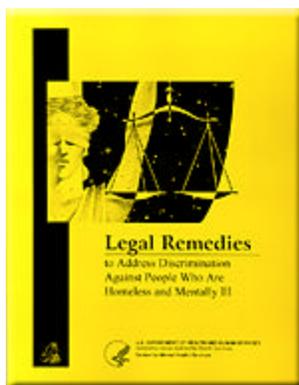


**National Resource Center  
on Homelessness and Mental Illness**



**Legal Remedies to Address Discrimination  
Against People Who Are Homeless and Have  
Mental Illnesses**



**Prepared by:**

Cynthia A. Beatty and Loretta K. Haggard

**Prepared for:**

National Resource Center on Homelessness and Mental Illness  
Policy Research Associates, Inc.  
Delmar, NY

**Published by:**

Homeless Programs Branch  
Center for Mental Health Services  
Substance Abuse and Mental Health Services Administration  
U.S. Department of Health and Human Services  
Rockville, MD

**1998**

# TABLE OF CONTENTS

<b>Preface .....</b>	<b>v</b>
<b>Introduction.....</b>	<b>1</b>
Discrimination Against People Who Are Homeless.....	1
Discrimination Against People Who Have Mental Illness .....	2
<b>Legal Remedies to Address Discrimination Against People Who Are Homeless.....</b>	<b>4</b>
A Change in Public Attitudes .....	4
Anti-Panhandling Laws.....	5
Laws that Regulate Public Sleeping and Camping.....	10
Property Loss .....	15
Summary.....	17
<b>Legal Remedies to Address Discrimination Against People Who Have Mental Illness.....</b>	<b>18</b>
Discrimination in Housing.....	18
Discrimination in Public Accommodations .....	27
Discrimination in Government Programs and Services.....	30
Discrimination in Employment.....	33
Summary.....	35
<b>Conclusion.....</b>	<b>36</b>
<b>Endnotes .....</b>	<b>38</b>
<b>Resources.....</b>	<b>65</b>
<b>Bibliography .....</b>	<b>69</b>
<b>Addendum.....</b>	<b>75</b>

The opinions expressed herein are the views of the authors and do not necessarily reflect the opinions or policies of the Center for Mental Health Services or the U.S. Department of Health and Human Services.

## **Acknowledgments**

The Center for Mental Health Services gratefully acknowledges the individuals whose hard work and expertise contributed to the completion of this paper. Authors Cynthia Beatty and Loretta Haggard (see “About the Authors”) conducted extensive research, wrote the initial draft, and made subsequent revisions. The final text was edited by Deborah Dennis of the National Resource Center on Homelessness and Mental Illness and Susan Miltrey Wells.

## **About the Authors**

Cynthia A. Beatty received her A.B. in Political Science from Brown University in 1988 after taking time off to work in Senator Gary Hart's office and volunteer for Senator Paul Simon's 1984 Presidential campaign. She graduated with her J.D. from Washington University in St. Louis in 1991, and became a member of the Missouri and Illinois Bars. Between 1991 and 1994, Ms. Beatty worked as a law clerk, first for United States Magistrate Judge Frederick R. Buckles and then for United States District Judge Jean C. Hamilton, both of the United States District Court for the Eastern District of Missouri. During her clerkship, she represented abused and neglected children as a Court Appointed Special Advocate for the St. Louis County Juvenile court. Currently, Ms. Beatty is the General Counsel for the Child Welfare League of America.

Loretta K. Haggard received her A.B. in Urban Policy from the Woodrow Wilson School of Public and International Affairs at Princeton University in 1986. Between 1986 and 1988, she worked as the Assistant Coordinator of the National Institute of Mental Health Program for the Homeless Mentally Ill in Rockville, Maryland. Ms. Haggard graduated with her J.D. and M.S.W. degrees from Washington University in 1993. She completed social work practicums with the Missouri Department of Mental Health's CASA Homeless Services Program. Legal Services of Eastern Missouri's Welfare Benefits Unit, and Missouri Protection and Advocacy Services. During summers, she clerked for the labor union law firm of Schuchat, Cook & Werner in St. Louis and worked as an Investigator for the Mental Health Division of the District of Columbia Public Defender Service. Ms. Haggard currently is a law clerk for the Honorable Jean C. Hamilton. She is a member of the Maryland Bar, and plans a career in disability law.

## Preface

When we completed the initial draft of this paper, we were cautiously optimistic about the use of various legal remedies to address discrimination against people who are homeless and have mental illnesses. Courts have begun to entertain challenges to laws that discriminate, either intentionally or unintentionally, against people who are homeless and have mental illnesses. Since that time, though, advocates have experienced several setbacks.

On April 24, 1995, the California Supreme Court overruled the California Court of Appeals' decision in *Tobe v. City of Santa Ana*<sup>1</sup>, a decision we discuss at length in this paper. In the initial *Tobe* decision, the lower court invalidated a Santa Ana ordinance that banned camping in public areas. Recognizing that the anti-camping prohibition was discriminatory in its purpose and in its impact on homeless people, the Court of Appeals ruled that the ordinance infringed on the constitutional right of homeless people to travel, and that it violated the Eighth Amendment by punishing people simply for the involuntary status of being homeless.

Unfortunately, the California Supreme Court reversed *Tobe* on appeal and has declared Santa Ana's anti-camping ordinance constitutional. Examining only whether the ordinance was discriminatory on its face (i.e., whether every possible application of the ordinance was unconstitutional), the Court found that the ordinance did not impermissibly impinge on the rights of homeless people to travel, because the right to travel does not provide immunity against local trespass laws, nor does it include the right to remain on property without regard to ownership.

Also, the Court ruled, the Santa Ana anti-camping ordinance does not punish people simply for the involuntary condition of being homeless, but instead criminalizes a particular conduct that is separate from the mere status of being homeless. The court's rejection of the plaintiffs' Eighth Amendment claim is particularly troubling; advocates had become hopeful of convincing courts that anti-sleeping and camping ordinances are "cruel and unusual" precisely because they punish homeless people for actions they cannot avoid.

The *Tobe* ruling is not an isolated decision. Since we completed this paper, several other cases challenging discrimination against homeless people who have mental illnesses have yielded disappointing results. For example, the Third Circuit Court of Appeals in *Easley by Easley v. Snider*<sup>2</sup> reversed Judge Brody's opinion, which is also discussed in this paper.

Judge Brody found that Pennsylvania's "Attendant Care Program" violated Title II of the Americans with Disabilities Act (ADA) because it was open only to "physically disabled/mentally alert" people (emphasis added). Judge Brody determined that people who were physically disabled but not mentally alert nonetheless were qualified for the program because family members could assist them in achieving the program's goals of independence and self-sufficiency. Therefore, Judge Brody concluded, the state impermissibly discriminated against people with physical disabilities who were not mentally alert.

---

<sup>1</sup> 892 P 2d 1145 (Cal. 1995).

<sup>2</sup> 36F 3d 297 (ed Cir. 1994).

The Court of Appeals disagreed, finding that mental alertness was an essential qualification for the program, and that requiring surrogate decision-makers would constitute an unreasonable modification of the state's program. The appellate court further concluded that the ADA does not prohibit a state from designing a program for individuals with a particular type of disability.

A federal district court in Maryland recently issued a decision interpreting the Fair Housing Amendments Act (FHAA) that is disappointing in some respects. In *Bryant Woods Inn, Inc. v. Howard County, Maryland*,<sup>3</sup> Judge Smalkin granted summary judgment in favor of a county and against the owner of a group home for elderly and disabled people. The group home was seeking to expand to 15 residents in a neighborhood zoned for no more than four boarders or eight disabled or elderly people.

The plaintiff argued that the county's zoning ordinance had the effect of discriminating against people with disabilities. Departing from other decisions cited in this paper, the Maryland court held that "where only one group or class of people is affected by a particular decision, there is no disparity in treatment between groups and no 'disparate impact.'"<sup>4</sup> Because most zoning decisions are made on a case-by-case basis, Judge Smalkin's interpretation leaves little room for a disparate impact claim to succeed.

The *Bryant* court also rejected the plaintiff's argument that the county violated the FHAA by refusing to provide a reasonable accommodation to the group home by making an exception to the zoning ordinance. The judge found that an exception would "fundamentally alter" the neighborhood's land-use scheme because it would create a precedent for future land-use decisions. The court also concluded, contrary to other cases cited in this paper, that the FHAA does not entitle a disabled person to live in any one particular dwelling.

Not all recent legal developments are discouraging. Advocates should be heartened, for example, by the Supreme Court's decision in *City of Edmonds v. Oxford House, Inc*<sup>5</sup>. The issue in *City of Edmonds* was whether a local zoning ordinance was entirely exempt from scrutiny under the FHAA. The ordinance created zones for single-family residences, and defined "family" as "persons [without regard to number] related by genetics, adoption, or marriage, or a group of five or fewer [unrelated] persons."<sup>6</sup>

Based on this ordinance, the City of Edmonds, Washington, sought to close down a group home for 10 to 12 people with alcohol and drug problems. The group home argued that the FHAA required the city to accommodate the residents' disabilities by permitting more than five unrelated people to live together in a single-family zone. The city contended that its ordinance constituted a reasonable maximum occupancy restriction that was exempt from regulation by the FHAA.<sup>7</sup>

---

<sup>3</sup> 911 F. Supp. 918 (D. Md. 1996).

<sup>4</sup> Id., 1996 WL 18826, at \*18.

<sup>5</sup> 115 S.Ct. 1776 (1995).

<sup>6</sup> Id. At 1778-79, citing Edmonds Community Development Code § 21.30.010 (1991).

<sup>7</sup> See 42 U.S.C. 3607 (b) (1) ('Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.').

The Supreme Court agreed with the group home, finding that the ordinance was a land-use restriction, not a maximum occupancy restriction, because it applied no maximum occupancy limits on related people living in the same household. Finding that the city's ordinance was subject to the FHAA, the Supreme Court sent the case back to the district court for consideration of the group home's discrimination claim.

Notwithstanding *City of Edmonds*, our tone would be somewhat less optimistic if we were writing this paper today. Recent decisions suggest that courts might be less willing than we realized to recognize or remedy discrimination against people who are homeless and have mental illnesses. However, although advocates might not meet with as much immediate success as we had hoped originally, we do remain encouraged by many of the decisions set out in the body of this paper.

