

# THE CRIMINALIZATION AND ADMINISTRATION OF THE HOMELESS: NOTES ON THE POSSIBILITIES AND LIMITS OF BUREAUCRATIC ENGAGEMENT

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#### INTRODUCTION

Homelessness is the sum total of our dreams, policies, intentions, errors, omissions, cruelties, kindnesses, all of it recorded, in the flesh, in the life of the streets.<sup>1</sup>

Homelessness is both a condition and a category.<sup>2</sup>

The Appellate Division of the New York State Supreme Court recently held four New York City officials in contempt for housing homeless families overnight in welfare offices.<sup>3</sup> The officials had relied upon such

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1. Peter Marin, *Helping and Hating the Homeless: The Struggle at the Margins of America*, HARPERS, Jan. 1987, at 39, 41.

2. MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* 186 (1989).

3. *McCain v. Dinkins*, 192 A.D.2d 217 (N.Y. App. Div. 1993), *aff'd as modified* 639 N.E.2d 1132 (N.Y. 1994). This was the latest in a series of forceful judicial responses to the practice of housing homeless families who could not otherwise be sheltered in Emergency Assistance Units (EAUs). See Celia W. Dugger, *Dinkins to Appeal Contempt on Homeless*, N.Y. TIMES, Dec. 15, 1992, at B3.

Earlier, in *Lamboy v. Gross*, Judge Ellerin found the city and state welfare officers' practices to be both contrary to the state's own policy directive and generally reprehensible. 126 A.D.2d 265, 266-69 (N.Y. App. Div. 1987) (citing N.Y.S. Admin. Dir. 83 ADM-47 (Sept. 20, 1983)). Their action is described as follows:

During the nights spent at the windowless, poorly ventilated EAU office, sleeping accommodations for the parents consisted of plastic chairs, countertops and makeshift beach cots, while their three children were crowded together in a single crib, all within the confines of a brightly fluorescent-lit office setting where noise and activity prevailed throughout the night. Bathing or washing facilities were non-existent, toilet facilities unspeakable and the food most inadequate. That the family was still relegated to the EAU office on Sunday, May 11th, the day ironically

stopgap measures in order to comply with a New York State Department of Social Services administrative directive which required the provision at emergency temporary shelter to those in need.<sup>4</sup> In the winter months, between twelve and sixty-two families were camping out in government offices, sleeping on tables and chairs. This was the welfare state at its most rudimentary. In a concurring opinion, Judge Milonas mused that it might be appropriate for the four officials to spend a night themselves in the welfare office in order to better understand the conditions to which the homeless families were being consigned. He concluded that “[i]ncreased comprehension of the damaging human impact caused by the city’s nonperformance of the legal mandates would presumably result in an intensification of the officials’ efforts to carry out their responsibilities.”<sup>5</sup>

As the *McCain* decision illustrates, some members of the judiciary continue to express frustration with city welfare workers’ treatment of the homeless. However, sporadic judicial concern has been overshadowed by the larger trend of the public’s “compassion fatigue” with homelessness. This trend mirrors a collective impatience with the state’s inability (or unwillingness) to reduce poverty through government intervention in the form of conventional welfare programs. The belief that public officials can effectively deal with such large and complex social phenomena appears to be dramatically on the wane.

It is difficult to discern the goals toward which the federal, state, and local governments’ current legislative responses to homelessness are striving. Clearly, no government accepts the premise that everyone has a right to be decently housed. At the other extreme, governments are not to be inactive (or, at least, to be seen as doing nothing). Homelessness has aroused great compassion on the part of many policy makers, but it has also entrenched the belief that, to varying extents, the homeless are to blame for their plight. Administrative responses to homelessness have reflected this ambivalence. Progressive critics cite bureaucracy as the reason why legislative and judicial initiatives fail to house and protect the homeless. Conservative critics blame bureaucracy for failing to reform the homeless and prevent them from harming or harassing others. Critics from all sides assail bureaucracy as a repository for delay, waste, inefficiency, cold-heartedness, corruption, labyrinthine irrationalities of red tape, and a

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designated as “Mother’s Day,” may well explain the genesis of this lawsuit. The negative impact of such inhumane conditions even on the most stable and secure of persons speaks for itself. How much more devastating an impact such threatening conditions would have upon the lives and health of troubled adults and children with fragile emotional resources is painful to imagine.

*Id.* at 269. In dissent, Judge Kupperman found the issue moot and stated simply that “the Judiciary is ill-equipped to resolve the housing shortage.” *Id.* at 274 (Kupperman, J., dissenting).

4. N.Y.S. Admin. Dir. 83 ADM-47 (Sept. 20, 1983) (requiring that emergency housing be “provided immediately”).

5. *McCain*, 192 A.D.2d at 221 (Milonas, J., concurring).

lack of dedication and leadership.<sup>6</sup> More than any of these, however, bureaucracy in the welfare state has come to signify the remoteness of political authority.

While a variety of scholars have recently risen to the defense of the *normative foundations* of the welfare state,<sup>7</sup> few condone the norms of its

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6. See, e.g., Peter W. Salsich, Jr., *A Decent Home for Every American: Can the 1949 Goal Be Met?*, 71 N.C. L. REV. 1619, 1637 (1993) (criticizing bureaucratic operations that are "inefficient, unresponsive and inflexible" as leading to a lack of public support for housing programs for the homeless); see also DAVID WAGNER, *CHECKERBOARD SQUARE: CULTURE AND RESISTANCE IN A HOMELESS COMMUNITY* 104-11 (1993). Wagner describes the responses of the homeless to the welfare bureaucracy in the following terms:

Even the most cynical of street people interviewed expressed astonishment at the byzantine operation of welfare programs that provided a minimum of aid coupled with a maximum of intrusive questions and humiliation . . .

Eric: I'll be honest. I just flipped out. I had filled out every goddamn application in the world and then [the] worker says "I'm sorry." I just couldn't control myself.

Lester: So I go and wait and wait. I tell them right away I'm unemployed . . . So what do they say after all these hours? I should get a job, I'm not eligible! You think at least they could tell me this in 5 minutes.

Sydney: I decided I'd never go back [to city welfare] and be humiliated. Spilled out my guts, and then I get a \$2 voucher. Never went back . . . [I] never will.

Nina: You go on your hands and knees [to welfare], and what do they give you? All I ever got was \$7 or \$8 a week, and you tell them everything, if you shit, shower, shave, [they] ask you about your sex life, get real personal with you . . . they [workers] act as if you're taking the money from them personally.

The motives of control and deterrence are embedded in all aspects of the welfare process.

*Id.* at 105; see generally PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* 1-54 (1994); Lorne Sossin & Julia E. Hanigsberg, *Phillip K. Howard's The Death of Common Sense*, 74 CAN. BAR REV. 529 (1995) (book review).

7. By "normative foundations," I mean the set of beliefs regarding the market and the workplace, forged mostly during the New Deal, which viewed the welfare state as a set of programs designed to provide social and economic benefits to those not able to provide for themselves. See Theodore R. Marmor, Jerry L. Mashaw & Philip L. Harvey, *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES* (1990). For a review of this and other similar defenses of the welfare state, see Lynn A. Baker, *The Myth of the American Welfare State*, 9 YALE L. & POL'Y REV. 110 (1991).

The distinction between welfare policies and the implementation of those policies is starkly revealed in debates regarding the normative purposes of the current welfare state or its moral claims. In such discussions, scholars constitute the "welfare state" as invariably revolving around particular policies of spending and taxing and particular goals such as equality. See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 232-33 (1980) (arguing that the pursuit of "liberal justice" will be costly and that "the statesman . . . must prepare a 'structural budget' indicating the resource costs the polity should accept in the effort to . . . guarantee [among other things] the initial equality of wealth."). Studies which consider these issues in the context of who administers such policies and who is subject to them are rare. For such an exception, see Carole Patemen, *The Patriarchal Welfare State*, in *DEMOCRACY AND THE WELFARE STATE*, 231 (Amy Gutman ed., 1988) (delineating the role of women within the patriarchal structure of the welfare state).

I share with Joel Handler the belief that this distinction between the normative foundations of the welfare state and the norms of its administrative practice is no longer tenable given the complexities of government and the pervasiveness of its administration, especially in the social welfare setting. Rather, one should focus on public action in both its policy and



*administrative practice*.<sup>8</sup> There has been little debate about administrative norms because no alternatives to the Weberian model of detachment and rational-legal formalism appear viable.<sup>9</sup> Bureaucracy is seen as a necessary evil to be minimized wherever possible. This is not simply one viewpoint among many. Rather, it appears to be the *only* one which may be credibly advanced. It is in part this failure to conceive of alternative frameworks of social and political life that has impoverished the current debate on the welfare state.

In contrast, I argue that successfully addressing social problems such as homelessness requires that the vast and often hidden discretion afforded public officials be exposed, rehabilitated, and expanded. A more proactive bureaucratic role in implementing social welfare legislation ought to be tied to explicit normative underpinnings.<sup>10</sup> State intervention to eliminate homelessness will only succeed if its goals are clear, if adequate resources are dedicated to the task, and if the public officials responsible for undertaking the intervention are empowered and directed to exercise their authority purposively as advocates on behalf of the homeless.

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administrative incarnations. See JOEL F. HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 160, 190 (1986) (arguing for a vision of social welfare programs where discretion in the delivery of services at a local level is seen as a positive good).

8. For a notable exception, see CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY* 3-5, 14 (1985) (noting that the bureaucratic model of organization is often disparaged by popular culture academics despite data revealing that the performance of bureaucracy is acceptable or satisfactory in the preponderant majority of actual encounters with citizens).

9. By "rational-legal" organization, Weber had specific criteria in mind, all of which correspond to the preeminence of instrumental rationality in modern (capitalist) society. These criteria for the characteristics of organization include: the hiring and promotion of officials on the basis of merit; defined, official functions bounded by impersonal rules; a systematic division of labor; an impartial hierarchy of offices; training of officials through technical rules and norms; administrative acts which are consistent, regular, and put down in writing; a prohibition on owning the means of administration and bequeathing or transferring an office; and finally, subservience to the head of state. MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1947). See also MAX WEBER, *ECONOMY AND SOCIETY* 217-25, 223 (Guenther Roth & Claus Wittich eds., 1968) (arguing that a bureaucracy capable of attaining the highest degree of efficiency is the most rational means of exercising authority over human beings; HAANS H. GERTH & C. WRIGHT MILLS, *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 245-50 (1958) (contrasting formal structural authority with the authority of a natural or "charismatic" leader).

10. The explicit "normative" underpinnings to which I refer in this Article describe administrative action that is justifiable on the basis of moral values such as fairness, equality, or the protection of the vulnerable. To justify an administrative decision on the basis of norms is to ask "Was the decision right?" This is distinguishable from administrative action that is justifiable on the basis of statutory authority and formal rules alone, which requires merely asking "Did the person making the decision have legitimate authority to decide?" In other words, norms are concerned with what "ought to be." For a discussion of the theoretical roots underlying the relationship between administrative action and normative justification, see Lorne Sossin, *The Politics of Discretion: Toward a Critical Theory of Public Administration*, 36 CAN. PUB. ADMIN 364 (1993).

This Article is divided into four sections. In the first section, I briefly discuss the dimensions and dynamics of homelessness, emphasizing the changing nature of the public's response to its most vulnerable citizens. In the second section, I discuss how this evolving understanding of homelessness is reflected in the shifting priorities of public officials who interact with the homeless. I detail the criminalization of homelessness, outlining the various legal rights which courts have accorded to the homeless and those of which they have been deprived as well as the key role discretion plays in this legal regime. In the third section, I maintain that discretion, as it is presently exercised and legitimated, relies on the disengagement of those affected in order for the administrative process to run smoothly. This disengagement undermines the normative goals of initiatives targeted at benefiting homelessness. In the fourth section, I sketch an alternative framework of engagement, predicated on the belief that discretion is a social act. I discuss the potential of discretion to act as a lightning rod for participation in the administrative process and for recalibrating the normative role of bureaucracy in the welfare state. I conclude by briefly speculating on how a framework of engagement can be applied in the administration of shelters for the homeless. But first, I provide a brief overview of these components and how they are related.

Homelessness may be said to encompass two general phenomena. The first is grinding poverty. In this regard, the homeless share a life experience and an administrative setting with the many recipients of welfare and other government entitlements who rely on the state for their economic survival. The second feature, which distinguishes the homeless from other welfare recipients, is a detachment from society.<sup>11</sup> The homeless, for one reason or another, have fallen through the cracks of family, social, and public support.

More engaged forms of bureaucracy ought to have little to do with the first feature of homelessness. The distribution of entitlements and income maintenance to those in poverty should be as bureaucracy-free as possible. Satisfying arcane eligibility criteria and grueling application procedures is a needlessly punitive measure for individuals and families struggling to escape poverty.<sup>12</sup> This is especially for the homeless, who often lack the basic

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11. It is important to clarify that, in many cases, this detachment is a consequence of homelessness and its deprivations. It is not meant to be synonymous with "disaffiliation," which was believed to be a psychological and sociological condition responsible for causing homelessness. See Howard M. Bahr, in *DISAFFILIATED MAN* 44-45 (Howard M. Bahr ed., 1970) (describing three major paths to disaffiliation—external changes in family or occupation, withdrawal from society, and lifetime unattachment—which, if not followed by reattachment, may lead to retreatism).

12. See THERESA FUNICIELLO, *TYRANNY OF KINDNESS: DISMANTLING THE WELFARE SYSTEM TO END POVERTY IN AMERICA* 24-53 (1993) (describing the anxiety and frustration welfare recipients feel at the mercy of the welfare bureaucracy and welfare workers who are often uncaring and overworked). On the poor's experience with the welfare bureaucracy, Funicello offers the following graphic depiction:

resources—such as a fixed address—for maintaining ongoing contact with state agencies. A guaranteed annual income or negative income tax would obviate the need for this costly bureaucratic surveillance. The economic and social arguments in favor of such an approach have been articulated persuasively elsewhere and lie beyond the scope of this Article.<sup>13</sup>

It is rather with respect to the second feature of homelessness that bureaucracy is crucially important. It is in this administrative interaction between the state and the homeless that the possibilities and limits of normative administration can be best explored, for it is in this context that the implications of disengagement are most stark. While the homeless lack many basic amenities, being treated as the objects rather than the subjects of their own administration underlies and underscores the other deprivations.

The homeless have historically been a visible feature of the urban landscape in America.<sup>14</sup> What was so unprecedented about the images of the 1980s depicting destitute men, women, and families living in the streets and huddling in shelters was the fact that they appeared in an era of increasing prosperity.<sup>15</sup> Unlike during the Depression, when poverty was widespread and capable of galvanizing public support for the New Deal, the rise of homelessness in the 1980s appeared anomalous. The homeless

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Think of the worst experience you've ever had with a clerk in some government service job—motor vehicles, hospital, whatever—and add the life-threatening condition of impending starvation or homelessness to the waiting line, multiply the anxiety by an exponent of ten, and you have some idea of what it's like in a welfare center. You wait and wait, shuttling back and forth in various lines like cattle to the slaughter. You want to wring the workers' necks, but you don't dare talk back. The slightest remark can set your case back hours, days, weeks, or forever. Occasionally someone loses it and starts cursing at the top of her lungs. Then she's carted away by security guards . . . . It's truly amazing that more welfare workers aren't killed; the torment so many of them inflict would break the patience of anyone whose life wasn't on the line. But that's always their ace in the hole. No check, no life . . . .

Most of the workers are so overwhelmed with the sheer volume of clients that only the truly stalwart keep up with the changes. . . .

*Id.* at 25.

13. See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 191-93 (1962) (arguing that the primary benefits of a negative income tax are that it operates outside of the market and that the community can determine what the income floor should be); CHRISTOPHER GREEN, *NEGATIVE TAXES AND THE POVERTY PROBLEM* 160-76 (1967) (reviewing the costs and benefits of a negative income tax and recommending that government provide some form of income-based grant to the poor, unrestricted by the special categories currently in operation); JAMES T. PATERSON, *AMERICA'S STRUGGLE AGAINST POVERTY, 1900-1980* 190-96 (1981) (reviewing the political and academic evolution of the notion of guaranteed income for the poor).

14. See GREGG BARAK, *GIMME SHELTER: A SOCIAL HISTORY OF HOMELESSNESS IN CONTEMPORARY AMERICA* (1991) (examining the condition of homelessness and providing a detailed analysis of the United States response to homelessness and the homeless).

15. Among the spate of studies examining the persistence of the homelessness crisis, see CHRISTOPHER JENCKS, *HOMELESS* (1994); JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* (1992).

came to be seen not as the tip of an iceberg of destitution, but rather as social and economic outcasts in a land of plenty. What is new in the 1990s is the public resignation that homelessness is not a crisis to be overcome, but rather a static condition to be contained.

As Lucie White explains, the enduring visibility of the homeless may tend to inure people to the complexities of their problems:

Ironically, . . . one of [the] long-term consequences of [rising homelessness] may be to desensitize the public to the housing crisis. When we are bombarded with media images of homeless people, we eventually get accustomed to what those images represent. . . . [The homeless have] become an anticipated part of the urban landscape, a nuisance one learns to step around without ever focusing on.<sup>16</sup>

Whether because of compassion fatigue or deepening government retrenchment on social policy generally, the increasing desensitization of middle-class communities to the plight of the homeless can be readily observed.<sup>17</sup> The homeless are being driven underground, figuratively and literally.<sup>18</sup>

The provision of shelter services and outreach programs for the homeless, once seen as a form of crisis intervention, has now become simply the

16. Lucie White, *Representing the "Real Deal"*, 45 U. MIAMI L. REV. 271, 299 (1990-1991).

17. See U.S. Cities Moving to Sweep Streets Clean of Poor, *Homeless*, CHI. TRIB., Dec. 27, 1993, at 5.

Americans finally may have decided . . . that they've had it with panhandlers and loiterers, drug sellers and prostitutes, squeegee men and graffiti artists, welfare parents without jobs and streets littered with people in obvious need of medical care. Call it compassion fatigue or plain frustration, but cities and states are increasingly trying to restore order to their streets.

*Id.* See also Sarah Ferguson, *Us v. Them: America's Growing Frustration with the Homeless*, UTNE READER, 50 (Sept.-Oct. 1990); Jeffrey Schmalz, *New Message to Homeless: Get Out*, N.Y. TIMES, Aug. 3, 1989, at A14; Priscilla Painton, *Shrugging Off the Homeless: The Nation's Toughest Urbanites Lose Patience With The Down-and-Out*, TIME, Apr. 16, 1990, at 14 (describing New Yorkers' increased aggression towards the homeless in mass transit facilities); Alan Finder, *Homelessness in New York: Years of Plans, No Solution*, N.Y. TIMES, Dec. 30, 1991, at A1; Isabel Wilkerson, *Shift in Feelings on the Homeless: Empathy Turns to Frustration*, N.Y. TIMES, Sept. 2, 1991, at A1 (reporting that a growing number of major United States cities are taking legislative action to reduce the visibility of homelessness, which is interpreted by advocates for the homeless as a hardening of public sentiment toward the homeless).

As Alice Baum and Donald Burns lamented, "the United States seems ready to admit that it has failed the homeless, and, having tried to provide help for so long with so few results, the general public seems to feel it has little left to offer." ALICE S. BAUM & DONALD W. BURNS, *A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS* 1 (1993).

18. Approximately three thousand homeless individuals and families are estimated to live under Grand Central Station and Penn Station in New York, and hundreds of others are scattered throughout abandoned subway stations, unused tunnels, and sewers. For an account of the lives of these homeless, see JENNIFER TOTH, *THE MOLE PEOPLE: LIFE IN THE TUNNELS BENEATH NEW YORK CITY* (1993).

next rung down on the welfare ladder from food stamps, AFDC, and other income support programs.<sup>19</sup> As a consequence of this view, the welfare bureaucracy has been left with neither the resources nor the incentive to fight homelessness; rather, public officials have been placed in the position of managing the homeless. In short, the crisis of homelessness has been normalized.

Administrative programs targeted at the homeless have become increasingly entrenched. Thus, any attempt to do more than control homelessness promises to be both capital- and labor-intensive. Even if a blueprint for government action could be agreed upon, there no longer appears to be a consensus that government is the best means for undertaking such an initiative. If the recent trend in New York City is any indication, a sea-change in social welfare administration is emerging with wide-ranging implications. Increasingly, New York City is contracting with nonprofit organizations to run shelters.<sup>20</sup> For example, sixty-seven of the City's seventy-three shelters designed especially for use by homeless families are currently operated by not-for-profit social service providers.<sup>21</sup> Also, the city is increasingly privatizing homelessness outreach and social work functions, while simultaneously creating more law-enforcement units specifically targeted at the homeless.<sup>22</sup> Bureaucracy, which became the last frontier during the 1980s in the crusade to implement a public agenda

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19. For a description of these programs and their impact on the poor, see generally SAR A. LEVITAN, *PROGRAMS IN AID OF THE POOR* (1990); MARY JO BANE & DAVID T. ELLWOOD, *WELFARE REALITIES: FROM RHETORIC TO REFORM* (1994).

20. Nationwide, the shelter system has undergone extensive privatization during the past several years, though it continues to be financed predominantly with public grants and vouchers given to the homeless. See BLAU, *supra* note 15, at 223 (explaining that while religious and other voluntary agencies have dramatically increased their assistance to the homeless in New York City since 1981, 80% of the beds available for single homeless adults are still operated by the city). This trend has important implications for the exercise of discretion in the provision of services to the homeless. See *infra* part V.A.

21. RUDOLPH W. GIULIANI, NINA SEGATVIA, & JOAN MALIN, *REFORMING NEW YORK CITY'S SYSTEM OF HOMELESS SERVICES* 14 (1994).

22. New York City's Department of Homeless Services reduced its complement of caseworkers from ninety to forty-four and slashed over \$2 million from its budget in 1994. At almost the same time, the City's police department established a unit of thirty-five officers dedicated exclusively to deal with the homeless, as part of the Mayor's controversial "Quality of Life" platform. See Celia W. Dugger, *Police to Start New Program for the Homeless*, N.Y. TIMES, Aug. 18, 1994, at B1 (discussing advocates' concerns that the police department's plan to train plainclothes officers to work with the homeless was motivated by a desire to get homeless off the streets rather than to help them); Rob Polner, *Cops' 'Homeless' Squad in Operation*, NEWSDAY, Oct. 24, 1994, at 4 (discussing advocates' concerns that the cops' "homeless" squad would instill fear in the homeless). It is worth noting that the city's justification for starting this specialized unit was to allay growing fears of police brutality against the homeless. Police Captain Kopstein responded to concerns voiced by homeless advocates by stating that only "sensitive" officers would be recruited to work in the new unit. Rob Polner & Michael Powell, *'Sensitive' Homeless Patrols*, NEWSDAY, Aug. 18, 1994, at 29.

The Transit Authority police, scheduled to be merged with the City police department in 1995, also maintain a unit of forty-four officers who deal exclusively with the homeless.

aimed at housing and healing the homeless, now serves as the front line in the 1990s campaign to cleanse the homeless from public view.

Though I draw on sources mostly from New York City, which expends more energy and resources on administering homelessness than any other city in the nation,<sup>23</sup> the implications of criminalizing homelessness are broader. The National Center on Homelessness and Poverty released a 1994 report entitled "No Homeless People Allowed" detailing attempts in forty-nine cities to enact or enforce provisions mandating the removal of the homeless from public spaces. All of these examples of public rage directed at neighborhood disorder indicate how interchangeably poverty, vice, and violent crime are associated in the popular imagination. Rather than viewing the homeless and poor as *victims* of the streets, the public are seeing the homeless as its *villains*.<sup>24</sup> In this Article, I try to show how the administration and criminalization of the homeless have become two sides of the same coin.

It is in this environment that the vast discretion vested in the officials responsible for applying general policies and statutes to specific cases becomes most significant. With the recognition of this power comes a host of questions: On what basis are discretionary determinations regarding the homeless made, and in whose interests? What principles, if any, should guide these judgments? Whose beliefs and desires ought to be considered paramount in this decision-making process? These questions not only remain unanswered in the current debate regarding the plight of the homeless; revealingly and disturbingly, they are unasked as well. These are the questions which must be resolved in order to understand the complex role public officials play in the lives of the homeless as well as the policies that target the homeless. Making the administrative process part of the solution to homelessness, rather than one of the burdens to which homelessness gives rise, requires engaging the homeless in the process of discretionary decision-making. I term this a framework of engagement.

Discretion is endemic to any governmental attempt to intervene in social and economic relations. Discretion can be a desirable means of ensuring that intervention is sensible, just, and tailored to the circumstances of

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23. By the close of the 1980s, New York City allocated sixteen times more local aid to deal with homelessness than Philadelphia, its nearest competitor, according to the Department of Housing and Urban Development. HUD, *HOMELESS ASSISTANCE POLICY AND PRACTICE IN THE NATION'S FIVE LARGEST CITIES* (1989). Nevertheless, at that same juncture, over 80% of New Yorkers reported seeing a homeless person on their way to work. Josh Barbanel, *Poll Shows New Yorkers Fault City Efforts for the Homeless*, N.Y. TIMES, June 29, 1989, at A1.

