role in helping some inadequately housed and homeless families and individuals. In reference to the definition of the right to adequate housing by the Special Rapporteur, these programs do help some segments of the target population²²⁶ to receive or “access” “housing resources.”²²⁷ Further, the programs arguably do

²¹⁹ See, generally, Chester Hartman, *The case for a Right to Housing*, 9 Housing Pol’y Debate 223- 246 (1998) for a discussion of several statutes on which a right to housing might be founded.

²²⁰ At least one commentator, taking the view that a right to housing was, if not conclusively determined under *Lindsey*, at least unlikely to change in the near future, stated that any entitlement to housing should come in legislative form. Berger, *Beyond Homelessness: An Entitlement to Housing*, 45 U.Miami L.Rev. 315, 325-6 (1990).

²²¹ This program provides “decent and safe rental housing for eligible low-income families, the elderly, and persons with disabilities.” HUD, Public Housing Program Fact Sheet, at <http://www.hud.gov/renting/phprog.cfm> (as of January 14, 2004) (this site also includes other summary information on the program).

²²² This “program is the federal government’s major program for assisting very low-income families, the elderly, and the disabled” and operates through the payment of housing subsidies through local public housing agencies. HUD, Housing Choice Voucher Program Fact Sheet (Section 8), at <http://www.hud.gov/section8.cfm> (as of January 14, 2004) (this site also includes other summary information on the program).

²²³ “HOME is the largest Federal block grant to State and local governments designed exclusively to create affordable housing for low-income households.” HUD, HOME Quickfacts, at <http://www.hud.gov/offices/cpd/affordablehousing/programs/home/quickfacts.cfm> (as of January 14, 2004) (this site also includes other summary information on the program).

²²⁴ This program “provides capital advances to finance the construction and rehabilitation of structures that will serve as supportive housing for very low-income elderly persons and provides rent subsidies for the projects to help make them affordable. HUD, Section 202 – Supportive Housing for the Elderly Program Program Description, at <http://www.hud.gov/progdsc/2eldrl14.cfm> (as of January 14, 2004) (also includes a summary description of the program).

²²⁵ This program “provides grants to nonprofit organizations to develop and construct or rehabilitate rental housing with supportive services for very low-income persons with disabilities. The companion Mainstream Program awards funding for Section 8 rental vouchers and certificates to very low-income families whose head, spouse, or sole member is a person with a disability.” HUD, Section 811 – Supportive Housing for Persons with Disabilities Program Description at <http://www.hud.gov/progdsc/811main.cfm> (as of October 27, 2001) (also includes a summary description of the program).

²²⁶ Special Rapporteur’s final report to the Sub-commission, (the “homeless, inadequately housed ... [and those] generally incapable of acquiring the bundle of entitlements implicitly linked with housing rights”).

represent “policy and legislative recognition” of some “constituent aspects of the right,”²²⁸ and thus represent “tak[ing] steps” towards a “progressive” realization of the right. In some limited ways, the affected group can make a “claim or demand ... upon society” for fulfillment of their right to housing.²²⁹ Members of certain defined groups – low-income families, the elderly and the disabled – can make claims for the “provision of or access to housing resources,”²³⁰ although because the programs are not adequately funded, these claims may not be honored, or the wait for them to be fulfilled may take years.²³¹ Finally, many of the programs address concerns of adequacy, under the seven-prong definition given in General Comment No. 4. They tend to focus in particular on the prong of “affordability,” which has been widely noted as a special concern in U.S. housing markets.²³²

However, these programs fall short of fulfilling the right to housing in important ways. First, they do not represent steps taken to the “maximum of available resources” to realize the right by “all appropriate means.”²³³ These terms are imprecise because they are context-driven and written in generalized language; nevertheless, they remain useful benchmarks. Given that the U.S. is the wealthiest nation in the world, the “maximum of available resources” should be more than sufficient to adequately finance these programs. In many of these programs, however, demand well exceeds the inadequate funding available. Under the Public Housing and Section 8 programs, “long waiting periods are common” for just this reason.²³⁴ Prioritization is a key issue here; even in the area of federal housing subsidies, only a relatively small amount goes toward low-income housing.²³⁵

²²⁷ *Id.*

²²⁸ *Id.* section (c).

²²⁹ *Id.* section (a).

²³⁰ *Id.*

²³¹ *See, e.g.*, U.S. Conference of Mayors 2003 Report, *supra* note 15 at 84. (In the cities surveyed, average wait for public housing was 24 months, for Section 8 certificates 26 months, and for housing vouchers 27 months.)

²³² *See* Section B, *supra*, on International Law for further discussion of the seven-prong General Assembly definition of “adequacy” and of “affordability” in that context.

²³³ CESCR, Article 2(1). Understanding that the U.S. has not ratified the CESCR, this document is still useful as an interpretive guide to the parameters of the “right to adequate housing.”

²³⁴ Section 8 Fact Sheet, Public Housing Fact Sheet (same quotation in both).

²³⁵ By way of illustration, it is significant to note in addition to the Low Income Tax Credits, the IRS also allows Mortgage Interest Deductions and Local Property Tax Deductions in support of homeownership. The federal income tax deduction for the former program totaled \$58 billion in 1995, which was more than twice HUD’s 1997 budget. \$29 billion of the Mortgage Interest Deductions went to homeowners making more than \$100,000/year. *Source:* http://thecity.sfsu.edu/~bahp/pdf_files/housing_policy.pdf (as of January 14, 2004).

Similarly, these programs do not “ensure *everyone* has access to housing resources” [emphasis added].²³⁶ While this requirement is subject to “progressive” fulfillment,²³⁷ within the context of abundant resources, the qualification should be a minor one. The limitation on eligibility for assistance to certain groups of people in need also is not consistent with access being provided to everyone. The Public Housing program, for example, is limited to low-income families and elderly and the disabled individuals. Further, not all who are eligible are aided, as demonstrated by lengthy – sometime closed – waiting lists for housing assistance.

Finally and perhaps most obviously, these programs do not provide that members of society should be able to make a “*claim or demand ... upon society* for provision of or access to housing resources”²³⁸ [emphasis added]. First of all, as noted in the preceding paragraph, not all of the homeless or inadequately housed can make any demand on society. Most individuals are excluded *de jure* from making such demands. Second, the value of such a claim on society will be determined by the remedy society provides for that claim. The remedy here is often inadequate or very slow in coming by virtue of the limited resources committed to these programs. This *de facto* prevents many families from satisfaction of their demands on society. Third, as the ability to make these demands is created by federal program, rather than statute or constitution, it can presumably be more readily abrogated. That which can be so readily extinguished by administrative fiat arguably does not rise to the level of a “right,” which is in part defined by its theoretical (although not practical) inalienability.

2. State Law

State constitutional and statutory law²³⁹ may provide more opportunity for finding and developing a right to housing in the United States. Individual states, rather than the national government, may be more likely to develop compliance with international law as regards the right to housing.

a. State Constitutions with Explicit Housing or Subsistence Provisions²⁴⁰

Several state constitutions contain the seeds of a right to housing. This nascent potential has been cultivated by some advocates for the poor, with varying degrees of success. In at least one state, a right to housing and a concomitant state duty to provide that housing has emerged, albeit with some qualifications. This section will discuss whether state constitutions could and should

²³⁶ Special Rapporteur’s report (a).

²³⁷ CESCR, *supra* note 10, at article 2(1).

²³⁸ Special Rapporteur’s Report.

²³⁹ Roisman, Establishing a Right to Housing, *supra* note 54.

²⁴⁰ Note that this report did not do an entirely independent review of state constitutions, relying heavily on earlier articles written on the subject. The particularly significant articles include: Roisman, Establishing a Right to Housing, *supra* note 54; Tseisis, *supra* note 189; Daan Braveman, *After the War: Poverty Law in the 1980s: Children, Poverty and State Constitutions*, 38 Emory L.J. 577 (1989); and Langdon & Kass, *supra* note 23.

support a right to housing. It will then look at the potential of state constitutions in developing a right to housing and where states have taken steps toward or achieved such a right.