We also look for encouragement to the often impassioned dissents written in those cases where a majority of the court was not persuaded by claims of discrimination. Consider, for example, the dissent written by Justice Mosk in the California Supreme Court's *Tobe* decision:

The City of Santa Ana... has conceded that the purpose of the ordinance is to address the "problem" of the homeless living in its parks and other public areas. The ordinance has, moreover, been enforced in a manner that specifically targets the homeless. For those reasons, I conclude that the ordinance is unconstitutional both on its face and as applied to the homeless residents of Santa Ana. Although a city may reasonably control the use of its parks and other public areas, it cannot constitutionally enact and enforce an ordinance so sweeping that it literally prevents indigent homeless citizens from residing within its boundaries if they are unable to afford housing and unable to find a space in the limited shelters available to them. The City cannot solve its "homeless problem" simply by exiling large numbers of its homeless citizens to neighboring localities.<sup>8</sup>

Because individuals and groups who support laws that appear to discriminate against people who are homeless and have mental illnesses often are well-financed and empowered by public option, advocates must be persistent. Jurisprudence evolves over time, and the fact that one court or even one judge has found merit in a particular argument means that the argument is viable. We argue advocates to avail themselves of all possible legal strategies in hopes of persuading the next court to recognize and remedy discrimination against people who are homeless and have mental illnesses.

Cynthia A. Beatty and Loretta K. Haggard  
March 22, 1996

---

<sup>8</sup> 892 P 2d at 1171.

# Introduction

In February 1994, the California Court of Appeals struck down a Santa Ana, California, ordinance banning camping in public areas.<sup>1</sup> Judge Crosby held, among other things, that the ordinance violated homeless individuals' constitutional right to be free from cruel and unusual punishment. The judge explained,

It was once a crime to be a drug addict in California, but that statute was held unconstitutional by the United States Supreme Court because it punished an individual based on status or condition, not conduct... In passing, the Court remarked, "It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to have a mental illness, or a leper, or to be afflicted with a venereal disease..." Unlikely maybe, but that is what Santa Ana has done. Many of the homeless have mental illnesses. They may not be punished for that or their homeless condition.<sup>2</sup>

Unfortunately, many legislatures and courts decide differently. People who are homeless and have mental illnesses still experience discrimination every day, all over this country. Individuals and groups who support laws that appear to be discriminatory often are well-financed and empowered by public opinion. Whether or not their intent is to single out people who are homeless and have mental illnesses for differential treatment (a distinction that often is left to the courts to decide), the effect frequently is the same.

Courts have begun to entertain challenges to laws that discriminate, either intentionally or unintentionally, against people who are homeless and have mental illnesses. Some advocates have successfully defended the rights of people who are disabled and disenfranchised to be free from unwarranted intrusion in their lives, and to have equal access to housing, employment, and public accommodations. The purpose of this paper is to describe the myriad ways in which people who are homeless and have mental illnesses may be discriminated against, and to propose appropriate legal remedies.

## *Discrimination Against People Who Are Homeless*

An estimated 600,000 people are homeless in the United States on any given night, and as many as 7 million Americans may have experienced homelessness in the latter half of the 1980s.<sup>3</sup> Approximately one-third of these individuals have serious mental illnesses, such as schizophrenia, bipolar disorder, or major depression, and at least 50% of homeless people with serious mental illnesses also abuse alcohol, drugs, or both.<sup>4</sup> This paper will not repeat the thorough research others have done on the causes of homelessness among people who have mental illnesses, or on their service needs. This paper focuses instead on discrimination.

"Discrimination" means the "failure to treat all people equally where no reasonable distinction can be found between those favored and those not favored."<sup>5</sup> Discrimination against people who are homeless and who have mental illnesses can take several forms. A statute or ordinance may, on its face, single out individuals who are homeless or have mental illnesses for adverse

treatment. Government officials may also selectively enforce a facially neutral statute or ordinance against people who are homeless or have mental illnesses, but not against others.

In addition, a neutral law that was enacted with the best of intentions may have a disproportionate negative impact on people who are homeless and have mental illnesses. This means that apart from any issues of discriminatory enactment or discriminatory enforcement, certain laws, such as those that prohibit people from sitting on a park bench for more than an hour, may have a more negative impact on homeless people simply because of their condition of being homeless. Finally, private organizations may exclude individuals who are homeless and have mental illnesses from benefits or opportunities offered to others.

The first section of this paper describes the public's changing attitudes toward homeless people. It then examines the potential discriminatory effects of anti-panhandling laws, laws that regulate public sleeping and camping, and property loss resulting from enforcement of these laws.

The paper then examines various foundations in the U.S. Constitution for challenging these forms of discrimination, including the First Amendment's free speech guarantee, the Fourteenth Amendment's Equal Protection and Due Process clauses, the Eighth Amendment's prohibition of cruel and unusual punishment, and the Fourth Amendment's right to be free from unreasonable searches and seizures. Not all constitutional claims are guaranteed to succeed, however. As the opinions discussed in this paper demonstrate, judges on the same court may reach markedly different interpretations of a given constitutional guarantee.

It is important to note that the U.S. Constitution primarily limits governmental action. The Constitution does not prohibit private discrimination against homeless people. Although advocates conceivably could use common law tort remedies<sup>6</sup> to challenge private discrimination against homeless people, such challenges are unlikely to have a substantial impact beyond a particular case. At this juncture there are no real remedies for challenging private discrimination against homeless individuals.

Readers are also advised that federal district court decisions may appear disunited because those courts are obliged only to follow the law of their particular circuits<sup>7</sup>. Of course, if there is a split among the circuits, the U.S. Supreme Court may decide to review the case, resolve the issue, and unify the courts below. However, the Supreme Court accepts only a limited number of cases for review each term.

### ***Discrimination Against People Who Have Mental Illnesses***

The second section of this paper addresses discrimination against people with mental disabilities in the areas of housing, public accommodations, government programs and services, and employment. The paper then proposes statutory and constitutional authorities for challenging these forms of discrimination, whether private or governmental. Particularly important are the recently enacted Fair Housing Amendments Act and the Americans with Disabilities Act.

Like the social service system, the law evolves in a fragmented, piecemeal fashion. No single law protects and addresses the multiple needs of people who are homeless and have mental

illnesses. The reader will need to integrate the legal principles presented in this paper in much the same way as a judge who confronts an individual who is homeless and has a mental illness in his or her courtroom. It is also important to remember that the division of this paper into separate sections on homelessness and mental illness is an artificial one mirroring a split in the law. Both because of discrimination and the severity of their illnesses, many people with mental illnesses are currently homeless or at high risk of becoming homeless at some point in their lives.

This paper does not address broader civil liberties questions such as standards for involuntary inpatient and outpatient commitment and the right to refuse psychiatric treatment<sup>8</sup>. Nor does it discuss an affirmative right to shelter<sup>9</sup> or right to mental health treatment.<sup>10</sup> And it does not attempt to highlight some of the innovative service initiatives created by the Stewart B. McKinney Homeless Assistance Act and other federal legislation.<sup>11</sup> These topics are of immense importance, but they extend beyond the scope of this paper.

# Legal Remedies to Address Discrimination Against People Who Are Homeless

The first section of this paper addresses discrimination against people who are homeless.<sup>12</sup> As the homeless population in this country has grown and become more visible, a substantial service response seems to have made little impact on the problem. Perhaps as a consequence, the public's attitude has shifted from one of compassion to frustration and, often, intolerance. In response, state and local governments have begun enacting or reinstating laws that serve to restrict the activities of homeless people. This section begins with a brief overview of the public's changing attitudes toward homeless people. It goes on to describe laws restricting begging, public sleeping, and public camping, and suggests legal remedies to challenge such laws.

Finally, the last part of this section suggests remedies for property loss resulting from enforcement of this type of legislation. Although this section of the paper addresses discrimination against homeless people in general, readers are reminded that people with mental illnesses are an especially visible segment of the homeless population<sup>13</sup> and may be particularly susceptible to discrimination.

## *A Change in Public Attitudes*

In the early 1980s, an advocate for homeless people identified the three main needs of homeless people as "housing, housing, and housing."<sup>14</sup> That notion was in keeping with the general public perception at that time that homeless people were blameless victims of poverty or failed domestic policies.<sup>15</sup>

In recent years, however, homelessness has increased and public sympathy has begun to wane. With the rise in homelessness and the simultaneous cutback in social welfare programs, many people have become discouraged about the prospects for improving the situation. Housing and Urban Development Secretary Henry Cisneros has expressed concern about the change in public attitudes: "A backlash is growing. What I believed was an almost universal compassion has given way to an impatience, a frustration, an anger toward the homeless."<sup>16</sup>

Cisneros' concern may be warranted. In a recent New York Magazine article, one columnist suggested "that homelessness is a public health problem spawned by 'drunks, crackheads, and crazies,' not a housing problem."<sup>17</sup> His opinion is not an isolated one. Fewer and fewer people attribute homelessness to circumstances beyond the control of people who are homeless. In 1989, 87% of the participants in one survey attributed homelessness, at least in part, to the unwillingness to work.<sup>18</sup> Another survey found that the number of people who link homelessness to external causes decreased from 75% in September 1989, to 63% in May 1990.<sup>19</sup>

Increasingly, people believe that homelessness is caused by individual imperfections and moral failings.<sup>20</sup> In particular, people with mental illnesses and substance use disorders are seen as more blameworthy and less deserving of compassion than homeless people who are merely "down on their luck."<sup>21</sup>

In response to their fears and concerns, people are now demanding that states and cities "restore order to their streets and discipline to their social policies." Politicians are getting this message. For example, one recent mayoral campaign focused on the candidate's promise to get tough on vagrants and panhandlers who fill city residents with "a sense of dread" and "violate their civil right to safety."<sup>23</sup> This change in attitude and behavior is not isolated.

Given the public's increasing frustration and resentment, one might be surprised to learn of a November 1993 poll which found that 81% of Americans are willing to pay higher taxes to help homeless people.<sup>24</sup> Perhaps this poll demonstrates a desire among a large segment of the public to support programs in their communities that would break the cycle of homelessness. Failing that, people are likely to continue to seek stop-gap measures to remove homeless people from the streets.

### ***Anti-Panhandling Laws***

Of all the manifestations of homelessness in this country, the outstretched hand of a person in need is perhaps the most difficult to ignore<sup>25</sup>. As the public grows increasingly intolerant of this most visible reminder of homelessness and poverty, many state and local governments have begun to enact or reinstate laws that restrict begging or prohibit it altogether.

