Homelessness: Halting the Race to the Bottom

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.

— President Ronald Reagan, Jan. 31, 1984

Early Wednesday morning, a woman in her late 50’s or early 60’s was forced by railroad police to leave Grand Central Terminal, where, as a homeless person, she was taking refuge from the cold. That was 1:45 A.M. An hour and a half later she was discovered dead, slumped on the sidewalk just outside one of the station’s doors. . . . [H]er death was “cold-related.”


Homelessness is a national crisis. State and local governments have responded in various ways to the problem, but the ad hoc development of local responses is an insufficient solution in the absence of any overarching federal program. Reliance upon local solutions promotes a “race to the bottom” whereby each locale reduces its program of shelter for the homeless to the minimum required by law in order to avoid attracting homeless people from neighboring areas. Communities attempt to solve their problems of homelessness by creating strong incentives for homeless people to move to localities with more comprehensive programs. Consequently, a systemwide bias against comprehensive programs at the local level results from the dynamic of the race to the bottom. In addition, local programs fail to address the deeper and more complex problem of integrating homeless people into the American economy, polity, and society. This Comment advocates federal action to end the race to the bottom and attempts to focus the debate about the content of future federal legislation to aid the homeless.

I. The Reasons for the Crisis of Homelessness

Although President Reagan has asserted that many people are "homeless by choice," most studies attribute the phenomenon of homelessness to societal factors rather than to the personal shortcomings of homeless people. These studies identify three primary causes of homelessness:

High unemployment, including a notable decline in jobs requiring unskilled and semi-skilled labor. Unskilled, chronically unemployed individuals comprise most of the "new homeless" who are mobile and physically and mentally capable, but who have little opportunity for advancement.

The dramatic decrease in the construction of both public and low-income housing. The declining stock of low-income housing, combined with the widespread destruction of single-room-occupancy hotels ("SROs") has produced a severe shortage of housing for the poor.

Massive deinstitutionalization of the mentally ill during the last decade without corresponding development of aftercare treatment and facilities. Without the availability of comprehensive community care facilities, the mentally ill are neither free nor sheltered.


6. The growth in the number of "new homeless" is rapidly changing the profile of the population of homeless people. Many "new homeless" are members of minority groups — Blacks, Hispanics and others — that have been disproportionately hurt by the high unemployment rate. See Hearings II, supra note 3, at 1874. These "new homeless" are more mobile than the "old" homeless, who are more frequently mentally disturbed, older in age, and more heavily burdened by physical problems.

7. Half a million units of low-rent dwellings are lost each year through the combined forces of conversion, abandonment, inflation, arson and demolition. The number of individuals involuntarily displaced each year is currently estimated at 2.5 million. See M. Cuomo, "Never Again:" Report to the National Governors Association Task Force on the Homeless (1983), reprinted in Hearings II, supra note 3, at 358. See also R. Sanjek, Federal Housing Programs and Their Impact on Homelessness (Oct. 1982) (published by the Coalition for the Homeless) (analyzing the impact that the reduction of public housing has had on homelessness). See also Note, Homelessness in a Modern Urban Setting, supra note 5.

In New York, the number of SROs decreased from 127,000 to 14,000 between 1970 and 1984. See Hearings II, supra note 3, at 1484 (testimony of the Coalition for the Homeless). The extent of lawlessness and irresponsibility manifest in the rapid destruction of SROs was recently dramatized in New York when an SRO in the Times Square area was recklessly demolished at night, two days before a bill banning all future destruction of SROs in the Times Square area was to go into effect. See N.Y. Times, May 7, 1985, at B3, col. 2.

8. Between 1955 and 1982 the number of patients in state mental institutions fell...
Homelessness

Unless these problems are addressed, the demand for emergency shelter will continue to grow. Although most commentators recognize that the problem of homelessness is worsening, there has been considerable debate about the appropriate definition of homelessness and consequent disagreement about the overall number of homeless people. However, regardless of the precise size and scope of the problem, the accelerating tempo of the race to the bottom is a strong argument for federal intervention. Furthermore, the debate over numbers ignores this country's moral responsibility to provide care for the homeless, a responsibility rooted in our democratic-capitalistic tradition.

II. The Inadequacy of Existing Shelters

Most existing shelter programs fail to address the long-term problems of homeless people. Most shelters lack any internal system for evaluating the needs of their clients. From 558,922 to 125,200. See Alter, Homeless in America, NEWSWEEK, Jan. 2, 1984, at 25. However, few community facilities were created to service released patients. See Note, Establishing a Right to Shelter for the Homeless, 50 BROOKLYN L. REV. 939, 947-48 (1984) [hereinafter cited as Right to Shelter]; Rhoden, The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory, 51 EOMY L.J. 375 (1982).

The large number of discharged mental patients has created the misperception that almost all homeless people are mentally ill. One frequently cited study claimed that 90 percent of the homeless were mentally ill. Bassuk, The Homeless Problem, SCIENTIFIC AMERICAN, July 1984, at 42. The study has been properly criticized as methodologically deficient in its use of an extremely small sample of homeless people and in its application of an overly broad definition of mental illness. A more accurate estimate of the proportion of homeless people who are mentally ill is 10-20 percent. See Hearings II, supra note 3, at 1875. See also H.R. Lamb, ed., The Homeless Mentally Ill (Oct. 15, 1984) (Task Force Report available from the American Psychiatric Association).


10. For instance, there has been extensive debate over whether to include in the definition people without homes who are temporarily residing with family or friends, or people who are institutionalized in hospitals or jails and will be homeless when released. See M. Cuomo, "Never Again:" Report to the National Governors Association, Task Force on the Homeless (1983), reprinted in Hearings II, supra note 3, at 370. Of course, the selection of the criteria for defining "homelessness" has political ramifications. The broader the definition, the greater the number of homeless people. The number of homeless, in turn, has important implications for the ultimate amount of federal monies expended on the problem.