24. The New York City Transit Authority provided a stark reminder of the vulnerability of the homeless with the report of an increase in the number of incidents of people trying to set fire to homeless individuals sleeping in subway stations. In 1992, twenty-one incidents were officially recorded of people dousing homeless persons with flammable liquids or placing lighted matches under their shoes. Michael T. Kaufman, *About New York: 21 Reasons to Simply Ask, Why?*, N.Y. TIMES, Jan. 9, 1993, at L27.

each particular case. Presently, officials possess both too little and too much discretion in the context of the homeless. They possess too little discretion to be truly responsive to the diverse needs of the homeless, and too much discretion to ensure a coherent and purposeful direction in the administration of the homeless. For discretion to be a legitimate tool in applying broad legislative initiatives to complex, individualized problems, public officials must be given both the leeway to be responsive and the guidance to respond in a fashion consistent with the purposes behind state intervention.

The importance of discretion increases in relation to the vulnerability of those over which discretion is exercised. Thus, discretion takes on both a potentially more salutary and a potentially more dangerous role in the lives of the homeless than in any other sphere of the welfare state.<sup>25</sup> I advocate administrative engagement with the homeless to go beyond comprehensively and effectively addressing the individual needs and social problems of the homeless. The purpose of bureaucratic engagement with the homeless ought to be to counter the lack of direction or "drift" that so often consumes the hopes of the homeless for a better life.<sup>26</sup> Discretion, if exercised within a framework of engagement, would allow public officials to reach out to the communities subjected to their authority and foster relationships of autonomy and interdependence which neither legislatures nor courts are able to sustain. In short, through discretion, public officials may become the human face of the administrative state, breaking down the barriers to communication which bureaucratic interaction has thrown up.

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25. See, e.g., JOEL F. HANDLER & MICHAEL SOSIN, *LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE* (1983) (describing the bureaucratic tension between standardization and meeting individual needs). A caveat of programs that are discretionary in nature is that perceptions that clients are undeserving result in limited programs of specialized assistance. Community pressure is another factor which influences the decision-making process.

26. This sense of aimlessness is captured well by Jackson Underwood, an anthropologist who spent two years living with the residents of a homeless encampment in Los Angeles:

Always, just below the surface, there was a sort of sad detachment from life, as though they were just doing time. They showed very little hostility, hatred, or anger, although those feelings were certainly justified by their circumstances. They manifested, instead, a heaviness of spirit, a suffocating demoralization—an emotional callous developed over a lifetime of rubbing up against a harsh reality. They wore their apathy like a bullshit-proof vest.

JACKSON UNDERWOOD, *THE BRIDGE PEOPLE: DAILY LIFE IN A CAMP OF THE HOMELESS* 169 (1993). See also ROB ROSENTHAL, *HOMELESS IN PARADISE 19-94* (1994) (using individuals' stories to illustrate that the typical path to homelessness involves financial and emotional vulnerability, precipitating events, and an inability to find substitute housing).

I.  
THE HOMELESS

A. *A Diverse Community*

Generally, the homeless are defined by where they sleep. But here agreement ends. The effort to quantify (and qualify) the problem of homelessness has been fraught with competing political agendas and social assumptions.<sup>27</sup> How should this heterogeneous group be enumerated? Should "homeless" include all those people living on the streets (a notoriously difficult constituency to count), or also those in homeless shelters and welfare hotels or other forms of emergency housing? More controversial still, should the count include the thousands of individuals and families, who, with no home of their own, have doubled up with friends or relatives?<sup>28</sup> Given that the lives of those "only one check away" from homelessness or living in squalid conditions are often scarcely distinguishable from those in shelters, should the virtually and soon-to-be homeless be counted in this category as well? No matter where this line is drawn, it is an arbitrary one. Congress, in the business of drawing these sorts of arbitrary lines, has defined the homeless in the following terms:

- (1) an individual who lacks a fixed, regular, and adequate night-time residence; and
- (2) an individual who has a primary night-time residence that is
  - (A) a supervised . . . shelter designed to provide temporary living accommodations . . . ;
  - (B) . . . 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.<sup>29</sup>

Whatever the precise parameters used, and no matter how approximate the figures must be, the statistics on homelessness are nonetheless revealing. Estimates of the nationwide population of the homeless, for example, have ranged from 300,000 to 3,000,000 nationwide.<sup>30</sup> In New York

27. See, e.g., Irwin Garfinkel & Irving Pilavin, Trends in the Size of the Nation's Homeless Population During the 1980s: A Surprising Result (discussion paper #1034-94, on file with the Institute for Research in Poverty, University of Wisconsin).

28. In New York, the ratio of individuals and families doubled-up to actual homeless individuals and families is estimated to be 20:1. Kim Hopper, *The Ordeal of Shelter: Continuities and Discontinuities in the Public Response to Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 317 (1989).

29. Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302 (1988 & Supp. IV 1992).

30. The controversial census count in 1990, boycotted by some shelters and widely criticized on methodological grounds, came up with a figure of 228,621. BAUM & BURNS, *supra* note 17, at 210. A 1986 HUD survey by two Harvard economists put the figure at 279,000. *Id.* The National Law Center on Homelessness and Poverty disseminated the widely publicized figure of 3,000,000. *Id.* at 123. However, Mitch Snyder, the leader of the Center at the time, readily admitted that there was no empirical basis for this claim. Snyder indicated that



City, the ranks of the homeless are estimated to have swelled by over 350% during the 1980s.<sup>31</sup> The Department of Homeless Services projected in 1994 that the average number of homeless families in shelters per night in 1995 will be 5,617 and the number of single adults will be 6,651.<sup>32</sup>

Describing the homeless has proven just as controversial as quantifying their numbers. During the 1980s, the identity of the homeless population was central to the struggle for the moral, political, and financial support of the American public. Thus, the question arose as to whether homelessness was embodied by a rust belt family fallen on hard times, a substance-abusing teenage mother, a mentally unstable man running into traffic, a drunk sleeping on a bench in urine-soaked clothes, or a bag-collecting elderly woman. A battle over which profile fit the typical homeless person raged between those who blamed society for the homelessness crises and those who blamed the homeless themselves.

Alice Baum and Donald Burns, in their study *A Nation in Denial: The Truth About Homelessness*, argue that the first step to addressing the problem of homelessness is to no longer speak of the "homeless" at all, but rather to disaggregate the heterogeneous population that for one reason or another lacks stable or adequate accommodation.<sup>33</sup> While I agree that the term "homeless" has a homogenizing effect on disparate groups, I use the term in this Article because it is precisely as homeless people that these otherwise unrelated individuals confront the bureaucracies on which they depend. It is in their experience as "cases" to be administered that a communality (and, perhaps, even a community) is forged among the homeless. This is especially pronounced in institutional settings such as homeless shelters.<sup>34</sup>

There are, to be sure, specific traits common to significant segments of the homeless. A third of the homeless are estimated to suffer from untreated or under-treated mental illnesses; among homeless women, the percentage of those with a mental illness is closer to 90%. Forty per cent of the homeless are estimated to have an alcohol addiction, though more

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the figure was necessary to satisfy a national press eager to sensationalize the problem. *Id.* at 121-24. After reviewing the various studies conducted in the 1980s and early 1990s, Garfinkel and Pilavin estimated that on any given night in the mid-1980s that the figure could range from 300,000 to 400,000. Garfinkel & Pilavin, *supra* note 27.

31. Paul E. Kay, *A Tale of Two Cities: A Comparative Analysis of the Cause and Legal Responses to Homelessness in New York and London*, 15 *BROOK. J. INT'L L.* 465, 466 (1989).

32. GIULIANI, SEGATRIA & MALIN, *supra* note 21, at 29.

33. BAUM & BURNS, *supra* note 17, at 173.

34. This feature of group identity is highlighted in Elliot Liebow's study, where he reports, "... so central was homelessness to the definition of the group, and so greedy was the group to make all the women members, that it declared all women in the shelter to be homeless whether they wanted to see themselves that way or not." ELLIOT LIEBOW, *TELL THEM WHO I AM: THE LIVES OF HOMELESS WOMEN* 211 (1993).

homeless men than women tend to suffer from alcoholism.<sup>35</sup> A recent study found that 80% of the male residents in general population shelters in New York City and 29% of the adults in the family shelter system had tested positive for drug use.<sup>36</sup> Among homeless single adults, 84% are unemployed and over 45% have not worked in a year or longer.<sup>37</sup> In New York City, destitute families with children comprise 62.2% of the homeless population.<sup>38</sup> Nationally, approximately one-third of the homeless are veterans<sup>39</sup> and a slight majority of the homeless belong to minority groups.<sup>40</sup> As a group, the homeless have a higher incidence of virtually every major acute disease (with the exception of obesity).<sup>41</sup>

What do these numbers add up to? At the very least, they suggest that any policy aimed at homelessness must be applied flexibly if the diverse needs and experiences of this population are to be addressed effectively. Legislative and policy initiatives cannot feasibly be drafted with all of the specific circumstances and characteristics of the homeless population in mind. Bureaucratic initiatives, by contrast, can tailor general principles and priorities to individual cases. In order for these assessments to be undertaken, a greater understanding of the causes of homelessness is needed.

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35. See Pamela J. Fischer & William R. Breakey, *The Epidemiology of Alcohol, Drug and Mental Disorders Among Homeless Persons*, 46 AM. PSYCHOLOGIST 1115, 1115-24 (1991).

36. NEW YORK COMMISSION ON THE HOMELESS, *THE WAY HOME: A NEW DIRECTION IN SOCIAL POLICY* 28, 69 (1992).

37. *Id.* at 25.

38. U.S. CONFERENCE OF MAYORS, *A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES* 26, 62 (1989).

39. JAMES D. WRIGHT & ELEANOR WEBER, *HOMELESSNESS AND HEALTH* 52 (1987); STEVEN VANDERSTAAY, *STREET LIVES: AN ORAL HISTORY OF HOMELESS AMERICANS* 100 (1992); Marjorie J. Robertson, *Homeless Veterans: An Emerging Problem?* in *THE HOMELESS IN CONTEMPORARY SOCIETY* 64, 68-72 (Richard D. Bingham, Roy E. Green & Sammis B. White eds., 1987).

40. MARTHA R. BURT & BARBARA E. COHEN, *AMERICA'S HOMELESS: NUMBERS, CHARACTERISTICS, AND PROGRAMS THAT SERVE THEM* 3 (1989) (stating that 54% of the homeless are nonwhite, and that homeless people are three to four times as likely to be black and slightly more likely to be Hispanic than the general population).

41. Pedro J. Greer, Jr., *Medical Problems of the Homeless: Consequences of Lack of Social Policy—A Local Approach*, 45 U. MIAMI L. REV. 407, 411 (1990-1991); see generally UNDER THE SAFETY NET: THE HEALTH AND SOCIAL WELFARE OF THE HOMELESS IN THE UNITED STATES (Philip W. Brickner, Linda Keen Scharer, Barbara A. Conanan, Marianne Savaerese, & Brian C. Scanlan eds., 1992) [hereinafter UNDER THE SAFETY NET]. Particularly common are skin ailments caused by exposure. The most common serious ailment among this group is respiratory infection, typically viral, followed by sexually transmitted diseases (exclusive of AIDS). William R. Breakey, Pamela J. Fischer, Morton Kramer, Gerald Nestadty, Alan J. Romanoski, Alan Ross, Richard M. Royall & Oscar C. Stine, *Health and Mental Health Problems of Homeless Men and Women in Baltimore*, 262 JAMA 1352, 1354 (1989). Among homeless women, nearly two-thirds have gynecological problems. Greer, *supra* this note, at 412. An increase in tuberculosis, on the decline in the general population, is particularly alarming—the pulmonary tuberculosis rate is 9.6 cases per 100,000 generally, and 500 cases per 100,000 among the homeless. *Id.* Gastro-intestinal disorders in the homeless, ranging from ulcers to colitis, are nearly double the national rate. *Id.* at 413.

### B. Causes of Homelessness

The causes of homelessness in New York City (and to a greater or lesser extent, nationwide) are fairly well-documented. Most notably, these causes include: enduring poverty;<sup>42</sup> declining opportunities for unskilled labor;<sup>43</sup> insufficient public assistance;<sup>44</sup> the dramatic reduction of low-cost, single resident occupancy buildings (SROs) and other low-income housing as a result of gentrification in the 1980s;<sup>45</sup> the effects of the widespread

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42. Poverty grew in the 1980s, both in absolute terms and in the proportional disparity between the rich and poor. KEVIN P. PHILLIPS, *THE POLITICS OF RICH AND POOR: WEALTH AND THE AMERICAN ELECTORATE IN THE REAGAN AFTERMATH* 8-23 (1990). However, the homeless poor are not measurably poorer than the housed poor. MARTHA R. BURT, *OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980s* 21 (1992).

43. Decreased opportunities for unskilled laborers were especially apparent in New York City, where the growth in jobs in the 1980s was concentrated mostly in the white-collar financial industry, while steep losses were absorbed by the manufacturing sector. This led not only to a worsening problem of unemployment and underemployment for the poor, but also to increased gentrification pressures in Manhattan, where the City offered tax abatements plus other incentives to lure corporate headquarters and provide for the construction of luxury condominiums. See BLAU, *supra* note 15, at 136-37 (arguing that New York City's investment strategies of the 1980s resulted in a growing service economy and decreased demand for unskilled labor).

44. *Id.* at 48-59. In 1990, the average combined total of SSI, food stamps, medical, and housing assistance was just over \$5,000 annually, or approximately 84% of the poverty level. Additionally, while over half of homeless persons are believed to be eligible for various forms of public assistance, only 10% are estimated to be actually receiving them. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *SOCIAL SECURITY: BROKEN PROMISES TO AMERICA'S HOMELESS* 3, 6 n.8 (1990).

45. As Jonathan Kozol bluntly emphasized, "The cause of homelessness is a lack of housing." JONATHAN KOZOL, *RACHEL AND HER CHILDREN* 11 (1987). Many argue that the economic conditions of the poor have changed less than the economic conditions of housing—especially in dense urban settings such as New York. Many of today's homeless would traditionally have been housed in low-income apartments or hotels, often of wretched condition, but offering residents a life far-removed from the streets and shelters. See KARIN RINGHEIM, *AT RISK OF HOMELESSNESS: THE ROLES OF INCOME AND RENT* 25 (1990) (arguing that urban renewal and rising land values have resulted in widespread elimination of SROs in many cities); Kim Hopper & Jill Hamburg, *The Making of America's Homeless: From Skid Row to New Poor, 1945-1984*, in *CRITICAL PERSPECTIVES ON HOUSING* 20-21 (Richard G. Bratt, Chester Hartman & Ann Meyerson eds., 1986) (arguing that the increase in the number of single-person households in the 1970s correlates with a trend of urban renewal and gentrification which resulted in nearly half of all SROs disappearing from 1970-1982); Michael S. Carliner, *Homelessness: A Housing Problem?*, in *THE HOMELESS IN CONTEMPORARY SOCIETY* 119 (Richard D. Bingham, Roy E. Green & Sammis B. White eds., 1989) (stating that older urban housing is filtering up to higher income groups rather than the poor because of gentrification and a rise in the number of affluent, non-family households and childless couples). Some have advocated rebuilding or refurbishing "skid rows" as a viable alternative to long-term public shelters. For a compelling presentation of this argument, see JENCKS, *supra* note 15; *Housing the Homeless*, N.Y. REV. OF BOOKS, May 12, 1994 (stating that federal and state governments have reshaped the housing choices available to the poor through policies that affect the housing market).

deinstitutionalization of the mentally ill in the 1960s and 1970s;<sup>46</sup> alcoholism and substance abuse (notably of crack cocaine);<sup>47</sup> all coupled with a broad range of personal, family, and community factors in each particular case.<sup>48</sup>

### C. *The Changing Nature of the Public's Response to Homelessness*

As I have attempted to show, homelessness is neither an abstract nor a neutral category. Rather, it is constructed and regulated as a policy issue by the state and through the media of popular culture.<sup>49</sup> The policies adopted by municipalities, states, and the federal government in response to the crisis of homelessness which emerged during the 1980s could generally be classified into four broad categories: (1) prevention; (2) short-term emergency shelter and other life- and health-sustaining services; (3) transitional services such as long-term residential placement, health care, and employment training and assistance; and (4) temporary and permanent housing.<sup>50</sup> In the 1990s, as the crisis has become normalized, policies directed toward the homeless have increasingly fallen under the rubric of "quality of life" initiatives, rather than social welfare. As a result, homelessness is often treated as a law enforcement or public order issue. This

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46. MICHAEL J. DEAR & JENNIFER R. WOLCH, *LANDSCAPES OF DESPAIR: FROM DEINSTITUTIONALIZATION TO HOMELESSNESS* 110-38 (1987); EDWIN FULLER TORREY, *NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL* 203-04 (1988); Edmund V. Ludwig, *The Mentally Ill Homeless: Evolving Involuntary Commitment Issues*, 36 *VILL. L. REV.* 1085, 1086-97 (1991). Deinstitutionalization began in earnest in the 1950s as new drugs were discovered, such as Thorazine, which allowed schizophrenics and other institutionalized psychiatric patients to function in the community. In 1975, the case of *O'Connor v. Donaldson*, 422 U.S. 563 (1975), compelled state hospitals to release patients who were not "dangerous" and who could survive in the care of family members or friends. The population of state mental hospitals decreased from approximately 500,000 in the 1950s to less than 100,000 today, with plans for future reductions. Ludwig, *supra* this note, at 1086.

47. Lisa Thomas, Mike Kelly & Michael Cousineau, *Alcoholism and Substance Abuse, in UNDER THE SAFETY NET*, *supra* note 41, at 204; *see also* Gina Kolata, *Twins of the Streets: Homelessness and Addiction*, *N.Y. TIMES*, May 22, 1989, at A1 (discussing how substance abuse contributes to homelessness).

48. While the above factors may account for the social phenomenon of homelessness, each homeless individual and family embodies a distinct and personal set of circumstances. *See generally* PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 143-79 (1989) (describing the factors that make extremely poor people vulnerable to homelessness).

Elliot Liebow expressed this thought in somewhat different terms in his study of homeless women in a Washington, D.C. suburb: "For the great majority of women I came to know, life had never been easy. Their childhoods were often punishing and painful. They came into homelessness by many different paths, almost all of which, one way or another, had to do with being poor and powerless." LIEBOW, *supra* note 34, at 16.

49. *See* Mark J. Stern, *The Emergence of the Homeless as a Public Problem, in HOUSING THE HOMELESS* 113, 113-123 (Jon Erickson & Charles Wilhelm eds., 1986) (discussing how the homeless have been conceptualized in the public's mind and their emergence as a public problem).

50. These categories are borrowed from *HOUSING THE HOMELESS*, *supra* note 49, at xxvii-xxix.

has become especially apparent in the new spirit of intolerance in New York City's parks, subways, bus and train stations, and other public spaces.<sup>51</sup>

Norman Seigel, a prominent New York civil rights lawyer, describes this dramatic shift in policy as follows:

Paralleling the significant rise in the number of homeless people in New York has been the increasing harassment of homeless people by government personnel. Government helped create the phenomenon of homelessness and should not and must not threaten the right of homeless citizens to survive. From the perspective of the homeless person who seeks to obtain quarters and dollars from sympathetic fellow citizens in order to eat and to rest for a few hours by sitting or lying in a railroad facility each day to survive, it is unseemly for the officials of the railroad and the police to focus their energies and resources in this insensitive manner . . . Homelessness is a political, social and economic problem and should be so recognized by the governmental entities. They should not attempt to transform the homelessness problem into a law enforcement problem.<sup>52</sup>

Because the homeless inhabit public spaces and rely on public resources for many of their basic needs, the discretionary choices having an impact on their status and welfare necessarily involve assumptions about what is and is not in the public interest.<sup>53</sup> In other words, whether homelessness is apprehended as a crime-control problem, a housing problem, or a health and welfare problem dictates the basis for exercising discretionary authority in significant but uncharted ways. It is to the nature of these choices and the scope of this authority that I now turn.

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51. See Sara Rimer, *Doors Closing as Mood on the Homeless Sours*, N.Y. TIMES, Nov. 18, 1989, at A1 (stating that as New Yorkers become less tolerant of the homeless population, public institutions are adopting policies that force homeless people out of train stations, subways, and parks and into the streets); Michael Freitag, *For the Homeless, Public Spaces Are Growing Smaller*, N.Y. TIMES, Oct. 1, 1989, at E5 (addressing new rules and codes of conduct in the city's bus and rail terminals, subway stations, and parks).

52. Norman Seigel, *Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions*, 36 VILL. L. REV. 1063, 1078 (1991).

53. The fact that the homeless have no choice but to live and sleep in public spaces also justifies viewing homelessness as an issue of community responsibility. Jeremy Waldron has characterized the issue in the following terms:

A responsible community does not address that tragedy by harassing the homeless or trying to push their predicament out of sight. The only responsible way to take the predicament of homelessness out of public sight is to provide accommodation for the homeless. Failing that, we must accept that the homeless have no choice but to live in public, and regulate public spaces in a way that is sensitive to their predicament.

Waldron v. San Francisco, No. C934129, at 7 (on file with author).

## II.

## THE LEGAL REGIME OF HOMELESSNESS

A. *Criminalizing Homelessness*1. *Anti-Panhandling Laws*

Many panhandlers are not homeless, and many homeless do not panhandle. Begging, however, remains emblematic of the presence of the homeless, and the public and bureaucratic response to begging in New York City is indicative of the rising fear and suspicion directed towards homeless people.<sup>54</sup> Panhandling is prohibited in New York in a variety of settings,<sup>55</sup> but nowhere more aggressively (and, many would add, ineffectually) than in New York's sprawling subway system, made up of 6,000 cars carrying over 3,500,000 passengers daily. Panhandling traditionally had been illegal on the subway, but, like so many of the statutes designed for an era when the homeless were a rare sight, this law that was not reliably enforced until the homeless population swelled in the early 1980s. As ridership fell, with the behavior of panhandlers increasingly cited as a contributing cause, the transit authority decided to put muscle into the statutory ban on panhandling in a move dubbed "Operation Enforcement" in 1989-90. Consequently, New York's vast underground transit network became the site of a major court battle involving the right of the homeless to panhandle.

William B. Young, Jr. and Joseph Walley were two of the New York subway system's legion of homeless ridership. They slept in shelters at night and received \$21.50 in public assistance weekly. After a number of raids, arrests, and prosecutions, the Legal Action Center for the Homeless (LACH) challenged the ban on begging on behalf of Young and Walley.<sup>56</sup> LACH claimed that panhandling was a protected form of speech and that the subway system was a public forum under the First Amendment. Though a lower court accepted the panhandlers' argument that the ban was an unreasonable violation of their freedom of speech and expression, the

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54. See Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a "Kinder and Gentler" America*, 19 HASTINGS CONST. L. Q. 783 (1992) (focusing on Americans' personal and legal responses to beggars, and how those responses reflect on societal attitudes).

55. N.Y. PENAL LAW § 240.35(1) (McKinney 1983) (prohibiting loitering for the purpose of begging); N.J. STAT. ANN. § 32:1-146.6(1)(d) (West 1989) (covering Port Authority properties); N.Y. ARTS & CULT. AFF. LAW § 35.07(1)(c) (McKinney 1983) (prohibiting the use of children for the purpose of begging).

56. This was not the first challenge to the validity of anti-panhandling statutes on first amendment grounds; see Helen Hershikoff & Adam S. Cohen, *Begging to Differ: First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 916 n. 6 (1991), citing *C.C.B. v. State* 458 So. 2d 47, 48-50 (Fla. Dist. Ct. App. 1984) (reversing a conviction for violation of a municipal ordinance that prohibited begging in public and holding that a total prohibition on begging violated the first and fourteenth amendments) and *Ulmer v. Municipal Court*, 55 Cal. App. 3d 263, 265-67 (Ct. App. 1976) (upholding a conviction under a statute that barred "accost[ing]" others to solicit alms, but noting that the statute did not apply to one "who merely sits or stands by the wayside" to beg (quoting legislative history)).

United States Court of Appeals for the Second Circuit upheld the ban on panhandling.<sup>57</sup> The appellate court majority began by cautioning that “it is not the role of this court to resolve all the problems of the homeless, as sympathetic as we may be,” and concluded by stating that “[b]egging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger.”<sup>58</sup> The basis of the court’s decision was that panhandling in subways does not convey a social or political message but rather is simply a means of collecting money, and that even if begging could be construed as speech worthy of constitutional protection, the state has a sufficiently important interest to warrant panhandling regulations.<sup>59</sup> The ban on panhandling has also survived state constitutional challenge in New York.<sup>60</sup>

Given the breadth of these rulings, the door is open for officials to step up enforcement of existing prohibitions against the homeless who panhandle to survive. Mayor Giuliani’s choice for Police Commissioner signalled an increased emphasis on enforcing penal provisions against such manifestations of homelessness as “squeegees,” New York’s “ubiquitous and increasingly aggressive . . . , money seeking, windshield-wiping men and women who foist their services on motorists stopped in traffic.”<sup>61</sup> Commissioner Bratton stated, “Squeegees are very visible signs of disorder, a lack of control. If you give up on it, it will overwhelm you.”<sup>62</sup> The enforcement campaign against such “criminal” activities associated with the homeless has had unspectacular results in terms of appreciably reducing these activities but, like the war on drugs in the 1980s, it has served to satisfy the public’s demand that something tangible be done.<sup>63</sup>

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57. *Young v. New York City Transit Auth.*, 729 F. Supp. 341 (S.D.N.Y.), *rev’d in part and vacated in part*, 903 F.2d 146 (2d Cir.), *cert denied*, 498 U.S. 984 (1990). Courts have also declined to find sleeping in public parks expressive conduct for the purposes of constitutional review. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Supreme Court found that it was reasonable to restrict the time and manner people “camped” in public parks.