#### **Types of Legislation**

Twenty-six states now have statutes pertaining to begging.<sup>26</sup> Five of the 26 prohibit loitering for the purpose of begging<sup>27</sup>. Two other states prohibit begging only by those able to work.<sup>28</sup> And six states prohibit begging or analogous activity outright.<sup>29</sup> The remaining 13 states grant municipalities the authority to prohibit begging.<sup>30</sup>

Many city governments have taken advantage of the authority granted to them by state statute and have begun enacting local ordinances that address <sup>begging</sup><sup>31</sup>. For example, in Atlanta, which made a bid to host the 1996 summer Olympics, local officials enacted an ordinance making it illegal to panhandle.<sup>32</sup> Other cities, such as Chicago, Miami, Phoenix, and Seattle, have also banned begging altogether.<sup>33</sup>

Cities that have chosen not to prohibit begging are now beginning to enact ordinances that strictly regulate the activity.<sup>34</sup> In Washington, D.C., for example, begging is now prohibited in train, bus, and subway stations; in traffic lanes; and within 10 feet of bank machines.<sup>35</sup> Baltimore has proposed a similar bill that prohibits individuals who are panhandling from approaching people at bus stops, cash machines, or public streets, and from using obscene language in the course of begging.<sup>36</sup>

The City Council in Berkeley, California, has proposed an ordinance that would prohibit: (1) begging after nightfall; (2) soliciting money from anyone who is sitting on a public bench, putting money in a parking meter, using a pay phone, purchasing a newspaper, standing in a theater or restaurant line, or waiting for a bus; (3) approaching people near bank machines; and (4) coercing or following people who have said "no" to a request for money.<sup>37</sup>

## Legal Remedies

Although begging has been regulated throughout history, these regulations have traditionally gone unchallenged.<sup>38</sup> And while some limits on panhandling are necessary to protect the public from threatening behavior, state and local governments have begun using begging laws in an apparent attempt to remove homeless people from sight. As a result, advocates for homeless people have begun to challenge the constitutionality of these statutes and ordinances.

**First Amendment.** Anti-begging laws and regulations are most often challenged as a violation of First Amendment guarantees. The First Amendment prohibits federal and state governments from denying any person the right to freedom of speech,<sup>39</sup> and the act of begging for money, some argue, necessarily involves the communication of certain information or ideas.

Whenever the government seeks to regulate speech, courts will analyze the law by weighing the importance or value of the speech against the state's interests in regulation. Laws aimed at regulating or prohibiting specific ideas (content-based regulations) are generally forbidden, and courts will scrutinize them carefully. Laws that are aimed at regulating conduct but incidentally restrict speech (content-neutral regulations) are more acceptable and generally are upheld if they merely regulate the time, place, and manner of speech. Courts have disagreed about whether and when begging constitutes protected speech.

Several courts have concluded that begging constitutes conduct, not speech, so that regulation of begging does not implicate First Amendment rights. In *Ulmer v. Municipal Court*,<sup>40</sup> the California Court of Appeals examined a state law making it a misdemeanor to accost other people in any public place for the purpose of begging or soliciting alms. The court noted that the regulation of conduct unrelated to the dissemination of ideas does not violate First Amendment guarantees. The court then concluded without hesitation that begging does not necessarily entail the communication of information or opinions, and thus such conduct is not protected by the First Amendment. Because the law in question regulated conduct rather than speech, it was held to be constitutionally valid.

A federal court of appeals reached a similar conclusion in the much-publicized case of *Young v. New York City Transit Authority*.<sup>41</sup> In *Young*, two homeless men filed a class action lawsuit challenging a Transit Authority regulation that prohibited begging and panhandling in the New York City subway system. After determining that begging constitutes speech protected by the First Amendment, the district court declared the regulation unconstitutional and permanently enjoined the Transit Authority from enforcing it.

A three-judge panel of the Second Circuit<sup>42</sup> reversed on appeal, finding that the regulation only governed conduct, not speech.<sup>43</sup> The court explained that conduct constitutes protected speech only when there is an "intent to convey a particularized message" and the likelihood is great that the message is understood by those who view it. Most people who are begging seek only to collect money, not to convey any social or political message, the court held. Even if an individual sought to convey a particular message, the court noted, most subway passengers feel too threatened when confronted by a person who is begging to understand what he or she may be trying to communicate.

The plaintiffs argued that begging cannot be distinguished from other forms of charitable solicitation that are protected by the First Amendment.<sup>44</sup> The Second Circuit, however, determined that the solicitation of money on behalf of organized charities necessarily involves the communication of ideas and information and the advocacy of certain causes.<sup>45</sup> Begging is much different, the court said, because organized charities do not intimidate or accost subway passengers. The court concluded that in "the very real context of the New York City subway... organized charities serve community interests by enhancing communication and disseminating ideas," but "the conduct of begging amounts to nothing more than a menace to the public good."

Other courts have concluded that begging does constitute protected speech. In *C.C.B. v. State of Florida*,<sup>46</sup> the Florida Court of Appeals considered the constitutionality of a municipal ordinance prohibiting all forms of begging or soliciting for alms. The court declared that begging implicates First Amendment rights because the act of begging itself necessarily involves speech or has some sort of communicative aspect. The issue then became whether the government's interest in prohibiting begging justified the complete abridgment of an individual's free speech rights.

The government claimed that the ban was necessary because the state has a "duty and responsibility under its police power to control undue annoyance on the streets and public places and prevent the blocking of vehicle and pedestrian traffic." The court disagreed, finding that the state had not asserted a sufficiently compelling reason to justify the complete abrogation of free speech. This particular ordinance was unconstitutional, the court concluded, because it impinged on First Amendment rights in a more intrusive manner than necessary.

A Washington Supreme Court Justice reached a similar conclusion in his analysis of an anti-begging ordinance. In *City of Seattle v. Webster*,<sup>47</sup> Justice Utter wrote that he was unpersuaded by *Young's* attempt to distinguish begging from charitable solicitation. Just as solicitation is characteristically intertwined with information about particular causes, reasoned Utter, "a beggar's speech also informs the public about significant facts of social existence" such as the "perceived inefficiency of the social service system in New York." Justice Utter also took issue with the *Young* court's determination that the government's asserted interests in regulating begging were legitimate and compelling. He wrote:

The *Young* majority also argued, no doubt correctly, that subway passengers experience begging as intimidating, harassing, and threatening, but do not feel intimidated by private charities. To the extent the public feels harassed by beggars because of the immediacy of their plight and the poignancy of their message, the First Amendment forbids protecting the public from harassment. No municipality may forbid speech because of the negative feelings engendered in the listener. The *Young* majority's position is untenable... [as it] relied upon the public's negative reaction to the homeless as the basis for its decision.<sup>48</sup>

Other federal courts considering the constitutionality of an anti-begging ordinance have declined to follow *Young* for similar reasons.<sup>49</sup> In *Loper v. New York City Police Department*,<sup>50</sup> one three-judge panel of the Second Circuit Court of Appeals struck down a New York statute making it

illegal to loiter for the purpose of begging. The *Loper* court rejected the Police Department's claim that the statute was an "essential tool" to address the "evils of begging," pointing out that numerous other statutes, such as those prohibiting disorderly conduct, accosting, and menacing, were available to control any undesirable conduct associated with begging. The court next concluded that begging constitutes some type of communicative activity, thereby departing from the *Young* court's position that begging is conduct, not speech. The mere "presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support or assistance," the judges decided. In addition, the panel found no meaningful distinction between charitable solicitations and begging.

The *Loper* decision holds out much hope for future First Amendment challenges to anti-begging ordinances.<sup>51</sup> In recognizing that not all begging constitutes "a menace to the public good," the *Loper* panel was willing to "hear" the messages that people who are begging convey and was willing to afford those messages protection. In addition, the panel acknowledged that anti-begging regulations are aimed, at least in part, at prohibiting the expression of an unpleasant message about current social conditions. Advocates should note that even where courts determine that begging constitutes speech, anti-begging ordinances may be upheld if the government can show that the regulation is content-neutral and seeks only to regulate the time, place, or manner of the "speech." Such regulations are constitutional if they serve a substantial government interest and do not unreasonably limit alternative means of communication.

In *Young*, for example, the court found the Transit Authority's justifications for prohibiting begging in the subway system to be quite compelling. The court referred to evidence that subway passengers feel captive in the close confines of the subway and therefore find begging to be "inherently aggressive" and threatening. The court concluded that the regulation did not unreasonably limit alternative means of communication because it prohibited begging only in the subway system and did not prevent people from begging throughout the streets of New York City.

Finally, advocates challenging anti-begging laws should note that the Constitution provides extra protection to speech that occurs in a "public forum" or public place traditionally associated with the exercise of free speech rights<sup>52</sup>. In *Loper*, for example, the Second Circuit determined that the statute at issue sought to prohibit speech on the sidewalks of New York City which is "property traditionally held open to the public for expressive activity." The court noted that the regulation in *Young* had been subjected to a lower level of scrutiny because it regulated speech in the subway system which was not a traditional and open forum for communication.

**Equal Protection.** The Fourteenth Amendment's guarantee of equal protection may provide an additional challenge to anti-begging ordinances. The Equal Protection Clause essentially provides that no state may deny any person equal protection of the laws<sup>53</sup>. The notion underlying the Equal Protection Clause is that laws should not treat certain classes of people differently from others. In practical terms, however, laws cannot deal with all people in the same way and must, by their very nature, make certain classifications. What the Fourteenth Amendment guarantees, though, is that classifications will not be based on prejudice. To that end, courts will scrutinize laws to insure that the classifications do not amount to discrimination.

Depending upon what type of classification is involved, courts will apply one of three different levels of scrutiny. Classifications based on race, national origin, or alienage are inherently "suspect" and are subjected to strict scrutiny.<sup>54</sup> This means that courts will uphold a law based on racial classifications only if the law and the racial classification are necessary to achieve a compelling government purpose and there is no less burdensome means of achieving that purpose. Classifications based on gender or legitimacy are "quasi-suspect" and are subjected to an intermediate level of scrutiny.<sup>55</sup> This means that a law based on gender classifications will be upheld only if the law and the gender classification are substantially related to an important government purpose. Finally, courts use a rational basis standard when scrutinizing any classification that is not suspect or quasi-suspect.<sup>56</sup> This means that the law will be upheld if it is rationally related to a legitimate state interest.