12. Although emergency shelters are discussed here as a single broad category, there are different types of emergency shelters, including those run by the government,
mechanisms for rehabilitating the homeless, and few shelters have
services for placing the homeless in those federal rehabilitative pro-
grams for which they qualify. In fact, homeless persons residing in
shelters are often unable to obtain those transfer payments and as-
associated federal program benefits to which they are entitled.13 As
currently constituted, the shelter system offers little promise for ac-
tually solving the problems of the homeless.

Most emergency shelters impose great costs on state and local
governments without attempting systematically to reintegrate the
homeless into society. For example, New York City, which is legally
obligated to provide emergency shelter to anyone who needs it, has
the nation’s most expensive shelter program.14 However, because
of New York City’s reluctance to meet its legal obligations and its
failure to plan for long-term needs, the city’s shelter program is
highly inefficient. During fiscal year 1984, New York City spent over
$200 million on its emergency public shelters.15 However, this
large expenditure has brought New York no closer to solving its
problem of homelessness.16 The unwillingness of New York City
officials to make long-term capital expenditures and to move be-
ond the “barracks approach” has led to a situation of chronic crisis
wherein the city consistently confronts a shortage of funds and beds
and an enormous short-term gap between the demand for shelter
and the city’s available supply.17

Furthermore, emergency shelters often do not achieve even their
non-profit groups, and religious organizations. Public shelters comprise only 6 percent
of the shelter stock, and most of these are located in New York City. Federal legislation
enforcing a minimum standard of care for all shelter facilities, as discussed infra, should
not serve as a means by which to replace privately run shelters with public shelters.
However, private shelters that accept government funds should be required to meet
federally imposed standards.

13. In many states, welfare applicants are required to provide a permanent address.
As a result, many homeless people are ineligible for aid. Massachusetts has solved this
problem by allowing homeless people to receive funds at shelters or social service agen-
Dukakis of Massachusetts).
14. New York is required to provide food, shelter, supervision and security to each
person who applies for shelter under the consent decree issued in Callahan v. Carey, No.
provide shelter and health services for all “law-abiding homeless.” See N.Y. Times, May
5, 1985, at 60, col. 2.
15. See NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, NEW YORK CITY’S PRO-
GRAM FOR THE HOMELESS 6 (undated) (reproducing New York City Fiscal 1984 Budget,
New Shelter & Housing Resources for Homeless Individuals) (on file with the Yale Law
17. The Koch administration has recognized that the current capacity of 7500 beds
must be expanded by 1000 to meet the peak demand next year. However, the city cur-
limited goal of providing safe nightly care. Many New York shelters are no more than huge barracks regarded by many homeless people as both undesirable and dangerous. One such shelter, the Palace Hotel, houses homeless people dormitory style. An investigative reporter described conditions at the Palace as follows:

Approximately 120 men are crammed into a room perhaps 80 feet by 40 feet. Beds are arranged in four long rows, each stretching the length of the room. Each bed is separated from the adjacent one by a metal locker. A few of the beds have no mattresses, the bare metal rack covered with makeshift padding (an old rug, a sheet of corrugated cardboard) or left exposed. The mattresses are, without exception, black with dirt and grime, pockmarked with the burns of innumerable cigarettes, and torn so that the stuffing protrudes. Perhaps a dozen of the beds have sheets or blankets. It was too dark to see whether the bedding was louse-infested. Four lightbulbs provide the only illumination in the room.\textsuperscript{18}

Many homeless people are so afraid of the conditions at such shelters that they prefer life on the street, where they have some control over their own safety, to life at a shelter, where they may be subjected to filth and physical danger.

III. The "Race to the Bottom"

Few states have emphasized rehabilitation in their programs for the homeless. There are obvious explanations for the conspicuous absence of programs for rehabilitation, including budget constraints and the traditional unwillingness of legislators to sacrifice short-term to long-term financial considerations. A less obvious yet equally important reason for the states' reluctance to fund programs for rehabilitation is the well-known phenomenon of the "race to the bottom."\textsuperscript{19}

State and local policy-makers are concerned that if their jurisdiction provides shelter programs that are relatively safe and comprehensive, homeless people will be attracted from neighboring areas. The fear that a community will become a magnet for homeless people currently has no available vacant, city-owned buildings to transform into shelters. \textit{See} N.Y. Times, June 7, 1985, at B1, col. 1.


19. The phrase originally described the competition among states to attract corporations by offering the prospect of a permissive statutory or regulatory scheme. Whereas states compete to \textit{attract} corporations, however, they compete to rid themselves of their populations of homeless people. For an analysis of the "race to the bottom" in the corporate context, see Cary, \textit{Federalism and Corporate Law: Reflections Upon Delaware}, 83 \textit{Yale L.J.} 663 (1974).
pie creates an incentive for it to maintain shelter facilities that are minimal both in number and in quality. Deficient state programs are perceived not only as a disincentive for homeless people from neighboring areas to enter the locale, but also as a method of “encouraging” resident homeless people to leave the area in search of better facilities. States, therefore, compete to have the least attractive provisions in an effort to minimize their populations of homeless people.

When state and local officials determine the level of funding for care for the homeless without federal participation, their fear of becoming a magnet for the homeless predominates. Proponents of improved programs for the homeless must contend with the insistence of opponents that a more comprehensive shelter program will produce a never-ending stream of homeless people and an ever-widening cycle of expenditures. For instance, the Mayor of New York City rejected a proposal to develop permanent shelter facilities by claiming that homeless people would “flock here,” thereby making New York a “landlord of last resort.”