58. *Young*, 903 F.2d 156 at 157.

59. In contrast, in the lower court hearing, Judge Leonard Sand had found the following:

[t]he simple request for money by a beggar or panhandler cannot but remind the passer-by that people in the city live in poverty and often lack the essentials for survival. Even the beggar sitting in Grand Central Station with a tin cup at his feet conveys the message that he and others like him are in need. While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech.

*Id.*

60. *Walley v. New York City Transit Auth.*, 602 N.E.2d 233 (N.Y. 1992).

61. Mike Dorning, *N.Y. Top Cop Cuts a Can-Do Image*, CHN TRIB., Dec. 22, 1993, at 1.

62. *Id.*

63. Panhandling remains a barometer of sympathy for, and fear of, the homeless population. A new crackdown on panhandling by the Giuliani administration (spearheaded by an ad campaign telling riders not to feel guilty for not giving) has had mixed results. While transit police have ejected increasing numbers of panhandlers, they are willing to tolerate many as well—especially those they have gotten to know. According to observers, transit

## 2. *The Fall of Vagrancy and Loitering Laws and the Rise of Other Forms of Anti-Homeless Legislation*

Though the normalization of homelessness through administrative means is a relatively recent development, the criminalization of the homeless is an old and familiar story. Historically, the criminalization of homelessness has been tied to changes in the economy. Vagrancy and loitering first became punishable in the fourteenth century to prevent peasants from travelling in search of better work or food in times of scarcity.<sup>64</sup> These prohibitions were justified as crimes of morality (idleness and indolence), rather than conduct.<sup>65</sup> In the 1960s, vagrancy was a crime in every state except West Virginia (where it remained a common law offence). As the New York Court of Appeals recognized in reviewing the state's vagrancy laws, the targets of enforcement were individuals "whose main offence usually consist[ed] in their leaving the environs of skid row and disturbing by their presence the sensibilities of residents of the nicer parts of the community."<sup>66</sup>

The criminalization of homelessness has its limits. Statutes which punish the status of homelessness remain constitutionally suspect because they single out an entire class of people, rather than any specific conduct.<sup>67</sup> In a 1972 case, *Papachristou v. City of Jacksonville*, the Supreme Court unanimously held a vagrancy law facially unconstitutional for vagueness under

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police have even made furtive contributions to a select few. Despite the cycle of new policy directives, officials still exercise some degree of arbitrary personal discretion as to how such measures will be implemented in daily life. See Nicholas Dawidoff, *To Give or Not to Give*, N.Y. TIMES MAG., Apr. 24, 1994, at 34, 40 (describing the personal experiences of beggars and panhandlers on the streets and subways of New York).

64. Most historians identify the first criminal vagrancy laws with the economic effects of the Black Plague in the English countryside, which caused drastic labor shortages and demographic shifts. The vagrancy laws were intended to confine the laboring population. It was common for these early vagrancy laws to also stipulate wages of pay for laborers. See generally A.L. BEIER, *MASTERLESS MEN: THE VAGRANCY PROBLEM IN ENGLAND 1560-1640* (1985) (discussing the economic and demographic background of vagrancy, how vagrant lifestyles differed from the norm, and how begging activities were punished by the state). For a modern parallel, see Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1206-09 (1953) (stating that the majority of American vagrancy laws punish idle or unemployed persons).

65. See Gary V. Dubin & Richard H. Robinson, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 104-06 (1962) (describing the evolution of concepts of vagrancy from economic criminality, where the vagrant burdened the public economy, to status criminality, where vagrants were considered "probable criminals," to conduct criminality, where vagrants were punished for specific criminal acts).

66. *Fenster v. Leary*, 229 N.E.2d 426, 450 (N.Y. 1967).

67. Under the Eighth Amendment, status offenses are unconstitutional. See *Robinson v. California*, 370 U.S. 660 (1962) (striking down a California law that made it a crime to "be addicted to the use of narcotics."); see also *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring) (giving as an example of a status offence a homeless person being prosecuted for public intoxication).



the Fourteenth Amendment's Due Process Clause, finding that the ambiguity of the legislation encouraged arbitrary arrests and harassment.<sup>68</sup>

After *Papachristou*, the legal regulation of the homeless shifted to loitering laws. Anyone found on the streets could be arrested if they could not satisfactorily "account for themselves."<sup>69</sup> As one might expect, many homeless people could not. In 1975, for example, as many people were arrested for loitering as for robbery.<sup>70</sup> Eventually, in a 1983 case, *Kolender v. Lawson*,<sup>71</sup> the Supreme Court struck down a California loitering law as unconstitutional for vagueness and for failure to meet the due process threshold established in *Papachristou*. As the court explained, the law failed "to establish minimal guidelines to govern law enforcement."<sup>72</sup> Significantly, it was not the curtailment of liberty that the Court found so objectionable, but rather the fact that, as a result of vaguely worded statutes, "arbitrary" decision-making was left in the hands of public officials.

Predictably, local officials perceived these decisions to be "a dangerous assault on their authority to enforce social order."<sup>73</sup> In what has become a sterile cycle of legislation, enforcement, and judicial review, new initiatives are carefully drafted to survive constitutional challenge. Recent laws can be divided into two categories: (1) laws which utilize broad language, such as a ban on "lodging" in a public space, leaving enforcement to police discretion without even minimal definitional guidelines; and (2) laws that prohibit more narrow conduct, such as "sleeping on a public park bench after closing hours."<sup>74</sup>

These laws enable the police to harass the homeless for conduct that harms no one, and for activities necessitated by circumstances over which the homeless have little or no control.<sup>75</sup> While facially directed at conduct, many of these laws, in practice, still boil down to criminalization of the status of being homeless. Sleeping in a park, for example, is conduct which

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68. 405 U.S. 156 (1972).

69. See Daniel L. Koffsky, *Orders to Move On and the Prevention of Crime*, 87 YALE L.J. 603, 609 n.39 (1978) (discussing the loitering prevention measures available to police since *Papachristou* and proposing a "move on" statute which would sufficiently limit police power within the confines of the Constitution).

70. *Id.* at 603 n.4.

71. 461 U.S. 352 (1983).

72. *Id.* at 358.

73. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 645 (1992).

74. This formulation is from Donald E. Baker, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 427, 429-32 (1990-1991).

75. See Simon, *supra* note 73, at 635, 646 n.97 (comparing medieval regulations which sought to ensure an adequate labor pool in the Black Plague era with modern regulations governing individuals displaced as a result of low-income housing); see also Mike Davis, *Afterword: A Logic Like Hell's: Being Homeless in L.A.*, 39 UCLA L. REV. 325, 326 (1991) ("Criminal law, in the case of Los Angeles's homeless, is handmaiden to a larger strategy that attempts to reconcile the diverse interests of business and homeowner groups trying to exclude the homeless from their respective parts of the city.")

in and of itself places no other person at risk—people do not commit crimes in their sleep—and for which there is no obvious alternative if the means and opportunity to secure shelter are not available.<sup>76</sup> As one commentator recently observed,

[I]n the vast majority of cases, it is only homeless persons who commit offenses like sleeping in the streets, urinating in public, or remaining in parks after hours. When homeless individuals sleep outside, and bathe and eat in public, they do so to survive and in doing so are simply manifesting their homeless status. To punish homeless men and women for manifestations of their status is nothing less than punishing them for their underlying . . . status of homelessness.<sup>77</sup>

Status-crimes against the homeless also take on other disguises. For example, while it would violate the constitution to single out and eject the homeless from parks after dark, simply shutting the parks down entirely would not be vulnerable to constitutional challenge. New York City adopted the latter strategy to curtail the use of parks by the homeless.<sup>78</sup> As long as the ban applies to everyone, it is of no constitutional significance that the effect of the closure is far more serious for the homeless than for other residents of the neighborhood.

Though this strategy has achieved its ends fairly well in the context of public parks, some have greeted the tactic less hospitably in other public spaces where the homeless congregate, notably train and bus stations. For example, a Federal District Court Judge in Manhattan imposed a preliminary injunction preventing Amtrak from enforcing their policy of evicting the homeless from Penn Station if the latter failed to justify their presence.<sup>79</sup> The case was initiated by a number of homeless individuals together with Streetwatch, a New York City organization which monitors police and private security guards' treatment of the homeless. The plaintiffs alleged that homeless individuals were "punched, shoved or struck with batons, shoved against walls or pillars, thrown to the ground, kicked, maced, dragged, beaten, or otherwise physically accosted by Amtrak police." Allegedly, the Amtrak police then ejected the homeless plaintiffs from Penn Station based solely on their own discretion.<sup>80</sup> Citing *Papachristou* and *Kolender*, a United States District Court held this unchecked police discretion invalid under the void-for-vagueness doctrine.<sup>81</sup> Moreover, in

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76. Baker, *supra* note 74, at 434.

77. *Id.* at 445.

78. See Emily M. Bernstein, *Tompkins Square (Almost) United*, N.Y. TIMES, Aug. 6, 1993, at B1.

79. *Streetwatch v. Amtrak*, 875 F. Supp. 1055 (S.D.N.Y. 1995) described in Richard Perez-Pena, *Amtrak is Ordered Not to Eject the Homeless from Penn Station*, N.Y. TIMES, Feb. 22, 1995, at A1, B4.

80. *Streetwatch*, 875 F. Supp. at 1058.

81. *Id.* at 1059.

granting the injunction, the court rejected the argument that the court should give weight to the public's "discomfit of being reminded on a daily basis that many of our fellow citizens are forced to live in abject and degrading poverty."<sup>82</sup>

While the constitutional validity of practices such as Amtrak's continue to be successfully challenged, the results have been mixed.<sup>83</sup> Additionally, a variety of nonconstitutional legal avenues exist to combat prosecutions of the homeless for vagrancy and loitering-type offenses. Of these, the criminal law doctrines of excuse, necessity, and justification appear the most effective.<sup>84</sup> Homeless defendants, however, rarely have the resources to take full advantage of the legal strategies most beneficial to their cause. Moreover, even where such defendants in acquittals or reduce the penalties for conviction, the burgeoning presence of the homeless in the court system still enhances the general impression that the homeless are worthy of prosecution.

As a result of the media attention on city services dealing with the homeless, high-profile, short-term emergency initiatives—such as temporary shelters and involuntary confinement policies during cold snaps—detracts funds and resources from long-term housing programs. Indeed, one of Mayor Giuliani's most controversial campaign planks in 1993 was a policy to limit shelter stays to ninety days.<sup>85</sup> In New York City, where funding for SROs is under threat and the construction of new shelters has been severely curtailed, prisons appear to be the only publicly funded housing for the homeless which are receiving increased funding and favor.

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82. *Id.* at 1066.

83. See *Pollard v. State*, 687 S.W.2d 373 (Tex. Ct. App. 1985) (dismissing complaint against homeless individual for sleeping in public space); *City of Pompano Beach v. Copalbo*, 455 So. 2d 468 (Fla. Dist. Ct. App. 1984) (overturning provision against sleeping in public on grounds of vagueness because it provided too much discretion to the police), *review denied*, 461 So. 2d 113 (Fla. 1984), *cert. denied*, 474 U.S. 824 (1985). *But see*, *Stone v. Agnos*, 960 F.2d 893 (9th Cir. 1992) (finding no constitutional violation by statute making it a misdemeanor to lodge in any place "without permission of the owner"); *Whiting v. Town of Westerly*, 942 F.2d 18 (1st Cir. 1987) (rejecting vagueness and overbreadth challenges to an ordinance which bans sleeping in public or in motor vehicles); *Hersey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987) (affirming decision that city ordinance was not unconstitutionally vague or overbroad if prohibition against sleeping was stricken from ordinance).

84. *Baker*, *supra* note 74, at 449-55.

85. Homelessness in New York City: Rudy Giuliani's Policy and Program Strategy, (1993) (New York City Mayoral Campaign Position Paper), *quoted in* Celia W. Dugger, *Giuliani Easing Election Stance on the Homeless*, N.Y. TIMES, Mar. 20, 1994, at A1, A36 ("Within days of the paper's release, Mr. Giuliani began backing away from the 90 day limit, saying he only meant to set a fire under sluggish bureaucrats to help the homeless, not to put needy women and children on the streets.") (emphasis added). Giuliani's approach in the 1990s may be contrasted with that of Mayor Koch in the late 1980s. Koch ruled out using the police to deal with the problem of homelessness on the grounds that such institutions lacked the "compassionate response" necessary. Josh Barbanel, *Homeless: What New York Can't Do*, N.Y. TIMES, Dec. 14, 1988, at A1.

At first glance, arresting the homeless may appear to be significantly less expensive than housing and providing services to them. Yet, most observers agree that banishing the homeless to the criminal justice system is an expensive and oppressive means by which to provide some tangible evidence of a public response to homelessness. As one exasperated judge observed:

Our jails have become our modern mental institutions—albeit institutions neither designed nor able to provide the required care these thousands who were cut loose during the deinstitutionalization of our state mental hospitals need . . . . Urban forces spend millions annually interfacing with the homeless. Similarly our urban jail holding tanks contain many homeless persons charged with misdemeanors (including failure to appear on an infraction, such as spitting on the sidewalk or tossing a cigarette). . . .

As a Municipal Court judge . . . I have seen hundreds of homeless individuals appear before me. With what are these people generally charged? . . . [T]respassing-type offenses—sleeping in public parks and beaches or in stairwells of buildings . . . . [or] [c]amping in one's own car . . . . Very rarely is a theft case seen; and I have been surprised, frankly, at the almost total dearth of homeless defendants being charged with felonies.<sup>86</sup>

When people are arrested for urinating in public or staying in a public park after dark, they are almost always released again soon after. The criminalization of homelessness serves essentially cosmetic functions for municipalities. Indeed, it is often motivated by a city's desire to put on a clean, affluent image for outsiders, as recently evidenced by Atlanta's plans to clear out the homeless in time for the 1996 Olympic games.<sup>87</sup> As offenders are invariably returned to the streets in a short period of time, the argument that this legislation exists to protect the homeless themselves from being victimized is unpersuasive. Prosecution of the homeless rarely does anything to influence the factors that brought those charged to their present straits. Rather, propelling the homeless through the revolving doors of the criminal justice system frustrates the goals of both the homeless and the state.

The homeless and their advocates have not accepted this shift in policy priorities passively.<sup>88</sup> The campaign waged by advocates to ward off this state harassment of the homeless has had mixed results. The homeless

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86. Robert C. Coates, *Legal Rights of Homeless Americans*, 24 U.S.F. L. REV. 297, 343-44 (1990).

87. See, e.g., *Atlanta's Homeless Dreading Olympics; Advocates Claim the City Doesn't Want the Poor in Sight During the Games*, ORLANDO SENTINEL, Feb. 11, 1996, at A11.

88. See Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-Homeless Lawsuit*, 23 STETSON L. REV. 467 (1994) (describing the

have gained a number of important legal rights, described below.<sup>89</sup> However, as one reporter recently observed, while “[t]he homeless and their advocates fight back with the usual lawsuits, . . . the clear consensus at street level is that they have lost the crusade for the public conscience. Many passers-by seem to have become numb.”<sup>90</sup> Indeed, the nonlegal impact of judicial rulings upholding the criminalization of the homeless only serves to reinforce the public’s increasing hostility toward the homeless. They reproduce and give judicial sanction to a vision of the homeless as deviant and dangerous. As Allan Hutchinson observed, “Inherent in [recent judicial] holdings is the assumption that the poor are different and undeserving, intimidating, unruly, and at the root of much of the chaos and crime that threatens the hard-working community.”<sup>91</sup>

### 3. *The Exercise of Discretion within a Policy Framework of Penalization*

The change in the statutory and legal framework of homelessness is only part of the story. Compassion fatigue is also manifested in the discretionary determinations which underlie how law enforcement and social services officers interpret penal and municipal statutes. The same shift in attitudes that resulted in the dramatic shift in policies aimed at the homeless are reflected in the approach street-level bureaucracies bring to their dealings with the homeless.<sup>92</sup>

Public officials with discretionary authority over the homeless are often confronted with two realities: (1) they cannot help everyone and (2) they can help some. In an era of scarce resources, the public officials who interact with the homeless are asked to perform more than a passive gatekeeping function; they are called upon to pass moral judgment as well. In particular, officials are called upon to distinguish the deserving from the undeserving homeless. Children are archetypal of the deserving, whereas drug-dealing, single young men and child-bearing, unmarried young women are archetypal of the undeserving. Ironically, individuals falling into

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process of organizing and arguing institutional suits against the City of Miami for pursuing a policy of harassing and arresting homeless individuals).

89. See *infra* part II.B.1.

90. Rick Bragg, *Homeless Seeing less Apathy, More Anger*, N.Y. TIMES, Feb. 25, 1994, at A1. See also note 16 and accompanying text, *supra*.

91. Allan C. Hutchinson, *Les Miserables Redux: Law and the Poor*, 2 S. CAL. INTERDISCIPLINARY L.J. 199, 206 (1993).

92. The term “street-level bureaucrat” is borrowed from JEFFREY M. PROTAS, *PEOPLE-PROCESSING: THE STREET-LEVEL BUREAUCRAT IN PUBLIC SERVICE BUREAUCRACIES 1* (1979); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* at xi (1980). Street-level bureaucrats are defined by Lipsky as police officers, welfare officials, prison guards, legal aid workers, court administrators, “and other [members of] agencies who have wide discretion over the dispensation of benefits or the allocation of sanctions.” *Id.* Lipsky argues that street level bureaucrats “reflect and perpetuate the values of the larger society, including the stigmatization of poor people,” *id.* at 181, and that, “[t]hrough street-level bureaucracies the society organizes the control, restriction and maintenance of relatively powerless groups.” *Id.* at 191.

the undeserving category may be separated only by a year or two in actual life experiences from their more deserving counterparts.<sup>93</sup> Nevertheless, in drawing such lines, officials are required to perform the same kind of triage performed by the public at large. As Anna Quindlen notes, "We bring the numbers down, not by solving the problem, but by deciding it is their own damn fault. The passive homeless are worthy, the aggressive unworthy. This is the opposite of the ethos of the streets, where only the strong survive."<sup>94</sup>

Anecdotal evidence suggests that increasing public willingness to blame the homeless for their plight is dramatically reflected in the various bureaucracies that interact with the homeless, and none more starkly, or with more devastating results, than the police. For example, New York's Mayor Rudolph Giuliani disclosed that the police "do have more latitude . . . . We want them to have more discretion to solve problems on the street, to tell someone to move on, tell people to stop aggressive activity." When questioned, police officers responded that they interpreted the focus on discretion to be a euphemism for tolerating more aggressive police tactics, including using a nightstick to forcibly remove homeless people.<sup>95</sup>

Police powers and other coercive mechanisms to confine or move homeless people are consistent with a short-term, stop-gap approach to the homeless. As homelessness has come to be constructed as a criminal issue, public officials, including shelter workers, physicians, transit officials, parks commissioners, social workers, and police officers have increasingly been called upon to use the authority at their discretion to contain and control the homeless.

This shift in the mind-set of public officials has rubbed off on the private sector as well. Reports of "goon squads" hired by the Grand Central Partnership to rouse the homeless from Grand Central Station provide a case in point.<sup>96</sup> The Partnership, a business improvement organization, initiated a program to entice the homeless from the train station, surrounding shops, automated teller machines, and other areas of high pedestrian traffic with inducements of food, shelter, and counselling. The federal Department of Housing and Urban Development (HUD) awarded the Partnership a grant of \$547,000 for its food and temporary shelter programs. The Partnership used a portion of this grant to fund its outreach services, for

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93. See KATZ, *supra* note 2, at 236-44 (1989) (illustrating government transfer of funds among the various classes of the poor).

94. Anna Quindlen, *Can We Help the Homeless? All the Homeless Worthy of Place to Live*, ATLANTA CONST., Dec. 19, 1993, at H2.

95. Bragg, *supra* note 90, at A1.

96. See Thomas J. Lueck, *Private Review of Homeless Program is Planned*, N.Y. TIMES, June 10, 1995, at A23.

which field workers—typically members of the homeless community provided with virtually no training—were given a stipend of \$50 per week.<sup>97</sup> Allegations surfaced in May 1995 describing routine beatings, harassment, and intimidation as the means chosen to clear the business district of the homeless.<sup>98</sup> Though the allegations are still under investigation, HUD has withdrawn its grant to the Partnership. When interviewed about the allegations, Andrew Cuomo, now an assistant secretary with HUD, stated “[w]e are not in the business of subsidizing thuggery.”<sup>99</sup>

While Cuomo’s outrage over the Grand Central Partnership incident was probably genuine, it is ultimately disingenuous for the government and the public to decry violence against the homeless in the same breath that it urges that streets, stores, subways and train stations be made unwelcome for them. Government may not be in the business of subsidizing thuggery, but it has helped produce the conditions under which thuggery against the homeless flourishes.

### B. *Legal Rights of the Homeless and their Limitations*

The legal rights of the homeless, while manifestly inadequate, are nonetheless impressive relative to the situation two decades ago. This is largely due to the single-minded determination of advocates for the homeless to pressure for court action in areas where government has lacked the ability or inclination to act. In this section, I note the important legal rights for the homeless which have been secured through the courts and begin to discuss how a framework of bureaucratic engagement can fill a significant gap left by the existing legal rights for the homeless—the right to be engaged in their own administration through a bureaucracy charged with the duty to meet their needs. This theory of engagement is further developed in the remainder of this Article.

#### 1. *The Achievement of Legal Rights through Litigation*

The Supreme Court has made clear that the Constitution cannot compel government to provide shelter for its citizens in need.<sup>100</sup> The basic principle of the Constitution is to restrain the state. Courts, consequently, will generally enforce negative liberties (the right to be free from interference),

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97. Bruce Lambert, *Group Bullied the Homeless, Agency Finds*, N.Y. TIMES, July 6, 1995, at B1, B5.

98. *Id.* at B1 (describing alleged mistreatment of homeless people resulting from mismanagement of the Partnership Program); David Firestone, *3 Tell Council They Beat Homeless to Clear Out Business District*, N.Y. TIMES, May 11, 1995, at B1 (reporting that three formerly homeless men hired as outreach workers told a City Council committee that a Grand Central Partnership official urged them to beat up other homeless men).

99. Thomas J. Lueck, *Grand Central Partnership is Subject of U.S. Inquiry*, N.Y. TIMES, May 26, 1995, at B4 (quoting Cuomo).

100. *Lindsey v. Normet*, 405 U.S. 56 (1972).

but not positive ones (the right to interference when it is needed or desired). There is, in other words, no constitutionally mandated positive right to welfare.<sup>101</sup>

State constitutions, however, do occasionally set out positive liberties.<sup>102</sup> New York's State Constitution is more explicit than most, providing 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."<sup>103</sup>

In the late 1970s, advocates for the homeless in New York City developed a litigation strategy to address homelessness. The first step was to establish a right to shelter.<sup>104</sup> In 1979, this strategy succeeded. A class action suit resulted in a temporary injunction against the City of New York, requiring it to provide additional shelter beds to adequately accommodate the homeless.<sup>105</sup> The parties settled the case with a consent decree two years later, requiring the City to continue abiding by the Court's previous injunction.<sup>106</sup> The initial plan had been to operate small, community-based shelters. However, the City began outfitting abandoned public buildings,

101. See *Lavine v. Milne*, 424 U.S. 577 (1976) (holding constitutional the rebuttable presumption that anyone applying for government assistance within seventy-five days after voluntarily terminating employment has terminated her employment to qualify for public assistance and will be thus disqualified for seventy-five days); *Rosado v. Wyman*, 408 U.S. 397 (1970) (discussing the voluntary nature of state participation in the AFDC program).

102. See, e.g., Anthony B. Klapper, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739 (1993) (recommending reliance on provisions in state constitutions to secure community-based services for the mentally-ill); James K. Langdon II & Mark A. Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 364-65 (1985) (listing the relevant provisions of each state's constitution).

103. N.Y. CONST. art. XVII, § 1.

104. See Langdon & Kass, *supra* note 102, at 334-45 (discussing the first suit filed in New York City seeking to establish the right to shelter); Geoffrey Mort, *Establishing A Right to Shelter for the Homeless*, 50 BROOK. L. REV. 939 (1984) (focusing on legal strategies employed in attempts to win judicial recognition of a right to shelter for homeless persons); Lauren M. Malatesta, *Finding a Right to Shelter for Homeless Families*, 22 SUFFOLK U. L. REV. 719 (1988) (tracing the development of establishing the right to shelter at the state level). For a discussion of the place of the right to shelter among other litigation strategies, see Kim Hopper & L. Stuart Cox, *Litigation in Advocacy for the Homeless: The Case of New York City*, in HOUSING THE HOMELESS *supra* note 49, at 303-14.