State constitutions are a recognized and important source of rights apart from the U.S. Constitution. “[T]he issue is directed at what states *should* do, not what they *may* do. It is clear that states are free to interpret their own constitutions without regard to interpretations of the federal Constitution.”²⁴¹ States have a “sovereign right” to construe their constitutions more broadly than the federal Constitution,²⁴² with the latter document essentially setting a “floor” on rights, which states are free to rise above but cannot fall below.²⁴³

Many commentators have further stated that not only can states follow an independent path as regards rights under their own constitutions but also that they should do so. One commentator has argued that there is a “myth of parity”²⁴⁴ between the federal and state constitutions and that for state courts to be “guided by federal constitutional law in their state constitutional jurisprudence is an error not merely of judgment, but of logic.”²⁴⁵ There are a number of arguments as to why state courts should not hesitate to diverge from interpretations of the Federal Constitution. Legal methodologies typically favor interpreting constitutions based on their text, tradition, policy implications, and/or associated case law, all of which can be and often are different for states than they are for the Federal Constitution. As a practical matter, it may be useful for advocates to focus on claims under state constitutions.²⁴⁶

²⁴¹ Braveman, *supra* note 240, at 593.

²⁴² *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74, 81 (1980), *quoted in* Braveman, *supra* note 237, at 593. *See also* *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 293 (1982), *cited in* Cohen, *After the War: Poverty Law in the 1980s: More Myths of Parity – State Court Forums and Constitutional Actions for the Right to Shelter*, 38 Emory L.J. 615, 623 (1989) (“a state court is entirely free to read its own State’s constitution more broadly than [the Supreme Court] reads the Federal Constitution, or to reject the mode of analysis used by [the] Court in favor of a different analysis of its corresponding constitutional guarantee.”).

²⁴³ Braveman, *supra* note 240, at 593.

²⁴⁴ *See* Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105 (1976), criticizing the Supreme Court’s holding in *Stone v. Powell*, 428 U.S. 465 (1976). *Stone* held that a state court can afford a party the opportunity to vindicate their federal constitutional rights as well as a federal court. Neuborne’s article argued that there are a number of differences between federal courts and state courts that make federal courts better at vindicating parties’ federal rights. Neuborne, *as cited and interpreted in* Cohen, *supra* note 239, at n8. Cohen’s “new myth of parity” is different in that it argues that “when state courts import related federal precedent into their state constitutionalism, they also overlook the important differences between the federal and state constitutions.” *Id.* at n9.

²⁴⁵ *Id.* at 617. *See also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131 (1999) (arguing that the policy concerns mandating rational review in federal constitutional analysis (efficiency and federalism, in particular) are not relevant for state constitutions and state courts should therefore be free to employ strict scrutiny in circumstances where federal courts are bound to use rationality review).

²⁴⁶ Some have argued that state constitutions may more closely embody Americans’ fundamental values: “In ways that are simply beyond their reach at the federal level, the people of a state have the opportunity to make immediate choices about fundamental issues of constitutional law. State constitutions are documents of aspiration as well as of government. They reflect historic and contemporary debates over great issues. They allow the people to articulate and refine a theory of self-government, to decide what values they hold most dear, to fashion

State constitutions may be divided into two categories relevant to a possible right to housing: those with explicit provisions that can be related to the poor, and those without such provisions. These will both be discussed in turn.

At least twenty-five state constitutions²⁴⁷ contain provisions concerning aid to the poor or the protection of the public's health or welfare.²⁴⁸ The relevant language in each of these

protections for individual rights, and, in the final analysis, to act responsibly for themselves and their posterity.” Howard, Introduction: A Frequent Recurrence to Fundamental Principles in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xi, xxiii (B.McGraw ed. 1985) (bibliography) *as cited by* Braveman, *supra* note 240, at 578.

²⁴⁷ The twenty-five states are: Alabama (“It [is] the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.”) Ala. Const. art. IV, § 88; Alaska (“The legislature shall provide for public welfare.”) Alaska Const. art. VII, § 5; California (authorizes legislature to enact laws relating to relief administration) Cal. Const. art. XVI, § 11; Colorado (requiring the provision of a pension to Colorado residents – and United States citizens – over the age of sixty, subject to other requirements determined by the legislature) Colo. Const. art. 24 § 3; Delaware (“The General Assembly shall provide for the establishment and maintenance of a State Board of Health which shall have supervision of all matters relating to public health.”) Del. Const. art. XII, § 1; Georgia (authorizes local governments to contract with public entities for the care of its indigent sick) Ga. Const. art. IV, § 3, para. 1; Hawaii (reaffirms a belief in government with “an understanding and compassionate heart toward all the peoples of the earth.”) Haw. Const. pmbl; Idaho (State must establish and support “education, reformatory, and penal institutions,” to provide for the “public good” of the “insane, deaf and dumb.”) Idaho Const. art. X, § 1; Illinois (the state Constitution is ordained and established among other reasons to “eliminate poverty and inequality; assure legal, social and economic justice; [and] provide opportunity for the fullest development of the individual.”) Ill. Const. pmbl; Indiana (authorizes county boards to establish farms to house those who “have claims upon the ... aid of society”) Ind. Const. art. IX, § 3; Kansas (“The ... counties of the 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 the aid of society.”) Kan. Const. art. VII, § 4; Louisiana (authorizes legislature to establish welfare and unemployment compensation as well as public health measures) La. Const. art. XII, § 8; Michigan (“The legislature shall pass suitable laws for the protection and promotion of public health.”) Mich. Const. art. IV, § 51; Mississippi (authorizes legislature to provide homes to those who have claims upon the aid of society) Miss. Const. art. XIV, §262; Missouri (“[T]he general assembly shall establish a department of public health and welfare[.]”) Mo. Const. art. IV, § 37; New York (“The aid, care and support of the needy ... shall be provided by the State[.]”) N.Y. Const. art. XVII, §§ 1, 3; Nevada (“Institutions for the benefit of the Insane, Blind and Deaf and Dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the State, subject to such regulations as may be prescribed by law.”) N.V. Const. art. 13 § 1; North Carolina (“Beneficent provision for the poor, the unfortunate, and the orphan 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.C. Const. art. XI, § 4; New Mexico (authorizes state and local governments to make provisions relating to the care of sick and indigent persons) N.M. Const. art. IX, § 14; Oklahoma (“The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county.”) Okla. Const. art. XXVII, § 3; Rhode Island (“All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens.”) R.I. Const. art. I, § 2; South Carolina (“The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern.”) S.C. Const. art. XII, § 1; Texas (authorizes payment of assistance to needy) Tex. Const. art. III, § 51a; West Virginia (“Coroners, overseers of the poor and surveyors of roads shall be appointed by the county court”) W.V. Const. art. IX § 2; and Wyoming (duty of the legislature to provide for “the health and morality of the people.”) Wyo. Const. art. VII, § 20. Until 1988, Montana also had such a provision. Mont. Const art. XII, § 3 (3) (1987) (“The legislature *shall* provide such economic assistance and social and rehabilitative services ... for those ... who ... may have need for the aid of society.” [emphases added]). Montana now fits in the second category of Constitutions, which authorize but do not

constitutions varies significantly. However, the constitutions can be roughly divided into the following three categories, corresponding to increasing levels of government obligation: those containing a statement of principle regarding the less fortunate, those that contain provisions authorizing the state or local government entities to provide for the poor or the health of its citizens, and those that refer to a governmental obligation to care for the needy or protect the health or welfare of all citizens.²⁴⁹ While the former two categories may provide some opportunities, the latter category has proven to be both the most frequently adjudicated and the most successful in developing a right to housing.

Of these twenty-five state constitutions, there are at least four containing statements of principle regarding the less fortunate in Hawaii, Illinois, Rhode Island and South Carolina. The preamble to the Hawaii Constitution, for example, affirms that government should have “an understanding and compassionate ear toward all the peoples of the earth.”²⁵⁰ The South Carolina Constitution states that “[t]he health, welfare and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern.”²⁵¹

Given their generality, these provisions are unlikely to form a primary basis for housing rights; and, in fact, they appear not to have been adjudicated. They could, however, provide secondary or additional support of such a right. However, they have apparently not done so. The purposes of the Illinois Constitution, for example, are to “eliminate poverty and inequality; assure legal, social and economic justice; [and] provide opportunity for the fullest development of the individual.”²⁵² Despite the seeming relevance of the preamble, however, the Illinois Supreme Court did not even mention the preamble in deciding, on state constitutional grounds, that there

require aid to the poor. *See* Mont. Const. art. XII, § 3 (3) (1988) (“[t]he legislature *may* provide such economic 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.*” [emphases added]). This list and the quotations are primarily an updating of Braveman *supra* note 240, at n 85–96. The above interpretation of the Idaho Constitution is propounded in Tseisis, *supra* note 187, at 124.