Furthermore, in several instances local and state officials have employed the rhetoric of the race to the bottom to effectuate more than simple reductions in shelter programs. Several Arizona cities have adopted radical policies to rid themselves of their populations of homeless people. Phoenix civic leaders have undertaken a campaign to eliminate the “unacceptable behavior” of the area’s 1,500 street people. A widely circulated advertisement featured a sketch of a man sleeping on a bench with a red line drawn through it. Similarly, the Mayor of Tucson won election in 1983 on a platform that included a pledge to get “the transients the hell out of town” and to provide increased police patrols. Efforts to “get rid of the homeless” are not limited to the Southwest. In 1983, for instance, the Governor of New Jersey heatedly protested New York City’s housing several thousand of the city’s homeless people in New Jersey hotels. Less than two years later, New York City’s Mayor Edward


21. In 1981, Phoenix adopted an Anti-Skid Row ordinance that discouraged the maintenance of blood banks, bars, soup kitchens and flophouses. The City Council made it a misdemeanor to lie on a Phoenix park bench or to sleep in a Phoenix park. Because a 1982 ordinance defined all trash as city property, homeless people (or anyone else) caught digging in trash baskets could be arrested for stealing. See Hearings II, supra note 3, at 570-615.


23. New Jersey Governor Thomas H. Kean said, “Dealing with the tragic problem of
Homelessness

Koch criticized New Jersey officials for giving some homeless people
train fare to New York City.24

The phenomenon of the race to the bottom is not limited to the
states. Cities and localities that receive little state or federal funding
for shelter services also have strong incentives to rid their jurisdic-
tions of homeless people.25 Moreover, efforts to ship out homeless
people are often rooted in the belief that they have been passed
along by neighboring communities. A perceived influx of homeless
people justifies a refusal to respond to their needs.26 Because of the
absence of assurances that other responsible actors at the state and
local levels, as well as at the federal level, are shouldering their fair
shares of the burden, states and communities remain unwilling to
assume responsibility for the homeless people in their areas.

By the same token, the race to the bottom also affects the efforts
of those communities that have attempted to improve their pro-
grams for the homeless. For example, advocates for the homeless in
Massachusetts, a state which has adopted a progressive approach to
the problem of homelessness, emphasize that concerns about a
“flood of homeless” from adjacent states with minimal shelter pro-
grams have limited the legislature’s willingness to provide better fa-
cilities than those of its neighbors.27

Similarly, in order to obtain wide public support for legislation to
aid the homeless, Washington, D.C.’s advocates for the homeless

25. Some local communities have passed exclusionary zoning laws to ban shelters.
In contrast to the state and city legislative decisions, however, policy-making on the
local level has been guided in part by the courts. Courts have intervened and enjoined
communities from banning shelter programs, holding that the public need for shelter
facilities outweighs the property interests of community residents. See Barn v. Koch, 723
F.2d 233 (2d Cir. 1983) (finding that any devaluation of property in neighborhood of a
shelter would not constitute a deprivation of property under the Fourteenth
Amendment).
26. See Hearings 1, supra note 3, at 999-40.
27. Interview with Vin McCarthy, member of Massachusetts Governor Dukakis’s
Task Force on the Homeless, in Boston (Nov. 13, 1984). Similarly, the Fort Lauderdale
City Commissioner, in discussing increased aid for the homeless, said, “We are caught
between a rock and a hard place. We don’t want to make it too attractive for vagrants to
come here.” See Harassing the Homeless, TIME, Mar. 11, 1985, at 68. And during a
Westport, Connecticut debate over whether to establish a soup kitchen, Detective Don-
ard A. Brown wrote, “The possibility does exist that Westport would become an oasis of
sorts” for criminals and homeless people from surrounding towns. A Westport resident
cautions, “Feed them and they will stay — as derelicts. And, even worse, they will
1. See Hearings 1, supra note 3, at 168 (statement of the Honorable Ted Wilson, Mayor,
Salt Lake City, Utah).
were forced to address directly the perception that an influx of homeless people would result from the passage of such legislation. In November 1984, residents of D.C. passed Initiative 17, establishing a right to shelter.\textsuperscript{28} Because of the public's concern about the influx of homeless persons that might attend codification of a right to shelter, proponents of the Initiative incorporated into it Section 6, which excludes from the right to shelter homeless people from neighboring states. The exclusionary provision allayed fears that Washington, D.C. would become a magnet for homeless people from the surrounding areas and thereby helped assure passage of the Initiative.\textsuperscript{29}

One apparent basis for the states' fear that they will attract homeless people from out of state is the allegedly high degree of mobility among the homeless. Although the actual mobility of the homeless is difficult to measure,\textsuperscript{30} the scant information available does suggest that it is fairly high. Studies by the New York City Human Resources Administration, the department that runs New York City's shelters, have shown that 7 to 10 percent of the homeless people who use shelters each night come from out of state.\textsuperscript{31} A more dramatic indication of the mobility of the homeless is a November 1982 poll of 1,329 men, conducted in two New York shelters, which found that 8 percent of the men had slept in another state the previous night.\textsuperscript{32} Clearly the "new homeless," who are homeless because of a recent loss of employment and income and who are generally physically and mentally fit, are more capable of traveling interstate than are the chronically homeless. Evidence suggests, however, that

\textsuperscript{28} See Washington Post, Nov. 9, 1984 (D.C. Committee on Overnight Shelter, Paid Advertisement, \textit{Vote Yes on Initiative 17} (Nov. 1984)).