105. See *Callahan v. Carey*, N.Y.L.J., Dec. 11, 1979, at 10 (N.Y. Sup. Ct. Dec. 10, 1979).

106. The consent decree was signed two weeks into the trial, on August 26, 1981. See *Final Judgment by Consent*, *Callahan v. Carey*, No. 42582/79. In the consent decree, New York City agreed to provide all homeless men with shelter and board, "provided that (a) the man meets the need standard for the homeless relief program in New York State; or (b) the man by reason of physical, mental, or social dysfunction is in need of temporary shelter." *Id.* at 3.

A consent decree, however, does not enjoy the status of precedent for other cases of this kind. Additionally, city officials have often been accused of not sufficiently adhering to the decree. By 1987, the Coalition for the Homeless had been to court thirty times to compel the municipal authorities to comply. Suzanne Daley, *Record Number Given Housing in City Shelters*, N.Y. TIMES, Jan. 27, 1987, at B2; see also Robert Hayes, *Litigating on Behalf of Shelter for the Poor*, 22 HARV. C.R.-C.L. L. REV. 79 (1987) (discussing the role of litigation



especially former armories, to serve as huge warehouses for the homeless. Hundreds of cots were placed side by side. In the Fort Washington Armory, 1400 people were housed in this fashion.<sup>107</sup> By the late 1980s, the shelter bureaucracy was firmly entrenched, as was the shelter as a way of life for many homeless persons. Thus, while litigation resulted in a roof over the head of New York City's homeless, it also contributed to the City's pursuit of a policy option that, arguably, did not serve the homeless well.

The right to some form of shelter was seen as only the first step in the campaign to address homelessness. The advocates next moved on to their goal of establishing a right to "actual and adequate" shelter. In *Jiggetts v. Grinker*, lawyers for the homeless in New York City argued that the federal AFDC shelter allowances were inadequate to meet the housing needs mandated by state statutes.<sup>108</sup> In a unanimous decision, the state's highest court, the New York Court of Appeals, held that the state must pay welfare recipients a monthly allowance bearing a reasonable relation to the cost of housing.<sup>109</sup> In *Doe v. Dinkins*, advocates obtained a preliminary injunction against New York City on behalf of present and past residents of two overcrowded Manhattan shelters requiring the City to reduce the number of beds in each shelter to comply with fire and safety codes.<sup>110</sup>

As alluded to at the beginning of this article,<sup>111</sup> a chronic problem in New York City has been providing emergency housing to families who arrive at the Emergency Assistance Unit (EAU) offices with nowhere else to go. From 1984 to 1995, advocates led by the Legal Aid Society's Homeless Family Rights Project repeatedly obtained contempt orders against the City of New York for failing to find emergency shelter for homeless families "immediately" as required, leaving these families no other choice but to sleep in the EAU offices.<sup>112</sup> Lawyers for the homeless filed court documents alleging that, from the beginning of July to the end of October 1994, 11,693 instances of families staying overnight at a welfare office were recorded. Beginning in November 1994, the courts held that, when the City was unable to provide emergency housing, homeless families became eligible to receive \$50 for the first night and \$100 for each successive night. The City was forced to budget \$5 million in fines for violating its obligation to

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in representing needy clients); Christine Robitscher Ladd, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272 (1986) (discussing recent litigation on behalf of the homeless in New York State courts).

107. BLAU, *supra* note 15, at 143.

108. 553 N.E.2d 570 (N.Y. 1990). Specifically, the Homeless Family Rights Project argued successfully that \$312.00 monthly was inadequate to house a family of four in New York City.

109. *Id.* See also Kevin Sack, *New York Court Sets a Standard for Housing Aid*, N.Y. TIMES, Apr. 4, 1990, at A1 (discussing the effect of the New York Court of Appeals' decision in *Jiggetts*).

110. 192 A.D.2d 270 (N.Y. App. Div. 1993).

111. See *supra* notes 3-6 and accompanying text.

112. Matthew Purdy, *New Approach Is Tried in Suit Over Homeless*, N.Y. TIMES, Nov. 23, 1994, at B5.

house the homeless. However, as one of Governor Cuomo's last acts in office, he modified the state regulations, allowing EAU workers a breathing space of forty-eight hours to investigate the genuineness of the family's need and to find suitable housing. Finally, in February 1995, the City and the homeless litigants reached a settlement. The City has been given a period of time to explore options to improve emergency housing facilities, in return for a cessation of contempt order motions.<sup>113</sup>

Despite setbacks, the 1980s witnessed other important victories for the homeless in court.<sup>114</sup> For example, advocates of the homeless successfully argued that homeless individuals can use shelter addresses for the purpose of qualifying for benefits. In the past, the lack of a permanent address was often used as a justification for the denial of welfare assistance.<sup>115</sup> Other civil rights victories won on behalf of homeless citizens have included the right to vote,<sup>116</sup> the right to keep families together by preventing children of homeless families from being placed in foster care,<sup>117</sup> and the right to privacy from search and seizure.<sup>118</sup>

## 2. *Limitations of a Rights-Based Strategy*

The one-dimensional reliance on *rights*, without reference to the *needs* of the homeless, or the *duties* of responsible public officials, demonstrates the limitations of legal discourse (and legal institutions) in addressing complex social problems where individual and community interests appear to collide.<sup>119</sup> The judiciary is not in the business of assessing need or dictating

113. Matthew Purdy, *City to Revise Its Housing of Homeless*, N.Y. TIMES, Feb. 2, 1995, at B3.

114. See, e.g., Stephen D. Houck, *Homeless in the Courts of New York State: The 1980s*, N.Y. ST. B.J., Nov. 1990, at 10 (surveying issues implicated in litigation in the 1980s involving the homeless).

115. Coates, *supra* note 86, at 315-17.

116. *Id.* at 317-20. In *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984), a class action suit was brought on behalf of homeless plaintiffs who sought to enjoin the City from applying regulations defining "residence" as "fixed, permanent home," thereby excluding homeless voters. The court found that less restrictive measures were available to the City to prevent fraud, and required the City to allow homeless individuals to vote as long as they could show they had a place they considered their "home base."

117. In *Martin A. v. Gross*, 524 N.Y.S.2d 121, 125 (Sup. Ct. 1987), plaintiffs had to relinquish their children to foster care because they were denied entry into an emergency shelter. The Court ruled, pursuant to N.Y. SOC. SER. LAW § 397(1)(b) (McKinney 1994), that families could not be separated due to poverty factors alone. However, in a similar case, *Grant v. Cuomo*, 519 N.E.2d 339 (N.Y. 1987), the court held that the nondiscretionary language of the Child Welfare Reform Act implicitly conveyed discretion to officials to remove children to foster care in such circumstances. See generally Bussiere, *Homeless Families and the Child Welfare System*, 11 CHILDREN'S LEGAL RTS. J. 2 (1990).

118. See David H. Steinberg, *Constructing Homes for the Homeless? Searching for a Fourth Amendment Standard*, 41 DUKE L.J. 1508 (1992) (arguing that homeless people ought to be denied fourth amendment protection in some instances).

119. For an elaboration of this theme, see Rand E. Rosenblatt, *Legal Entitlement and Welfare Benefits*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 262 (David Kairys ed., 1982) (describing the inadequacy of advocates' efforts to assert and defend the legal

the duties of public officials. For example, although a court can uphold a ban on urinating in public, it cannot compel the state to provide public toilets.<sup>120</sup> Because a contest of rights generally leads to a winner-take-all environment, compromises are rare and a consensus on how to resolve the conflict in a manner which furthers the public interest is rarer still. The result is that the homeless can be left effectively without the lawful right to do what is necessary in order to survive.<sup>121</sup> Judicial remedies, even where well-intentioned and well-designed, are fundamentally reactive, narrowly focused, and unable to take wider political, social, and economic contexts into sufficient consideration. Thus, despite numerous litigation successes in providing the homeless with rights they did not have in the past, the courts ultimately represent a flawed means of realizing social policy goals.<sup>122</sup>

Moreover, judicial intervention has often expanded the breadth of the state's discretion in formulating and implementing its social welfare policy.<sup>123</sup> While expanding the breadth of the state's discretion, litigation in the context of homelessness often has no impact on the bureaucracies which wield the real power against the homeless.<sup>124</sup> Ronald Slye has asserted that, with respect to litigation, "[i]ts utility as a tool to address immediate and narrow injustices makes it less useful for producing and implementing long-term constructive policies . . . to address broad problems like homelessness."<sup>125</sup>

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rights of the poor in the absence of efforts to build coalitions between poor people and other social groups to pursue common goals).

120. For a recent example, see *Lucas v. Dinkins*, 608 N.Y.S.2d 403 (App. Div. 1994) (finding that homeless individuals' claim that their rights had been violated by New York City's failure to provide public toilets was not justiciable).

121. See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991) (discussing the relation between homelessness, the rules of public and private property, and the underlying freedom of the homeless).

122. See Ronald C. Slye, *Community Institution Building: A Response to the Limits of Litigation in Addressing the Problem of Homelessness*, 36 VILL. L. REV. 1035 (1991) (examining how litigation should complement nonlitigious legal activities).

123. See *Tucker v. Toia*, 371 N.E.2d 449, 451 (N.Y. 1977) (stating that provision of assistance to the needy is specifically mandated by the state constitution); *Bernstein v. Toia*, 373 N.E.2d 238, 244 (N.Y. 1977) (holding that while the state must provide assistance, the legislature has discretion to determine the manner and means of discharging that duty); *RAM v. Blum*, 425 N.Y.S.2d 735, 738 (Sup. Ct. 1980) (discussing *Tucker*, *Bernstein*, and the court's interpretation and application of these holdings in subsequent cases). See also Ladd, *supra* note 106, at 275-81 (describing the limits to the protection that Article XVII, § 1 of the New York State Constitution gives to the needy).

124. Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, in THE RIGHTS OF THE HOMELESS 285 (P.L.I. Litigation & Administration Practice Course Handbook Series No. 366, 1988) (offering litigation strategies to attorneys seeking to aid the homeless in confronting bureaucratic impediments to shelter, sustenance, and entitlements).

125. Slye, *supra* note 122, at 1050. However, this tunnel vision is, as Stephen Wizner observes, also litigation's strength:

Legal advocates confront homelessness as an emergency condition. It is their task to address [an] individual's current housing needs, not to devise measures that may become effective for the individual or society in the future. Advocacy must work

The issue of forced confinement of the homeless due to mental illness is a case in point. In *Madness on the Streets*, Rael J. Isaac and Virginia C. Armat argue that the rise of what they term a "mental health bar" and its support of the right of the mentally ill to refuse confinement and treatment have significantly contributed to the homelessness crisis.<sup>126</sup> Homeless individuals cannot be hospitalized against their will unless they are shown to be a danger to themselves or others.<sup>127</sup> Motivated by a basic distrust of psychiatry and a belief that the central threat to the homeless was the possibility of involuntary state confinement, the mental health bar argued for the civil rights of the homeless to be placed ahead of other concerns, such as these individuals' families' interests in seeing them hospitalized. As Isaac and Armat contend, families of the homeless mentally ill discovered their loved ones had the "right to refuse treatment," even if that amounted to little more than a "right to freeze."<sup>128</sup>

For example, consider the saga of Billie Boggs.<sup>129</sup> Joyce Brown (who went by the name of a popular New York television personality named Bill Boggs), lived over a heating grate in the posh upper east side of Manhattan in the mid 1980s. Prior to 1985, she had lived a relatively stable life, held a steady job, and lived at home with her family. She was diagnosed with schizophrenia. Boggs was the first, and became the most notorious, of the homeless people involuntarily confined to psychiatric institutions and medicated as part of Mayor Koch's Project HELP.<sup>130</sup> The first aspect of the

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directly, centering upon the housing needs of homeless people, not upon homelessness as an abstract social issue or, as some conservative writers contend, a behavioral condition.

Stephen Wizner, *Homelessness: Advocacy and Social Policy*, 45 U. MIAMI L. REV. 387, 391 (1990-1991).

126. RAEJ JEAN ISAAC & VIRGINIA C. ARMAT, *MADNESS IN THE STREETS: HOW PSYCHIATRY AND THE LAW ABANDONED THE MENTALLY ILL* 109-24 (1990).

127. Mark S. Kaufman, "Crazy" Until Proven Innocent? *Civil Commitment of the Mentally Ill Homeless*, 19 COLUM. HUM. RTS. L. REV. 333, 337 (1988) (summarizing caselaw holding that mentally ill persons cannot be involuntarily committed absent a finding of dangerousness); Gregory Taylor, *Bitter Freedoms: Deinstitutionalization and the Homeless*, 3 J. CONTEMP. HEALTH L. & POL'Y 205, 214-16 (1987) (discussing dangerousness standard as interpreted and applied by state and federal judiciary with respect to mentally ill homeless).

128. Concurrent with the fight on behalf of the homeless for the right to refuse coercive hospitalization or institutionalization has been the struggle to establish a right to treatment in the wake of the massive deinstitutionalization of the nation's psychiatric hospitals in the 1970s and 1980s.

In *Klostermann v. Cuomo*, 463 N.E.2d 588 (N.Y. 1984), a class action suit brought on behalf of former psychiatric patients who alleged that community treatment facilities were being denied the plaintiffs, a factor which forced the plaintiffs onto the streets. The suit challenged the constitutionality of the state's mental health regime. While the Court accepted the possibility of court intervention in what the defendants described as a bureaucratically delegated allocation of resources, the Court would not rule whether a constitutionally based right to receive adequate medical treatment exists.

129. See Jeanie Kasindorf, *The Real Story of Billie Boggs*, N.Y. MAGAZINE, May 2, 1988, at 39 (detailing the life story of the homeless woman and her legal battle with New York City for placing her in Bellevue as part of Mayor Koch's Project HELP).

130. *Id.* at 41.

HELP operation was surveillance. Social workers and psychiatrists observed Boggs' aggressive behavior on the street, such as shouting obscenities at passers-by, tearing up money given to her, and sleeping in blankets covered in urine and feces. They hospitalized her on three different occasions, but each time she was released after being found not to be dangerous to herself or others. However, her dangerous behavior manifested itself to the HELP officials, whom she chased and verbally harangued.<sup>131</sup>

When Boggs could not be persuaded to seek treatment and housing voluntarily, she was forcibly transferred and confined to Bellevue Hospital on October 28, 1987. On her behalf, the New York Civil Liberties Union successfully sued to win her release from involuntary confinement, though the City's policy of forcible confinement and treatment was upheld by the appellate court.<sup>132</sup> Briefly, Boggs became the *cause celebre* of the homeless advocacy movement, culminating in her lecturing to students at Harvard University.<sup>133</sup> Within a matter of months, however, she dropped from public view and returned to a life divided between stints on the streets, a shelter for homeless people suffering from mental illness, and psychiatric hospitals.

The Billie Boggs experience is instructive on a number of fronts. First, it represents the state's willingness to resort to coercion as a means of removing the homeless from the streets and transferring them into administrative settings where treatment and surveillance go hand in hand. Second, it reveals that, currently, state intervention to address homelessness is often limited to litigation which champions the civil rights of homeless individuals. Third, it illustrates how, once a homeless person comes into contact with the homelessness bureaucracy, that relationship takes on a life of its own. Finally, it demonstrates that no place is safe for the homeless. Ultimately, though Billie Boggs justifiably claimed to be a victim of the homeless bureaucracy, that same bureaucracy arguably remains her only hope for a better life.

A central aim of the framework of engagement I seek to advance in this study is the transformation of the way in which the homeless are treated in the administrative process. This, in turn, would serve as a first step towards decriminalizing homelessness. The decriminalization of the homeless will require significant changes in the expectations placed on bureaucracy, not only to be more humane, but also to act more aggressively in meeting the unique needs of the homeless.

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131. *Id.*

132. *In re Boggs*, 522 N.Y.S.2d 407 (Sup. Ct. 1987), *rev'd sub nom Boggs v. N.Y. City Health and Hospitals Corp.*, 132 A.D.2d 340 (N.Y. App. Div. 1987).

133. See Kasindorf, *supra* note 129, at 39; Sid Cassese & Patrick Brasley, *Brown Urges More Housing*, *NEWSDAY*, Mar. 24, 1988, at 7 (describing Joyce Brown, also known as Billie Boggs, delivering a speech concerning her experiences of being homeless and her push for more affordable housing for the homeless).

Adopting a framework of engagement would not remove the dilemma of the Billie Boggs case: the need to make hard decisions about where to draw the distinction between the rights of the homeless and the legitimate needs of the community. However, adopting a framework of engagement would alter *how* those decisions are made, and subsequently defended, both to the homeless individual and the community. Assessing that someone is a danger to themselves or to others is a highly subjective enterprise. For this reason, it should not be undertaken in the abstract, on the basis of objective standards and predetermined rules or in the absence of a relationship with the parties involved. In the case of Billie Boggs, less formal confrontations, one-on-one overtures, and seeking out family and friends to aid in establishing trust all might have obviated the need for coercion. As a recent study on homelessness outreach found, "a provider attempting to engage a person should be flexible, . . . . A key characteristic of establishing relationships is emphasis on the voluntary nature of this type of engagement."<sup>134</sup>

The story of Billie Boggs, however, also points to the limitations of a framework of engagement. Bureaucrats often face no-win situations in their dealings with the homeless. The failure to involuntarily confine someone who is menacing a neighborhood may be perceived as an irresponsible and dangerous decision. The failure to respect the autonomy and liberty of a homeless individual who has not yet harmed anyone may be perceived as draconian and unjust. In such situations, officials must act on the basis of training, expertise, and their instincts. Though there is no guarantee an engaged bureaucracy will make the right choice, officials who take a personal interest in the values underlying the state's intervention will be more capable of recognizing and learning from their mistakes.

Though public officials will sometimes find it necessary to curtail the liberty of the homeless, this should be done in a fashion consistent with a respect for the autonomy of the homeless person in question.<sup>135</sup> As Billie Boggs' counsel Norman Seigel remonstrates, this requires knowing the homeless person in question:

The key to any effective policy regarding homelessness is a demonstration by the federal, state and city governments that they care about each homeless person's situation. Government officials should meet and talk with homeless people. They should find out who these people are, why they are there, and what, if anything, government can do for them in the short and long terms. . . . Perhaps most importantly, they would convey to the

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134. Steven L. Wobido, Tena Frank, Bill Merritt, Sandra Orlin, Larry Prisco, Mark Rosnowi, & Diane Sonde, *Outreach*, in UNDER THE SAFETY NET, *supra* note 41, at 330.

135. Jennifer Nedelsky has written that "[t]o become autonomous is to come to be able to find and live in accordance with *one's own law*." Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1988).

homeless that the city, state and federal governments care and want to help. Compassion must be shown by government and citizenry alike.<sup>136</sup>

Facilitating autonomous participation in public life requires overcoming the paternalistic desire to do good on the behalf of others, as well as the equally paternalistic belief that it is for the provider to decide what is in the best interests of a recipient of social welfare. Respecting someone else's autonomy requires ascertaining her circumstances and soliciting her side of the story before making a decision which affects her. As Yolanda Serrano, executive director of an outreach program for the homeless funded by the Transit Authority in New York, asserts, the administration and dehumanization of the homeless go hand in hand:

What it comes down to is we don't see them as persons with feelings. We may lack the experience. The police see them as threats. The system pulls them apart, . . . Neither side really understands the other. We need to have that understanding. But we don't have the time or the compassion to see where they're coming from. And they don't have the trust.<sup>137</sup>

### III.

#### DISCRETION AND THE THEORY OF ENGAGEMENT

The welfare state calls upon public officials to make a host of important judgments in the performance of their duties, judgments which shape the social, political, and economic fabric of our society.<sup>138</sup> The practice of public administration, however, is still understood as a domain of technocrats who apply predetermined rules to particular settings in an impartial fashion. Though discretion is said to have "emerged from the shadows" with respect to the implementation of social welfare policy,<sup>139</sup> it is still viewed primarily as a threat.

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136. Seigel, *supra* note 52, at 1084.

137. Toth, *supra* note 18, at 71 (quoting Yolanda Serrano).

138. As Michael Lipsky has pointed out, "the decisions of street-level bureaucrats, the routines they establish, and the devices they invent to cope with uncertainties and work pressures, effectively *become* the public policies they carry out." Lipsky, *supra* note 92, at xii. This is so, he observed, for two main reasons: (1) officials are given wide latitude for discretion; and (2) officials have relative autonomy from any meaningful supervision of their discretionary judgments. *Id.* at 13-24. Neither the latitude for discretion, nor the freedom from close supervision, however, offers any insights into whose interests the discretion of these officials is intended to further.

139. Joel F. Handler, *Discretion: Power, Quiescence and Trust, in THE USES OF DISCRETION* 331 (Keith Hawkins ed., 1992) (arguing that discretion permits the exploitation of power advantages and encourages neither effective bargaining nor the meaningful participation of both parties in decision making); Bruce Feldthusen & Natalie des Rosiers, *Discretion in Social Assistance Legislation*, 8 J.L. & SOC POL'Y 204 (1992) (discussing both authorized and unlawful *de facto* discretion in social assistance programs). See also DISCRETION AND

The problem with discretion is not that officials make poor judgments, but that the substance of their judgments are, for all intents and purposes, immune from public scrutiny. Because we seek to uphold the ideal that bureaucracy is impartial, there is no legitimate forum in which the values and assumptions which underlie administrative discretion can be challenged—or justified. As a result, administrative decision-making appears remote and arbitrary to those who depend on it. In my view, social welfare legislation does not need more discretion (or less), but rather requires a different *kind* of discretion, one based on a relationship of engagement.<sup>140</sup>

### A. Discretion and Relationships of Power

#### 1. Defining Discretion

Broadly construed, discretion comes into play whenever an official makes a choice among possible courses of legally sanctioned action.<sup>141</sup> Discretion is amorphous, however, difficult both to quantify and to categorize. Ronald Dworkin referred to discretion as the empty spaces encircled by law, using the metaphor of a doughnut to convey this distinction.<sup>142</sup> Elsewhere, I have challenged this dichotomization of law and discretion as substance surrounding nothingness.<sup>143</sup> Instead of the doughnut, I offered the metaphor of the sponge. Discretion, in this view, is what allows law to be porous.

I am more interested in the kind of authority within which discretion takes place, than in how strong or weak that discretion appears to be. Toward this end, I have identified three layers of administrative discretion: (1) legal discretion, (2) interpretive discretion, and (3) communicative discretion.<sup>144</sup> All three layers of discretion overlap in the administration of homelessness. Even the most cursory glimpse at a relevant statute reveals what an important role these layers of discretion play in the administration of homelessness, as illustrated by a section of New York's Private Housing

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WELFARE (Michael Adler & Stewart Asquith eds., 1981) (addressing, in a collection of essays by various authors, a range of issues raised by the use of discretion in social welfare).

140. This emphasis on quality rather than quantity is adapted from Leo Panitch, *A Different Kind of State?* in *A DIFFERENT KIND OF STATE? POPULAR POWER AND DEMOCRATIC ADMINISTRATION* 5 (Gregory Albo, David Langille & Leo Panitch eds., 1993).

141. A good formulation of this definition is contained in D. J. Galligan, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* 2 (1986).

142. RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977). Dworkin is here outlining a larger distinction between what he terms "strong" and "weak" discretion, which are distinguished on the basis of how much leeway exists between the binding powers on the official and the scope of her tasks. Dworkin illustrates this distinction with the example of a sergeant choosing soldiers for patrol; if he is told to choose any soldiers, his discretion is strong, while if he is told to choose the five most experienced, his discretion is weak. *Id.* at 32.

143. See Lorne Sossin, *Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State*, 26 *OTTAWA L. REV.* (1994).

144. These categories are drawn from those developed in my earlier study. See Sossin, *supra* note 10, at 384-86.



Finance Law which includes the following definition for “eligible homeless family”:

“[E]ligible homeless family” shall mean . . . families who are homeless or who live in temporary or transitional housing and are unable to secure permanent and stable housing without special assistance, or families who live in permanent housing who are in danger of becoming homeless, or such other categories of families at risk of becoming homeless as determined by the commissioner of social services or a social services district . . . .<sup>145</sup>

*Legal discretion* refers to statutory or policy directives which specifically and expressly mandate officials to make discretionary determinations. In the above statutory definition of who is eligible for benefits, the legal discretion occurs in the last line, where the responsible official is explicitly called upon to “determine” which “other categories of families at risk of becoming homeless” ought to be included in the coverage of the Act.

*Interpretive discretion* refers to how officials give meaning to imprecise working or controversial terminology in the statutes or policies they must apply. In the provision reproduced above, the interpretive discretion flows from such terms as “unable to secure permanent and stable housing without special assistance.” What does “permanent and stable” mean in this context? How much independent income would be required to be able to secure such housing without “special assistance”? Would it differ in a larger city as compared to a smaller one?