²⁴⁸ Other commentators differ on the number of state constitutions containing such provisions, due to definitional differences (provisions related to aid of the poor compared with provisions related to aid of the poor or the general welfare). *See* Dennis D. Hirsch, *Making Shelter Work: Placing Conditions on an Employable Person’s Right to Shelter*, 100 Yale L.J. 491, 508 (1990), *citing* Langdon & Kass, *supra* note 23, at 332–34 (“There are seventeen state constitutions that do contain provisions concerning aid to the poor.”) and Braveman, *supra* note 240, at 595 (“Unlike the United States Constitution, the constitutions of 22 states include in some manner a specific provision relating to the care of the needy or the protection of the health of the people”).

²⁴⁹ These categories are drawn from Braveman, *supra* note 240, at 595–97. Note that Professor Braveman’s list of relevant state constitutions is the same but for three additional states included in this analysis: Colorado, Idaho and Rhode Island. Those states were drawn from other lists, including Langdon & Kass, *supra* note 23; and Tseisis, *supra* note 189.

²⁵⁰ Haw. Const. pmbl, *supra* note 247.

²⁵¹ S.C. Const. art. XII, § 1, *supra* note 247.

²⁵² Ill. Const. pmbl, *supra* note 247.

is no obligation to support the poor and that the legislature therefore has broad discretion in designing welfare laws.²⁵³

There are at least eight state constitutions containing provisions authorizing the state or a local government entity to provide for the poor or the health of its citizens. These provisions directly refer to the care of either the poor or the health of state citizens without defining a specific governmental obligation to provide for that care. The state constitutions at issue include those of California, Georgia, Indiana, Louisiana, Mississippi, New Mexico and Texas. Article XVI, § 11 of the California Constitution provides an example of one of these provisions, which tend to give quite broad authority while being relatively clear that they are not creating a governmental duty:

The Legislature has plenary power to provide for the administration of any constitutional provisions or laws heretofore or hereafter enacted concerning the administration of relief, and to that end may modify, transfer, or enlarge the powers vested in any state agency or officer concerned with the administration of relief or laws appertaining thereto. The Legislature, or the people by initiative, shall have 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 [sic], or make such provision for reimbursement of the counties by the State, as the Legislature deems proper.²⁵⁴

Third and finally, there are thirteen or more constitutions referring to a government obligation to care for the needy or to protect the health or welfare of all citizens. Given the relative specificity of these provisions and the explicit governmental obligation, it is not surprising that these constitutional provisions have been the most frequently adjudicated in the search for a right to housing.²⁵⁵ A right to housing or public assistance has come up in nearly half of these states, with varied results.²⁵⁶ Constitutions of this type seem to be the most promising route for right to housing advocates, as evidenced by their qualified success.

²⁵³ *Warrior v. Thompson*, 96 Ill. 2d 1, 12 (1983). Decision criticized in Braveman, *supra* note 240, at 593 (“Noticeably absent from the decision was any reference to the preamble. At the very least, the court should consider the language of the preamble and whether it might justify more careful line drawing by the state legislature in the area of social welfare.”).

²⁵⁴ Cal. Const. art. XVI, § 11.

²⁵⁵ Another lesson that we can learn from the Montana experience is the crucial difference between constitutions that authorize and those that obligate particular treatment of the poor.

²⁵⁶ Note that this refers to state *constitutions* only, as statutory rights to housing or minimum public assistance have been found in a number of these states, including those where constitutional issues on the right to housing have not been adjudicated (*e.g.* West Virginia).

Language about the poor or the health and welfare of all citizens in the constitutions of Alabama, Alaska, Delaware, Idaho, Kansas, Michigan, Missouri, Montana, New York, North Carolina, Oklahoma, West Virginia, and Wyoming are quite varied, but all note governmental duties to these groups. The Constitution of North Carolina, for example, states that “[b]eneficent provision for the poor, the unfortunate, and the orphan 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.”²⁵⁷ The Wyoming Constitution, in contrast, says that it is the “[*d*]uty of the legislature to protect and promote the health and morality of the people.”²⁵⁸ Article XVII of the New York Constitution states simply that, “The aid, care and support of the needy ... *shall* be provided by the State.”²⁵⁹

A right to housing or some form of minimum subsistence has come up in six of these states, namely Alabama, Delaware, Kansas, New York, Montana and Idaho.²⁶⁰

Alabama: Alabama has found a governmental duty to provide for the maintenance of the poor but unfortunately has done so in what appears to be a legally unenforceable manner. The state has, however, found a narrow duty to provide for the involuntarily committed.

In 1953, the Alabama Supreme Court found that the legislature has a mandatory duty to require counties to provide adequately for the maintenance of the poor under Article IV, § 88 of the state constitution.²⁶¹ Unfortunately, however, the court then turned this important governmental obligation, backed by force of law, into the practical equivalent of nothing more than moral imperative by commenting that “of course there is no way to force the legislature to perform that duty, although it has always undertaken to do so.”²⁶² The Court also defers entirely to the legislature in defining who does and does not constitute the poor,²⁶³ further taking the teeth out of the governmental duty to the poor. Two Alabama cases in 1989 and 1992 suggest that there is a right to “pre-commitment care and treatment” for indigent “citizens who had been involuntarily committed to the custody of the Department of Mental Health.”²⁶⁴ However, this right to “care” is not defined.

²⁵⁷ N.C. Const. art. XI, § 4, *supra* note 247 [emphasis added].

²⁵⁸ Wyo. Const. art. VII, § 20, *supra* note 247 [emphasis added].

²⁵⁹ N.Y. Const. art. XVII, §§ 1, 3, *supra* note 247 [emphasis added].

²⁶⁰ Of the other six states, at least one, West Virginia, has found a statutory right to housing.

²⁶¹ Ala. Const. art. IV § 88, *supra* note 247, *as interpreted by* *Atkins v. Curtis*, 259 Ala. 311 (1953).

²⁶² *Atkins v. Curtis*, 259 Ala. 311, 315 (1953).

²⁶³ *Id.* at 316.

²⁶⁴ *Childree v. Health Care Authority of the City of Huntsville*, 548 So.2d 419 (Ala. 1989); and *Health Care Authority of the City of Huntsville v. Madison County et al.*, 601 So.2d 459 (Ala. 1992).

Delaware: In *Tilden v. Hayward*, the Delaware Court of Chancery held that there was no right to “financial assistance to secure housing,” in the Federal or Delaware Constitutions or statutes.²⁶⁵ The Court recognized, however, that both moral and economic considerations “plainly support the plaintiffs’ position.”²⁶⁶ On the moral side, the judge noted that “[t]his case is about basic human rights” and that government has a “moral obligation to eliminate the evils of poverty, of which one of the most serious modern examples is homelessness.”²⁶⁷ As an economic consideration, the judge pointed out that “[i]t has been shown again and again that it is more economical to house an intact family than to provide child protective services for a single child.”²⁶⁸

Despite this “plain support,” the judge reasoned that to decide in accordance with these policy concerns would be to ignore courts’ institutional role and “principles of restraint”²⁶⁹ and that there would be “severe practical problems” with “crafting a meaningful judicial decree.”²⁷⁰ Despite this result, the Delaware decision has been cited in support of a right to minimum subsistence. The dissent in a landmark 1995 case before the Connecticut Supreme Court, for example, stated that *Tilden* “expressly recognized that other state constitutions do, in fact, provide such a right, and noted that the language of a state constitution and its history are important factors to consider in determining whether such a state constitutional right exists.”²⁷¹

Idaho: Under Article X, § 1 of its state Constitution, Idaho is bound to establish “institutions ... for the benefit of the insane, blind, deaf and dumb.”²⁷² This provision arguably creates “an affirmative right to the homeless who are mentally ill.”²⁷³

Kansas: In Kansas, the state has a duty to “inhabitants who ... may have claims upon the aid of society,”²⁷⁴ but the requirements of this duty to provide some public assistance do not appear to have been clarified.²⁷⁵ Article VII, § 4 of the Kansas Constitution states that “[t]he ... counties of

²⁶⁵ *Tilden v. Hayward*, 1990 WL 131162 (Del. Ch. 1990).