\textsuperscript{29} Although Section 6 may have been necessary for passage of Initiative 17, it is possible that the section violates the constitutionally protected right to travel, as enunciated in Edwards v. California, 314 U.S. 160 (1941) (striking down state limits on individuals' ability to migrate from state to state) and developed in Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that a one-year residence requirement for welfare benefits impairs the fundamental right of interstate movement). See also Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (invalidating an Arizona one-year residency requirement for an indigent's receipt of free nonemergency hospitalization or medical care). If Section 6 is found to be unconstitutional, the likelihood that measures similar to Initiative 17 will be passed will be reduced. Ironically, the constitutional right to travel, a liberty of particular importance to the indigent, may thus accelerate the race to the bottom.

\textsuperscript{30} See HUD Report, supra note 11, at 339-40.

\textsuperscript{31} See N.Y. Times, Jan. 25, 1985, at B1, col. 2.

\textsuperscript{32} See id. See also Human Resources Coalition, The 1984 Seattle King County Emergency Shelter Study IV (June 1984) (finding that only 57 percent of homeless people living in shelters in the Seattle area listed a Washington address as their last permanent address).
Homelessness

des these homeless do not necessarily move to obtain better shelter care but are, rather, in search of job opportunities.\footnote{33. For instance, many homeless people move to Phoenix principally because they perceive Phoenix to be an attractive job market. \textit{Hearings I}, supra note 3, at 669 (statement of Louisa Stark, Consortium for the Homeless, Phoenix, Arizona).}

However, the perception that homeless people of all kinds are highly mobile is more widespread than the available evidence warrants. The fear of attracting homeless persons is based partly on anachronistic images of the freely mobile “hobo.”\footnote{34. S. Wallace, \textit{Skid Row as a Way of Life} 165-67 (1965).} Particularly in the West, the memory of the revolutionary and disruptive International Workers of the World, composed largely of migrant laborers, may linger.\footnote{35. During the early 1900s, members of the International Workers of the World regularly responded to requests from their leadership to travel to demonstrations around the nation. See 4 P. Foner, \textit{History of the Labor Movement in the United States} 441-56 (1965).} More important, the “new homeless” have received a disproportionate share of the media’s attention. It is erroneous, however, to attribute their mobility and relative mental fitness to all homeless persons; such a generalization ignores the various causes and types of homelessness.\footnote{36. In fact, the “old homeless” are both more numerous and less mobile than the “new homeless.” See \textit{Hearings II}, supra note 3, at 1873-875 (report of the Shelter Task Force, Metropolitan Human Services Commission, Columbus, Ohio). Although the greater mobility of the “new homeless” has received much attention, little notice has been given to their greater potential for reintegration into society and their markedly less demanding welfare needs.}

Furthermore, it is probably misleading to assert that homeless persons actually migrate in search of the best shelter facilities.\footnote{37. For an example of this “migration theory,” see Main, \textit{The Homeless in New York}, 72 \textit{Pub. Interest} 3, 4 (1983).}

Even assuming that the stereotype of “rational utility maximizer” describes the average citizen, it is an improbable characterization of the homeless person who has had to confront “life on the street.” Homeless people do not generally have access to the necessary information to permit “shelter shopping.” Instead, they are likely to move in a more or less random fashion until they find satisfactory care facilities. Once in satisfactory facilities, it is unlikely that homeless people would continue in a quest for ever-better services. Since most communities, however, provide insufficient services to meet the minimal needs of the homeless, the homeless may become concentrated in those communities and states that offer reasonable shelter programs. Therefore, although the homeless lack both the information and the rationality to flock purposefully to the finest shelters or the best state programs, a natural flow may exist if the
homeless move until they are satisfied.\textsuperscript{38}

Nevertheless, the perception persists that homeless people will inevitably gravitate towards even marginally superior facilities. Thus, the perception that homeless people are highly mobile, the lack of any uniformity in the level of care provided, and the shortage of federal financial assistance to community shelter efforts all contribute to a race to the bottom at each level of government.

IV. \textit{Present Solutions and Possible Solutions}

Because states acting autonomously have powerful incentives to underspend for the homeless, federal intervention to assume greater responsibility in funding programs for homeless people is both necessary and appropriate. During the past two years, Congress has responded to the problem of homelessness by appropriating a total of $210 million in emergency relief,\textsuperscript{39} thus indicating both its awareness of the problem and its willingness to adopt more effective measures.\textsuperscript{40} This Congressional effort, however, is structurally flawed and lacks sufficient commitment to a solution to the problem of homelessness.

\begin{itemize}
\item \textsuperscript{38} A second, related explanation for the concentration of homeless people in certain states is that most homeless people experience several “stages” of decreasing rationality. At early “stages,” many homeless people are capable of purposefully choosing places to live and might gravitate toward states with comprehensive social programs. If the generosity of the state welfare programs and programs for the homeless are positively correlated, states with more comprehensive social programs may have larger populations of homeless people.

\item \textsuperscript{39} Congress has to date appropriated $160 million to the Federal Emergency Management Agency (“FEMA”), which distributes the money earmarked for the homeless through a voluntary “National Board” consisting of leading charities. The National Board passes the funds on to local boards in needy areas. The local boards then distribute the funds to local providers of care for the homeless.


\item During debate over the initial appropriation of $50 million to FEMA, Congressman Bruce Vento stated:

The action by the House demonstrates an increasing awareness of the problems of the homeless...Homelessness is not a situation that defies a Federal remedy. Congress, along with the cities and voluntary organizations, can meet and must meet the immediate and life-threatening needs of people who have no place to live.