Laws can be discriminatory in one of several ways. A law that includes a classification on its face may be facially discriminatory. For example, an ordinance stating that "no person without an address may apply for a library card" could be challenged under the equal protection clause as being facially discriminatory. Because the homeless population has not been identified as a suspect or quasi-suspect class,<sup>57</sup> the ordinance would be subjected to only a rational basis standard of review. In other words, the government would merely have to show that the requirement of an address is rationally (or conceivably) related to some state interest. In this example, the state might argue that the requirement of an address is rationally related to the state's interest in being able to contact people and insure the return of books

A law that is facially neutral but applied in a different manner to different classes of people may also be challenged as an equal protection violation. For example, Massachusetts has a 19th-century law that outlaws begging. If the Cambridge police used the statute to arrest the homeless man who sits on the sidewalk with a begging cup but did not arrest the Harvard student who approaches passers-by and asks for money to fund a trip to Mozambique, the law could be challenged as discriminatory in its application.<sup>58</sup> For the law to be invalidated, the challenger would have to prove that the government had a discriminatory purpose when it enforced the law in an unequal manner,<sup>59</sup> and that the discrimination was not rationally related to any legitimate government interest.

Finally, a law that is facially neutral but has a different impact on different classes of people may also violate the Equal Protection Clause. For example, an ordinance prohibiting people from sitting on a park bench for more than an hour might be challenged as having a disparate impact on people who are homeless. Apart from the manner in which police choose to enforce such an ordinance, the ordinance may simply have a greater negative impact on people who are homeless because such individuals may be more likely to sit on a park bench for more than an hour simply by virtue of having no place else to go. For the law to be invalidated, however, the challenger must not only show disparate impact but must also prove that the law was enacted for a discriminatory purpose,<sup>60</sup> and that the discrimination was not rationally related to a legitimate government interest.

In the *Webster* case,<sup>61</sup> the City of Seattle prosecuted a homeless man for violating a pedestrian interference ordinance. The man argued that the ordinance violated the Equal Protection Clause because it disparately impacted on the homeless population as a class. Although the law was

neutral on its face -- in that it prohibited all people from standing, sitting, lying, or walking so as to interfere with pedestrian traffic -- the law had a harsher impact on people who are homeless. The Washington Supreme Court rejected the challenge after finding that the ordinance was facially neutral and applied equally to all people.<sup>62</sup> Justice Utter, in his partial concurrence, argued that in focusing on facial neutrality, the majority failed to address the disparate impact claim.

**Due Process (vagueness).**<sup>63</sup> Under the Fourteenth Amendment, no state may "deprive any person of life, liberty, or property, without due process of law."<sup>64</sup> Included within the guarantee of due process is the notion that a law must be written in such a way that it gives people reasonable notice of the conduct it prohibits. Any law that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" may be challenged as void for vagueness and declared facially unconstitutional.<sup>65</sup> Although some "void for vagueness" challenges to vagrancy and loitering laws have been successful,<sup>66</sup> courts that have addressed this type of challenge to anti-begging laws have found that the language of the legislation put reasonable people on notice of the conduct prohibited.<sup>67</sup>

### ***Laws that Regulate Public Sleeping and Camping***

As the number of people seeking emergency shelter is increasing, more and more homeless people are sleeping on the streets and in public parks. In some cases, homeless people sleep out-of-doors simply due to the lack of available shelter beds, or the fact that they have used up the number of consecutive days some shelters allow people to stay. Others are not permitted to stay in shelters because of certain characteristics or behaviors, including obvious psychiatric symptoms or intoxication. Still other homeless people choose not to use shelters, citing dangerous, dirty, overcrowded conditions, or rules they find unacceptable, including mandatory attendance at religious services and no-smoking policies.<sup>68</sup>

The realities of poverty are unpleasant, and many citizens have begun to complain about unsightly tents, makeshift cardboard shelters, and all the other visible evidence of human beings living out-of-doors. In response to these complaints, many local governments have enacted laws that prohibit sleeping in public or camping on public property.

### **Types of Legislation**

San Francisco provides one of the most recent examples of a city using anti-sleeping and camping ordinances to remove homeless people from public places. The city's Matrix program, originally entitled the "Quality of Life Enforcement Program," calls for stepped-up enforcement of laws that ban camping in parks and sleeping in public places.<sup>69</sup> In addition, police are encouraged to arrest people for activities such as trespassing, aggressive panhandling, public intoxication, and urinating in public. The program even includes a plan for police to seize the hundreds of shopping carts used by homeless people to transport and store their belongings.<sup>70</sup>

In the first eight months of the Matrix program, police arrested or cited more than 7,000 people.<sup>71</sup> The Matrix plan is supposed to include provisions for increased health and social services,<sup>72</sup> but after four months, fewer than 70 people who encountered Matrix workers had been sheltered.<sup>73</sup>

Though there are between 4,000 and 16,000 homeless people in San Francisco, there are only about 1,400 beds available for those in need of emergency shelter.<sup>74</sup> And although mental health workers are supposed to accompany police on "homeless roundups," one Department of Public Health source was quoted as stating, "You can't help someone with their mental health woes when they are being handcuffed."<sup>75</sup>

On November 24, 1993, civil rights advocates filed a lawsuit in federal court challenging the constitutionality of the Matrix operation.<sup>76</sup> Plaintiffs have already suffered a significant defeat in the initial stages of this lawsuit. On March 15, 1994, the United States District Court for the Northern District of California denied plaintiffs' request for preliminary injunctive relief from the Matrix program.<sup>77</sup> In a lengthy opinion, the court carefully considered plaintiffs' myriad claims and concluded that they were unlikely to succeed on the merits at trial.

Although the Matrix program's strongest backing comes from downtown business merchants, it appears that most San Francisco residents continue to support these efforts.<sup>78</sup> San Francisco's response to the crisis of homelessness is not unique. Many other cities across the country have enacted or begun enforcing laws that prohibit sleeping in public or camping on public land<sup>79</sup>

## **Legal Remedies**

The constitutionality of laws that regulate public sleeping and camping has been challenged, with mixed results, on the basis of the Fourteenth Amendment's guarantees of due process and equal protection, and the Eighth Amendment's prohibition of cruel and unusual punishment. Several of these cases are discussed below.

**Due Process (vagueness).** Laws that are so vague that they fail to give notice of the conduct prohibited violate the Due Process Clause of the Fourteenth Amendment. Many courts have rejected this type of challenge to anti-sleeping or anti-camping ordinances.<sup>80</sup>

One recent California case, however, suggests that courts are still amenable to this type of challenge. In *Tobe v. City of Santa Ana*,<sup>81</sup> the California Court of Appeals struck down an anti-camping ordinance that made it illegal "to camp, occupy camp facilities or use camp paraphernalia" in any public area. The court declared the statute unconstitutionally vague because its definition of "camp facilities" and "camp paraphernalia" was not exhaustive. For example, the ordinance defined "camp paraphernalia" as tarpaulins, cots, sleeping bags, or other "similar equipment." The Court found the definitions to be "an invitation to arbitrary and selective enforcement because they provide no distinction between picnicking and 'camping' or students' backpacks and 'camping paraphernalia' and leave enforcement to the virtually unfettered discretion of the police."<sup>82</sup>

**Due Process (overbreadth).** The Fourteenth Amendment's guarantee of due process includes the notion that laws may not prohibit innocent conduct. To that end, a law may be declared unconstitutionally overbroad "even if it is clear and precise, if it reaches conduct that is constitutionally protected"<sup>83</sup> or conduct that is beyond the reach of the state's police power.<sup>84</sup> The Supreme Court has stated, though, that laws should not be struck down for overbreadth unless they reach "a substantial amount of constitutionally protected conduct."<sup>85</sup>

Overbreadth challenges to laws prohibiting sleeping in public or camping on public land have met with mixed results. Although several courts have rejected these types of arguments,<sup>86</sup> two recent opinions indicate that anti-sleeping and anti-camping laws, especially as applied to people who are homeless, may now be more susceptible to overbreadth challenges.

In *Pottinger v. City of Miami*,<sup>87</sup> three homeless plaintiffs brought a class action lawsuit on behalf of Miami's entire homeless population. The plaintiffs alleged that the city's practice of harassing and arresting homeless people for engaging in basic, life-sustaining activities violated their constitutional rights. They challenged several of the city's ordinances that prohibited activities such as sleeping in public, being in the park after hours, trespassing, and obstruction of sidewalks. The plaintiffs complained that these laws were overbroad, as applied to them, because they prohibited innocent conduct (such as sleeping) that was beyond the reach of the city's police power.

The court first acknowledged that activities such as sleeping are not constitutionally protected. Under traditional overbreadth analysis, these ordinances would probably have been upheld because they did not reach constitutionally protected conduct.<sup>88</sup> This court went on to find, though, that as applied to homeless people, the ordinances did interfere with plaintiffs' constitutionally protected right to freedom of movement and freedom from cruel and unusual punishment.<sup>89</sup> The court thus concluded that the ordinances were unconstitutionally overbroad, as applied to the plaintiffs, because they reached essentially innocent conduct.

In *Tobe v. City of Santa Ana*,<sup>90</sup> the California Court of Appeals struck down an anti-camping ordinance making it illegal "to camp, occupy camp facilities or use camp paraphernalia" or "to store personal property" in any public area. The ordinance's definition of "store" included "to place or leave in a location." The court declared the ordinance unconstitutionally overbroad, first because it made it illegal "for any person to leave any personal property unattended in any public place for any purpose for any length of time." Also, the ordinance was overbroad because it "preclude[d] people who [had] no place to go from simply living in Santa Ana."

**Cruel and unusual punishment.** Laws prohibiting sleeping in public and camping on public land may also violate the Eighth Amendment, which proscribes cruel and unusual punishment.<sup>91</sup> At least two courts have determined that application of these laws to homeless people is cruel and unusual because it punishes them for actions they cannot avoid.<sup>92</sup>

The notion that status-based punishments are unconstitutional stems from the Supreme Court's decision in *Robinson v. California*.<sup>93</sup> In *Robinson*, the Court declared that because drug addiction is an involuntary status, much like having a physical or mental illness, any punishment based on that status is cruel and unusual. The Court noted, though, that the Eighth Amendment does not protect voluntary conduct that stems from addiction, such as the use or purchase of drugs.<sup>94</sup>

One federal district court looked to the principles set out in *Robinson* when it considered whether homelessness is a status protected by the Eighth Amendment. In the well-publicized *Pottinger* case, evidence showed that the City of Miami arrested thousands of homeless people from 1987 to 1990 for standing, sitting, and sleeping on sidewalks, on benches, in parks, and in other public

buildings.<sup>95</sup> In this class action lawsuit brought on behalf of Miami's entire homeless population, plaintiffs claimed that the arrests punished them for conduct they could not avoid and were therefore cruel and unusual.