²⁶⁶ *Id.* at 60.

²⁶⁷ *Id.* at 58-9.

²⁶⁸ *Id.* at 60.

²⁶⁹ *Id.* at 59.

²⁷⁰ *Id.* at n.20.

²⁷¹ *Moore v. Ganim*, 233 Conn. 557 at 688 (A.J. Berdon, dissenting).

²⁷² Idaho Const. art. X, § 1, *supra* note 247.

²⁷³ Tseisis, *supra* note 189, at 124.

²⁷⁴ Kan. Const. art. VII, § 4.

²⁷⁵ See *Bullock v. Whiteman*, 254 Kan. 177 (1993). *Bullock* was cited by the Connecticut Supreme Court for the proposition that there are no “affirmative state constitutional rights to subsistence benefits” in Kansas.

the state shall provide ... for those inhabitants who ... may have claims upon the aid of society.”²⁷⁶ This provision was noted in a 1922 case involving emergency medical aid for a homeless child, which held that it is the

duty of the overseer to care for the poor, and to see that they are given relief, and it is the duty of the board of county commissioners to raise money and pay for such care and relief (Gen. Stat. 1915 § § 6820, 6822, 6851). The constitution enjoins this care and commands that counties of the state shall provide for the poor and those who have claims upon the sympathy and aid of society. (Art. 7, § 4.) When an overseer of the poor finds a poor person in need of care, it is his duty to furnish him prompt and proper relief.²⁷⁷

There may be arguments that emergency medical care is fundamentally different from shelter and that the state duty to provide one does not imply a state duty to provide the other. Some other courts have, however, suggested that both (in addition to food) are required elements for “minimum subsistence necessary for humane survival.”²⁷⁸

Montana: In 1987, the Montana Supreme Court found a state constitutional duty to aid the poor.²⁷⁹ However, the state legislature amended the state constitution the following year to make the commitment to the poor discretionary.

In *Butte Community Union v. Lewis*,²⁸⁰ the Montana Supreme Court found that “[c]learly and grammatically ... the State Constitution imposes upon the legislature a duty to provide necessary economic assistance to inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society.”²⁸¹ While it found that there was no fundamental right to welfare (at 1310) because the provision in question was not in the Constitution’s Declaration of Rights, it did say that welfare benefits are “lodged in” the Montana Constitution and warrant a heightened, middle-tier level of constitutional scrutiny.

Moore v. Ganim, 233 Conn. 557, 584 (1995). The dissenting opinion in the same case, however, points out that the *Bullock* opinion “explicitly avoided” this holding. *Id.* at 692 (Berdon, A.J., dissenting). *Bullock* itself does not deny the existence of a duty to the poor, stating that “[t]he real issue is the depth, and breadth, of that duty.” 254 Kan. at 183. This case raises interesting questions about how to define who is “poor” and therefore eligible for aid but it does not undermine the Kansas Supreme Court’s 1922 holding, in *Caton & Starr v. Board of County Commissioners of the County of Osborne*, that a duty to the poor does exist. 110 Kan. 711, 714 (1922).

²⁷⁶ Kan. Const. art. VII, § 4.

²⁷⁷ *Caton & Starr*, *supra* note 275, at 714.

²⁷⁸ Moore, 233 Conn. at 661 (A.J. Berdon, dissenting).

²⁷⁹ *Butte Community Union v. Lewis*, 229 Mont. 212 (1987).

²⁸⁰ *Butte Community Union v. Lewis*, 229 Mont. 212 (1987).

²⁸¹ *Id.*

The following year, a constitutional amendment changed the obligatory language (“shall”) and character of this constitutional provision to one authorizing governmental intervention.²⁸² The new provision states that, “[t]he legislature *may* provide such economic 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.*”

New York: New York’s constitution is arguably the most hospitable to minimum subsistence rights.²⁸³ Article XVII, § 1 of the New York Constitution states that “[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means as the legislature may from time to time determine.”²⁸⁴ In 1977, in *Tucker v. Toia*, the State Court of Appeals held that this constitutional provision imposes an obligation on New York to aid the needy.²⁸⁵ The court stated that, “[i]n New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution.”²⁸⁶

Two years later, in *Callahan v. Carey*, a New York state trial court found that the homeless plaintiffs did state a cause of action and a justiciable controversy in claiming that Article XVII and a number of statutory requirements that New York City care for the needy included an obligation to shelter the homeless. Further, the Court ordered a temporary mandatory injunction preventing the Department of Social Services from closing particular shelters in advance of the coming winter.²⁸⁷ In 1981, the suit was settled by a consent decree,²⁸⁸ entered into by both the City and State, guaranteeing a right to shelter for all homeless men in the City and establishing minimum health and safety standards for homeless shelters. This decree was extended to include

²⁸² Making the current version of the Montana Constitution more like the second group of constitutions.

²⁸³ Note that this is not to suggest that New York State has done the best job nationally at reducing homelessness or providing adequate shelter or housing, only that it has the most compliant constitutional framework in this regard.

²⁸⁴ N.Y. Const., art. XVII, § 1.

²⁸⁵ 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977).

²⁸⁶ *Id.* at 7, 371 N.E.2d at 451, 400 N.Y.S.2d at 730.

²⁸⁷ *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 15, 1979), *reprinted in* N.Y.L.J., Dec. 11, 1979, at 10 (ruling on a motion for a preliminary injunction).

²⁸⁸ A consent decree is a binding obligation entered into by opposing parties in a dispute.

homeless women in 1983²⁸⁹ and families in 1986.²⁹⁰ Under this decree, shelter has been provided for “hundreds of thousands” of homeless New Yorkers.²⁹¹

Two decades later, however, the rights of the needy generally and the rights of the homeless under the consent decree particularly have been significantly undermined. The former has resulted from the effective negation of the obligation to help the needy as a result of courts broadly construing legislative discretion in determining whom it classifies as needy.²⁹² In *RAM v. Blum*, the court seemed to make the obligation practically voidable at legislative discretion.²⁹³ In that case, the State’s constitutional obligation was deemed satisfied without judicial inquiry into the merits of the claim that the recipients’ aid level had “fallen significantly below that recognized as ‘subsistence’ level by the legislature six years earlier.”²⁹⁴

The rights of the homeless to shelter have been undermined by court-sanctioned restrictions imposed on that right by city officials. One example of this is the 1998 decision *McCain v. Giuliani*, where a New York Supreme Court found that eligibility requirements for shelter were within the State Department of Social Services rulemaking power.²⁹⁵ These eligibility requirements allowed exclusion of applicants who did not cooperate with an agency needs assessment or of recipients who failed to comply with the agency’s independent living plan. More noteworthy, however, was the great deference afforded by the court to the legislature. The Court stated that this regulation was acceptable because it “does not on its face permit the arbitrary, outright denial of temporary shelter,”²⁹⁶ with the “on its face” language implying that discriminatory effect would not be a consideration in looking at restrictions.

²⁸⁹ *Eldredge v. Koch*, 459 N.Y.S.2d 960, 961 (N.Y. Sup. Ct.1983) (stating that the claim that women should also be included in the consent decree under the 14th Amendment to the U.S. Constitution is “so obviously meritorious that it scarcely warrants discussion.”).

²⁹⁰ *McCain v. Koch*, 484 N.Y.S.2d 985 (N.Y. Sup. Ct. 1984), 502 N.Y.S.2d 720 (1986).

²⁹¹ Coalition for the Homeless, *The Right to Shelter: The History*, at <http://www.right2shelter.org/history.htm> (as of October 29, 2001).