\textit{Hearings I, supra note 3, at 8.}

\end{itemize}
Homelessness

A. The Current Federal Effort

Of the $210 million appropriated by Congress, $160 million has been channeled through the Federal Emergency Management Agency ("FEMA") and its "Emergency Food and Shelter National Board Program" to private shelter providers. Several criticisms can be leveled against this process.\textsuperscript{41} Such funding carries severe restrictions on use, including a strict prohibition against capital expenditures and direct personnel costs.\textsuperscript{42} These restrictions needlessly curtail local flexibility.\textsuperscript{43} As a result, particular shelter needs go unmet.

The legislation contains no "matching funds" mechanism or other provision designed to encourage contributions from state and local governments. In bypassing the states, the current approach ignores a significant source of potential funding, manpower, and commitment. Furthermore, FEMA distributes funds directly to private providers without working through state agencies, thus overlooking yet another potential device for securing meaningful state involvement. Ironically, the combination of pure federal funding and burdensome, detailed spending rules runs directly counter to the Reagan Administration's "New Federalism" goals of shifting part of the financial burden of welfare programs to the states and concomitantly decentralizing decisionmaking authority.\textsuperscript{44}

\textsuperscript{41} FEMA is an independent agency that was created to respond to isolated emergency disasters, such as floods, hurricanes, tornadoes and earthquakes. It lacks the organizational expertise to administer a program designed to address a long-term and pervasive social problem. FEMA is thus an unlikely source of innovative or creative proposals for helping the homeless. Its lack of commitment to solving the crisis of homelessness was revealed by a senior agency official's assertion that "[w]e don't normally get involved in social programs of this nature. We weren't real thrilled about it initially. But we've done what we were asked to do." N.Y. Times, June 12, 1983, at 23, col. 1.

\textsuperscript{42} Costs currently ineligible for FEMA funds include utility payments, rent deposits, capital equipment, expansion, direct personnel costs, shelter refurbishment, medical prescriptions and expansion of the limited rent or mortgage assistance provision. See 49 Fed. Reg. 42,683 (1984).

\textsuperscript{43} For instance, Bishop Eugene Marino, from the Archdiocese of Washington, testified:

\textbf{[W]e urge greater flexibility in the use of FEMA funds by groups with a proven track record of serving the hungry and the homeless. Rigid rules left us with a situation where we could lease a vehicle to deliver food, but not purchase one despite long term clear cost savings. We could purchase a washing machine but not have it installed. We could expand a shelter, but not improve the primitive conditions in some other shelters. We were unable to purchase some items, such as underclothes and nightgowns desperately [sic] needed by the homeless, because of rigid regulations.}

\textbf{Hearings II, supra note 3, at 151.}

\textsuperscript{44} "'It's almost as if FEMA had never heard of the New Federalism,' said Kathryn
FEMA presently distributes its funds according to a single criterion — "need." A jurisdiction qualifies for funding based on either its poverty rate or its unemployment rate — the two criteria FEMA considers to be the best available proxies for "homeless need." However, use of these narrowly focused criteria leads to underfunding of those jurisdictions that have large numbers of structurally unemployed and "old homeless." On the basis of the FEMA criteria, only one fourth of all jurisdictions receive any funding at all, which suggests that the FEMA allocation formula evaluated on its own terms produces substantial misallocations. Furthermore, the criteria used to allocate the emergency appropriations completely ignore existing efforts to aid the homeless made by jurisdictions on their own behalf. Because the distribution formula as currently designed is based solely on need, it provides little or no incentive for self-help. The failure to reward or encourage local and state self-help is particularly remarkable in light of both the shortage of funds and the glaring unevenness of their distribution.

The problems of funding and distribution exist primarily because assistance for the homeless was initially viewed as a "one time emergency shot in the arm." The state governments and larger federal agencies were deliberately bypassed because the primary goal of the emergency appropriations was to provide immediate aid to the homeless. Congress's "emergency" approach to the problem of homelessness has both narrowed the scope of proposed solutions and produced inefficiencies. Because no authorization bill has been passed and the program is funded solely through emergency appropriations, funding is inconsistent and unreliable in terms of both timing and amount. In any given year, uncertainty exists as to whether any funds will be appropriated to programs to combat homelessness. Long-range planning is thus rendered virtually impossible under the existing federal scheme.  


45. The criteria for selection incorporate two factors: (1) the most current twelve-month unemployment rates and (2) the total number of unemployed within a civil jurisdiction. These data have in other instances been used as a surrogate for need. See Hearings II, supra note 3, Appendix M, at 1807.

46. See Hearings II, supra note 3, at 1808-815.


48. The absence of long-range planning at the federal level acutely affects local shelter operators. Because federal funding is not reliable, shelter operators are unable to
Homelessness

Funding provided by the current legislation is inadequate. The quality of care provided is constrained by the scarcity of funds. Emergency, stopgap funding is simply not sufficient to address the problem of homelessness nationwide. Homelessness is a long-term problem; it cannot be treated with temporary or emergency measures, as one might treat a natural disaster. The problem of homelessness is complex and, in light of the limited commitment to solve it at each level of government, requires a comprehensive, coordinated federal/state/local response. Emergency legislation is not only insufficient and inefficient, but also at odds with the increasing recognition that the problem of homelessness is chronic and not anomalous.