In addressing this challenge, the court determined that homelessness is an involuntary status, much like the status of drug addiction set out in *Robinson*. People do not choose to be homeless, but instead find themselves homeless due to economic, physical, or psychological factors beyond their control. Although anti-sleeping and anti-camping ordinances prohibit conduct stemming from homelessness rather than the status of homelessness itself, the *Pottinger* court found that the prohibited actions of sleeping, sitting, and eating in public were so intertwined with the condition of homelessness that the conduct and the status became inseparable. In other words, homeless people have no choice but to perform certain life-sustaining activities -- such as sleeping -- in public. As a result, arresting homeless people for engaging in these "involuntary" acts is cruel and unusual.

The California Court of Appeals followed *Pottinger* when it held that a Santa Ana anti-camping ordinance violated the Eighth Amendment because it criminalized the involuntary status of homelessness. In *Tobe v. City of Santa Ana*,<sup>96</sup> the court declared that "[h]omelessness, like illness and addiction, is a status not subject to the reach of the criminal law; and that is true even if it involves conduct of an involuntary or necessary nature [such as] sleeping." Because the camping ordinance punished people for nothing more than being poor, it constituted cruel and unusual punishment.

Other courts may not be so willing to accept the notion that homelessness is a status or that acts resulting from that status are constitutionally protected. One federal district court in the Northern District of San Francisco has rejected that argument after a lengthy discussion of its merits. In *Joyce v. San Francisco*,<sup>97</sup> the court ruled that a class of homeless plaintiffs was not likely to succeed on the merits of its claim that San Francisco's Matrix program violates the Eighth Amendment rights of homeless individuals by punishing them simply for the status of being homeless. The court first defined "status" as a characteristic one acquires involuntarily and over which one has little control. It then concluded that unlike certain innate characteristics, such as age, race, gender, national origin, or illness, homelessness "is not readily classified as a 'status.'"<sup>98</sup> Moreover, the court explicitly disagreed with *Pottinger*'s extension of Eighth Amendment protection to conduct resulting from homelessness and emphasized that the Supreme Court has never held that the Eighth Amendment protects acts derivative of status.

**Equal Protection.** The Equal Protection Clause of the Fourteenth Amendment offers two avenues for challenging anti-sleeping and anti-camping laws. As noted above, equal protection insures that similarly situated people are treated alike. This guarantee is enforced in two different ways. One stream of equal protection analysis involves the nature of the right at issue and insures that certain fundamental rights are protected. The other stream of equal protection analysis addresses the nature of the affected group and insures the heightened protection of certain "discrete and insular minorit[ies]."<sup>99</sup> Anti-sleeping and anti-camping laws may violate the Equal Protection Clause if they infringe upon a homeless person's fundamental right to travel, or if they are enacted as an expression of government hostility toward an unpopular group.

*Fundamental right to travel.* There are certain fundamental rights that the Constitution protects implicitly rather than explicitly. These fundamental rights include the right to travel<sup>100</sup> the right to vote, the right to refuse medical treatment, and certain rights of privacy. Courts strictly scrutinize regulations of fundamental rights and uphold them only if they are necessary to protect a compelling government interest.<sup>101</sup>

Historically, the freedom to travel interstate without government interference has been recognized as an important and basic right.<sup>102</sup> Although the Supreme Court has never held that the fundamental right to travel encompasses intrastate travel, lower court decisions have recognized that a distinction between interstate and intrastate travel serves no purpose and have included intrastate migration as part of the fundamental right to travel.<sup>103</sup>

At least one federal district court has held that anti-sleeping and anti-camping laws violate the Equal Protection Clause because they impinge on the fundamental right to travel. In *Pottinger v. City of Miami*,<sup>104</sup> the court found that Miami city ordinances prohibiting public sleeping and camping impermissibly burdened the right to travel because they prevented homeless people from performing certain "necessities of life," and because the constant threat of arrest effectively banned homeless people from all public areas.<sup>105</sup>

*Hostility toward unpopular groups.* Homeless advocates may also argue that anti-sleeping and anti-camping laws violate equal protection guarantees because they are enacted with the intent to discriminate against homeless people and reflect government hostility toward an unpopular group. Advocates may try to argue that homelessness qualifies as a suspect or quasi-suspect classification and that laws discriminating against homeless people should be subjected to strict scrutiny by the courts. Commentators have argued that homeless people have historically suffered from unequal treatment and political powerlessness, just like other suspect classes. In addition, they have advanced the claim that homelessness can be considered an immutable characteristic -- just like race or national origin -- because the status of homelessness is involuntary or non-volitional.<sup>106</sup> Although courts have thus far been unwilling to declare that homelessness is a suspect or quasi-suspect classification, certain decisions suggest that this argument may become more viable in the future.<sup>107</sup>

To establish an equal protection violation, advocates would first have to prove that the government had a discriminatory purpose in enacting the legislation. Although it would be easy to produce statistical data showing that anti-sleeping and anti-camping laws have a disproportionate impact on homeless individuals, such evidence is rarely sufficient to establish discriminatory purpose.<sup>108</sup> Most often, courts look to the language of the ordinances and the legislative history in order to determine whether the government intended to discriminate against a particular group.

Even if advocates were able to establish that anti-sleeping and anti-camping laws were enacted with an intent to discriminate against homeless people, such discrimination is acceptable if the court finds that the classification was rationally related to any legitimate state purpose. As noted above, homelessness has not yet been deemed a suspect or quasi-suspect classification, so laws discriminating against homeless people must survive only the highly deferential, rational basis standard of review.<sup>109</sup> This means that courts will more than likely uphold these laws because it

is not difficult for states to show that the laws in question are rationally related to some government purpose.

Although laws subjected to rational basis review are rarely struck down, principles enunciated in several Supreme Court cases suggest that discrimination motivated solely by government hostility toward an unpopular group violates equal protection guarantees no matter what the standard of review.<sup>110</sup> In other words, advocates might argue that certain legislation was motivated solely by government antipathy toward homeless people and that the legislation thus serves no permissible or legitimate state interest

### ***Property Loss***

In the process of enforcing anti-sleeping and anti-camping laws, police often "sweep" homeless encampments and seize or destroy the property of homeless individuals. Personal property may also be destroyed when city officials bulldoze or otherwise dismantle homeless encampments for health or safety reasons. For example, in 1992, Oakland police raided a homeless camp under a Northern California highway and destroyed the clothing, food stamps, and other possessions of seven homeless people who had lived under the overpass for four years.<sup>111</sup> More recently, Chicago police ousted 20 homeless men from an encampment, bulldozed their shacks, and destroyed all of their personal property.<sup>112</sup> Unfortunately, these incidents are not isolated.<sup>113</sup>

### **Legal Remedies**

The Fourth Amendment's prohibition against unreasonable searches and seizures provides the most viable legal remedy for homeless people whose property is destroyed by government action.<sup>114</sup> Homeless people may also challenge the confiscation or destruction of their property as a violation of their Fifth Amendment rights. Specific examples are noted below.

**Fourth Amendment.** The principle underlying the Fourth Amendment is that the government may not unreasonably invade the privacy of individual citizens.<sup>115</sup> Although traditionally thought of as protecting the sanctity of the home,<sup>116</sup> certain courts have expressed a willingness to extend Fourth Amendment protections to homeless people living in makeshift or temporary homes.<sup>117</sup>

To determine whether a government intrusion is unreasonable and thereby violates the Fourth Amendment, courts engage in a two-part inquiry. They first consider whether the person exhibits an expectation of privacy in the invaded area, and then they ask whether that expectation is one that society would regard as reasonable.<sup>118</sup> If both of these questions are answered in the affirmative, courts will then balance the government's interest in searching and seizing the property against the individual's expectation of privacy in their property.<sup>119</sup>

In the landmark case of *Connecticut v. Mooney*,<sup>120</sup> the Connecticut Supreme Court found that a homeless man did have a reasonable expectation of privacy in belongings that he kept hidden under a highway bridge abutment where he lived. Mooney, a homeless man, was convicted of murder based in part on evidence police found in a closed duffel bag and cardboard box when they searched his makeshift home under the bridge. On appeal, Mooney claimed that police

violated his Fourth Amendment rights when they seized and searched his belongings without a search warrant.

In finding that Mooney exhibited an expectation of privacy in his duffel bag and cardboard box,<sup>121</sup> the court emphasized that both containers were closed at the time of the search and that they were located in a place that police knew Mooney regarded as his home. The court then found that Mooney's expectation of privacy was reasonable because the "interiors of those two items represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders . . ." and "[o]ur notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy . . ."<sup>122</sup> Because police could have secured a warrant without jeopardizing society's interest in law enforcement, the court invalidated the warrantless search as a violation of Mooney's Fourth Amendment rights.

Federal and state courts outside of Connecticut are not bound to follow Mooney as precedent. However, several courts have been persuaded by its lengthy analysis of the Fourth Amendment rights of homeless people. When faced with a warrantless police raid of a homeless shelter, for example, one federal district court declared that homeless people have the same Fourth Amendment rights as those people who have permanent housing.<sup>123</sup>

The federal district court in *Pottinger*<sup>124</sup> also followed and expanded the principles set out in Mooney. The plaintiffs claimed that the City of Miami had a pattern of destroying personal property or forcing homeless people to abandon it at arrest sites. The court found that the plaintiffs had exhibited an expectation of privacy in their belongings, which they stored in a way that suggested ownership, and distinguished them from abandoned property. Citing Mooney, the court found that the plaintiffs' expectations of privacy were reasonable in light of societal norms and that the city's interest in confiscating the property did not outweigh the plaintiffs' expectations of privacy.<sup>125</sup> Instead, it declared that "the property of homeless individuals is due no less protection under the Fourth Amendment than that of the rest of society," and held the city liable for unlawful seizure of the plaintiffs' belongings.