Finally, *communicative discretion* encompasses all the various types of interaction between officials and those subject to administrative authority. In this example, communicative discretion is triggered by the requirement of identifying families that are “in danger.” Are families contacted by mail or telephone? Are referrals sought from other public agencies who deal with the poor? Should families be invited to come to state offices and plead their own cases of endangerment? One study of welfare recipients revealed that thirty per cent of potential recipients who received applications did not fill them out due to either a preliminary conversation with a welfare worker or because the process was described in a way which caused the person to fear following through with the application.<sup>146</sup>

Typically, observers have devoted their efforts to fashioning a normative hierarchy of discretion by distinguishing between differing forms of discretion in order to better control, confine, and legalize discretionary

145. N.Y. PRIV. HOUS. FIN. LAW § 69 (McKinney 1994).

146. Thomas P. McDonald & Irving Piliavin, *Failure to Participate in AFDC: Some Correlates and Possible Influences*, in 20 SOCIAL WORK RESEARCH & ABSTRACTS 17-22 (National Association of Social Workers ed., 1984) (studying potential welfare recipient in Madison, Wisconsin), discussed in Michael R. Sosin, *Legal Rights and Welfare Change, 1960-80*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986).

acts.<sup>147</sup> I distinguish between these forms of discretion for another purpose—in order to delineate the different possibilities for a more engaging and interdependent administrative relationship to which each layer might be susceptible. Each layer of discretion has the potential to serve as either a bridge or a barrier to increased client participation in the administrative process, depending on how the administrative process is structured. Discretion cannot be neutral, however. It always discloses meaningful judgments about the ends of a particular statute or policy. Nowhere is this more true than in the context of social welfare legislation.<sup>148</sup>

In order to legitimate discretion, recourse to legal authority is required at each layer. In this sense, discretion is not an autonomous source of power in our legal system. Ever since Alfred Dicey's declaration that discretion represented the "antithesis of law," administrative authority has been defined in terms of its lack of independent legitimacy.<sup>149</sup> K.C. Davis, one of the pioneers of research into the relationship between law and discretion, described the dangers of discretion in the following terms:

Discretion is a tool only when properly used: like an axe, it can be a weapon for mayhem or murder. In a government of men and of laws, the portion that is a government of men, like a malignant cancer, often tends to stifle the portion that is a government of laws. Perhaps nine-tenths of injustice in our legal system flows from discretion and perhaps only one-tenth from rules.<sup>150</sup>

## 2. *The Rise of Welfare Rights and the Formalization of Bureaucracy*

Rights in the welfare state have become synonymous with a citizen's power against the arbitrary potential of a state official's discretion.<sup>151</sup> Ever

147. This is the case with Dworkin, as noted in Nicola Lacey, *The Jurisprudence of Discretion: Escaping the Legal Paradigm*, in *THE USES OF DISCRETION*, *supra* note 139, at 366-68.

148. See R. SHEP MELNICK, *BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS* (1994) (explaining the role of statutory interpretation in entitlement programs).

149. See A.V. Dicey, *The Development of Administrative Law in England*, 31 *LAW Q. REV.* 148 (1915) (arguing that courts should deem invalid any action by an administrative agency outside the scope of its initially granted authority). This dichotomy, always on shaky ground, made far more sense when it was first disclosed than it does under the welfare state. Jeffrey Jowell, among others, questions the principal assumption on which this vision of administrative law is built—that judges and bureaucrats are not alike: "an organization charged with implementing vague legislation will itself be an agent in the clarification and elaboration of legislative policies. In this sense, bureaucracies are law-makers themselves." JEFFREY L. JOWELL, *LAW AND BUREAUCRACY: ADMINISTRATIVE DISCRETION AND THE LIMITS OF LEGAL ACTION* 14 (1975). Alan Hutchinson echoes this point: "Administrators not only make far more law than legislators but they resolve far more disputes than judges . . . . The legal process has played a major part in distorting this reality." Allan C. Hutchinson, *The Rise and Ruse of Administrative Law*, 48 *MOD. L. REV.* 293, 301-02 (1985).

150. KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 25 (1969).

151. Prior to the litigation which yielded these reforms, welfare officials utilized a range of discretionary powers to deter people from applying for benefits, to turn them down

since *The New Property*, Charles Reich's influential article about welfare entitlements,<sup>152</sup> the attainment of substantive legal entitlements and procedural due process guarantees has been synonymous with protecting the interests of the disadvantaged from the vagaries of bureaucratic action, thus changing the perception of welfare from a discretionary gift to an entitlement giving rise to a constitutionally protected property interest.<sup>153</sup>

The focus on the *rights* of the homeless throughout the 1980s increased the formalization of the administrative process.<sup>154</sup> Consequently, the *right* of the homeless which has been most often trampled upon is the right to be engaged in their own administration. This is a right which currently cannot be won in the courts, but rather can only result from the institutionalized

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when they did, and to cut them off the rolls once they had succeeded in obtaining benefits. These practices, and the efforts to challenge them, are detailed in FRANCES FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 248-340 (1993).

For a representative survey of discretionary excesses prior to the welfare rights movement, see Jerry L. Mashaw, *Welfare Reform and Local Administration of Aid to Families with Dependent Children in Virginia*, 57 VA. L. REV. 818 (1971).

152. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 765 (1964). Reich wrote:

Inequalities lie deep in the administrative structure of government largess. The whole process of acquiring it and keeping it favors some applicants and recipients over others. The administrative process is characterized by uncertainty, delay, and inordinate expense; to operate within it requires considerable know-how. All of these factors strongly favor larger, richer, more experienced companies or individuals over smaller ones.

*Id.*

Shortly thereafter, in the *Greening of America*, Reich compared the uncounted economic cost of pollution within the manufacturing process to the uncounted economic cost of homelessness within our capitalist system and concluded that, "[t]rees that are dying of acid rain and homeless people struggling to survive on our streets can be saved only by a long-overdue change in our thinking." See Charles A. Reich, *The New Property After 25 Years*, 24 U.S.F. L. REV. 223, 239 (1990).

153. The source of this property interest may be traced to the Fifth Amendment of the U.S. Constitution, which provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law," and the Fourteenth Amendment, which prohibits the State from infringing these same interests without due process. See *Goldberg v. Kelly*, 397 U.S. 254 (1970) (finding a Fourteenth Amendment requirement that a hearing be provided to a recipient facing termination of welfare benefits and expressly adopting Reich's reasoning that welfare benefits were analogous to property for those whose livelihood depended on them).

Reich's approach to legal rights for the homeless has enjoyed some popularity and a mixed reception in the courts. See, e.g., *HOPE v. Deich*, 589 N.Y.S.2d 744 (N.Y. City Ct., 1992) (finding that a property interest existed in a shelter bed), *aff'd sub nom.*, 615 N.Y.S.2d 215 (Sup. Ct. 1994); *Orozco v. Sobol*, 703 F. Supp. 1113 (S.D.N.Y. 1989) (holding that a seven-year-old homeless child had a property right to free public education).

154. Critics charge that advances in the courtroom in the 1980s have been diluted by the manner in which bureaucracies have applied the new legal standards and requirements. Robert Rabin declares that "local governments have too often seemed ready to counter such victories with additional bureaucratic roadblocks. American citizens need to make one threshold political demand of their local governments, namely, that these entities obey the law." Robert L. Rabin, *The Administrative State and its Excesses: Reflections on The New Property*, 24 U.S.F. L. REV. 273, 360 (1990).

development of mutual recognition and trust between the homeless and public officials. William Simon points out the paradox of using the New Property doctrine and welfare rights arguments as a justification for expanding the welfare state on the one hand and handcuffing it on the other hand: "If by discretion we mean, not arbitrariness, but flexible, complex judgment, then discretion may be necessary to help people. . . . Reducing state power can limit the capacity of officials to harm citizens, but it can also limit their capacity to help them."<sup>155</sup>

Discretion, because it is premised on the subjective authority of an official, generally has been understood as harmful to the formation of "bonds of mutual responsibility" between officials and those under their jurisdiction.<sup>156</sup> It is too rarely noted that the growth of the welfare rights movement, and the subsequent rise in applications and benefits, was largely engineered by federal officials or federally-funded neighborhood projects utilizing the discretion built into their mandates to "take sides with the poor."<sup>157</sup> Usually, this meant taking sides against local welfare offices. In situations where some public officials are empowered to lobby or even to litigate against others, patrolling discretion obscures the underlying problem—namely, that public officials receive mixed signals about how, and for whose benefit, to exercise their power.

In the absence of clear direction, the entrenchment of welfare rights and entitlements resulted in a much more formal process of determining eligibility for services and benefits for the poor. These rules, while generally formulated to protect vulnerable groups, often resulted in measures which insulated bureaucrats from criticism while still enabling them to reduce the scope of benefits. For example, the infamous "special needs" grants, under which applicants had to persuade officials of their need for extra coats and shoes for winter, were replaced by flat, nondiscretionary grants in the late 1960s.<sup>158</sup> The flat grant, tied to variables such as family size, region, income, and so forth, gradually was eroded by inflation, causing deprivations for which officials rightly claimed they were not responsible.<sup>159</sup>

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155. William H. Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 33 (1985). The rise of welfare rights discourse has also been criticized for perpetuating the status quo, thus inhibiting the debate on social needs and the normative principles a less individualistic discourse might privilege. *Id.* at 22-29.

156. See Joel F. Handler, *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, 35 UCLA L. REV. 999, 1037 (1988) (examining the use of discretion in situations where parties have unequal power).

157. PIVEN & CLOWARD, *supra* note 151, at 292.

158. See MARTHA DAVIS: BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 46, 53, 122-23 (1993) (describing special grants and their replacement by nondiscretionary flat grants).

159. *Id.* at 122-23 (describing the failure of flat grants to meet state-determined standards of need).

Michael Sosin argues that after the welfare rights movement dissipated, the concern for equity and the rights of recipients gave way to concern for fraud, abuse, and the loss of financial control over entitlement programs.<sup>160</sup> Computerization, error control, and more specific (and hence more complex) application forms all contributed to creating a more formal administrative process as well as keeping large numbers of the eligible poor off the welfare rolls. As the bureaucracy has become more efficient and has been cleansed as much as possible of the appearance of discretionary authority, welfare work has become more clerical and less professional.<sup>161</sup> The result has been a separation between those who shape broader policy and those who process applications and determine eligibility. Thus, supervising administrators who could exercise discretion to grant eligibility to borderline or exceptional cases have no contact with those clients and thus little incentive to exercise their discretion. On the other hand, caseworkers who do have contact with such individuals have little discretion to exercise.<sup>162</sup> Simon summarizes this transformation in the following terms:

The old regime aspired to inculcate a capacity for complex interpretive judgment based on an understanding of the fundamental purposes of the program. Work was conceived as direct participation in the elaboration and implementation of important social goals. . . . The formalization of recent years repudiates this ideal and embraces mechanical judgment and literalistic interpretation. At the same time, it implicitly prescribes an attitude of impersonality. It seeks to alienate the worker from the purposes of the norms she enforces.<sup>163</sup>

The preeminence of this formalization of bureaucracy has had a variety of ramifications for the provision of social services, but none so far-reaching and damaging as denying officials the opportunity to exercise discretion on the basis of relationships with recipients. Rights serve to frustrate the establishment and maintenance of administrative relationships.<sup>164</sup>

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160. Sosin, *supra* note 146, at 273-79.

161. Simon identifies three shifts in the administration of welfare that explain, in part, the diminishing recognition of discretion in the official-client relationship:

. . . [F]irst, the formalization of entitlement, by which I mean the formulation of the eligibility norms as rules; second, the bureaucratization of administration, by which I mean the intensification of formal hierarchical organization; and third, the proletarianization of the work force, by which I mean the diminution of the status, skill, education, and reward associated with the frontline welfare worker's job.

William H. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 *YALE L.J. STUD.* 1, 1199 (1983).

162. See Sosin, *supra* note 146, at 277.

163. Simon, *supra* note 161, at 1203-04.

164. See Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 *REV. OF CONST. STUD.* 1, 7-8 (1993). Nedelsky asserts the following:

[T]he idea is that rights are barriers that protect the individual from intrusion by other individuals or by the state. Rights define boundaries others cannot cross and

Officials relate to recipients only as members of certain administrative categories, whose rights vary entirely according to the type of benefits involved (AFDC, SSI, etc.) as well as status—those applying for benefits, those receiving ongoing support, those whose benefits are being terminated, and so forth.

Rights also interpose other actors into the administrative process. The institution which decides and enforces rights (and therefore which regulates and supervises discretionary authority) is the judiciary.<sup>165</sup> Though some critics have emphasized the judiciary's unsuitability to the task,<sup>166</sup> an administrative system organized around the protection of rights requires an arbiter of those rights. Within such a system, officials act when it is *lawful*, not when it is necessarily *right*, to do so.<sup>167</sup>

When the lawfulness of administrative action is challenged (a rare event in this context given the limited resources of welfare recipients), a court balances the rights of recipients against the rights of the state. Judicial review is premised on the belief that a well-defined and verifiable boundary exists between the scope of an official's lawful authority to decide (*intra vires*), and the exercise of authority that lays beyond it (*ultra vires*). Administrators' determinations will be reversed only where it is shown they decided a matter outside their jurisdiction (or, in certain circumstances, unreasonably decided a question within their jurisdiction).<sup>168</sup>

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it is those boundaries, enforced by law, that ensure individual freedom and autonomy. This image of rights fits well with the idea that the essence of autonomy is independence, which thus requires protection and separation from others. My argument is that this is a deeply misguided view of autonomy. What makes autonomy possible is not separation, but relationship.

This approach shifts the focus from protection against others to structuring relationships so that they foster autonomy. Some of the most basic presuppositions about autonomy shift: dependence is no longer the antithesis of autonomy but a precondition in the relationships—between parent and child, student and teacher, state and citizen. . . .

*Id.*

165. See generally JERRY L. MASHAW, *BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY* (1983) (analyzing the processes of administrative decision-making, implementation, and legal challenges to agency rulings in the Social Security Disability program).

166. See generally JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (asserting that judicial review should be limited to rectifying failures of democratic participation and should not involve the substantive merits of issues).

167. On the legal basis of administrative action, see Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

168. For a summary of the scope of judicial review, see PETER L. STRAUSS, *AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES* 239-70 (1989). See also R. Shep Melnick, *Administrative Law and Bureaucratic Reality*, 44 ADMIN. L. REV. 245, 245-46 (1992), who writes the following:

Administrative Law in the United States is almost entirely about *courts*. Articles abound on judicial doctrines relating to scope of review and rule making procedures. But no one pays much attention to the tasks performed by administrators, the agency's sense of mission, the conflicting pressures placed on it, or even what happens after judges hand down their decisions . . . It is time administrative law

Within their scope of lawful authority, public officials have the right to be wrong in exercising their discretion.<sup>169</sup> Thus, judicial review transforms the administrative relationship from a contest over substantive benefits to a technical debate about jurisdiction. Though the occasional bad decision will be overturned through judicial review on these grounds, the more significant role played by judicial review is to legitimate the fairness and equity of the administrative process.<sup>170</sup>

Though it would be wrong to describe the bureaucratization of welfare as part of the criminalization of homelessness, the two trends share some important traits. In both cases, vulnerable groups are alienated from the one place which promises support—namely, the state. Further, tying discretion to the categorization of vulnerable people into discrete, generalized groups based on their poverty prevents officials from tailoring the exercise of discretion to the needs of particular individuals or families. Finally, in both cases, the state contributes to the stigmatization of poverty as a status worthy of punishment.

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spent less time dissecting the words of judges and more time observing the activities of bureaucrats.

See also JEREMY A. RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989) (arguing that judges should be less involved in policy and should instead limit their decision making to the area of individual constitutional rights); MARTIN M. SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* (1988) (examining when courts should exercise judicial review of administrative actions); PHILIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* (1988) (analyzing individual cases of judge-made policy and their consequences for administration).

169. As Joel Handler explains:

In essence, discretion means that the complaining client only has a right to a hearing; there is no clear answer to the substantive question; who is right or wrong is a judgment call. If the agency acts reasonably—or is careful enough to build a sufficient record—then the court will defer to agency discretion.

Handler, *supra* note 156, at 1020.

170. Frug conveys the point in more cynical terms: “administrative law defines, perpetuates, explains, justifies, and reassures us about bureaucratic organization.” Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1285-86 (1984).

The question which always threatens to undermine the principles of administrative law is why the discretionary judgments of the judiciary are inherently more legitimate than the discretionary judgments of administrators? Clearly, the answer to this question lies more in the meaning we invest in public institutions and constitutional fiats than in the qualitative worth of the decision making. While it is beyond the scope of this Article to explore these relationships in detail, Bruce Feldhusen and Natalie des Rosiers’s account of this phenomenon seems particularly apposite:

Public administration has none of the mystery of law; administrative decisions are made without the ritual of law; and administrators function without the professional status of judges and lawyers. *Administrative discretion is naked human decision-making*. Without the ideological support that nurtures lawyers and judges, administrative discretion is vulnerable to the type of criticism from which our legal system is culturally protected.

Feldhusen & Rosiers, *supra* note 139, at 210 (emphasis added).

a. *Using Rules to Turn People into Clients*

The homeless present more of a bureaucratic challenge than other communities dependent to one extent or another on state assistance. Most other groups actively enter the administrative process in order to secure state benefits. By contrast, many of the homeless actively avoid the welfare bureaucracy and the shelter system precisely in order not to be put in such relationships of dependency.<sup>171</sup> Often, the homeless arrive at shelters having been forcibly removed from other locations, and forms are often filled out by others on their behalf. For many homeless individuals, administration is simply a bewildering net in which they have become unwillingly ensnared. Consequently, officials who deal with the homeless must be flexible and adaptive. The first and perhaps most sensitive task of officials in their interaction with the homeless is persuading them to enter, or remain, a part of a system that has often been alienating and abusive towards them, and which nearly always reinforces their lack of control over their own life.<sup>172</sup>

Even the loner who shuns all forms of society experiences the administrative process as a social system in which her subjectivity is always at issue. Accordingly, the manner in which a homeless person presents herself to the administrative process becomes an opportunity to make a statement about homelessness. As Lucie White points out,

Occasions for representative groups of poor people to speak out in artistic and political settings can and should be expanded. But even if such opportunities increase, many poor people will continue to comment about poverty in less "visible" ways. For instance, to gain admission into an emergency shelter, a homeless person must devise an instrumental strategy; she must figure out what to say, and indeed how to look, in order to get through the

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171. See Thomas Morgan, *Fear and Dependency Jostle in Shelters*, N.Y. TIMES, Nov. 4., 1991, at A2 (stating that many homeless people prefer to stay on the streets than go to a shelter where they may encounter violence, exposure to disease, and drug addicts).

172. Lipsky has identified four pillars of the control bureaucracy exercises over the lives of its clients, and through which people are transformed into clients: (1) distributing benefits and sanctions that are supposed to be provided by the agencies; (2) structuring the context of their client's interactions with the agencies; (3) teaching clients how to behave as clients; and (4) allocating psychological rewards and sanctions associated with clients entering into relationships with the agencies. LIPSKY, *supra* note 92, at 60; see also WAGNER, *supra* note 6, at 96-118. Wagner asserts the following:

The major bureaucratic institutions with which poor people interact—the shelter system, the public welfare system, the child welfare system, the mental health system, and the criminal justice system—play a significant role in exacerbating the crises of poverty and homelessness. They do so not only by the well-documented sin of omission—providing inadequate income, benefits, and services for people to survive—but also by sins of commission: They so oppress and control poor people that many self-respecting individuals choose to retain their dignity and live on the streets rather than submit to a "degradation ceremony" in which the cost is their freedom and personal control.



door. But as each person acts out her chosen strategy, enhancing some features of the dominant stereotypes of poor people and rejecting others, she also expresses a subtle critique of those stereotypes and the paradigms of poverty which undergird them. Through her distinctive style of survival, each homeless person works out a critique of the theories of poverty to which her behavior is expected to conform.<sup>173</sup>

Thus, no matter how unprepared for participation in the administrative process the homeless seem, there is still implicit in that process the potential for some degree of engagement.

Working against this potential is an administrative system presently structured for the production of "clients." Rather than trying to understand and respond to a homeless person's unique circumstances, officials are more likely to require standardized documentation and preprinted forms. Thus, clients are created through the very control an official exerts over a person dependent on the administrative system.<sup>174</sup> Individuals constructed as clients are in turn treated as customers who enjoy the rewards of the welfare state.<sup>175</sup> Lipsky describes this process in the following terms:

People come to street-level bureaucracies as unique individuals with different life experiences, personalities, and current circumstances. In their encounters with bureaucracy they are transformed into clients, identifiably located in a very small number of categories. . . . The processing of *people* into *clients*, assigning them to categories for treatment by bureaucrats, and treating them in terms of those categories, is a social process. Client characteristics do not exist outside of the process that gives rise to them. An important part of this process is the way people learn to treat themselves as if they were categorical entities.<sup>176</sup>

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173. White, *supra* note 16, at 308.

174. Habermas has termed this relationship a "violent form of abstraction." JURGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION, LIFEWORLD AND SYSTEM*, 362-63 (1987). Habermas states:

The *generality* of legal situation-definitions is tailored to *bureaucratic implementation*, that is, to the administration that deals with the social problems as presented by the legal entitlement. The situation to be regulated is embedded in the context of a life history and of a concrete form of life; it has to be subject to violent abstraction, not merely because it has to be subsumed under the law, but so that it can be dealt with administratively. The implementing bureaucracies have to proceed very selectively and *choose* from among the legally defined conditions of compensation those social exigencies that can at all be dealt with by means of bureaucratic power exercised according to law.

*Id.*

175. *Id.* at 350.

176. LIPSKY, *supra* note 92, at 59; see also KATHY E. FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 134-37 (1984) (discussing the administrative production of clients).

The transformation of homeless people into clients facilitates the distancing of public officials from those people whose lives are affected by their decision making. These individuals become little more than statistics. One glaring manifestation of this abstraction was the common practice of "churning" in social welfare bureaucracies in the 1980s.<sup>177</sup> Churning involves the intentional closure of large numbers of welfare cases for procedural defects. The goal of churning is to reduce the error rate of recipients who are receiving benefits to which they are not entitled by identifying those who cannot successfully have their cases reopened, and to reduce the overall number of welfare recipients at any one time (although, once recipients have their files reopened, they are entitled to retroactive benefits). Often, however, administrators are fully aware that churned recipients are entitled to have their files reopened after a thirty-day waiting period. By 1981, case reopenings exceeded new case openings in New York City. In 1983, close to 49,000 cases of closings and reopenings were reported.<sup>178</sup> Theresa Funicello, a social welfare activist, journalist, and former welfare recipient gives the following account of churning:

I was cut off the rolls that way once—at a time when I was counselling as many as one hundred families and individuals per week on the requirements for establishing and maintaining eligibility. When I received the cutoff notice, I made a mad dash to the welfare center to explain that I had been cut off in error. The letter I was holding in my hand said I was cut off for not returning a previous letter asking me to check off whether or not I still needed welfare. I told them I never received the prior letter . . . . I was known by most of the workers at the center, so they couldn't have doubted my eligibility. I informed them of the error but was advised that it didn't matter—even though my case was still in the computer, I would have to reapply as though I had never been on welfare at all, a process that took weeks. These were the dangerous weeks or months that sent people over the edge.<sup>179</sup>

Given the climate of cutbacks and retrenchment in social welfare programs throughout the 1980s, it is not surprising that those who administered such

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177. See BLAU, *supra* note 15, at 51 (describing churning as the process of closing and reopening welfare cases, motivated by the need to reduce costs by cutting caseloads under the guise of administrative demands for greater documentation and face-to-face recertifications of need), see also FUNICIELLO, *supra* note 12, at 168-71 (discussing Tim Casey's report on churning, quality control, and the "churning crisis").

178. BLAU, *supra* note 15, at 51 (citing NEW YORK CITY HUMAN RESOURCES ADMIN., OFFICE OF POLICY AND ECONOMIC RESEARCH, THIRTY DAY ADMINISTRATIVE CLOSING: HOW OFTEN AND TO WHOM? 4, 17 (1987)).

179. FUNICIELLO, *supra* note 12, at 170.

programs were compelled to eye their bottom line, blinding themselves to the people behind the numbers.<sup>180</sup>

The growing emphasis on cracking down on welfare fraud provides another example of shifting priorities resulting in conflicting responsibilities for public officials. In the current era of criminalizing the homeless, the same public officials who determine eligibility and oversee the welfare application process are being asked to crack down on the screening process in search of welfare fraud.<sup>181</sup> In addition to the familiar, onerous welfare application process, investigators are being sent out in increasing numbers to verify addresses and promptly drop from the rolls those who cannot be documented.

*b. The Need for Relationships of Engagement*

In my view, although administrative relationships should be built on a foundation of legality to prevent corruption, this should not take the form of impersonal regulations and formal rules designed to restrict discretion. As Joel Handler has observed, “[t]here are large areas of human interaction, and especially citizen-state interaction, where legal formalism becomes dysfunctional. It fails to achieve the instrumental goals of the rules themselves; and in the process, it often distorts and destroys other valuable relations.”<sup>182</sup> I seek to explore the types of legality which promote rather than preclude the potential of discretion, or in Handler’s words, “how to structure a discretionary decision-making process that reaches intelligent substantive decisions and, at the same time, enhances the autonomy, dignity, and responsibility of the participants.”<sup>183</sup>

In addressing this question, it is important to keep in mind that many recipients of public assistance have either been abandoned by their families and communities or found dependence on these groups so onerous that setting up a separate household seemed preferable, despite the additional financial hardship this entails. This is especially true for single mothers who rely on the marginal assistance provided by AFDC. In a very real sense, dependence on public assistance is what allows these individuals

180. See generally KATZ, *supra* note 2 (arguing that social welfare policies have failed to attack the roots of poverty in employment, income distribution, and discrimination).