B. The Proposed New Direction

Any politically viable solution to the problem of the race to the bottom must accord with the traditional values of federalism. The essence of American federalism is the degree of autonomy maintained by the states. In many areas where there is no articulated federal policy, states use their freedom to develop innovative and diverse solutions to a variety of problems. In the area of homelessness, however, the lack of any explicit and effective federal policy actually operates to curtail state autonomy. The absence of any federal regulation in the area of homelessness promotes the race to the bottom. Although states have diverse programs, each state's freedom to fashion an optimal homelessness policy is in effect limited by the downward spiral. Federal action requiring each state to...
bear at minimum an equal burden is therefore necessary to enable the states to take effective action to fulfill basic obligations owed their citizens.54

Congress can put a stop to the race to the bottom by passing federal legislation establishing a uniform, minimum level of care for the homeless. A federal minimum standard of care that redefines a shelter’s function from the mere provision of emergency care, food, clothing and a bed to the provision of some degree of rehabilitative care would improve the inadequate level of services currently provided by many shelters. Adherence to such a minimum standard of care might initially be expensive, but it would reduce the costs of care in the long term by preparing homeless persons to become independently functioning members of society.55

Any minimum standard of care should require that shelters have sufficient resources to use existing transfer programs and to develop alternative programs for the particular needs of the homeless. Shelters must also concentrate more on the long-term needs of the homeless. For instance, the typical emergency nightly process, which requires the homeless to line up each evening, not only is dehumanizing and degrading, but also undercuts any chance homeless people may have of establishing a stable routine and environment. Shelters, therefore, should offer shelter for a more extended period than the current regime of emergency nightly service. In addition, shelters should provide adequate health care and social services. Staff members not only should be knowledgeable about the variety of available welfare benefits, guidance facilities, and local job opportunities, but also should be willing to help the homeless identify and participate in appropriate social programs.56 Proper services and a stable living environment might interrupt the vicious cycle of homelessness and enable many homeless people either to

54. See Stewart, supra note 53, at 1264.
55. The long-term costs associated with the failure to provide comprehensive care for homeless people can be analogized to the problems of providing for handicapped children. Senator Weicker’s observation concerning funds for the education of handicapped children that “spending today avoids spending even larger sums for maintenance and care tomorrow” is equally applicable to the issue of funding programs for the homeless. Weicker, The Need for a Strong Education for All Handicapped Children Act, 14 Conn. L. Rev. 471, 474 (1982).
56. Services for homeless people are often inadequate because agencies refuse to cooperate with each other. For example, the New York State Office of Mental Health has asserted that the needs of street people are the responsibility of the social welfare system, and the New York State Department of Social Services has refused to become what it perceives to be a housing broker for discharged mental patients. Consequently, no agency provides services for these people. See Rhoden, supra note 8, at 183.
Homelessness

resume or to commence productive lives.\textsuperscript{57}

A uniform minimum national standard of care for the homeless that requires states to provide sufficient services would decrease appreciably the migration of homeless people. More homeless people would likely be satisfied by the programs offered within the jurisdiction where they first became homeless. A minimum standard of care, by lessening the number of homeless people seeking to migrate,\textsuperscript{58} would undercut the claim that progressive programs serve merely to attract more homeless people. The concern about "inundation" would wane. States would thereby acquire the flexibility to enact superior shelter programs.\textsuperscript{59} A federal standard would thus enhance rather than compromise local autonomy.

Furthermore, Congress should alter its current approach of emergency funding through FEMA to aid the homeless. Long-range planning would be greatly facilitated by the passage of an authorization bill creating an ongoing, regularly appropriated "program" or "fund."\textsuperscript{60} In addition, any program of federal funding should include a matching program that encourages state and local contributions toward care for the homeless. Finally, distribution of funds should be based on more rational standards than FEMA's current definition of "need." That criterion should be supplemented by a standard for allocation that rewards, or at least does not penalize, those jurisdictions that act independently to address the needs of their populations of homeless people. These provisions not only would ensure a steadier, more substantial flow of federal funds to aid the homeless, but also would encourage much-needed cooperation between the federal and state governments in the effort to alleviate the crisis of homelessness.

Congress has numerous constitutional grants of lawmaker authority on which it can rely to enact legislation to assist the home-

\begin{footnotes}
\footnotetext{57}{See Hope & Young, Sinking Into Homelessness, COMMONWEAL, June 15, 1984, at 368. \textit{See also} E. Baxter & K. Hopper, supra note 18.}
\footnotetext{58}{As noted above, a homeless person is generally not a rational shopper — he or she does not compare "bundles." Therefore, once a homeless person receives minimum care, he or she will probably not move to another community solely because it provides better services.}
\footnotetext{59}{Besides alleviating the existing race to the bottom, a federal bill would force legitimate recognition of the severity of the problem of homelessness and thereby reduce the political resistance currently confronting local and state officials seeking to enact legislation to aid the homeless.}
\footnotetext{60}{Legislation providing annual spending authority would remove the "emergency" label from funds for the homeless and would permit the program to be transferred from FEMA to HUD. Although passage of an authorization bill does not translate into ongoing appropriations, it would both assure the issue of homelessness a place on the Congressional agenda each year and serve to legitimate a larger federal role.}
\end{footnotes}
less. Unquestionably it would be providing for the "general welfare" as authorized by Article I, Section 8 of the Constitution.\textsuperscript{61} The significant interstate movement of homeless people suggests that the Commerce Clause is also authority for such legislation.\textsuperscript{62} Furthermore, an argument might also be made that Congress is authorized under Section 5 of the Fourteenth Amendment to provide shelter care.\textsuperscript{63}

Federal legislation to address the problem of homelessness must achieve four readily identifiable goals:

1. The legislation must halt the "race to the bottom."
2. The legislation must be constitutional.
3. The legislation must be politically acceptable to Congress.
4. The legislation must be cost-effective.