²⁹² See, e.g., *Bernstein v. Toia*, 43 N.Y.2d 437, 373 N.E.2d 238, 402 N.Y.S.2d 342 (1977), and *RAM v. Blum*, 103 Misc. 2d 237, 425 N.Y.S.2d 735 (Sup. Ct., N.Y. County, 1980), *aff’d*, 77 A.D.2d 278, 432 N.Y.S.2d 892 (1st Dep’t 1980). The seeds for this judicial deference were sown in *Tucker* itself, where the court stated that the N.Y. Constitution “provides the Legislature with discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term ‘needy.’” *Id.* at 8, 371 N.E.2d at 452, 400 N.Y.S.2d at 731.

²⁹³ *Id.*

²⁹⁴ Ladd, *supra* note 189, at 278–79.

²⁹⁵ *McCain v. Giuliani*, 252 A.D.2d 461 (1998), *appeal dismissed*, 93 N.Y. 21 848 (1999).

²⁹⁶ *Id.*

b. State Constitutions without Explicit Housing or Subsistence Provisions

The absence of an express provision in the other twenty-five constitutions does not mean that it is impossible to find an implicit constitutional right to minimal subsistence or housing. This, therefore, is the second major category of State Constitutions that may support such rights, especially in the context of a given state's traditions and case law.²⁹⁷ The experience in Connecticut and New Jersey suggests that arguments supporting a right to housing or public assistance may be compelling, as in Connecticut, or at least ambiguous, as in New Jersey. Indeed, in some respects this type of state constitution may prove to be a better starting point for finding a right to housing or minimum subsistence than those constitutions that mention the poor or the public welfare but do not create a governmental obligation to them.

In Connecticut, in dissenting and concurring opinions, three of seven Supreme Court justices recognized a governmental obligation to provide a minimal safety net to Connecticut's poorest residents, the components of that safety net at least including "shelter, food and essential medical care."²⁹⁸ They found this obligation in broad constitutional provisions²⁹⁹ that, they reasoned, lead to Connecticut "law and customs" that preceded the 1818 constitution³⁰⁰ and that support a state constitutional right to minimum subsistence.³⁰¹ The minority opinions in Moore individually or collectively contain a number of other interesting and compelling lines of argument as well: they appeal to international law as a basis for the right to minimum subsistence,³⁰² they discuss the role of the judiciary vis-à-vis the legislature with regards to defining the right,³⁰³ and they suggest that the right is so fundamental to modern democracy that it cannot be ignored.³⁰⁴

²⁹⁷ See, e.g., Moore v. Ganim, 233 Conn. 557, 661 (1995) (Berdon, A.J., dissenting) ("The state constitution, which was first formally adopted in 1818, does not explicitly provide for the right of the poor to receive subsistence from the towns. Nevertheless, we have previously recognized that there are some rights that are so fundamental they need not be set forth in the state constitution.").

²⁹⁸ Moore, *supra* note 297, at 646.

²⁹⁹ Conn. Const. preamble ("The People of Connecticut acknowledging with gratitude, the good providence of God, in having permitted them to enjoy a free government; do, in order more effectually to define, secure and perpetuate the liberties, rights and privileges which they have derived from their ancestors; hereby, after careful consideration and revision, ordain and establish the following constitution and form of civil government") and *id.*, Art. I, § 10 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay").

³⁰⁰ *Id.* at 646 (Berdon, A.J., dissenting).

³⁰¹ *Id.* at 617, 661.

³⁰² The concurring opinion cites Article 25(1) of the Universal Declaration of Human Rights and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, as examples that "contemporary economic circumstances and contemporary conceptions of democracy" have "led the international community to incorporate a right to subsistence into the international law of human rights." Moore, *supra* note 297, at 637 (Peters, C.J., concurring).

³⁰³ The concurring opinion states that objections to recognizing a right on grounds that it will be "judicially unmanageable" do not "foreclose the recognition of a limited constitutional right that obligates government to

The New Jersey Constitution, like the Connecticut Constitution, does not include a provision that on its face addresses the government’s obligation (or lack thereof) to the poor.³⁰⁵ The existence of a right to housing for the homeless in New Jersey is unclear. The New Jersey Supreme Court has chosen not to rule on a right to housing under the state constitution, despite two opportunities to do so,³⁰⁶ stating quite clearly in the later case that “the question before us is not whether the homeless have a constitutional right to shelter.”³⁰⁷ The fact that a right to housing might still be found under a provision that on its face is not directly related to the poor, suggests that such a right might be found under other, similar state constitutions. At least one commentator has suggested that a right to emergency shelter for the homeless under the New Jersey Constitution is supported by legislative history, preexisting case law and state traditions.³⁰⁸

The twenty-five state constitutions without applicable explicit reference to the poor, then, may be useful in finding a right to minimum subsistence. International law, as well as state legislative history, case law and traditions, may provide sources of support for such a right.

provide only minimal subsistence but reserves to government broad discretion about the manner in which such an obligation is to be implemented.” *Id.* at 639–40 (Peters, C.J., concurring). The Dissenting Opinion states that the appropriate level of constitutional scrutiny to be applied by the judiciary is not important here, as all that is at issue is humane survival. This leaves making “a greater level of benefits” available to “the poor and needy” within “the authority of the legislature, of course.” *Id.* at 699 (Berdon, A.J., dissenting).

³⁰⁴ For the view expressed in the concurring opinion, *see supra* note 297 on “contemporary conceptions of democracy.” The dissenting opinion states that “this right to minimal subsistence is a right so fundamental that without it no other guaranteed rights, explicit or implicit, can be enjoyed. It is the right to life itself – the right to subsistence, sufficient for humane survival.” *Id.* at 700. (Berdon, A.J., dissenting).

³⁰⁵ At least one commentator has argued that the safety and security provisions of Article I provide a textual basis for finding a right to housing under the New Jersey constitution. Article I reads:

All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of *pursuing and obtaining safety* and happiness.

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.

[emphasis added] N.J. Const., art. 1.

³⁰⁶ *L.T. v. Dept. of Human Services*, 134 N.J. Super. 304, 624 A.2d 990 (1993); and *Franklin v. Dept. of Human Services*, 225 N.J. Super. 504, 543 A.2d 56 (1988).

³⁰⁷ *L.T. v. Dep’t of Human Services*, *supra* note 306, 134 N.J. at 323.

³⁰⁸ John C. Connell, *A Right to Emergency Shelter for the Homeless under the New Jersey Constitution*, 18 Rutgers L.J. 765 (1987).

3. State Statutes

In addition to state constitutions and their provisions for the aid of the poor, both explicit and implicit, there are also states and localities where a right to housing or minimum subsistence has been found under statute.³⁰⁹ Commentators have identified two primary types of applicable laws: general assistance (GA) statutes and adult protective services statutes.

GA programs are cash and in-kind assistance programs financed and administered wholly by the state or locality in which they operate and are intended to meet the needs of low-income people ineligible (or waiting for) federally funded cash assistance (*e.g.* TANF or Supplemental Security Income (SSI)).³¹⁰ These programs are quite small, in terms of recipients, when compared with the major federal assistance programs.³¹¹ Thirty-five states, including the District of Columbia, have state GA programs.³¹² Of the remaining sixteen states, at least six contain one or more county or municipality providing some form of General Assistance.³¹³

While there is considerable variety across states on income eligibility limits, most states limit access to this program to those with incomes less than one-half of the poverty level, otherwise called the “severely poor.”³¹⁴ Finally, these benefits are even lower than the inadequate levels of aid distributed under federal assistance programs. These programs have been a target of advocates for the homeless because of two of their characteristics: they usually contain clear language on the government’s duty to the needy, and this government obligation to the poor should also hold for the homeless as the “poorest of the poor.”³¹⁵

There are significant problems with GA statutes in finding a right to adequate housing, however. First of all, they clearly miss a very broad swath of the population, including only the “severely

³⁰⁹ The review here is descriptive rather than comprehensive and there may be strong (or stronger) claims for a right to adequate housing under statutes from states not mentioned herein.

³¹⁰ Explanation and following data drawn from Gallagher et al., *The Urban Institute, State General Assistance Programs*, April 1999 (hereafter “State GA Programs”). This report is based on information current up to the summer of 1998.

³¹¹ *Id.* at 5.

³¹² These states are Alaska, Arizona, California (Los Angeles County), Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Idaho (Ada County), Illinois (City of Chicago), Indiana (Center Township of Marion County), Iowa (Polk County), Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada (Clark County), New Hampshire (City of Manchester), New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota (Minnehaha County), Utah, Vermont, Virginia (Fairfax County), Washington, Wyoming (Dane County). *Id.* at 8.