Other courts have interpreted the Fourth Amendment more restrictively. In *Joyce v. San Francisco*,<sup>126</sup> a class of homeless plaintiffs sought injunctive relief against San Francisco's Matrix program. The plaintiffs complained in part that the City of San Francisco was violating their Fourth Amendment rights by confiscating and destroying their property in its efforts to "clean up the streets." The court denied their request for injunctive relief, finding that they were unlikely to succeed on their Fourth Amendment claim at trial. The court sympathized with the city's claim that it had trouble distinguishing abandoned from unattended property, and noted that the city's new property inventory policy would prevent future Fourth Amendment violations.<sup>127</sup>

**Fifth Amendment.** The Fifth Amendment prohibits the taking of private property for public use without just compensation.<sup>128</sup> The "public use" requirement is interpreted in relation to the state's police power and is satisfied whenever the state's purpose in "taking" property is rationally related to a legitimate public purpose.<sup>129</sup>

The federal district court in *Pottinger*<sup>130</sup> found that the City of Miami's practice of confiscating and destroying homeless individuals' property constituted a "taking" in violation of the Fifth Amendment. Even though the city did not use or possess the property, the "public use" requirement was satisfied because the arrests and property sweeps were within the scope of the city's police power.

Advocates should note that there are limits on the remedies available for Fifth Amendment violations.<sup>131</sup> The Fifth Amendment does not prohibit the government from interfering with an individual's property, but instead requires the government to compensate or pay damages to the individual once the taking has occurred.<sup>132</sup> Because the *Pottinger* court declined to rule on the damages issue without more evidence, one can only speculate as to how courts will determine what compensation is "just" when a homeless person's belongings are destroyed. In addition, an individual must first seek compensation through state law procedures before making a claim under the Fifth Amendment's Takings Clause.<sup>133</sup>

**Procedural Due Process.** One commentator has argued that property sweeps may also be challenged as due process violations because they deprive homeless people of their property without notice or an opportunity to be heard.<sup>134</sup> The viability of this remedy is questionable, however, because the government is liable only for intentional deprivations and not those that occur negligently. Also, due process is satisfied where a pre-deprivation hearing would be impracticable and state law provides an adequate post-deprivation

## *Summary*

All of the available remedies for challenging various forms of discrimination against homeless people find their source in the federal and state constitutions. For example, although First Amendment challenges to anti-panhandling laws are the most likely to be successful, advocates should not rule out Equal Protection or Due Process claims. Not all constitutional claims are guaranteed to succeed, however. As the Young and Loper opinions demonstrate, judges on the same court may reach markedly different interpretations of a given constitutional guarantee. However, if advocates can at least articulate plausible claims, they may be able to negotiate changes in a city's policy without having to go to court.

# **Legal Remedies to Address Discrimination Against People Who Have Mental Illnesses**

The second portion of this paper addresses discrimination against individuals who have serious mental illnesses such as schizophrenia, bipolar disorder, and major depression. This section examines discrimination against people with mental illnesses in housing, public accommodations, government programs and services, and employment. It then suggests numerous legal remedies for challenging these types of discrimination.

The division of this paper into separate sections on homelessness and mental illness is an artificial one mirroring a split in the law. Both because of discrimination and the severity of their illnesses, many people with mental illnesses are currently homeless or at high risk of becoming homeless at some point in their lives. Because of the obvious link between housing discrimination and homelessness, the bulk of this section focuses on housing issues.

## ***Discrimination in Housing***

The term "housing" as used in this paper includes traditional single family homes, apartments, single-room-occupancy dwellings, residential treatment facilities, group homes, and homeless shelters. Both private and governmental entities have been known to discriminate against people with mental disabilities in the area of housing. The distinction between "private action" and "state action" is relevant to the selection of an appropriate legal remedy for discrimination.

### **Discrimination by Private Entities**

People with mental illnesses or mental retardation suffer blatant discrimination by private realtors, landlords, and neighbors. Sometimes discrimination takes the form of criminal activities such as arson.<sup>135</sup> More often, landlords refuse to rent apartments or group homes to people with mental disabilities or to the organizations that serve them.<sup>136</sup> Many landlords seek to evict tenants with mental disabilities based on fear and prejudice rather than for a legitimate reason such as a breach of the lease.<sup>137</sup>

Neighborhoods organize campaigns to exclude group homes from their communities by distributing negative literature, fueling fears and stereotypes, and generating widespread publicity at public zoning meetings.<sup>138</sup> Some neighbors sue would-be sellers for violating restrictive covenants prohibiting group homes.<sup>139</sup> Others buy out sellers rather than tolerate a group home purchasing the property and moving into the neighborhood.<sup>140</sup>

### **Discrimination by Governmental Entities**

Governmental entities frequently employ exclusionary zoning to discriminate against people with mental disabilities. Zoning is the process by which a local government regulates land use, structures, and development within its jurisdiction. Zoning ordinances typically divide a community into single-family and multi-family residential districts and commercial districts. The

ordinances restrict land use and building structures to fit the character of the district. Single-family districts normally contain only single-family dwellings, for example. Often the occupancy of those dwellings is restricted to individuals related by blood, marriage, or adoption, or to a small number of unrelated people.

If a proposed building or land use falls within the structures and uses authorized in that particular district, it is permitted automatically. If a proposed building or land use is not expressly authorized, it may be "conditionally" or "specially" permitted if it meets extra requirements. Supporters of the proposed building or use may have to show at a public hearing, for instance, that their proposal would not impair the general welfare or create a nuisance.<sup>141</sup>

The vast majority of people with mental disabilities can be treated more effectively in an integrated community setting than in an institution<sup>142</sup>. Unfortunately, when group homes for people with mental disabilities attempt to locate in single-family districts, local governments often employ the applicable zoning ordinance to exclude them. This is known as the "Not in My Backyard" (NIMBY) phenomenon.<sup>143</sup> Opponents frequently claim that group homes will increase crime or traffic, decrease their property values, or detract from the esthetics of the neighborhood.<sup>144</sup> Empirical studies have shown these fears to be groundless.<sup>145</sup>

A zoning ordinance may discriminate against group homes for people with mental illnesses in one or more of the following ways. First, the ordinance may prohibit group homes in single-family districts altogether. Second, the ordinance may classify group homes as commercial, medical, or business facilities, all of which are excluded from single-family or even multi-family residential districts. Third, by defining "family" narrowly to include only related individuals or a very small number of unrelated people, the ordinance may have the effect of excluding all group homes from single-family districts.<sup>146</sup> Fourth, the ordinance may allow group homes in single-family districts as conditional uses, but define the "conditions" so restrictively, or leave so much discretion to the locality, that all group homes are excluded in practice.<sup>147</sup> Fifth, the ordinance may impose quotas on the number of group homes in a neighborhood or require homes to be a minimum distance from similar facilities.<sup>148</sup> Finally, the ordinance may impose special fire and safety code restrictions on group homes beyond those required of single-family residences.<sup>149</sup>

Homeowners sometimes mimic exclusionary zoning through a "restrictive covenant," in which they promise that neither they nor anyone who ever buys their property will operate a group home on the premises.<sup>150</sup> Many of the legal remedies against zoning ordinances may be applied to restrictive covenants as well.

## **Legal Remedies**

Victims of housing discrimination have a range of legal remedies available. The following section discusses statutory and constitutional remedies for housing discrimination under both state and federal law. The choice of a particular remedy depends on the public or private status of the discriminatory actor, the type of discrimination experienced, the content of applicable state statutes and local ordinances, the chances for negotiation and settlement, and the resources available for litigation.

**Landlord-tenant laws.** If a landlord tries to evict a tenant because of his or her mental disability rather than for good cause, the tenant may invoke the protection of landlord-tenant laws. Landlord-tenant laws commonly require notice prior to eviction, and prohibit eviction during the term of a lease except for cause. New York City's Rent Stabilization Code, for example, permits eviction for creating a nuisance only if the landlord demonstrates a "course of conduct that threatens the safety and comfort of others."<sup>151</sup> A tenant with serious mental illness and alcoholism successfully challenged his eviction for negligently causing a fire in his apartment on a single occasion.<sup>152</sup> The neighbors' fears of the tenant did not warrant eviction, the court held. Sometimes the landlord-tenant laws are unhelpful, however, because a tenant's mental disability may cause him or her to violate the lease.<sup>153</sup> In those cases, the tenant might challenge the eviction law itself under the Rehabilitation Act or the Fair Housing Amendments Act, as described later in this section.

Landlord-tenant laws are only useful if the person with a mental disability can prove that he or she is a "tenant."<sup>154</sup> When the parties have a lease defining their relationship, this issue does not often arise.<sup>155</sup> However, individuals who live a more transient lifestyle in hotels or lodging houses sometimes have trouble establishing that they are tenants. Courts are more likely to recognize a landlord-tenant relationship if the renter has exclusive possession of the unit, stays indefinitely, furnishes the unit him or herself, and maintains no other residence<sup>156</sup>. Several recent cases addressed the question of whether residents of mental health treatment or social service programs qualify as "tenants." Courts generally have withheld "tenant" status from clients of service-intensive programs, especially where treatment staff have had access to clients' rooms.<sup>157</sup>

**Zoning laws.** Sometimes it is possible to challenge neighborhood discrimination by working within existing zoning laws. A group home for people with mental illnesses may be able to argue that the home falls within the local ordinance's definition of "family." Even if the ordinance expressly limits the term "family" to related individuals, some state courts have been willing to expand the definition to encompass unrelated individuals with mental disabilities if they share housekeeping and cooking chores, make decisions jointly, and regard the home as their long-term residence.<sup>158</sup> The presence of live-in staff will help in proving that a group home functions as a family.<sup>159</sup> Courts have applied these same arguments to group homes seeking to be included within the definition of "family" in restrictive covenants.<sup>160</sup>

Educational and religious organizations often receive special treatment under zoning laws. The Massachusetts Zoning Act, for example, exempts from local zoning restrictions a land use or structure that is used primarily for religious or educational purposes.<sup>161</sup> Group homes facing neighborhood opposition should investigate whether they could invoke a similar exception for religious or educational land uses, as might be appropriate.