Trade-offs among these oft-conflicting goals will exist in any federal legislation to aid the homeless. For instance, uniformity and political feasibility are maximized by legislation that requires the states to pay for a specified level of care for the homeless.\textsuperscript{64} Such

\begin{itemize}
  \item \textsuperscript{61} U.S. CONST. art. I, § 8, cl. 1. The spending power has been given an expansive reading. \textit{See} Buckley v. Valeo, 424 U.S. 1, 90-91 (1976). \textit{See also} Steward Machine Co. v. Davis, 301 U.S. 548, 586-87 (1937) ("It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare").
  \item \textsuperscript{62} U.S. CONST. art. I, § 8, cl. 3. This too has been construed to be a nearly unlimited source of Congressional authority. \textit{See} United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262 (1964) (the exclusive discretion of Congress in the area of interstate commerce is "subject only to one caveat — that the means chosen by it must be reasonably adapted to the end permitted by the Constitution"); Garcia v. San Antonio Transit Authority, — U.S. —, 105 S.Ct. 1005 (1985).
  \item \textsuperscript{63} U.S. CONST. amend. XIV, § 5. Congressional legislation authorized under Section 5 of the Fourteenth Amendment "trumps" any claim of state autonomy asserted under the Eleventh Amendment. \textit{See} Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976). The Court, however, has never defined the parameters of Congress's power to use Section 5 to expand the explicit constitutional rights of "life, liberty, and property" and the consequent Tenth Amendment limitations on legislation that can be said to be "authorized" under Section 5. \textit{See generally} Oregon v. Mitchell, 400 U.S. 112 (1970). Thus, Congress might determine that shelter is a right integral to the enjoyment of "life, liberty, and property." For a discussion of the applicability of the Fourteenth Amendment to a putative "right to housing," see Michelman, \textit{The Advent of a Right to Housing: A Current Appraisal}, 5 HARV. C.R.-C.L. L. REV. 207 (1970).
  \item \textsuperscript{64} "Political feasibility," or the likelihood that legislation will pass Congress, is obviously enhanced by the prospect of limited federal costs — particularly in light of the huge budget deficit. Moreover, state politicians are more likely to support legislation in which Congress refrains from intervening in the operation of state or local governments. Legislation establishing a uniform minimum level of care for homeless persons would not interfere with the functioning of the state governments. In addition, legislation to assist the homeless is not likely to arouse the strident opposition of "special interests." In this sense legislation to aid the homeless differs from other types of legislation for the general welfare, such as environmental legislation, which impose direct costs on particular industrial interests.
\end{itemize}
legislation might, for example, create a statutory right to shelter by requiring the states to pay for and to comply with a federally prescribed minimum level of care. However, federally mandated levels of care for the homeless that require large state expenditures may appear to challenge the autonomy of the states. A statutory requirement that the states reallocate resources and re-order budget priorities in order to comply with a mandated minimum level of care for the homeless may constitute a wrongful or even unconstitutional interference with state policy-making functions. Although such legislation may elicit a great deal of political support within Congress because it would not have a palpable impact on the federal budget, state politicians are likely to exert strong political pressure against legislation that permits federal legislators to “claim credit” for addressing the problem of homelessness yet forces states to provide 100 percent of the funding.

In contrast, a federally funded program generally avoids these constitutional issues. Congress could use its authority under the Spending Clause to establish a matching fund program and attach varying conditions to its grant of federal funds. Conditional grants would encourage rather than require state contributions, therefore avoiding constitutional infirmities. Congress could also impose conditions that are directly related to its shelter program and disburse funds only to those states that have met federal standards of care for the homeless. However, if the federal standards are too onerous, the states may opt to reject the program, risk losing the corresponding federal funds for care for the homeless, and thus defeat the federal government’s purpose in attaching the conditions in the first place. Congress could more effectively encourage state

65. Large state expenditures may be induced by conditional federal spending. Although the Supreme Court has emphasized that the reach of Congressional power is limited by principles of federalism, the Court has rarely struck down federal legislation for invading state autonomy. In Garcia v. San Antonio Transit Authority, — U.S. —, 105 S.Ct. 1005 (1985), the Court in a 5-4 decision specifically overruled National League of Cities v. Usery, 426 U.S. 833 (1976), which had been the most emphatic case expounding Tenth Amendment limitations on the commerce power.


67. Such an arrangement would certainly meet the two-tiered test of constitutionality established by Steward Machine Co. v. Davis, 301 U.S. 548 (1937), that the expenditure and the condition must be “reasonably related to a legitimately national end, and, the state must be induced, not coerced, into accepting the condition.” See Vermont v. Brinegar, 379 F.Supp. 606, 616 (D. Vt. 1974).

68. Threats to terminate federal grants often have little credibility and at best modest efficacy in promoting compliance with federal program standards. See Stewart, supra note 53, at 1251; Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid*
compliance by attaching conditions that implicate federal funding for unrelated but essential state services. (However, the broader and more unrelated the program threatened by the conditions, the more coercive and thus constitutionally suspect the federal scheme will appear to the courts.\textsuperscript{69}) For instance, Congress could compel the states to meet minimum federal standards of care for the homeless in order to receive funds for housing\textsuperscript{70} or for highways.\textsuperscript{71}

In any case, heavy federal funding to assist the homeless is an uncertain prospect for three reasons. First, the large budget deficit makes it unlikely that a costly social welfare program will pass Congress.\textsuperscript{72} Second, because homeless people are concentrated in certain regions, representatives from those states without large populations of homeless people will have little incentive to vote for legislation that will be perceived as subsidizing the care for homeless people in other states. Third, the homeless have little political power. Many homeless people are denied the right to vote;\textsuperscript{73} few who retain the right exercise it. The homeless are largely dependent on public interest advocates, the self-interest of the "marginal" poor who fear homelessness themselves, and the altruism of the voting public. Hence, homeless people as a class have little political leverage to obtain assistance through the federal legislative pro-

\textsuperscript{69} No decisional law exists on the extent to which principles of federalism limit the "conditional" spending power. See Stewart, \textit{supra} note 53, at 1257.