181. For example, New York’s state-funded welfare program for single, impoverished adults without children requires a 45-day waiting period during which an applicant must fill out a variety of forms in one office, submit to a “verification” interview in another office, undergo finger-imaging, and meet with either employment services, SSI staff, or a drug treatment program assessment team. Those who are steered towards employment services must keep a log of each job for which they apply and enroll in a part-time works program if deemed eligible. Kimberly J. McLarin, *Poor See New Indignity in Welfare Fraud War*, N.Y. TIMES, Apr. 21, 1995, at A1, B3. As a result of the crackdown begun at the beginning of 1995, 57% of applications are currently rejected, compared with 20% the year before. *Id.* at B3.

182. Handler, *supra* note 156, at 1049.

183. Joel Handler, *Discretion in Social Welfare: The Uneasy Position in the Rule of Law*, 92 YALE L.J. 1270, 1282 (1983).

some measure of *independence*.<sup>184</sup> Whether or not the recipient had a choice in the matter, this independence comes at great personal cost. The social bonds that accompanied families' assistance of their own members (even when given grudgingly or oppressively) are palpably absent in virtually all forms of welfare administration. People qualify for public assistance because they fit within a category of eligibility, not because their unique life circumstances or innate qualities have been recognized or validated. The price of independence, therefore, is going from the status of a person whose family offers care and support (with the expectation that changing circumstances may reverse the relationship, as with the parents who know that their child may eventually have to care for them), to the status of a "case" which state officials administer with no reciprocity or mutuality. Thus, the key to attaining Handler's goal, or at least aspiring to it, is defining the role of the bureaucrat in the provision of welfare as meaningfully social as well as administrative. It is ultimately about people, not clients or consumers.

There is nothing inherently demeaning in depending on someone else. Not only do members of a family routinely depend on one another, but so do neighbors in ongoing reciprocal relationships, and so do complete strangers in times of emergency or natural disaster. Depending on a person in times of need, no matter what the imbalance in the power relationships between the parties, carries with it less stigma than that commonly associated with institutional dependency.<sup>185</sup> For this reason, many homeless people prefer to live off the unpredictable exigencies of panhandling than to rely on the shelter system.

The contact between officials and the homeless is typically devoid of trust, empathy, and mutuality. This is not to suggest that the people who staff and direct shelters are intentionally insensitive or punitive towards the homeless (though, to be sure, some are). The workers at shelters, like the officials who staff social service bureaucracies, embody a tension when interacting with the homeless. They must at the same moment act as individuals confronting a person in need and as agents of the state dealing with a file. This duality often leads to officials crafting a split personality. For example, I spoke with one welfare official who regularly gave spare change to a homeless man on his way home from the subway. One afternoon, the homeless man was not at his regular street corner. The official asked

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184. Frances Fox Piven & Richard A. Cloward, *The Contemporary Relief Debate*, in *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* 92-101 (Frances Fox Piven ed., 1987).

185. While all citizens who need or benefit from state services may be said to depend on them, those who depend on welfare, unemployment insurance, or other types of public benefits for their sustenance experience an added moral-psychological dimension of *dependency*. For these groups, dependency on the state frames their identity and devalues their social esteem. See Nancy Fraser & Linda Gordon, *A Genealogy of Dependency: Tracing a Keyword of the U.S. Welfare State*, 19 *SIGNS* 309 (1994).

around, concerned for the man's well-being. He confessed that he almost never displayed this sort of personal attention for a recipient at the office who failed to show up for an appointment. Bureaucratic settings, he added, are not conducive to relationships of care. Lipsky identified this problem as one of psychological withdrawal, born out of the dissonance between ideal service models and the real limitations facing the street-level bureaucrat. This causes these officials to "reject personal responsibility for agency performance."<sup>186</sup> Moreover, welfare workers, have "very difficult jobs" in which "they are typically overworked, poorly trained and have few paths to career advancement" sometimes vent these frustrations by abusing clients.<sup>187</sup>

The communicative structures of welfare state bureaucracies and the communicative needs of recipients may well be incompatible, but are they irreconcilable? Lipsky summed up the dilemma of the individual in service bureaucracies in the following terms:

To deliver street-level policy through bureaucracy is to embrace a contradiction. On the one hand, service is delivered by people to people, invoking a model of human interaction, caring and responsibility. On the other hand, service is delivered through a bureaucracy, invoking a model of detachment and equal treatment under conditions of resource limitations and constraints, making care and responsibility conditional.<sup>188</sup>

I endorse an advocacy role for officials as a means of resolving this contradiction. As discussed in more detail below, an advocacy model of administrative action promises to democratize the administration of the homeless, while at the same time unfettering officials to exercise discretion more purposefully and more creatively. The relationship between officials and those who depend on their discretionary judgments should be one of *engagement*.

### B. *Theoretical Underpinnings of a Framework of Engagement*

"Engagement" is a term with several related meanings, including attraction, commitment, and entanglement. My goal is to develop a theoretical framework for a democratic form of public administration that captures elements of each of these images, one that sets parameters for developing a social bond between public officials and the recipients of public assistance.<sup>189</sup> This framework takes as its point of departure the conventional

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186. LIPSKY, *supra* note 92, at 142-43.

187. White, *supra* note 16, at 309 (citing the remarks of one public official).

188. LIPSKY, *supra* note 92, at 71.

189. This discussion is drawn from Lorne Sossin, *Salvaging Modernity: Democracy, Discretion and Welfare State Law* (June 12, 1994) (paper presented at the Annual Meeting of the Canadian Political Science Association Calgary, Alberta ) (on file with *New York University Review of Law & Social Change*).

wisdom regarding welfare rights, namely that people will accept a judgment as more legitimate when it is arrived at by just means. This theory is further predicated on the belief that the decisions which can be legitimated are those decisions where each person, group, and community with a clear stake in the decision are represented, and in which the official's normative posture is accessible. Due process is not the only concern, however. People not only seek the procedural right to be heard, but also desire that judges and administrators arrive at a just decision. Discretionary determinations made within this framework would not only be more efficient and effective, but also more flexible and responsive to the needs of the recipient community.

Although this approach is more labor-intensive in some respects than current social welfare delivery structures, a framework of engagement would significantly reduce the costs of administering the homeless. This is so for several reasons. Criminalizing homelessness is a wasteful and expensive undertaking. Prisons are far more expensive than shelters. Locking up and patrolling the parks at night, setting up "quality of life" patrols to crack down on squeegee men, launching advertising campaigns to discourage giving to panhandlers, and dismantling squatters' camps are all costly measures, and none of them will make homelessness or the homeless go away. Were the money currently spent on such efforts committed to making shelters and other temporary housing for the homeless into centers for advocacy and empathy, it likely produce more encouraging results. While no level of engagement can address the many underlying causes of homelessness, engagement may allow programs and services directed at the homeless to be implemented with these root causes in mind. For example, discretion that is exercised with the purpose of enhancing autonomy and cultivating trust, rather than with the purpose of expressing official authority, may erode the apathy and passivity that the "culture of dependency" has engendered.

The framework of engagement I advance borrows ideas about the meaning of popular participation in government from both civic republican and critical theorists. Both of these schools of thought advocate a form of democratic administration intended to highlight discretion in the process of imagining more deliberative and less dominating forms of government.

### 1. *Deliberative Administration*

Deliberative forms of democracy value the process of political decision-making rather than its result. Deliberation is a means to argument and consensus, but it also serves as an independent source of legitimacy for the resulting decision, since the outcome represents the shared views of all who participated.<sup>190</sup> This is juxtaposed to conventional liberal democratic

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190. Bernard Manin, *On Legitimacy and Political Deliberation*, 15 *POL. THEORY* 338, 352-53 (1987).

politics, in which outcomes are determined by direct participation through voting.

The civic republican movement, which came to prominence in the 1980s, argues persuasively for the benefits derived from groups and individuals communicating about their needs, values, and interests in a public setting.<sup>191</sup> Rather than viewing American society as pluralistic, made up of autonomous individuals seeking to maximize their own self-interest through political institutions, civic republicans invoke an Aristotelian model of virtuous citizens entering into shared deliberation in pursuit of the common good.<sup>192</sup> This vision of deliberative public life is intended to challenge the cynicism of strategic interaction in the supposedly free market of political influence in liberal democratic institutions. Civic republicanism privileges instead the shared search for compromise through mutual understanding and debate. As Frank Michelman asserts, “[i]n order to approach republican validation of a law, justificatory argument must at least begin to explain how that law might have been *actually* regarded by the people subject to it, in all their actual social and experimental situations, as deserving acceptance by them.”<sup>193</sup>

The most ambitious attempt within this literature to capture the possibility of democratic deliberation within administrative structures of power

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191. See generally, Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988) (utilizing concepts of civic republicanism to critically examine American constitutionalism generally and the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) in particular); Frank I. Michelman, *The Supreme Court, 1985 Term: Forward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986) (examining the interplay of legal imperialism and self-government in the context of the civic republican tradition); Richard H. Fallon, Jr., *What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695 (1989) (assessing how proponents of republicanism construe its role as a counter point to liberalism and a model for constitutional analysis); Bruce Ackerman, *Constitutional Politics Constitutional Law*, 99 YALE L.J. 453 (1989) (examining the transformation of constitutional politics that occurs through dialogue between the voters and government institutions); Linda R. Hirshman, *The Virtue of Liberality in American Communal Life*, 88 MICH. L. REV. 983 (1990) (applying the virtue of liberality to concepts of republicanism as a means for choosing among contenders for redistribution to the underclass).

192. See Stephen M. Feldman, *Republican Revival/Interpretive Turn*, 1992 WIS. L. REV. 679 (1992).

193. Michelman, *Law's Republic*, *supra* note 191, at 1503. Frank Michelman's description of citizenship in the ideal republic squarely expresses its utopian aspiration:

In the strongest versions of republicanism, citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person. *Political engagement is considered a positive human good because the self is understood as partially constituted by, or as coming to itself through, such engagement.* This view opposes the “pluralist” view in which the primary interests of individuals appear as pre-political, and politics, accordingly, as a secondary instrumental medium for protecting and advancing those “exogenous” interests.

*Id.*

is Mark Seidenfeld's article, *A Civic Republican Justification for the Bureaucratic State*.<sup>194</sup> Seidenfeld attempts to demystify the three central justifications for bureaucratic authority in the welfare state: (1) administrative officials simply apply rules representing the will of the legislature; (2) administrative officials are simply experts unaffected by interest group politics; and (3) politics, like the market, requires equilibrium which the delegation of powers to officials can help foster. Seidenfeld demonstrates how none of these justifications is a tenable means of asserting democratic control over the dominance of administration in welfare state politics. Rather, he exposes and explores the authority of officials in order to highlight the democratic potential such power contains:

[O]n the whole, civic republicanism is consistent with broad delegations of political decision-making authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators. Moreover, given the current ethic that approves of the private pursuit of self-interest as a means of making social policy, reliance on a more politically isolated administrative state may be necessary to implement something approaching the civic republican ideal.<sup>195</sup>

Seidenfeld argues that broad delegations of political decision-making authority to administrative officials is consistent with civic republicanism, promising

democratic government that does not exclude or coerce citizens whose backgrounds and values differ from those of mainstream society. The civic republican model rejects pluralistic assertions that government can, at best, implement deals that divide political spoils according to pre-political preferences of interest groups. Instead, government's primary responsibility is to enable the citizenry to deliberate about altering preferences to reach consensus on the common good . . . .<sup>196</sup>

These lofty ideals seem much better suited to regulatory contexts, where relatively equally positioned groups compete in their own self-interest, than to the setting of homelessness. The relevance of civic republicanism to this setting is questionable given the apparent inability to account for imbalances of wealth, power, access, and influence in republican politics.<sup>197</sup> While embracing the participatory political structures of republicanism, Iris Young cautions that the place of marginalized voices in the republic must be exposed:

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194. 105 HARV. L. REV. 1511 (1992).

195. *Id.* at 1514-15.

196. *Id.* at 1514.

197. As long as access to political dialogue is skewed, there can be no confidence that the outcomes of such deliberation will reliably approximate the common good. For an analysis of this argument in the context of constitutional authority, see Stephen M. Feldman,



If we give up the ideal of impartiality, there remains no moral justification for undemocratic processes of decision-making concerning collective action. Instead of a fictional contract, we require real participatory structures in which actual people, with their geographical, ethnic, gender, and occupational differences, assert their perspectives on social issues within institutions that encourage the representation of their distinctive voices . . . .

This ideal of the civic public . . . excludes women and other groups defined as different, because its rational and universal status derives only from its opposition to affectivity, particularity, and the body. Republican theorists insisted on the unity of the civic public; insofar as he is a citizen every man leaves behind his particularity and difference, to adopt a universal standpoint of the common good or general will.<sup>198</sup>

The republican revival is accused by some of deflecting attention away from the social decay that presently corrodes public institutions and reinforcing the comforting belief that there is, indeed, a common good out there to find. In *Rodrigo's Fifth Chronicle*, Richard Delgado imagines the following exchange between a law professor and a student aspiring towards an academic career:

“As we were saying, I think one of the functions of normative discourse is to abstract problems, to translate them into something else. A subsistence claim—‘I’m hungry’—is answered by: ‘All right, I’ll talk with you about your hunger.’”

“That’s civic republicanism,” I said. . . . “It shifts attention from the way the world is to my own situation. Now we can talk and discuss my virtue for having listened to you, or your frailty for having allowed yourself to become hungry, or society’s shortcomings for being structured so as to have hungry, unemployed people, and so on. In ancient Greece, they began discussing civic

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*The Persistence of Power and the Struggle for Dialogic Standards in Postmodern Constitutional Jurisprudence: Michelman, Habermas and Civic Republicanism*, 81 GEO. L.J. 2243 (1993).

198. IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 116-17 (1990); see also Nancy Fraser, *Women, Welfare, and the Politics of Need Interpretation* 2 HYPATIA: J. FEMINIST PHIL. 103 (1987). Republican thought, however, has tried to address this critique by redefining the very terms of the debate. For example, Cass Sunstein has observed the following:

Republican thought is characterized by a belief in universalism, a term that I will use in a somewhat idiosyncratic sense. The republican commitment to universalism amounts to a belief in the possibility of mediating different approaches to politics, or different conceptions of the public good, through discussion and dialogue. The process of mediation is designed to produce substantively correct outcomes, understood as such through the ultimate criterion of agreement among political equals. It is because of the belief in universalism that republican approaches posit the existence of a common good.

Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988).

virtue in earnest only when their society was on the verge of collapse. Our culture is doing that now."<sup>199</sup>

While this claim may resonate through the halls of the legal academy, where normative discourse is not a scarce resource, it harmonizes less well with the realities of homelessness, where the claim "I am hungry" is more likely to be met with the response "Fill out this form, wait in that line, sign here, come tomorrow with the proper documents and we'll see if you qualify for a voucher." Too often, it is precisely the absence of anyone in an official capacity willing to "talk about your hunger" that is the problem. As Elliot Liebow emphasizes, while the daily search for shelter, food, and care were obviously important priorities for the homeless women he observed, the lack of any social recognition was often a deeper concern:

Betty went on to say that she sits on a lot of park benches looking for someone to talk to. Many times there is no one, so she talks to the birds . . . . For Sara, leaving the shelter in the morning was by far the worst time of the day. That was when being homeless hit her the hardest. You can't decide what to do because it doesn't matter what you do. You're not needed anywhere, not wanted anywhere, not expected anywhere. Nobody cares what you do.<sup>200</sup>

The position of the bureaucrat in civic republican thought could thus be summarized as an enlightened listener, seeking to encourage the recognition of diverse interests and facilitate the deliberations of diverse individuals and groups, all in the interest of fostering an inclusive public sphere rededicated to the pursuit of the elusive common good. Scattered examples of officials mediating between advocates of the homeless and community groups opposed to the establishment of shelters in their vicinity suggest some promise for these deliberative aspirations.<sup>201</sup>

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199. Richard Delgado, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 STAN. L. REV. 1581, 1596-97 (1993).

200. LIEBOW, *supra* note 34, at 29-30.

201. For example, the Los Angeles County Human Relations Commission successfully mediated a dispute between the St. Joseph Center and the Venice Beach community. Local merchants and residents organized to pass a "No Camping" ordinance for the vacant parking lot which the St. Joseph's had been using to distribute meals to the area's homeless population. As a response, St. Joseph's purchased a vacant restaurant which it sought to convert into a drop-in and meal center. The plan provoked intense controversy. Opponents to the center called in anonymous bomb threats, and slashed the automobile tires of the municipal council members whose approval was necessary for the project to proceed. The Human Relations Committee held eleven formal mediation sessions with opposing camps, along with numerous informal sessions aimed at dispelling rumors and fostering a productive environment. The result was a collaborative initiative, whereby the leader of the opposition to the drop-in center joined the board committee and ultimately was given responsibility for designing the landscaping surrounding the new center. For an account of the mediation and similar examples in Seattle and Nashville which led to more mixed results, see John N. Lozier, Mandy Johnson, & Joan Haynes, *Overcoming Troubled Relationships Between Programs and the Community*, in UNDER THE SAFETY NET, *supra* note 41, at 32-43.

Mediation, however, cannot be the end of the public official's role in the implementation of policies targeting homelessness. Discretion at the policy level must confront explicit normative choices; the extent to which it is advisable for an arbiter to take sides in the competition between policy options is an open question<sup>202</sup>—and one with which the civic republican literature ought to do a better job of grappling in the future. No matter how fully an official has solicited and recognized various opinions, she must eventually act in a way likely to leave some parties feeling betrayed. For example, Liebow reports the scenario of a woman seeking concrete assistance from a government social worker who, unable to provide any aid, responds hollowly, "Sometimes it just helps to *talk* about things. . . ." <sup>203</sup>

Clearly, for the homeless, talk is necessary but never enough. More often, many homeless people require intervention on their behalf. It is this delicate juncture at which civic republicanism reinforces bureaucratic impartiality to the traditional status quo that critical approaches to social welfare administration view as their point of departure.

## 2. *Dialogic Administration*

Critical theorists<sup>204</sup> take the impossibility of neutrality and the imbalance of power between citizen and state as the starting point for any understanding of the role of administrative intervention in social life. Exposing modern administration as characteristically dominating and oppressive is one of critical theory's central tasks.<sup>205</sup> Critical theorists view the role of bureaucracy in the social welfare system primarily as a mechanism for social control over the poor.<sup>206</sup> These theorists, however, have rarely focused on bureaucracy in and of itself. When they have, it has been largely to confirm and expand upon Weber's insight that administration is an "iron cage" which must be overcome.<sup>207</sup>

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202. See, e.g., Charles J. Fox & Clarke E. Cochran, *Discretionary Public Administration: Towards a Platonic Guardian Class?*, in *IMAGES AND IDENTITIES IN PUBLIC ADMINISTRATION* 87 (Henry D. Kass & Bayard L. Catron eds., 1990) (noting a swing toward discretion in public administration literature and arguing for the creation of a guardian class in local government).

203. LIEBOW, *supra* note 34, at 30.

204. I use the term in its broadest sense here, including not only Frankfurt School theorists, but Critical Legal Studies and Critical Race theorists as well.

205. For the clearest and most powerful example of this, see MAX HORKHEIMER & THEODOR W. ADORNO, *THE DIALECTIC OF ENLIGHTENMENT* (1947) (arguing that the advances of the Enlightenment have enabled the modern state to exert greater control and mastery over individuals in society).

206. See generally PIVEN & CLOWARD, *supra* note 151 (discussing how welfare benefits are used by the government to regulate the political, economic, and social behavior of the poor); DEAN HARTLEY, *SOCIAL SECURITY AND SOCIAL CONTROL* (1991).

207. Sossin, *supra* note 10, at 372 (analyzing Weber's view of bureaucracy as separating people from control of their own culture and social relations, making the large-scale domination of human society possible).

It is one thing to declare that complex structures of bureaucratic authority must be confronted from the outside, it is quite another to elaborate how such a transformation is to take place from within. Beginning in the late 1970s, critical theorists began forging a new understanding of bureaucracy, one which posited a transformative role for administration in the emancipation of political life.<sup>208</sup> These theorists advocated new forms of democratic administration, though the means by which this goal might be obtained remained hazy.<sup>209</sup>

One of the more trenchant attempts to overcome the one-dimensionality of critical thought on public administration is provided by Gerald Frug. In his article, *The Ideology of Bureaucracy in American Law*,<sup>210</sup> Frug sets about the task of excavating the underlying fear of bureaucratic domination which, in his view, is common to welfare state democracies: "Each model of bureaucratic legitimacy is a story designed to tell its listeners, 'Don't worry, bureaucratic organizations are under control.'" <sup>211</sup>

The deeper problem of administrative legitimacy, he argues, requires more than constructing "illusions" to convince the population that bureaucratic authority is under the control of democratic institutions, illusions intended to conceal the tension produced by administrative involvement in social relations between people's individual and communal interests.<sup>212</sup> Frug asserts that the way to combat bureaucracy's reliance on subterfuge is to expose it: "Critical theory seeks to undermine this ideology by exposing the false consciousness through which people understand their world. Such an exposure itself is an act of liberation."<sup>213</sup> Frug's focus on false consciousness, however, mistakenly assumes that true consciousness is all that is needed to solve the problem of administrative domination. One may

208. Robert B. Denhardt, *Toward a Critical Theory of Public Organization*, 41 *PUB. ADMIN. REV.* 628, 633-34 (1981) (suggesting less hierarchy and repression and more democracy of social relationships within bureaucracies as a means of encouraging better relationships between bureaucracies and the individuals they serve); John Forester, *Critical Theory and Organizational Analysis*, in *BEYOND METHOD: STRATEGIES FOR SOCIAL RESEARCH* 234 (Gareth Morgan ed., 1983).

209. This spirit is captured well in Gerald Frug's opaque definition of "participatory democracy." Frug, *supra* note 170, at 1296 ("[T]he term 'participatory democracy' does not describe a fixed series of limited possibilities of human organization but the ideal under which the possibilities of joint transformation of social life are collected."); see also Gerald E. Frug, *Administrative Democracy*, 40 *U. TORONTO L.J.* 583 (1990) (offering alternatives to bureaucratic forms of organization through fostering administrative democracy).

210. For a critique of Frug's typology, see Timothy H. Jones, *Administrative Law, Regulation, and Legitimacy*, 16 *J.L. & Soc.* 410 (1989).

211. Frug, *supra* note 170, at 1284.

212. *Id.* at 1287. Frug concludes:

All the stories of bureaucratic legitimation, in short, share a common structure: they attempt to define, distinguish, and render mutually compatible the subjective and objective aspects of life. All the defenses of bureaucracy have sought to avoid merging . . . the demands of commonness and community with those of individuality and personal separateness—because to do so would be self-contradictory.

*Id.*

213. *Id.* at 1295.

know bureaucratic authority to be antithetical to an ideal of freedom, but still defend its current form as a necessary evil to which there are no viable alternatives.

The focus must therefore shift to the search for viable alternatives and new structures through which public discourse may be filtered. Contemporary critical theorists, especially the recent work of Jurgen Habermas, have emphasized a linguistic or interpretive turn in the analysis of legal structures and social systems.<sup>214</sup> Put simply, Habermas believes that bureaucratic communication and normatively rational dialogue are mutually exclusive in the welfare state.

As Pierre Schlag has observed, administrative discourse is *designed* so as to preclude normativity from shaping the interaction of officials and those who depend on their services.<sup>215</sup> He questions whether moral values such as honesty, sincerity, loyalty, honor, or craft are applicable or even intelligible in bureaucratic settings. To illustrate this contention, he lists characteristic traits of bureaucratic interaction and asks whether it is possible to determine which of the competing characteristics is closest to "doing the right thing":

*Bureaucratic Morality I:*

It's not my job.

Some other department.

I don't make the rules, I just follow them.

I'm sorry, this is not the proper form.

I wish I could, but I simply can't . . .

do that.

answer that question.

Come back tomorrow.

Oh, I wouldn't have said that.

I'm sorry, your file is not in here.

*Bureaucratic Morality II:*

I really shouldn't be telling you this, but if . . .

No one will check on this.

You can't do it that way, but if you call it this instead . . .

Technically, it doesn't comply but . . .

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214. See generally JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* (Thomas McCarthy trans., 1984) (using the theory of communicative action to examine the modernization of societies); JURGEN HABERMAS, *LAW AS MEDIUM AND LAW AS INSTITUTION, IN DILEMMAS OF LAW IN THE WELFARE STATE* (Gunther Teubner ed., 1986) (analyzing the tendency towards an increase of written law in communicatively structured areas); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (W. Rehg trans., 1995).

215. Pierre J. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 881-82 (1991); see also RALPH P. HUMMEL, *THE BUREAUCRATIC EXPERIENCE* 21-24 (2d ed., 1982) (describing rational, dehumanizing communication between bureaucrat and client as part of bureaucratic design).