³¹³ These states are Florida (Dade County), Georgia (Fulton County), Kentucky (Jefferson County), Montana (Yellowstone County), North Carolina (Durham County) and North Dakota (Cass County). *Id.*

³¹⁴ *Id.* at 3.

³¹⁵ John H. Whitfield, *A Guide to Finding A Right to Shelter for the Homeless*, 9 Miss. Coll. L. Rev. 295, 313 (1989).

poor;” some impose other eligibility requirements as well.³¹⁶ A second major problem is that current GA programs do not nearly provide sufficient funds to help secure “adequate” (as defined by GA Comment No. 4) housing. As a recent report has stated, “the maximum monthly benefits available to General Assistance recipients are generally set far below the federal poverty line.”³¹⁷ Both of these problems, among others, would arguably have to be remedied before state statutes would fulfill the right to adequate housing. That said, however, state GA programs, modified for eligibility, funding levels and nature of benefits, do at least provide a base from which to work towards a state statutory right to shelter.

There are at least thirty-eight states with Adult Protective Services statutes.³¹⁸ These statutes are intended to provide emergency care and services to adults deemed unable to protect themselves from abuse or neglect.³¹⁹ This care typically includes the provision of basic necessities, including shelter. There are at least ten statutes specifically referring to shelter,³²⁰ as well as a number that do not explicitly mention but could be interpreted to include shelter. These statutes include those such as Wisconsin and Kentucky that refer to the provision of “social services,” those such as Arizona and Tennessee that offer “appropriate” services, and those such as Wyoming that refer to the narrower group of “necessary” services. In addition to a shelter provision (explicit or possibly interpreted), there are arguably two other characteristics that are significant in finding a right to housing under these statutes.³²¹

³¹⁶ These non-financial requirements include, for example, Connecticut’s prohibition of disbursement for employable persons without children. *See* State GA Programs, *supra* note 310, at 5.

³¹⁷ State GA Programs, *supra* note 310, at 4.

³¹⁸ These states are: Alabama (Ala. Code §§ 38-9-1 to -11), Arizona (Ariz. Rev. Stat. Ann. §§ 46-451 to -454), Arkansas (Ark. Stat. Ann. §§ 59-1301 to -1314), California (Cal. Wel. & Inst. Code, §§ 15750-5), Colorado (Colo. Rev. Stat. §§ 26-3.1-101 to -105), Connecticut (Conn. Gen. Stat. Ann. §§ 46a-14 to -26), Delaware (Del. C. §§ 3901-13), District of Columbia (D.C. Code, §§ 6-2502-13), Florida (Fla. Stat. Ann. §§ 415.101-.112), Hawaii (HRS §§ 346-221 to -253), Idaho (Idaho Code §§ [39-5301 to -5312] 39-5201 to -5212), Indiana (Ind. Code Ann. §§ 12-10-3-2 to -31), Kansas (Kan. Stat. Ann. §§ 39-1401 to -1410), Kentucky (Ky. Rev. Stat. Ann. §§ 209.010-.990), Louisiana (La. Rev. Stat. Ann. § 14:403-2), Maine (Me. Rev. Stat. Ann. tit. 22, §§ 3470-87), Maryland (Md. Family Law Code Ann., Title 14), Michigan (Mich. Comp. Laws Ann. §§ 400.11-.11f), Minnesota (Minn. Stat. Ann. § 626.557), Montana (Mont. Code Ann. §§ 52-3-101 to -813), Nebraska (R.R.S. Neb. §§ 28-348 to -387), Nevada (Nev. Rev. Stat. §§ 200.5091 to .5099), New Hampshire (N.H. Rev. Stat. Ann. §§ 161-E:1), New Jersey (N.J. Stat. §§ 52: 27D-406 to -422), New Mexico (§§ 27-7-1 to -31), New York (N.Y. Soc. Serv. Law §§ 473-473a), North Carolina (N.C. Gen. Stat. §§ 108A-99 to -111), North Dakota (N.D. Cent. Code §§ 50-25.2-01 to -13), Ohio (Ohio Rev. Code Ann. §§ 5101.60 to .72), Oklahoma (Okla. Stat. Ann. tit. 43A, §§ 10-106, 107 & 111), Oregon (Or. Rev. Stat. §§ 410.610 to .700), Pennsylvania (Penn. Stat. § 5608), South Carolina (S.C. Code Ann. tit. 43, Ch.35), Tennessee (Tenn. Code Ann. §§ 71-6-1), Virginia (Va. Code §§ 63.1-55.1 to .7), West Virginia (W. Va. Code §§ 9-6-1 to -8), Wisconsin (Wis. Stat. Ann. §§ 55.001 to .07), and Wyoming (Wyo. Stat. §§ 35-20-101 to -108). Given the range of possible titles for programs of this type, this survey may have missed some states and may not include every state with an adult protective services program. This list is updated from Langdon & Kass, *supra* note 23 at 379-86.

³¹⁹ This definition is drawn from Langdon & Kass, *supra* note 23, at 327.

³²⁰ These ten states are Alabama, Colorado, Connecticut, Idaho, Kansas, Maryland, North Carolina, Ohio, Oklahoma and West Virginia.

³²¹ This analysis draws heavily on the Appendix in Langdon & Kass, *supra* note 23, at 379–86, which suggests that these characteristics are particularly important and catalogues them as of roughly 1985.

First, language that is mandatory rather than discretionary is preferable. This condition is often satisfied. Of the thirty-eight statutes mentioned here, at least seventeen states make the provision of services to the eligible population a duty.³²² There are others, such as Alabama, Kentucky, Tennessee and Virginia that make provision of services mandatory to the extent of available funds. There are also those such as Arkansas, Colorado, South Carolina, Wisconsin and Wyoming, less promising in the right to housing context, that make provision of services more discretionary.

Second and more difficult, is how the statute defines the population eligible for relief. Many of these statutes limit eligibility to individuals with “mental or physical impairment,” for example, or those with developmental difficulties. Some, such as Virginia, make eligibility contingent in some cases on a lack of other willing caretakers. There are, however, a few protective services statutes that are more inclusive. West Virginia, for example, includes adults incapacitated by “mental, physical or other infirmity.”³²³ In the case of *Hodge v. Ginsburg*, the Supreme Court of Appeals of West Virginia found that a homeless person is an “incapacitated adult,” as “other infirmity” included “the recurring misfortunes of life” leading to homelessness.³²⁴ Homeless people were therefore the intended beneficiaries of the Social Services for Adults Act of 1981 and the state was required to provide them with emergency shelter, food and medical care.

There are also sub-groups within the homeless population that might be eligible for assistance under these statutes where homeless persons as a group are not. These groups include the elderly, the physically or mentally disabled, substance abusers and/or those in ill health.

D. THE RIGHT TO HOUSING IN EUROPE

Europe, the European Union, and individual nations have addressed housing and homelessness, and there appears to have been a recent flurry of activity at all levels of government. This section briefly summarizes actions by Europe as a whole, the European Union, and selected individual states.

1. European Laws and Bodies

Both Europe as a whole and the European Union have addressed housing and homelessness with increasing frequency and in a variety of arenas. The following is a brief summary of key initiatives.

³²² These seventeen states are Arizona, Connecticut, Florida, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon and West Virginia.

³²³ W. Va. Code § 9-6-1(4).

³²⁴ 303 S.E.2d 245, 249-50 (1983).

a. Council of Europe

The European Social Charter, a non-binding policy document, includes a right to housing, as well as an agreement to take measures to implement the right, in order to prevent and reduce homelessness, with a view to its gradual elimination.