\textsuperscript{70} Conditions need not be directly related to the expenditure. See \textit{Oklahoma v. United States Civil Service Comm'n}, 330 U.S. 127, 143-44 (1947) (upholding the requirement that a state official not participate in partisan politics). By incorporating the program to alleviate homelessness into the broader housing grant program, Congress would obtain leverage sufficient to guarantee state compliance with the attached conditions, yet would avoid the constitutional pitfalls of wholly unrelated conditions or sanctions. Such a semi-related condition should be constitutional because it imposes a condition essentially related to the purpose of the program itself.

\textsuperscript{71} Using the rationale that both homelessness and highway programs are issues that involve interstate commerce, Congress could stipulate that failure to meet the conditions of the grant designed for the alleviation of homelessness would result in a cut-off of highway funds.

\textsuperscript{72} The Reagan Administration has proposed a freeze on most domestic programs while eliminating entirely several others, including the rural housing program and urban development action grants. Given the Administration's budget proposal, it is unlikely that Congress will advocate or implement new social programs. For an analysis of the Administration's proposed budget, see \textit{N.Y. Times}, Apr. 5, 1985, at A15, col. 5.

\textsuperscript{73} Voting laws in many states include residency requirements that call for personal addresses. Because the homeless have no residential addresses, they are effectively disenfranchised in those states.
Homelessness

cess.74 None of these realities is likely to change in the near future. They must be at least partially overcome, however, in order for Congress to enact legislation that provides federal funds for the homeless.

The next few years offer a window of opportunity for the passage of legislation that will provide lasting relief for the homeless. The growth of the problem of homelessness, particularly in the Northeast, has produced an explosion of media coverage and a consequent increase in attention by government and advocacy groups.75 There has recently been a remarkable upsurge in the American public's awareness of the issue of homelessness.76 The dramatic growth in attention given to homelessness may represent only the beginning of a long-term increase in attention given to the problem. However, the recent upsurge in attention may, in fact, be nearing its peak or may have already peaked.77 Although it is difficult to estimate how long such attention will endure, advocates for the homeless should act with a sense of urgency and an awareness that a unique opportunity to enact an ongoing federal program may now be at hand.

Several bills now in Congress that address the problem of homelessness78 contain proposals that resemble the recommendations of this Comment for federal legislation. Each bill proposes to solve the range of problems facing the homeless — "to provide more than just a hot meal and cot."79 Furthermore, each bill uses some form of matching grants or conditional spending clauses in a conscious

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74. This power is growing, however, because of the recent success of advocates for homeless people. This is in part due to the current attention given by the media to homelessness. In addition, by arguing that increased funding for programs for the homeless does not necessarily imply decreased funding for other social services, advocates for the homeless have assuaged the concerns of other public interest groups.

75. See Newsweek, supra note 8, at 25.


77. In the American political process, many issues leap to sudden prominence, remain there for a short time, and then gradually fade from public attention — even if largely unresolved. The period of intense "issue attention" provides a short-term opportunity for generating effective change. See Downs, The Issue-Attention Cycle and the Political Economy of Improving Our Environment, in The Political Economy of Environmental Control 9 (J. Bain & W. Ickman eds. 1972).


effort to encourage contributions from private, local and state
sources.\textsuperscript{80} Several of the bills vest oversight in either the Department of Housing and Urban Development or a specially created organization ensuring the long-term commitment that FEMA is unable to offer.\textsuperscript{81} Finally, one bill, submitted by Rep. Theodore Weiss (D-NY), stipulates minimum health and safety standards that shelters must meet in order to receive any funding.\textsuperscript{82}

Despite potential political and constitutional obstacles, a federally mandated minimum standard of care is the ideal solution to the problem of homelessness, a problem that transcends state boundaries. Legislation meeting the criteria described in this Comment will result in a coordinated effort by federal, state and local governments to improve care for the homeless equitably and efficiently. Such legislation is the only practical means to achieve comprehensive, rehabilitative care for the homeless.

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\textit{Andrew E. Tomback}

\textsuperscript{80} Thus, several of the bills require that all shelters receiving federal grants contribute some percentage of their own funds to their project's costs. See H.R. 1, 99th Cong., 1st Sess. tit. 4, part B, § 412(a)(2) (federal assistance not to exceed 80 percent); H.R. 1526, 99th Cong., 1st Sess. § 4(b)(4) (applicants must provide at least 25 percent of their own funding); H.R. 1422, 99th Cong., 1st Sess. § 3(a)(2) (federal assistance cannot exceed 80 percent).

\textsuperscript{81} H.R. 1669, \textit{supra} note 78, would establish a permanent National Endowment for the Homeless that is similar to the existing FEMA structure but is authorized to give priority to permanent, more comprehensive shelter programs. H.R. 1422, \textit{supra} note 78, and H.R. 1, \textit{supra} note 78, would vest the administration of the program for the homeless in HUD. H.R. 1526, \textit{supra} note 78, would vest authority to administer the program in the Department of Health and Human Services.

\textsuperscript{82} H.R. 1526, 99th Cong., 1st Sess. § 5(b)(5)(A)-(F) would ensure some level of privacy by requiring that men, women and families be sheltered separately; families receive separate rooms, and individuals are limited to eight per room. It also requires that the shelter provide medical and psychiatric care, serve at least two meals a day, and provide or assure access to employment training. Finally, it requires that staff be able to help the homeless obtain public assistance.