Well, it's really supposed to be done that way, but what really matters is . . .

I'm sorry, your file is not in here. . . <sup>216</sup>

Schlag concludes that the norms we might select would have to be driven almost exclusively by context. But even once such responses are contextualized, they do not correspond neatly to any recognized public virtues. In other words, the isolation of administrative authority from its purposes itself has a purpose—that is, to reinforce the status quo of legal formalism. Bureaucracy has in this sense become self-steering. Technical, rule-bound, detached decision-making is no longer the most efficient bureaucratic means to a given political end. Rather, according to critical theorists, it has become an end in itself.

In *Dependent People, the State, and the Modern/Postmodern Search for the Dialogic Community*, Joel Handler addresses this isolation by examining the legitimacy of administrative discretion from a “dialogic” viewpoint:

The modern/postmodern search for dialogic community rejects classic liberalism, the promise of governing human relationships through formalism, as well as the epistemological aggrandizement of positivism. Instead, it seeks to break down hierarchy, to explicitly introduce values, commitments, and intuitions into the discourse of action, and to create the conditions whereby people talk to each other. In law, the dialogic community would be located in the areas of discretion. It asks: In these spaces, what are the conditions necessary for community?<sup>217</sup>

Handler correctly asserts that genuine public participation springs from social, not legal, relationships. Thus, he adds his voice to the call for more “reflexive” structures of administration and regulation—that is, agencies and bureaus that are more integrated with the social forces around them and more able to respond and adapt to changes in the constellation of those forces.<sup>218</sup> According to Handler, the interventionist posture of public officials must be not only reexamined, but also linked to mechanisms for popular participation. Alternative dispute resolution serves as an easy example of the less formalistic and insulated bureaucratic models he has in mind.<sup>219</sup> Handler also shares with feminist communitarians the view that simply tinkering with procedure to increase the accessibility of administration is not enough: “the public world must not only be entered, it must be

216. Schlag, *supra* note 215, at 882.

217. Handler, *supra* note 156, at 1000-01.

218. *Id.* For a discussion of the development of the theory of “reflexive” law, see Niklas Luhmann, *The Self-Reproduction of Law and its Limits*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 111 (Gunther Teubner ed., 1986); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *LAW & SOC. REV.* 239 (1983) (identifying emergence and dominance of reflexive law in industrial society).

219. *But see* Evelyn Z. Brodtkin, *The Organization of Disputes: The Bureaucratic Construction of Welfare Rights and Wrongs*, in 12 *STUDIES IN LAW, POLITICS, AND SOCIETY* 53,

transformed.”<sup>220</sup> Melding together these critical perspectives, Handler develops an approach to bureaucratic structures that is flexible, normatively motivated, and dynamic—one which, as a general rule, not only tolerates the necessary presence of discretion, but expressly *embraces* it.<sup>221</sup>

Having determined that the exercise of discretion contains transformative potential, Handler turns to the question of how decisions should be made if this potential is to be realized. In his view, the key is relying on what he terms the “dialogic character of human existence.”<sup>222</sup> It is only in dialogue, he argues, that common bonds, mutual respect, and genuine openness towards diverse opinions may emerge. Further, it is through dialogue that we form communities, and within communities that a consensus on issues of public concern may occur. He identifies the failure of past studies of dialogism to properly analyze the power structures embedded in dialogic relations as their weaknesses.

To its proponents, therefore, dialogism is a “moral position,” requiring not only understanding and cooperation, but also trust and a belief in another’s good will.<sup>223</sup> Trust requires a measure of self-disclosure.<sup>224</sup> Therefore, clients are more likely to develop a relationship of trust with administrators who share the decision-making options open to them and the basis on which they have chosen one option over the others.

The secrecy of bureaucratic decision making, however, is the central foundation of its power. It is clear that bureaucracies *do* exercise discretion on the basis of often unknown priorities, but must this be the case?

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53-76 (Susan S. Silbey & Austin Sarat eds., 1992) (arguing persuasively that alternative dispute resolution often amounts to a conservative instrument used to extend state control even further into social relations).

220. Handler, *supra* note 156, at 1042.

221. *Id.* at 1060. Handler explains:

[t]he reflexive law theorists want regulatory law to pull back, to allow people to interact without the impediments of what is inevitably dysfunctional law. The communitarian feminists view the creation of space as essential for the caring, nurturing communication of femaleness. Proponents of cooperative styles of regulation, alternative dispute resolution, and the problem-solving style of negotiation also view discretion affirmatively.

*Id.*

222. *Id.* at 1062.

223. *Id.* at 1076 (discussing Annette Baier, *Trust and Antitrust*, 96 *ETHICS* 231 (1986)).

224. The literature on trust and self-disclosure has dealt with clinical and education settings. See e.g., Kathleen A. Sullivan, *Self-Disclosure, Separation and Students: Intimacy in the Clinical Relationship*, 27 *IND. L. REV.* 115 (1993) (positing that proximity, mutuality, trust, and self-disclosure make intimacy possible between people despite societal inequalities of power). A similar literature has emerged on the interaction of lawyers and disadvantaged or disenfranchised clients. See e.g., Jamie G. Heller, *Legal Counselling in the Administrative State: How to Let the Client Decide*, 103 *YALE L.J.* 2503 (1994) (arguing that the attorney should provide the client with as much information about options and their consequences as possible, instead of acting paternalistically on behalf of the client).

In Sullivan’s and Heller’s models, the less powerfully positioned person assumes a fuller role in the joint decision-making process when the more powerfully positioned cedes her monopoly on knowledge.

There is no obvious reason why these priorities cannot be made explicit and subject to public justification. One way to do this is to establish a public database in order to preserve borderline, noteworthy, or controversial discretionary judgments. Such an enterprise could be quite informal and would not serve primarily as a replication of common law precedents for administrators. Instead, the database could function as a guide to future officials in similar circumstances who would still retain discretion and as a means to better inform recipient groups about the different options open to officials.

Simply providing channels for more dialogue between officials and clients, however, is not enough. For critical theorists, the question of who is doing the talking also matters. For example, in *The Alchemy of Race and Rights*, Patricia Williams recounts the story of how she and a white male colleague had very different experiences while finalizing contracts for the lease of their respective apartments.<sup>225</sup> For Williams, whose identity emerges in part from the experience of disenfranchisement of African-American women, the formality of a lease contract represented a very different expression of trust and power than it did for her colleague whose preference would have been to seal the deal with a handshake:

On a semantic level, Peter's language of circumstantially defined need, of informality, solidarity, overcoming distance, sounded dangerously like the language of oppression to someone like me who was looking for freedom through the establishment of identity; the formulation of an autonomous social self. To Peter, I am sure, my insistence on the protective distance that rights provide seemed abstract and alienated.<sup>226</sup>

In this example, both the fact of Williams' race and gender and the fact that the communication occurred through a contract shaped the dynamics of trust. Though their priorities differed, both Williams and her friend were relatively autonomous agents with enough resources to afford the apartment. I am interested in settings where no such autonomy may be taken for granted. When the poor look for apartments, they are at the mercy of capricious landlords; when they find apartments, they remain one rent check away from eviction; if they complain about squalid conditions, the building often will be condemned, and they will be back out on the street.<sup>227</sup> For those who have little or no power in the market economy, the discretion of public officials holds profound importance. This is not only

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225. Patricia J. Williams, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* 146-65 (1991).

226. *Id.* at 148.

227. For numerous first-hand examples of these dynamics in operation, see STEVEN VANDERSTAAY, *STREET LIVES: AN ORAL HISTORY OF HOMELESS AMERICANS* 1-28, 57-80, 183-224 (1992).



because access to income and housing hinges on the action of these officials, but also because these officials are bound by a different set of norms than market actors.

Indeed, one of the most common causes of homelessness is eviction from low-rent housing, often for technical violations of lease provisions. Poor tenants rarely have the resources to seek legal advice, and almost never possess enough savings to tide them over during housing transitions. If no friends or family are present as safety-nets, the only alternatives are the shelters or the streets. Thus, far from enhancing the autonomy of low-income renters, contractual formalities provide a veil of legitimacy behind which homelessness often threatens low-income tenants.

Rather than stressing law's curtailment of administrative discretion with formal rules, critical theory emphasizes the substantive impact of law. While bureaucracy's regulation may well have prevented arbitrary officials from harassing social welfare and social services recipients, it has also prevented those officials from acting as recipients' advocates.

#### IV.

#### EXERCISING DISCRETION ON BEHALF OF THE HOMELESS

Discretion reflects and reproduces assumptions about power. In the present legal regime, discretionary authority merely reinforces the status quo. Public officials are more likely to defer to powerful clients and dominate helpless ones. In this section, I outline a framework for redistributing discretionary authority to those most vulnerable to its exercise. I argue that the poor and the homeless would be better served by bureaucrats directed to act in their interests than by bureaucrats required solely to respect their rights.

Using the discretionary authority of welfare officials to empower recipients has been contemplated before. In his influential 1983 article entitled *Legality, Bureaucracy, and Class in the Welfare System*, William Simon criticized the formalization and mechanization of welfare administration.<sup>228</sup> Simon assails the Weberian model of detachment and narrowed human judgment and argues instead for the model of welfare delivery as social work, an aim contemplated, but never achieved in Simon's view, during the New Deal era. Simon suggests some "modest reforms" toward this end, including building upon the appeal review structure. Simon contends that such a step would allow welfare officials to escape the normatively bankrupt nature of their routine duties and would allow recipients to have greater leverage in the administrative process.<sup>229</sup>

Handler questions the plausibility of Simon's approach as a practical solution to the dilemma of administering social welfare. He argues that

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228. Simon, *supra* note 161, at 1222.

229. *Id.* at 1267-68.

both the crushing volume of welfare caseloads and the structural inequalities of wealth and power prevent the poor from taking a meaningful role in their own administration.<sup>230</sup> Handler favors a "mixed" system, where routine processes would be augmented by hearings in difficult or controversial cases and where poor claimants could be assisted by "advocates" mandated to help the poor.<sup>231</sup>

The poor, especially the homeless, do not require a *new* class of advocates or a professionalized cadre of social workers to protect them against the vagaries of social welfare administration. Rather, the administrative process itself should serve as a source of advocacy for the vulnerable, in a manner similar to conventional client-centered approaches familiar to the fields of social work, health care, and the treatment of the mentally impaired, all of which play a significant role in the administration of the homeless. In a client-centered approach, clients are involved in all aspects of decision making to ensure that individual goals are realistic and achievable. At the same time, those providing services recognize their power over clients and their responsibility to exercise this power in the best interests of the client.<sup>232</sup> A client-centered approach must be comprehensive and continuous, providing what clients need, when they need it, for as long as necessary.<sup>233</sup> High volume, scarce resources, and public skepticism make the adoption of a client-centered approach throughout the bureaucracy responsible for the homeless unlikely. However, even incremental, piecemeal change would go a long way to expose current bureaucratic practices to greater critical scrutiny.

Whenever a homeless person or group comes under the authority of public officials, important judgments are made which will either increase or frustrate the chances of that person escaping the web of homelessness.

230. Handler, *supra* note 183, at 1270.

231. Handler uses the example of a special education program in Madison, Wisconsin to illustrate that, when program administrators considered parents to be equal moral agents to teachers and afforded parents relevant information and meaningful responsibility, the process of administrative decision making empowered parents. *Id.* at 1282-84.

232. See Marianne Savarese, Thomas Detrano, Jill Koproski & Carol Martinez Weber, *Case Management*, in UNDER THE SAFETY NET, *supra* note 41, at 295. In describing their client-centered approach, the authors explain their role in the following terms:

While rehabilitation provides direction to case management, advocacy is the bulwark supporting the process . . . . Case managers must determine when and whether clients are capable of informed consent. Therein lies the potential of the case manager to override client choice and client refusal through professional control and superseding influence . . . . Case management is not about mastery and control; it is about assistance and advocacy. We must know our clients well to determine when to intervene on their behalf to free them from harm and when simply to remain available until they are ready, willing and able to accept our help. . . . [Case managers] must temper expectations with a patience and a sensitivity to each person's pace and progress. . . . [W]e often must be ready to help but not to treat, to care but not to cure, and to maintain rather than to improve.

*Id.*

233. *Id.*

Whereas many welfare recipients need only income, not social services,<sup>234</sup> the homeless need both income *and* social services. The discretionary realm encompassing the homeless includes eligibility for income-related programs, realms in which increased bureaucratic involvement is usually punitive, but also includes entry into substance abuse and job training programs, admission to hospitals, referral to community groups, access to shelters, and so forth. It is primarily in these latter areas that officials should be directed to exercise their legal, interpretive, and communicative discretion on behalf of the homeless.

Having sketched some of the pathologies which a framework of engagement would confront, it is now necessary to set out how such a framework would challenge these practices within each of the three layers of discretion set out earlier.<sup>235</sup>

#### A. *Legal Discretion: Purposive Delegation of Authority to Pursue Policy Goals*

Social welfare statutes which afford officials legal discretion should contain clearly purposive language delegating necessary authority, including minimal ambiguity regarding the goals of such legislative and policy initiatives.<sup>236</sup> Social welfare legislation is designed to advance certain specific policy objectives, the foremost of which is that the state has a moral duty to protect individuals like the homeless, whom economic conditions have left vulnerable, exploited, or destitute.<sup>237</sup> Accordingly, public officials implementing social welfare legislation applicable to the homeless should be, as a matter of statutory authority, directed to exercise their discretion to aid poor people. At a minimum, they should be directed not to delay or disrupt the provision of benefits by exercising their discretion punitively.

An easy start would be to provide statutory eligibility criteria benefits that instruct officials to resolve any doubts in the exercise of discretion in favor of the applicant.<sup>238</sup> As for the plausible charge that such laxity would only increase the growing problem of welfare fraud, it is precisely the bureaucratic distance of officials from those clients for whom they are responsible that has given rise to incidences of fraud. This is especially true for

234. This is especially true of single mothers receiving AFDC.

235. See *supra* note 144 and accompanying text.

236. The argument for more purposive state action has gained prominence in conservative as well as critical circles. See Peter F. Drucker, *The Age of Social Transformation*, ATLANTIC MONTHLY, Nov. 1994, at 53 (advocating strong governmental actions to deal with social and economic changes); Peter F. Drucker, *Really Reinventing Government*, ATLANTIC MONTHLY, Feb. 1995, at 49 (arguing for continuous improvement programs and clear statements of purpose from governmental agencies).

237. For a discussion of this and other normative foundations of the welfare state, see ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A RE-ANALYSIS OF OUR SOCIAL RESPONSIBILITIES* (1985).

238. The normative basis for such an approach is set out in ROBERT E. GOODIN, *REASONS FOR WELFARE: THE POLITICAL THEORY OF THE WELFARE STATE* 219-23 (1988).

welfare offices where high volume currently reduces applicants and recipients to the status of numbers to be processed. A relationship of engagement provides not only for closer supervision of officials by recipients, but also for closer supervision of recipients by officials. Indeed, not only is engaging the homeless likely to cost less than criminalizing them, but engagement also holds the promise of further savings through the reduction of fraud, waste, and redundancy which plague the current system. While engagement may thus lead to increased surveillance over the homeless, surveillance is not in and of itself an oppressive result; rather, it is the purpose to which surveillance is directed that may be salutary or oppressive.

*B. Interpretive Discretion: Extending the Reach of Administrative Law to Hold Officials Accountable for Discretionary Decision-Making*

Through clear statutory language, policy-makers and legislators can guide officials as to which sorts of decisions are committed to the officials' legal discretion. However, legislators and policy-makers are less able to influence officials' interpretation of statutory language that contains no explicit discretion. It is not feasible, for example, to mandate officials to act compassionately, respectfully, or sensitively towards the homeless. However, by extending the reach of administrative law, officials can be held accountable for their discretionary decision-making to the extent that it undermines or contradicts statutory goals. In other words, officials acting under a statute enacted to aid the homeless can and should be penalized for rudeness, denigration, and a lack of appropriate sensitivity towards the homeless. A framework of engagement furthers statutory goals because it is far more interested in valid interpretations of statutory language than with the presence or absence of good intentions.

For example, an official determining eligibility under a statute establishing a rehabilitation project for needy HIV-positive homeless men could not be held accountable for refusing entry to a needy man who happened to be HIV-negative, since this aspect of the criteria is not discretionary. However, the same official could be made responsible for defining "need" so as to maximize the benefits of the program to its intended beneficiaries. The official could also be made responsible for conducting outreach to find those HIV-positive people who might benefit from the program and assisting them in applying for entry. The idea is not for the official to give the recipients what they want; more often than not, budgetary and resource constraints undermine this option. Rather, the goal is to give legal significance to the interests of the homeless in interpreting statutes enacted for their benefit.<sup>239</sup>

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239. Cf. Iris Marion Young, *Punishment, Treatment, Empowerment: Three Approaches to Policy for Pregnant Addicts* 20 FEMINIST STUDIES 33, 48-49 (1994). Young considers the administrative dynamics of drug-treatment programs:

C. *Communicative Discretion: Fostering Administrative Relationships of Engagement*

Finally, a framework of engagement places the spotlight of legal inquiry on the communicative discretion of public officials. The foundation of any framework of engagement is that formal, administrative relationships be conducted with the same sensitivities that define our everyday, social relationships. In order to affect the communicative discretion of bureaucrats confronting the homeless, the humanity of public officials must be given an outlet and the inhumanity of officials must not be tolerated.<sup>240</sup>

Engagement means that parties to an administrative relationship seek to understand each other's motivations, constraints, and values and are willing to place themselves in one another's shoes. While this should be a reciprocal enterprise, the onus to initiate this process remains with the official. This requires not sympathy, but empathy.<sup>241</sup> Empathy allows for an

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Social Service theorists who use . . . empowerment challenge the more overtly dominating forms of power that sometimes appear in drug treatment programs. They challenge models of service provision that make the service provider an expert and authority, and which rely on rules and surveillance. They advocate instead. . . the service provider's exercise of power over the subordinate in such a way that the subordinate agent learns certain skills that undercut the power differential between her and the dominant agent.

See also Judy Kopp, *Self-Observation: An Empowerment Strategy in Assessment*, SOCIAL CASEWORK: J. SOC. CONTEMP. SOCIAL WORK, May 1989, at 276-79; THOMAS E. WARTENBERG, FORMS OF POWER: FROM DOMINATION TO TRANSFORMATION (1990).

240. Though this paper focuses primarily on legal structures and administrative procedures, the official herself is at the heart of any attempt to implement a framework of engagement. Given its reliance on discretion, the success of a framework of engagement depends on the quality of the individuals chosen to staff the homelessness bureaucracy. Skills such as practical reasoning, intuitive capacity, compassion, authenticity, trustworthiness, and integrity become paramount in the hiring and advancement criteria. Roberto Unger's portrayal of a modern bureaucrat's pathology illustrates the need to reconcile an official's responsibility with her innate humanity:

First, there is the sentiment of unreality. The social relationships of bureaucratic life are completely severed from the relationship each individual has to nature. There is no natural basis for the definition of personality to community . . . . Then there is the sentiment of isolation. Individuals know each other and interact as occupants of particular roles, who have well-defined skills and from whom the performance of definite tasks is expected . . . .

To these affections one must add the sentiment of self-abasement. The performance of the bureaucratic role is carried out under a double constraint. It is an expression of a particular side of the personality to the exclusion if not the prejudice of other sides. . . . Thus, it is difficult to recognize any lasting worth in the performance of one's roles. All of them will seem, and they will be, to a greater or lesser extent, a diminishment of what I shall describe as the attributes of the self.

Many subtle hypotheses have been fashioned to explain the changes and conflicts that characterize the history of bureaucratic institutions. Sometimes mysterious laws of economic growth, of technological renewal, or of the organization of power have been invoked. But perhaps the main explanation is much more simple. Men want to be human, and the bureaucracy does not satisfy their humanity.

ROBERTO M. UNGER, KNOWLEDGE & POLITICS 173-74 (1975).

241. See Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (elaborating on the distinction between sympathy and empathy).

interdependence between officials who ask for the cooperation, trust, and acceptance of the homeless and clients who need the benefits or services distributed by the officials.<sup>242</sup> One of the most prevalent forms of oppression identified by homeless people who have significant interaction with social service workers is the constant demand to answer personal and probing questions.<sup>243</sup> Empathy entails not only listening to and trying to understand the other person, but also respecting her privacy. Engagement thus entails both the willingness to reach out to someone who desires to make a connection and the willingness to withdraw when it is evident someone would rather be left alone. It may be necessary to reorganize the administration itself, ensuring that a single person or team of persons is responsible for both eligibility decisions and the ongoing provision of services and benefits, in order to enable the relationships necessary for the effective exercise of communicative discretion.

Presumably, many shelter workers join such organizations out of a desire to provide quality services to the homeless. Many volunteers join agencies which run shelters specifically to give their time and effort precisely to overcome the disengagement of the homeless.<sup>244</sup> Thus, there is a significant population of dedicated personnel working with and on behalf

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242. William H. Simon argued that a jurisprudence of "interdependence" ought to be forged between clients and officials along the lines of social workers during the New Deal era:

The social workers repudiated the classical idea of independence in favor of what they termed "interdependence" and sought to develop a jurisprudence that did justice to the values of both autonomy and solidarity. They portrayed mutual dependence, not only as an inescapable reality, but also as a morally valuable and fulfilling aspect of the human condition. They argued for a kind of security that might be enhanced by the willingness of individuals to become vulnerable to each other and by the openness of the social process to collective reassessment and revision.

William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1431 (1986). See also CHARLOTTE TOWLE, *COMMON HUMAN NEEDS: AN INTERPRETATION FOR STAFF IN PUBLIC ASSISTANCE AGENCIES* (1945) ("Not merely what we are doing for people but what we are doing to people is a question which should be uppermost in the minds of the persons responsible for administering public assistance."), quoted in Simon, *supra* note 155, at 16 (emphasis added).

243. See LIEBOW, *supra* note 34, at 134-39. Liebow recounts how many of the homeless women he observed resisted such questioning, despite their general interest in talking about their lives.

It is difficult to appreciate the intensity of feeling, the bone-deep resentment that many of the women felt at always having to answer questions, often very personal, and often the same ones over and over again. But having to answer questions was part of the price they paid for being powerless. Even for those women for whom much of ordinary reality had slipped away, the contempt and the resentment and the fear of questioning remained.

244. See AMY HAUS, *COLUMBIA UNIVERSITY COMMUNITY SERVICES, WORKING WITH HOMELESS PEOPLE: A GUIDE FOR STAFF AND VOLUNTEERS* 9-19 (1988) (teaching methods of interaction, management, and problem solving on behalf of and with the homeless). Volunteers are encouraged to see the homeless as "guests" that are being "helped" through a "relationship of trust." *Id.*

of the homeless.<sup>245</sup> While encouraging skilled professionals to dedicate talent and resources to the administrative world the homeless are compelled to navigate is important, recruiting from the ranks of the presently and formerly homeless is especially important to the process of engagement. Experience in the community, familiarity with the stresses of dependency, and an understanding of the effects of poverty are all as important as any professional training in advocacy or social work. The Office of Economic Opportunity's experiment with "maximum feasible participation" and Community Action Agencies (CAAs) in the 1960s demonstrated how grass-roots organizations can develop community-based services.<sup>246</sup> However, this experiment also taught that, when grass-roots advocacy movements confront entrenched bureaucratic interests, a backlash will often occur, like the one which led to the demise of the CAAs in the late 1960s.<sup>247</sup> Rather than adversarial posturing, the goal of grass-roots advocacy should be the infiltration of the bureaucracies they seek to transform.

Despite tremendous obstacles, the homeless have shown creativity and resourcefulness in organizing on their own behalf.<sup>248</sup> The homeless have attempted to find a voice in shaping the policies affecting them through vehicles such as community action projects, tenants' rights groups, and other self-help organizations. However, as one homeless activist once lamented, "It is very hard to sustain a movement when everyone is hungry."<sup>249</sup> Nonetheless, the very spectacle of the homeless can serve as a powerful political statement. A controversial example of such political communication by the homeless occurred in Tompkins Square, a New York City park, in the late 1980s.<sup>250</sup> The controversy developed when over two hundred homeless people and activists established a tent city in the park. The confrontation which followed led to a police raid and riot.<sup>251</sup> Though such widescale, violent resistance is rare, the formation of homeless communities and social networks is common. Communicative discretion undertaken within a framework of engagement can foster such grass-roots advocacy toward constructive ends.

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245. *But see* LIEBOW, *supra* note 34, at 126-29, for a revealing discussion of the ambivalence many volunteers feel toward the homeless they give their time to serve.

246. *See* Piven & Cloward, *supra* note 184, at 287-305 (describing "storefront" delivery of welfare services in New York and Chicago).

247. *See* ANDREW J. POLSKY, *THE RISE OF THE THERAPEUTIC STATE 170-78* (1991) (asserting that the threat of the welfare rights movement, including activist control of CAAs, led urban bureaucracies and center right political forces to defund welfare programs and co-opt activism).

248. *See, e.g.,* WAGNER, *supra* note 6, at 104-11 (describing homeless individuals' efforts to cope with the byzantine operation of welfare programs in Los Angeles).