**State statutes or policies promoting community integration.** More than 30 states have enacted statutes governing group homes for people with mental illnesses or mental retardation.<sup>162</sup> These statutes often contain a preamble declaring the state's policy to promote the integration of individuals with mental disabilities into the local community. Most of the statutes classify at least small group homes as permitted uses in all residential zones, and "preempt" or override local ordinances excluding such homes or imposing onerous conditions on them.<sup>163</sup> A few statutes allow local governments to have input into the site selection process, impose conditions

on group homes, or require special use permits.<sup>164</sup> Many of the statutes impose quotas or minimum distance requirements that operate to exclude group homes from affordable and desirable single-family neighborhoods.<sup>165</sup>

Group homes hoping to locate in single-family residential areas should check whether the state has passed a statute preempting exclusionary zoning ordinances. If the state has such a statute, the group home should invoke it early in the zoning process. The group home might want to request state officials to intervene if the local government refuses to comply with the statute.<sup>166</sup> If litigation becomes necessary, the group home should prevail under a favorable preemptive statute. Courts have upheld all but one preemptive statute against attack by municipalities, finding that since the state delegates zoning power in the first place, it has the authority to retract some of that power.<sup>167</sup> Even if the state lacks a preemptive statute, courts may be willing to override exclusionary zoning ordinances based on an expressed "policy" of the state to foster deinstitutionalization and community integration.<sup>168</sup>

**Immunity of state-affiliated programs.** Group homes affiliated with the state may be "immune" from local zoning restrictions, since the state is a "superior sovereign" over municipalities. Facilities are more likely to receive immunity if they are operated directly by the state or receive substantial state subsidies, if they are licensed or closely regulated by the state, or if they are implementing a state policy of deinstitutionalization.<sup>169</sup> Some courts will balance the local government's interest in adhering to its zoning regulations against these factors.<sup>170</sup>

**Equal Protection.** The Fourteenth Amendment prohibits states from denying any person the "equal protection of the laws." As explained earlier, this means that states must treat people in similar circumstances in the same manner. The Fourteenth Amendment applies only to governmental action, not to private individuals or organizations. Discrimination by private landlords and realtors against people with mental illnesses is not covered by the Fourteenth Amendment. Discrimination by public housing programs and exclusionary zoning by municipalities are covered, however.

Zoning ordinances generally are subject only to rational basis review and are invalidated only if they are found to be "clearly arbitrary and irrational" and without "substantial relation to the public health, safety, morals or general welfare."<sup>171</sup> In *Village of Belle Terre v. Boraas*,<sup>172</sup> a group of college students challenged a zoning ordinance that limited occupancy in single-family districts to traditional families or no more than two unrelated individuals. The Supreme Court upheld the ordinance, finding that it furthered the municipality's legitimate interest in preserving a quiet neighborhood.

Mental health advocates urged courts to apply intermediate scrutiny rather than rational basis review to municipalities' efforts to discriminate through their zoning laws against people with mental disabilities. Some lower federal courts accepted this argument, finding that people with mental retardation and mental illnesses were quasi-suspect classes, since they had suffered a history of prejudice and discrimination.<sup>173</sup> (For a discussion of "suspect" and "quasi-suspect" classes, see the discussion at the bottom of page 9.)

The Supreme Court held in *City of Cleburne, Texas v. Cleburne Living Center*<sup>174</sup> that mental retardation is neither a suspect nor a quasi-suspect class. Although individuals with mental retardation had suffered a history of discrimination, the court found that much of this history had been remedied by federal and state legislation that legitimately focuses on their special needs. Although the court applied a lenient standard, it nonetheless found that the City of Cleburne's zoning ordinance irrationally discriminated against a group home for people with mental retardation.<sup>175</sup>

Cleburne Living Center's victory was somewhat hollow, however. The Court's decision to apply only rational basis review means that most federal equal protection challenges to exclusionary zoning will fail.<sup>176</sup> Group homes are most likely to prevail if the zoning ordinance explicitly discriminates against people with disabilities, as did the Cleburne ordinance. If the ordinance appears neutral on its face, group homes will prevail only if they can show outright prejudice in the application of the ordinance.

A federal district court recently questioned whether Cleburne permanently forecloses a claim that mental retardation is a quasi-suspect classification.<sup>177</sup> The court recited Congress' findings in the Americans with Disabilities Act that "individuals with disabilities are a discrete and insular minority who have been... subjected to a history of purposeful unequal treatment..."<sup>178</sup> Through the foregoing language, the court held, Congress did not overrule Cleburne as a matter of law, but rather made a factual finding that mental retardation meets the Supreme Court's criteria for a quasi-suspect classification. This district court decision may be reversed on appeal, but for now it provides a creative argument for applying intermediate scrutiny to classifications involving any kind of disability, notwithstanding Cleburne.

Most state constitutions contain equal protection clauses that track the language of the U.S. Constitution. Unlike the Supreme Court, some states have decided that people with mental disabilities are a suspect or quasi-suspect class, and have applied intermediate scrutiny rather than rational basis review.<sup>179</sup> A group home considering an equal protection challenge to a zoning ordinance should investigate whether the state constitution would provide stronger authority than the Fourteenth Amendment.

**Rehabilitation Act.** Congress passed the Federal Rehabilitation Act in 1973.<sup>180</sup> Section 504 of the Rehabilitation Act prohibits discrimination on the basis of disability by federal agencies and programs receiving federal funding.<sup>181</sup> In order to make a Rehabilitation Act claim, a plaintiff must prove that he or she is disabled but otherwise qualified to participate in the program, that he or she has been excluded from the program solely because of his or her disability, and that the program receives federal financial assistance.<sup>182</sup>

An individual is "disabled" if he or she has a physical or mental impairment which substantially limits one or more major life activities,<sup>183</sup> if he or she has a record of such an impairment, or if he or she is regarded by others as having such an impairment.<sup>184</sup> Mental retardation, mental illness, organic brain syndrome, and learning disabilities qualify as "mental impairments."<sup>185</sup> An individual cannot claim that he or she is "disabled" just because he or she currently uses illegal drugs.<sup>186</sup> A disabled person is "otherwise qualified" if, with accommodation, he or she can meet all of a program's requirements in spite of his or her disability.<sup>187</sup>

The Department of Housing and Urban Development (HUD) has enacted regulations which describe in some detail the kinds of discrimination that are illegal under the Rehabilitation Act.<sup>188</sup> A federally funded project may not, for example, refuse to sell or rent a dwelling to a qualified person with a disability or deny him or her an equal opportunity to receive program benefits.<sup>189</sup> Even if a recipient of federal funds has only good intentions, it may not implement neutral policies or practices that have the effect of discriminating against people with disabilities. Recipients of federal funds must modify their housing policies and practices to insure that they do not discriminate against people with disabilities, as long as those modifications would not fundamentally alter the program or impose an undue burden.

Victims of discrimination may file an administrative complaint with the federal funding agency, which in turn may terminate funding or refer the case to the Attorney General for a lawsuit.<sup>190</sup> Alternatively, victims may file a lawsuit for damages.<sup>191</sup> Several tenants with mental disabilities have used the Rehabilitation Act to challenge discrimination by landlords.<sup>192</sup>

**Fair Housing Amendments Act.** The Rehabilitation Act prohibits discrimination on the basis of disability only by recipients of federal funds. Congress enacted the Fair Housing Act<sup>193</sup> in 1968 in order to reach housing discrimination by purely private entities on the basis of race, color, religion, sex, and national origin. Not until 1988, with passage of the Fair Housing Amendments Act (FHAA),<sup>194</sup> did Congress prohibit housing discrimination by both public and private entities on the basis of handicap.<sup>195</sup> Congress' purpose in passing the FHAA was to combat "misperceptions, ignorance, and outright prejudice" against individuals with disabilities, and to foster community integration and independent living.<sup>196</sup>

Substantive provisions of the FHAA. The FHAA is modeled on the Rehabilitation Act and incorporates the same definition of disability. Like the Rehabilitation Act, the FHAA provides no protection for current users of illegal drugs; however, people with substance abuse problems who are in treatment and not currently using illegal substances are covered.<sup>197</sup>

The FHAA expressly prohibits discrimination by a realtor or landlord (but not by a private homeowner acting without a real estate agent) in the sale or rental of a dwelling because of a handicap of the buyer or renter or a person living with or associated with the buyer or renter.<sup>198</sup> For example, a housing provider cannot require a higher sale price or rent, impose different qualification criteria, or evict a tenant on the basis of disability.<sup>199</sup> The Act also forbids discrimination on the basis of handicap in the "terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities" at the dwelling<sup>200</sup>. A landlord, for instance, cannot request an extra security deposit from an applicant who is disabled or delay maintenance of a handicapped tenant's apartment.<sup>201</sup> It is discriminatory for a housing provider to refuse to make reasonable accommodations in its policies and practices, so as to enable a handicapped person an equal opportunity to use and enjoy a dwelling.<sup>202</sup>

In addition, the FHAA forbids "state or local land use and health and safety laws, regulations, practices or decisions" that have the purpose or effect of discriminating against individuals with disabilities.<sup>203</sup> It is illegal to enforce restrictive covenants prohibiting sale or rental of a dwelling to a person with a disability, to attempt to steer a homeowner or landlord away from a transaction with such an individual, to engage in discriminatory advertising, or to engage in blockbusting.<sup>204</sup>

"Blockbusting" means to induce someone to buy or rent property out of fear that disabled or similarly protected individuals will otherwise enter the neighborhood. Finally, the FHAA prohibits coercion, intimidation, threats, or interference against anyone who asserts his or her rights under the FHAA or assists another person in doing so.<sup>205</sup>

Notably, the FHAA does not require that a "dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."<sup>206</sup> A "direct threat" defense requires proof of a substantial risk of harm based on a "history of overt acts or current conduct."<sup>207</sup> A past history of mental illness alone is insufficient. Although a landlord can ask whether an applicant can meet qualification criteria imposed on all tenants, the landlord cannot make blanket inquiries about an applicant's disabilities.

*Enforcement scheme.* The FHAA made substantial changes in the remedies previously available to combat housing discrimination.<sup>208</sup> A victim of housing discrimination has several options. The individual can file a lawsuit in federal or state court, seeking injunctive relief and/or actual and punitive damages.<sup>209</sup> The court may appoint an attorney, relieve court costs, or award attorney's fees if the individual prevails.