The European Convention on Human Rights, which is binding, is also less clear. Article 8.1 of the Convention provides that “everyone has the right to respect for ... his home”³²⁵ The European Court of Human Rights, which enforces the convention (together with national courts) has stated that the “scope of any positive obligation [under 8.1] to house the homeless must be limited.”³²⁶ Many states have incorporated the convention into national law. In a 2001 case against the UK involving a homeless person evicted from a hotel room provided as temporary accommodation, the Court said that “Article 8 does not in terms give a right to be provided with a home.”³²⁷ In another case (1989) the Court said that article 8.1 doesn’t “guarantee a right to have one’s housing problem solved by the authorities.”³²⁸

b. European Union

The European Community Commission, the main source of legislative and other initiatives within the European Union, has developed a “poverty strategy” that identifies “ensuring reasonable accommodation to all” as one of eight “core” social challenges. This in turn led the European Parliament and Council to establish a program to encourage member states to combat “social exclusion,” a term broader than but including homelessness. But there is no enforceable right to housing, and housing policy is explicitly left up to states.

The Charter of Fundamental Rights of the European Union, adopted in 2000, largely declares existing rights and principles. The Charter includes in Article 34.3 a provision that the “union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the laws laid down by Community law and national laws and practices.” This last clause probably means that the only enforceable rights are whatever rights exist under national law.³²⁹

The committee of the regions, which represents regional and local authorities, has no legislative powers. In 1999, however, it issued a report on housing and homelessness, identifying homelessness as a core issue. The report noted that while information was scanty, homelessness was increasing within the EU.³³⁰

³²⁵ See Appendix at 9.

³²⁶ *Id.* at 16.

³²⁷ App. at 15.

³²⁸ *Id.*

³²⁹ App. at 23.

³³⁰ App. at 23-24.

The European Parliament has limited, but growing, power to initiate legislation. It has adopted three resolutions regarding homelessness and housing. The first, adopted in 1987, urged that a right to a habitat should be legislatively guaranteed. The second, adopted in 1996, invited community institutions to immediately incorporate a right to housing. The third, in 1997, was a more general resolution noting the growth of homelessness in the EU. While it also noted that precise numbers were lacking, the resolution called on members to take steps to prevent homelessness and to ensure minimum levels of security for all.³³¹

A community program to combat social exclusion, adopted in December 2001 by the European Parliament and Council, encourages EU members to fight social exclusion, including but not limited to homelessness. This new program calls for the collection of information, evaluation and monitoring, as preliminary steps.³³²

2. Housing Rights in Selected European Countries

The following section briefly reviews housing rights in Belgium, France, Germany, England, Wales and Scotland.

a. Belgium

The Constitution contains a right to housing. In addition, a number of laws protect housing rights, at least to some degree. For example, current law provides that everyone has a right to welfare benefits. Such benefits can include rental assistance.³³³

In addition, a law adopted in January 1993 (as an emergency program for a more united society) grants local government the authority to requisition building that have been unoccupied for more than six months in order to put them at the disposal of homeless persons. This authority is subject to conditions: for example, it does not apply in areas that already have sufficient buildings that could be used for housing.³³⁴

In Walloon, there is a program that provides for “social real estate agencies” that mediate between private owners and tenants with low incomes.³³⁵

b. France

There is no right to housing in the French Constitution. However, courts have recognized housing as “an objective of constitutional value.”³³⁶

³³¹ App. at 25-26.

³³² App. 26-27.

³³³ App. 27, 36-37.

³³⁴ App. 38.

³³⁵ App. 38-39.

France has ratified the ICESCR, but its housing provisions have not been transposed as such into national law. While there is no direct reference, the ICESCR may have inspired what has been significant legislative activity regarding housing and homelessness.

Housing for the poor in general

The Besson law. In May 1989, legislation was passed recognizing that housing is a fundamental right within limits defined by law. In July 1990, new legislation (the “Besson” law), stated that the community has a duty to guarantee the right to housing and that any disadvantaged person is entitled to public aid to get access to or remain in adequate and independent housing.

The anti-exclusion law. The Besson law was modified and strengthened in 1998 by a new “anti-exclusion” law. This requires the national and district governments to work together with landlords, local authorities, social service agencies and humanitarian groups, to develop district action plans for housing the most disadvantaged. The plans must identify needs and define objectives over a minimum of three years.

The law also strengthened a July 1989 eviction prevention law, by ensuring that district authorities and social service providers intervene if needed. Under these provisions, the court bailiff must notify authorities at least two months before issuance of any summons for non-payment and of any order to evict; this is intended to ensure that any demand for rehousing within the district plan may be considered. Between 1998-1999, evictions fell by 14.3%. However, they rose between 2000 and 2001.

The law also reforms the system for allocating social housing: each district and social housing authority must make a three year commitment with annual goals for allocating such housing; the head of each district must convene an inter-city conference of mayors, social landlords and associations of all cities within the district that are having difficulty allocating social housing to ensure that the agreement is implemented. The conference must also annually survey status of demands for housing that have not been timely satisfied. All applications for low cost housing are registered under a single number so that abnormally long waiting times can be identified. A December 2000 law on solidarity and urban renewal requires cities to make 20% of their housing stock available for social housing.

The anti-exclusion law created a “housing solidarity fund” that provides loans, guarantees, and subsidies, and in some cases covers unpaid rent. It provides a tax incentive by exempting from tax the rental income from renting to the disadvantaged.³³⁷ The anti-exclusion law also establishes a tax on dwellings in large cities that have been empty since January 1, 1999, for more than two years. It grants district authorities the right to requisition property vacant more than 18 months and to make such property available for disadvantaged persons for one to six years.

³³⁶ Paris Court of Appeal, Sept. 15, 1995.

³³⁷ The finance bill of 2002 improves upon this measure. An earlier, July 21, 1994 law also added tax incentives to encourage social organizations and cities to develop social housing for use as a shelter and to encourage renting by private owners to people in difficulty.

Court rulings. A lower court in 1995 held that housing rights prevail over property rights; two lower court decisions in Paris in 1995 and 1996 held that housing is such a fundamental right that it creates a national duty and must be protected like the right to property. Thus, allocation of vacant private housing to the homeless and disadvantaged is justified and owners are not entitled to indemnity.

In a 1996 decision, the High Civil Court cancelled the order of a lower court to demolish a housing unit, partly based on the right to housing. The Paris court of appeal in September 1993, with Supreme Court approval, allowed 23 homeless and very poor families to stay in city premises for six months. But in a 1997 decision, the court confirmed an order to expel families occupying semi-private housing.

Rights for homeless people specifically: The Besson law gives priority to homeless people and those under threat of eviction or in extremely inadequate housing. Subsequently, a July 1994 law obliged districts to develop emergency housing plans for the homeless by December 31, 1994. In developing these plans, the districts were required to assess needs and provide for emergency housing in conditions of comfort and hygiene necessary to preserve human dignity. The law required one place for every 2000 people in cities of 10,000 to 100,000 and one for every 1000 in cities over 100,000. Since then, these plans have been integrated into a broader framework than emergency care, and put within broader plans for housing the disadvantaged. According to the government, this has improved the emergency system of care, and the number of emergency shelter slots has increased from 15,000 in 1995 to 23,000 in 2001.

Laws criminalizing vagrancy and begging were abolished in 1994. A 1999 law enables people without a fixed address to open postal and bank accounts.

Implementation of housing rights: Six years after the enactment of the Besson law, every district had developed a plan to house the disadvantaged. Since May 2001, each application for low cost housing is issued a unique registration number; this allows waiting times to be tracked and abnormally long times to be flagged. The government has provided 100 million Euros annually in 2000 and 2001. District plans have helped 1 million households and created more than 100,000 housing units for disadvantaged.

After the anti-exclusion law reformed the requisition process in 1998, the state housing department announced in June 2001 a plan to requisition 1,000 buildings in 2001 and 2002.

Over a period of 10 years, from 1991 to 2001, 170,000 units of emergency and integration units have been made available for disadvantaged individuals – 100,000 in public housing stock and 70,000 in private housing, with government agreement and funding. At the end of 2001, the government proposed a plan to build 65,000 social housing units in 2002; it also planned to destroy 50,000 units in very poor condition over five years.

In June 1995, the government launched an emergency plan to fund emergency dwellings for homeless and poor people. By the end of 1997, 25,000 families were provided accommodation as a result. The plan also included requisitions from banks and insurance companies. This plan is implemented nationally by the national housing department and locally by the districts.

As part of this plan, between 1995 and 1996, the government requisitioned 1,000 vacant housing units owned by institutional investors in Paris. In 2001, the government proposed creating 500 places available annually in housing and social reintegration centers. It recently launched a plan to create 10,000 places in social residences around Paris for young people looking for a job.