249. BLAU, *supra* note 15, at 93.

250. *See generally* Bernstein, *supra* note 78. *See also* BLAU, *supra* note 15, at 94.

251. The park was finally closed in 1991, completely renovated and opened again a year later with a fence surrounding it, a gate that is locked at dusk, and a 24-hour guard. *See generally* Bernstein, *supra* note 78.

Thus, instituting a framework of engagement is not simply a matter of a single policy initiative. Rather, it includes a variety of new approaches to administering programs for the homeless. First, a framework of engagement would require legislators to reform statutes to widen the scope of officials' legal discretion, while at the same time providing clearer guidance as to the normative priorities those officials are to follow when exercising their discretion. Within a particular administrative setting, similar direction should be given internally to guide bureaucrats in the exercise of interpretive discretion. In addition, a framework of engagement would enable relationship-building between officials and recipients. Finally, those charged with reform should ensure that officials are trained in how to engage the homeless and how to exercise authority without abusing power. These changes, in turn, would inevitably lead to others which have been alluded to above, such as rethinking the basis on which challenges to administrative decisions should be adjudicated and reformulating the criteria for recruitment of officials.

There is, of course, no guarantee that altering officials' legal and interpretive discretion to deal with the homeless will make a significant difference, but it would constitute a clear and important signal to officials and their clients that how administrators act, the assumptions they make, and the consequences that follow are legally relevant concerns. This would also render the exercise of communicative discretion and its consequences subject to legal analyses and legal remedies. While litigation has proven unsuccessful in compelling the state to provide aid, it remains a useful tool in ensuring that the state follows through on what statutes promise. The mounting contempt citations against the City of New York for its emergency shelter practices attest to this.<sup>252</sup>

Having sketched the changes a framework of engagement might bring about, I now turn to the reforms' implications for the setting in which most homeless people find themselves.

## V.

### THE HOMELESS SHELTER: APPLYING A FRAMEWORK OF ENGAGEMENT

Like the shelter itself, the shelter bureaucracy with which the homeless individual interacts should serve as a kind of refuge. The designers of a case management system for administering health care to the homeless put this idea in the following terms:

Like a functional family that socializes each member to adulthood, case managers provide support, asylum, and rehabilitation to each client toward the goal of improving health and well-being. As we create systems of health care for homeless persons, the

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252. See *supra* notes 104-13 and accompanying text.



human need for refuge must be remembered. The provision of asylum, in a figurative sense, is the function of supporting and protecting a person. It must be individualized. For some, the need for asylum is episodic; for others it may be lifelong.<sup>253</sup>

*A. Ensuring Public Accountability in an Era of Contracting Out Administrative Functions*

Most homeless shelters are now operated with government funds by private, nonprofit social service organizations.<sup>254</sup> These organizations are required to meet a series of state-imposed guidelines regarding the physical requirements of a shelter and the social services they must provide.<sup>255</sup> Virtually all of these requirements, however, are descriptive (i.e., how many beds a building may accommodate, how many staff members must be present, the amenities which must be made available, and so forth); none relate to the actual interaction between the staff and the shelter residents. This realm of authority is left to the discretion of the shelter operators. The recruitment of shelter staff is also left to the discretion of shelter operators. Like other discretionary realms, these sources of authority should be subject to greater substantive scrutiny.

The growing trend of contracting out social services seriously challenges the ideal of integrating the provision of services and benefits to the homeless with a coherent set of goals and priorities aimed at transforming bureaucracy. Some agencies contracted to provide social services bring

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253. Savarese et al, *supra* note 232, at 289 (footnotes omitted).

254. Operating agencies running family shelters in New York include: American Red Cross of Greater N.Y., Association to Benefit Children, Brooklyn Neighborhood Improvement Assn., Bushwick Economic Development Corp., Catholic Home Bureau, Children's Aid Society, Children's Rescue Fund, Citizens Advice Bureau, H.E.L.P., Homes for the Homeless, Inc., Metropolitan Assistance Corporation, Metropolitan N.Y. Coordinating Council on Jewish Poverty, Nazareth Homes, Project Hospitality, Providence House, Inc., Sanctuary for Families, Sebco Development Co., Tolentine Zeisner Community Life Center, Urban Strategies, Inc., Victim Services Agency, Volunteers of America, and Women in Need. See DEPARTMENT OF HOMELESS SERVICES, DIRECTORY OF TIER II FACILITIES AND FAMILY CENTERS 18-20 (1994).

255. See N.Y. COMP. CODES R. & REGS. § 491 (1989) (pertaining to adult care facilities including community and residential care facilities). In awarding contracts, the Department of Homeless Services also requires that bidders demonstrate how they will meet a series of program criteria established by the City. For example:

Providers must provide counseling and case-management services. Each program must also include basic independent living skills training that incorporates such issues as money management and group living, and health education on issues such as AIDS prevention, nutrition, and substance abuse. During the assessment process, each client, with the assessment center social service staff, will have developed an independent living plan that outlines the steps he must take to attain the goal of independent living. Providers will be responsible for helping clients to meet the objectives and goals of their plans, and for reviewing and adjusting plans as necessary.

DEP'T OF HOMELESS SERVS., REQUEST FOR PROPOSALS FOR NON-PROFIT ORGANIZATIONS TO OPERATE SINGLE ADULT HOMELESS FACILITIES 11 (1995).

their own religious, political, and social agendas to the management of shelters. While most private charities and foundations are not permitted to show a profit, virtually all have a vested interest in the construction and maintenance of shelters, as opposed to securing permanent housing for the homeless.<sup>256</sup> Such ulterior agendas do not necessarily have a deleterious effect on the homeless (at least, no more deleterious than the government's agenda), but they do further remove the administrative relationship with the homeless from public scrutiny and political debate.

The trend toward contracting out service provision also reinforces a normative gap between the public officials who distribute the funds and oversee shelters and outreach services and the private workers who actually run the shelters and provide the services. Rather than farming out the engagement of the homeless, the government could better serve its normative goals by operating publicly funded shelters and services while receiving additional support from a variety of private charities. This latter group could best assist the government by working within the bureaucracy, sharing its energy and expertise, and strengthening the position that homelessness is a problem of public dimensions calling for community solutions.

Toward this end, it is reasonable to assume that a representatively staffed bureaucracy in a given community is more likely to respond to the needs of that community than one that is unrepresentative. Of course, calls for a bureaucracy more representative of the gender, class, racial, and ethnic make-up of society are neither new nor unproblematic. A framework of engagement, however, would place new emphasis on the importance of who is exercising discretionary authority.

### *B. The Shelter as a Site for Engagement of the Homeless*

Shelters have been the primary administrative response to the problem of homelessness, harkening back to earlier forms of "indoor relief" which valued social control and moral education as highly as providing the destitute with a roof over their heads.<sup>257</sup> Shelters continue to serve as the primary meeting ground between the homeless and those who administer them. As such, they may serve as sites of either domination or engagement.

Shelter workers wield near total authority over the homeless they shelter. Shelter workers are responsible for who is admitted to shelters, how they must behave within a shelter, when and if they may leave during the

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256. See FUNICIELLO, *supra* note 12, at 178-256 (describing the bureaucratic forces which lead to the construction of shelters rather than permanent housing and the shortcomings of this strategy).

257. For a history of "indoor relief," see generally KATZ, *supra* note 2. See also Kim Hopper, *The Public Response to Homelessness in New York City—The Last Hundred Years*, in *ON BEING HOMELESS: HISTORICAL PERSPECTIVES* 88 (Rick Beard ed., 1987).

night, and when and if they must vacate the premises in the morning. Shelter workers also determine who must be evicted and who should be selected for benefits or participation in certain programs. These officials also exert more subtle but no less important influences over their clients' well-being, by insinuating who is deserving and undeserving of assistance, what behavior is correct, and what behavior is deviant.

Elliot Liebow examined shelters for homeless women in suburban Washington during the mid 1980s and discovered marked differences in their philosophies.<sup>258</sup> The first, called the Refuge, was run primarily by volunteers. Neither they nor the paid staff saw themselves as experts or professionals. They did not seek to judge or to change the women who slept there and enforced rules pertaining only to conduct, such as rules against weapons, verbal or physical abuse, or drug use inside the shelter. Anything not expressly prohibited was permitted in order to foster as much of a sense of freedom and privacy as possible within the constraints of the shelter. The second shelter was called The Bridge House. There, the staff identified themselves as professionals and actively intervened in the lives of the residents for purposes of helping them out of homelessness. This included recording the women's detailed personal histories, having the women sign personal contracts setting duties and expectations, setting up weekly meetings to monitor and resolve shelter problems, developing goals for the women to achieve, and evaluating clients' progress. For these shelter administrators, to do nothing on behalf of the clients would be tantamount to complicity in the dependency and failures of the shelter residents. Both of these shelters received some form of public aid or government contract. Liebow also described a third shelter, run out of a church with no government funds. In this shelter, called New Beginnings, the director retained virtually complete discretion over who would be admitted and who would not. According to Liebow, the director exercised this arbitrary power "with an eye towards the particular needs of each woman as she [saw] them."<sup>259</sup>

While attempts at engagement are woven into these approaches to shelter administration, in none of these examples do the homeless seem to have a real role in designing programs or determining rules. Engagement does not mean the homeless will run shelters, but it should mean involving the homeless in as many administrative tasks at the shelter as possible. Such a goal will not be practicable in the case of all the homeless, nor will all shelter residents possess the skills necessary to play such a role. For some, structure and order imposed by a figure in authority may well be a good thing and certainly should not be seen as incompatible with a framework of engagement.

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258. See generally LIEBOW, *supra* note 34.

259. *Id.* at 9.

Imagining a framework of engagement guiding the administration of the homeless is to some extent speculative. Assessing the limitations of the status quo, however, requires little guess-work. The homeless seeking refuge in shelters have no way of knowing what to expect from a particular shelter administrator on a particular day, but must endure whatever comes if they want to remain in the shelter. Clients may be treated with compassion one day and contempt the next. They may be offered a window of opportunity from one social service agency and come up against a brick wall in the next. All of this becomes part and parcel of the experience of powerlessness which characterizes virtually all homeless people.<sup>260</sup> For example, when homeless people enter New York City's shelter system, they are placed under almost constant face-to-face contact with shelter staff. Yet, there are no safeguards to ensure that the communicative discretion exercised by shelter workers will not compound the deprivations endured by the homeless. The fear and uncertainty this produces in the homeless, combined with the squalid conditions of some of the shelters—especially those of the larger, warehouse type—act as deterrents to seeking shelter, preventing the shelters from serving their primary function.<sup>261</sup>

One possible approach consistent with a framework of engagement includes organizing a shelter system on the basis of graduating levels of participation in the administration of shelters. Placement services would identify the right shelter for each particular individual seeking shelter. This approach favors smaller shelters where administration is not a distant and foreign process but a familiar and daily process of getting things done (e.g.,

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260. As Liebow observes,

Some shelters are terrible places, some are not so terrible, and some are as nice as one can reasonably expect a shelter to be. Location, size, facilities, amenities, and layout all contribute to the quality of life and personality of any given shelter, but these can easily be overridden by the people who staff the shelter and the philosophy that defines their jobs and shapes their relationship to their homeless clients . . . . Between servers and served there is often patronization and obsequiousness and much else, including sometimes, respect, compassion, and even love. Whatever the content of the relationship, however, its structure is essentially vertical, strongly conditioned by the differences in social class, power, and status.

*Id.* at 115-16.

261. The removal of this deterrent will present new policy challenges. If shelters were made more attractive, they would attract those currently doubled up with friends or relatives or living in deplorable conditions on their own. City officials appear to fear that "if you build it, they will come." A recent proposal to begin charging rent to shelter residents who are earning income reflects this new dilemma. Thus, just as homelessness has been normalized through administration into the next rung down on the ladder of welfare, so public shelters are being normalized into the next rung down on the ladder of public housing. See James Dao, *Shelter Fee is Proposed for Homeless*, N.Y. TIMES, Apr. 21, 1995, at B3 (discussing a Pataki administration proposal that is a part of a broader set of regulations establishing a code of conduct for homeless shelter residents); James Dao, *Unreal Estate: Pataki Says Some of the Homeless Should Pay Rent*, N.Y. TIMES, Apr. 23, 1995, § 4, at 2. (describing the debate over the Pataki proposal and explaining that "[b]oth sides agree the proposal's symbolic significance far outweighs its fiscal importance").

sheets washed, food prepared, job interviews scheduled, training or counselling sessions set up, welfare applications filled out). A goal of this approach might be to hire residents of shelters with a high level of resident participation who wish to work with the homeless to staff shelters whose residents require more supervision and guidance.

The Department of Homeless Services coordinates the City's various outreach and shelter services along what it refers to as a "continuum of care."<sup>262</sup> Two large shelters for men and two for women are designated as assessment centers for the adult single shelter system, where homeless people are given a respite and orientation period (typically twenty-one days) during which their individual needs are assessed.<sup>263</sup> Many homeless people voluntarily enter these shelters, while others are taken or induced to go there by a variety of outreach programs sponsored by the transit authority, the parks authorities, and the police.

After assessment, referrals are provided to shelters which are deemed appropriate for the applicant. How officials exercise this interpretive discretion, whether tailored to the service needs and expressed desires of the homeless person or tailored instead to administrative and logistical factors such as which shelters have the most room or are closest to the applicant, is unregulated. This is precisely the sort of discretionary authority which, under a framework of engagement, would require more explicit direction. For example, a direction could mandate that an applicant be sent to the shelter which could best maximize his or her participation in the administration of the shelter, given the applicant's skills and needs. Of course, the applicant ought to play an active role in the decision-making process.

Though there is no typical shelter, most provide interrelated basic social services and specialized services. For example, the Harlem Men's Shelter, with a capacity of 187 beds, provides a "Clean and Sober Dorm" program for twenty residents, which requires participation in a treatment program, contractual agreement to abide by program dictates, and a willingness to attend Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings with a shelter support-group. The Harlem Men's Shelter also offers a Work Experience Program (WEP) for twenty residents, which is a voluntary program that pays shelter residents \$12.50 for working in and around the shelter for twenty hours per week in order to assist in the development of work skills;<sup>264</sup> a Jobs Corps Readiness Program for ten residents, which provides men between the ages of eighteen and twenty-four

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262. See GIULIANI, SEGATVIA & MALIN, *supra* note 21, at 2.

263. For men, the Atlantic Avenue Armory Shelter (capacity 300) and the 30th Street Men's Shelter (capacity 841) are used for assessment. For women, the Brooklyn Women's Shelter (capacity 190) and the Kingsbridge Armory Shelter (capacity 107) are used. DEPARTMENT OF HOMELESS SERVICES, ADULT SHELTER SYSTEM 11, 16, 33, 35 (1994).

264. The WEP was the first work program targeted for the homeless. Established by the Koch administration in 1983, the program has remained controversial ever since. Most of the controversy centered on suggestions that working in exchange for room and board at

with educational and vocational training; on-site work experience and counselling; and a Shelter Employment and Housing Project (SHEP) for seventy residents, which assists motivated individuals to obtain a job and develop independent living skills.<sup>265</sup>

The goal of these programs, along with the ordinary medical and social work services provided by shelter workers, is to impose a constructive structure on the homeless residents. However, as Joel Blau observes, linking participation in training programs such as WEP and SHEP with eligibility to stay in a public shelter only reinforces the myth that the homeless would not be so if they worked: "Lacking any genuinely marketable skills, all the homeless get is access to the bottom rung of the labor market. The problem is, of course, that with the salaries they receive, it is virtually impossible to obtain housing in New York City."<sup>266</sup> In most cases, it was the combination of low wages and high rents that pushed people on the streets, or kept them there, in the first place.

While poverty may be the unifying thread of homelessness, a recent study of the Borden Avenue Veterans Residence (BAVR), a shelter in Queens, New York with a capacity of four hundred beds, characterized the most prevalent trait among these individuals and families as *drift*—a combination of lack of self-direction and vulnerability to outside circumstances.<sup>267</sup>

A closer look inside the complexities and conflicts of the BAVR shelter is instructive.<sup>268</sup> Their former practice of simply providing services in

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the shelter would normalize life in the shelter and discourage attempts to find work elsewhere. In contrast, homeless advocates warned that shelters were coming to resemble Victorian workhouses for the poor more and more. The City defended the program on the basis that it served to improve participants' self-esteem and prevent erosion of their work ethic. See BLAU, *supra* note 15, at 148-51. Tellingly, the program was developed in response to the view that the provision of shelter ought to justify imposing burdens on the homeless to earn their keep. See Thomas Main, *The Homeless of New York*, PUBLIC INTEREST, Summer 1983, at 3-28.

265. SHEP differs from WEP principally in that it assists shelter residents in securing outside, paid employment. Most residents are placed in clerical, maintenance, security, messenger, and food service positions. Critics of SHEP point out that the program typically takes only the most employable of shelter residents and thus mainly helps the people who appear to need it the least. BLAU, *supra* note 15, at 150.

266. *Id.*

267. Drifting behavior includes:

An aimlessness in daily activities; such aimlessness is sometimes joined by a resistance to shelter programs or daily routines and regulations; an expression of extremely vague or unrealistic goals; coupled with an absence of planning for the future; a willingness simply to leave situations that seem difficult or threatening; and a reliance on the push of external events to dictate courses of action.

JANICE M. HIROTA, CITY OF NEW YORK HUMAN RESOURCE DIV., LIFE AND WORK IN CITY SHELTERS: HOMELESS RESIDENTS AND ORGANIZATIONAL DYNAMICS AT THE BORDEN AVENUE VETERANS RESIDENCE (1991) at iii-iv [hereinafter BAVR STUDY].

268. The following description of the Borden Avenue Veterans Residence (BAVR), is drawn from the BAVR STUDY, *supra* note 267. The BAVR, which is run by the Salvation Army, consciously does not refer to itself as a "shelter." Via this practice, the BAVR seeks to distance its population and its approach from the HRA-operated facilities which are seen

what appeared a tolerant and caring environment seemed only to reinforce the resident's entropy. The staff at the BAVR found that shelter programs had to be designed around the residents' having to make choices. The experience at the BAVR has shown that shelter staff must balance the need to make shelter life as participatory as possible while also trying to create an oasis of structure. This demonstrates that administering programs for the homeless in a responsive and flexible fashion requires remaining open to a variety of strategies of engagement. Whereas present administrative practices remain rule-driven, engagement values pragmatic solutions above programmatic ones.

The goal of the BAVR staff is to work within the confines of a dependency relationship in order to cultivate the skills shelter residents need to survive outside that relationship. The program seeks to ensure that the work shelter residents are asked to do takes place in the community and away from the isolated, demoralizing atmosphere of the shelter. By so doing, the BAVR administrators consciously try to break down the shelter residents' identity of themselves as homeless. The administrators concede, however, that "we have to accept the possibility that some people will prefer to keep drifting," and thus programs must be made available for those who choose not to participate.

The BAVR requires its residents to sign a "social service contract [which] both articulates and attempts to implement a notion of reciprocal rights and responsibilities that is binding on the shelter as an institution and on each resident." Part A of the contract sets out the rules and regulations of the residence by which the prospective resident must agree to abide. Part B is drafted by the prospective resident and a caseworker setting out the personalized strategy for working on issues such as drug and alcohol abuse, mental health issues, job preparedness, and so forth. The contract may be modified every 90 days. According to the BAVR study, "[t]he contract system is emblematic of what is, from a social service perspective, the ideal relationship between worker and resident. Within such a system, a client's problems are recognized and resolved by worker and resident working together in an individualized relationship of mutual respect and reciprocal accountability."

While the contract may set out reciprocal promises, the responsibility still remains with the officials to involve themselves proactively in facilitating the residents' ability to keep up their end of the deal. Each BAVR

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as "dirty, overcrowded, and chaotic." The BAVR opened in 1987 and has a capacity of approximately 730 beds which are divided into sleeping bays of 12 beds each and separated by cinder-block partitions. Each bay is provided a measure of privacy, and each resident has a locker for personal effects beside the bed.

resident is expected to see his caseworker every fifteen days. Major reviews of the client's situation are conducted at nine-month intervals.<sup>269</sup> Most often, what the caseworkers and review board hear from residents are tales of drift. This can devolve into situations where, at the nine-month review, caseworkers simply talk on a homeless person's behalf. More frequently, drifting residents may fall through the cracks, as there are few institutional or professional rewards for devoting effort to a client who will not reciprocate.

The BAVR report discloses a revealing rift between different approaches to the challenges of administering the shelter. The staff at the BAVR is made up of Salvation Army officials who hold a HRA contract to run the shelter<sup>270</sup> and HRA officials who run the SHEP unit on site. Residents often come under the authority of both groups. Moreover, each group ostensibly defines its mission as allowing the client to escape dependency on the shelter. Beyond this goal, however, the philosophies of these two camps differ dramatically. The SHEP officials begin from the premise that most residents in the shelter population are employable and capable of independent living. These officials see the population as transient and their role as regulating the stay of the residents. They are not loath to hand out "infractions" to residents who break the shelter rules (after three infractions, a resident can be forced to leave the shelter and must wait 30 days for readmittance). These officials emphasize "concretely definable, measurable, relatively short-term goals" and they are generally suspicious of "touchy-feely" social work.

The Salvation Army officials, by contrast, see their role as primarily rehabilitative. The report notes that these "caseworkers take a relatively broad view of a client's situation, trying to grasp various facets of his personal and familial history; some also place residents and their difficulties within a critique of larger social trends." The rehabilitative process, however, requires responsive residents with whom they can build a relationship of trust. This approach allows residents to manipulate shelter officials easily, conning workers and the system.

The BAVR study summarizes this distinction in the following way: "Put very baldly, staff in [SHEP] tend to perceive residents as clients who can and should work; [Salvation Army] staff tend to perceive residents as clients who need rehabilitation." The report concludes that there is thus an urgent need for "a long-term, overarching, shelter policy that provides the

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269. The nine-month review involves the resident, his caseworker, and a review board made up of shelter staff including the shelter director and supervisor of social services. Reviews generally last between fifteen and twenty minutes. In 1989, after two years of operation, 140 clients had undergone such a review.

270. Though employed by the Salvation Army, the majority of these workers are not members of the organization. For example, none of the social services workers have ever been Salvation Army members, nor are the current director of the shelter or supervisor of social services members.



context and impetus for decision-making at the point of policy implementation.”

The same criticism could be levelled at various strands of the administrative system entrusted with overseeing programs for the homelessness generally. Social workers, psychologists, psychiatrists, welfare officials, shelter staff, and the police all have diverse and occasionally contradictory professional interests in confronting homelessness. City, state, and federal initiatives are not always compatible with each other or with the diverse private social service provider organizations who share these jurisdictions.

The BAVR experience, like the shelter studies by Liebow,<sup>271</sup> show how administrative frameworks shape relationships. In the BAVR case, shelter staff created the false choice between rehabilitating the homeless and imposing a regimen of punitive discipline in order to modify their behavior, as if these were the only two paths possible and the pursuit of one implied the rejection of the other. Thus, officials allowed for only two types of relationships with shelter residents—they could be either social workers or, in effect, prison wardens. A framework of engagement is about recognizing that other paths are both possible and necessary to pursue.

### CONCLUSION

For those homeless suffering from a cycle of poverty, disengagement, and drift, there is only so much that progressive social legislation or more zealous judicial enforcement can do. While such measures can express a shared public commitment to protect and assist the most vulnerable elements of society, the greatest potential for ameliorating the suffering of the streets lies within the bureaucracies that administer programs for the homeless and distribute benefits to them.

Administrative discretion allows the contextual judgments of public officials to guide the exercise of their legal and political authority. I have argued that legal discretion built into these officials' statutory authority should clarify the normative priorities which ought to guide administrative decision-making relating to the homeless. The absence of this guidance has led to a kind of drift within social service and shelter bureaucracies which mirrors that of the people for whose welfare they are responsible. Neither group has much to say to the other; neither can see a way out of homelessness; neither has been given much incentive to look for one; and both believe, in some real sense, that their hands are tied.

As both civic republicanism and critical theory make clear, once public institutions can accommodate normative debate about whose interests ought to be furthered as a result of bureaucratic action, discretion may lead to more just decisions and a more participatory administrative system. The

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271. See *supra* notes 258-60 and accompanying text.

first step in establishing a framework of engagement is thus to see alternatives as possible and necessary. The manifest injustice and self-destructiveness of the current campaign to criminalize the homeless demonstrates an urgent need to take this step now. Change invariably will be modest and incremental, but if government officials and policymakers could develop some vision of an administrative process worth striving towards, it would be a measurable improvement over the status quo. Currently, widespread cynicism regarding bureaucracy's capacity to realize legislative goals will only hasten the privatization of social welfare services and further isolate discretionary authority from public scrutiny.

Engagement is not a cure for homelessness. More low-cost housing, better mental health treatment, more money for training and jobs programs, and higher levels of public assistance are all possible cures; most likely, it will take a combination of some or all of these to make a real difference. Engagement, rather, aims to alleviate many of the most debilitating symptoms of the homeless condition—the experience of powerlessness, alienation, isolation, and drift—which the administrative process has, until now, exacerbated. If successful, a framework of engagement can transform bureaucracy from a factor contributing to the normalization and criminalization of homelessness, into a conduit for social justice for the homeless.