In 1992, the High Committee for Housing of Disadvantaged people was created, as part of the office of the prime minister. Most of its proposals have so far become law. In a 2001 report, the Committee proposes improvements of the anti-exclusion law. It also makes proposals to prevent evictions. There is also a national consultative commission on human rights that makes proposals on topics including the right to housing. The Office of National Ombudsman also makes proposals (and can hear complaints from individuals).

Nevertheless, out of a French population of 61.1 million, three million people live in very poor housing, and some 200,000 are homeless. The UN Committee responsible for overseeing the ICESCR has expressed concern about this, and stated that there is not enough attention given to prevention and reduction of homelessness.

c. Germany

There is no right to housing in the German constitution. In 1994 there was an initiative to add the right but this was rejected by Parliament. However, Germany has ratified major treaties providing right to housing and transposed them into federal law. Thus they have direct effect in German law. But these rights have not yet been raised in court.

Most German states have adopted the right to housing. It is not, however, mandatory or enforceable but rather aspirational. The language defining the right varies according to the state, and the definitions fall into four different categories. The strongest version, adopted after the Second World War, facially recognizes an individual right to adequate housing. Others say that the state is obliged to prevent homelessness. Others say that the state has to try within its capabilities to provide adequate housing. Finally, some state constitutions contain no provisions on housing rights.

But even the strongest language is not enforceable, according to the courts. In a landmark 1962 decision, the Bavarian Constitutional court ruled that there is no enforceable right to housing under the Bavarian Constitution, despite wording that appeared to support such a right. But the court also said that the language does oblige the state to take steps to create housing and to prevent homelessness. In addition, state police laws and federal social welfare law recognize a right to housing when certain requirements are met, and courts do enforce these laws.

Police laws: In general, the police laws of all German states provide that the authorities must take all measures necessary to prevent dangers to public order and safety. It is well established, by extensive case law, that involuntary homelessness as such is a danger to public safety. (Voluntary homelessness, however, is not, unless a voluntarily homeless person is in need of protection.) Based on the police laws, the authorities are authorized to allocate homeless people to shelters and other temporary housing. These are provided mainly by the municipalities.

Courts have ruled that this obligation of the authorities to eliminate homelessness under the police laws corresponds to a right of individual homeless persons to be provided temporary housing by municipal authorities in a timely manner. This right has been repeatedly enforced by the courts. But the right is limited: the housing is temporary and it need not meet the adequacy standards that are applied to permanent housing. No individual room is required; rather, basic needs must be met.

Municipalities must also take steps to prevent homelessness. In case of eviction, they must ensure that homelessness will not result. Persons who are evicted without anywhere to go must be placed in a shelter, cheap hotel, or a group home run by the municipality. For up to six months, they may also be kept in the home from which they are being evicted, with the state paying the owner. This is standard because of the lack of affordable housing.

Federal Social welfare law: The state has an obligation to provide social housing and/or financial help to pay for housing for low-income people, and to provide those already homeless with permanent housing. Social housing is provided by private individuals or entities; the state helps finance construction, and owners agree to rent only to the needy. But landlords still have the right to decide to whom to rent, and they often refuse to rent to homeless persons. In such a case a homeless person can enforce the right to housing; however, since homeless people generally do not have lawyers this right is generally not enforced. Also, both federal social welfare law and police laws have a “subsidiarity” provision and municipalities often rely on police laws and so provide shelter, not housing.

Overall, there is not enough affordable housing. But there are initiatives to overcome this shortfall. In 1995, Baden-Wurtemberg established a program to give public funds to private investors to build housing to be rented to homeless. In 2002, Northrhine-Westphalia established a program for social workers to help homeless persons negotiate social housing leases; consequently, street populations reduced significantly.

d. England and Wales

The UK does not have a constitution. It became party to the ICESCR (and ICCPR) in 1976, but the treaty has not been transposed into English law. However, there has been much legislative activity, and there are extensive housing rights under domestic law.

In 1977, the Housing (Homeless Persons) Act required priority access to permanent social housing (and temporary social housing if there was no permanent housing available) for unintentionally homeless people in certain categories: families with children, natural disaster victims, pregnant women and vulnerable single people – defined as those who are elderly, or mentally or physically disabled.

In 1996, these rights were restricted by the Housing Act: the priority was removed, and homeless people were required to join the same waiting list as everyone else for social housing. Access to temporary housing for those on the waiting list was limited to two years. In response to heavy criticism, the new Labour government required local authorities to prioritize homeless people on

the waiting lists. According to commentators, at least this much is required by the European Convention on Human Rights.

Under the 1996 Act a person is eligible for housing assistance if that person is homeless or threatened with homelessness (defined to mean that the person will become homeless within 28 days). Under the law, homelessness must be unintentional and must be within categories above. The local authority must temporarily house the person while determining eligibility. If the person is eligible but there is no suitable alternative accommodation in the area, the local authority must provide accommodation for at least two years. If the person is not eligible, there is no duty to provide accommodation but the local authority must provide advice and assistance in obtaining accommodation.

In 1997, the government set as a priority the reduction of “rough sleepers” (people living in public) by two-thirds in three years; according to the government, it has met this goal ahead of schedule. The government has established a social exclusion unit and also rough sleepers unit.

In 2000-2001, local authorities received 252,780 homelessness applications. Of these, 114,350 were found to be unintentionally homeless and in priority need. In March 2002 the government set out six key homelessness objectives; the Secretary of State for Transport, Local Government and the Regions is in charge of implementing them.³³⁸ The government also announced that over the next year 125 million pounds would be spent and that a Homelessness Directorate would coordinate policy at national level. The government set a goal for March 2002 that no homeless family with children should have to live in “bed and breakfast” except in an emergency.

In 2002, the Homelessness Act 2002 was adopted, as part of the government’s new broader and more strategic approach to homelessness. The Act is divided into three parts. The first part requires local governments to adopt a strategy to address the problems of homelessness. They first must review the problem in their area, and consult with their local public activities or voluntary group. They must then adopt a strategy that includes housing those who are homeless or about to become homeless and also preventing homelessness.

The second part repeals the two-year limit on temporary accommodations and requires local authorities to provide temporary accommodation until they can find permanent accommodation. (This does not apply, however, if the applicant refuses an offer of suitable accommodation.) This part of the law also adds people at risk of violence in their current accommodation to the category eligible for aid. It provides a right to appeal to court.

Part three amends and repeals the part of the 1996 Act dealing with housing allocation. It provides that any person is eligible unless they are subject to immigration control (under immigration law) or they fall within a class of persons defined as ineligible by the Secretary of State. It also allows local authorities to treat a person as ineligible if he or a member of his household has been guilty of seriously unacceptable behavior sufficient to justify eviction by the

³³⁸ The objectives issued by the Secretary were in response to the Department’s report, “More than a Roof,” which sets out a series of policy proposals, *at* www.housing.odpm.gov.uk/information/homelessness/response/index.htm (as of January 14, 2004).

local housing authority. This part also makes provision for information and advisory services for applicants. It grants priority to homeless people, people in living in overcrowded situations and people with other special circumstances.

Revised guidance is to be published which will extend priority need categories to include those with a history of institutionalization, either in care, Armed Forces, or prison; fleeing domestic, racial or other violence, and 16 or 17 year olds whose family relationships have broken down.

Shelter, a leading non-profit organization, supports the new Act and says that over time it will lead to a shift away from crisis management toward a strategic response. According to Shelter, homelessness is moving up in the political agenda and into the mainstream of social policy.

e. Scotland

On March 5, 2003, the Scottish Parliament passed the Homelessness Bill, and it is being hailed by Shelter, a leading charity that worked for its passage, as putting Scotland “ahead of all other European countries on homelessness.”

The Bill was introduced in Parliament in September 2002, following recommendations of the Homelessness Task Force, which published its second and final report in March 2002. The report recommended changes to homelessness legislation, service provision, steps by local authorities to prevent homelessness, and support for homeless.

All parties supported the principles of the Bill. The aim of the law is to give everyone the right to a home within a decade. Shelter notes that there are challenges ahead, primarily the allocation of sufficient funding to ensure that the legislation’s goal is achieved.