Simultaneously, a victim of housing discrimination, or the HUD Secretary, may file a complaint with HUD.<sup>210</sup> That complaint eventually may be resolved by HUD or be referred to a state or local anti-discrimination agency or a court.<sup>211</sup> If the Attorney General finds reasonable cause to believe that a respondent is engaged in a pattern or practice of discrimination, or that a group of people with disabilities has been deprived of their rights in a case of "general public importance," he or she may initiate a lawsuit in federal court.<sup>212</sup>

*Cases interpreting the FHAA.* Numerous courts have interpreted the handicap provisions of the FHAA. The claims asserted in these decisions have taken any of three forms. A plaintiff alleging "disparate treatment" must show that the defendant purposefully discriminated on the basis of disability.<sup>213</sup> In a "disparate impact" case, the plaintiff alleges that a seemingly neutral policy or practice of the defendant has a disproportionate impact on individuals with disabilities. If the plaintiff succeeds, the defendant has the burden to prove that its actions served a legitimate purpose and that it had no less discriminatory alternative.<sup>214</sup>

Finally, a plaintiff asserting a "failure to accommodate" claim must demonstrate that the application of a neutral policy to him or herself would deprive him or her of an equal opportunity to enjoy the housing he or she seeks, but that a reasonable adjustment in the policy in his or her case would give him or her that opportunity.<sup>215</sup> An accommodation is not reasonable if it would result in an undue burden or a fundamental alteration of the program. The following paragraphs describe some of the more significant FHAA cases against local governments, private entities, and service providers. Additional cases are described in the endnotes.

**Suits against local governments.** People with mental disabilities (or the Attorney General acting on their behalf) have mounted a number of successful challenges under the FHAA to exclusionary zoning by local governments. The district court in *U.S. v. City of Taylor, Mich.*<sup>216</sup> held that a city violated the FHAA by refusing to grant zoning approval for a group home in a

single-family residential area for 12 elderly women with mental illnesses. The city failed to accommodate the group home even though its residents functioned as a single housekeeping unit within the meaning of the local zoning ordinance. Moreover, the court found indirect evidence of a discriminatory motive based on the city's past history of rejecting group homes and city officials' negative comments about group homes. The court enjoined the city from further interference with the group home, imposed a civil penalty of \$50,000, and awarded the group home operator \$152,000 for lost revenue.

Two judges on the Sixth Circuit Court of Appeals disagreed with many of the district court's factual findings and remanded (or sent back) the case to the district court for new findings.<sup>217</sup> The district court on remand once again found that the city had intentionally discriminated against and failed to accommodate the group home.<sup>218</sup> The court ordered the city to amend the definition of family in its zoning ordinance to include a group home of not more than 12 elderly persons with disabilities; to pay a civil fine of \$20,000 to the United States; and to pay the group home operators \$284,000 in actual damages.<sup>219</sup>

The court in *Easter Seal Soc. v. Township of North Bergen*<sup>220</sup> granted a preliminary injunction requiring a town to issue a construction permit to a group home for people with mental illnesses and substance abuse problems. The group home residents were likely to succeed on the merits of their claim, the court held, because they presented evidence of openly hostile statements by the mayor and showed that the zoning ordinance's narrow definition of "family" had a disparate impact on group homes. Advocates for people with mental disabilities also can rely on cases that successfully challenged exclusionary zoning against alcohol and drug treatment programs.<sup>221</sup>

Local ordinances imposing extra safety requirements on group homes also have failed under the FHAA.<sup>222</sup> The *Sixth Circuit in Marbrunak, Inc. v. City of Stow*<sup>223</sup> affirmed the district court's decision to permanently enjoin a town from enforcing an ordinance that required group homes for people with developmental disabilities to install extensive and costly fire protection systems. The ordinance was "based on 'false [and] overprotective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose,'" the court noted.

**Suits against private entities.** The *Fourth Circuit in U.S. v. Southern Management Corp.*<sup>224</sup> was the first Court of Appeals to apply the FHAA to a private landlord who discriminated on the basis of disability. The court found that individuals with alcohol and substance abuse problems participating in a treatment program demonstrated a "record of an impairment" under the FHAA, and that a leasing company's refusal to rent apartments to them violated the Act. The court affirmed the district court's order requiring the leasing company to rent apartments to people in recovery.

A district court in *Roe v. Sugar River Mills Assoc.*<sup>225</sup> refused to allow a private landlord to evict a tenant with a mental disability based solely on the landlord's assertion that he was a "direct threat" to the safety of other residents. Although the tenant was convicted of disorderly conduct for screaming obscenities and threatening other tenants, the landlord could not evict him without first considering reasonable accommodations that could have reduced the threat he posed to others.

Several courts have considered FHAA claims against individual homeowners and neighbors. Two have held neighbors liable for violating the FHAA by filing suit to enforce restrictive covenants against group homes for people with mental disabilities.<sup>226</sup> A federal district court in Michigan took a far narrower view of the FHAA. That decision, *Michigan Protection & Advocacy Service v. Babin*,<sup>227</sup> warrants extended analysis.

Michigan Protection & Advocacy Services (P&A) filed suit on behalf of individuals with developmental disabilities who were seeking a group home site. A couple in the township decided to sell their home. When their realtor was unable to sell the property, the realtor herself bought it with the intention of leasing it to the state for use as a group home. Neighbors who learned of the state's plans mounted an organized campaign against the group home. They held a petition drive, obtained media coverage, distributed negative propaganda, and threatened to boycott and picket the realtor's office. The realtor's next door neighbors purchased the property from her, with financial support from other neighbors. P&A sued the realtor, her employer, the purchasers, and the other neighbors who opposed the group home

The court granted summary judgment in favor of all of the defendants. The realtor was not liable for selling her property to the neighbors, the court held, since she acted as a private person selling her own home rather than as a realtor. The realtor's agency was not liable because it played no official role in the transaction.

More surprisingly, the neighbors' opposition campaign did not run afoul of the FHAA. Only realtors could be guilty of discriminatory advertising or blockbusting, the court held. The neighbors were not liable for "otherwise mak[ing] unavailable" a dwelling, the court further determined, since they were in no position "to exercise influence over or control the disposition of the dwelling." Even if the neighbors did violate the FHAA, the court found, their campaign constituted expressive activity protected by the First Amendment. Finally, the court held, the neighbors who contributed to the down payment were not guilty of "interfering" with the potential group home residents' housing rights, because they neither used nor threatened to use some type of "potent force or duress" to exclude the group home.<sup>228</sup>

Unfortunately for advocates, the Sixth Circuit Court of Appeals affirmed the district court's opinion in almost all respects.<sup>229</sup> The court held, and P&A apparently agreed, that to penalize the neighbors for their letter-writing and media campaign and town meeting would violate the First Amendment. The court then determined that the neighbors could not be held liable for soliciting and contributing money to buy the house, even if they acted for discriminatory reasons, as long as they did no more than engage in economic competition. The court thought the lower court's "potent force or duress" test was too restrictive, but nonetheless found on the facts that the neighbors had not sufficiently "interfered" with P&A's rights to violate the FHAA.<sup>230</sup> The Court of Appeals declined to rehear the case en banc (with all Circuit Judges participating).

A federal district court in Nebraska was quick to criticize both of the Babin decisions. The judge in *United States v. Hughes*<sup>231</sup> stated, "Respectfully, I believe that both the opinion of the district court and the circuit court in Babin are plainly wrong in suggesting that there is some sort of 'economic competition' exception to the Act." The word "interference" appears without any sort

of qualification in the statute, the court held. Moreover, the court argued, "true economic competition" does not exist when people are motivated by irrational prejudices and stereotypes

**Suits against service providers.** Mental health and social service programs could be either governmental or private entities. However, lawsuits against such programs present unique issues that merit separate discussion. The Third Circuit in *Growth Horizons, Inc. v. Delaware Cty, Pa.*<sup>232</sup> considered the FHAA claim of a group home operator against its county sponsor. The county originally made a contract with Growth Horizons to open four community residences for people with mental retardation. The county later cancelled the contract for three of the residences and refused to provide the promised housing, allegedly because of neighborhood opposition. Group Horizons sued.

The court held that even if the county was influenced by negative bias, it could not be guilty of violating the FHAA, since the county could not be both the housing provider and the defendant at the same time. The court recognized that even service providers may be prejudiced, but argued that "that problem... is far different from and presumably less serious than the problem of biased sellers and lessors Congress here addressed."

In a similar opinion, the Massachusetts Supreme Court held that the FHAA did not require the state department of mental health to provide housing services to its "most difficult clients" (those with both serious mental illnesses and substance abuse problems).<sup>233</sup> "The focus of federal disability discrimination statutes," the court held, "is to address discrimination in relation to nondisabled people, rather than to eliminate all differences in levels or proportions of resources allocated and services provided to individuals with differing types of disabilities." The court expressed great reluctance to second guess the department's service and funding structure. This decision conflicts with the reasoning of *Martin v. Voinovich*,<sup>234</sup> which held that the Rehabilitation Act prohibits housing discrimination among individuals with different disabilities. Only time will tell which approach most courts will adopt.

**State or local anti-discrimination laws.** State and local anti-discrimination laws provide one of the most useful but frequently overlooked remedies for housing discrimination.<sup>235</sup> In 1988, laws in 36 states and 76 localities were certified as "substantially equivalent" to the original Fair Housing Act (which banned discrimination on the basis of race, color, sex, religion, and national origin).<sup>236</sup> Not all of these state and local laws prohibited discrimination on the basis of disability, but many are likely to be amended to conform to the FHAA. The Missouri Human Rights Act<sup>237</sup> is one example of a state statute that already prohibits discrimination in housing on the basis of disability and closely tracks the FHAA.

### ***Discrimination in Public Accommodations***

The term "public accommodation," perhaps paradoxically, refers to a private entity that owns or operates a nonresidential facility that is open to the public. Congress has classified the following entities as places of public accommodation:<sup>238</sup>

- hotels and motels;
- establishments serving food or drink;

- places of entertainment such as theaters and stadiums;
- places of public gathering, such as auditoriums and convention centers;
- stores, shopping centers, other sales or rental establishments;
- service establishments such as banks, gas stations, lawyers' and doctors' offices, hospitals;
- public transportation terminals;
- museums, libraries, other places of public display;
- parks, zoos, other places of recreation;
- private schools;
- social service establishments such as shelters for homeless people, food banks, day care centers, senior citizen centers; and
- gymnasiums and other places of exercise.

Obviously, the accommodations most relevant to people who are homeless and mentally ill are shelters, parks, public transportation terminals, health care facilities, and social service establishments.

### **Types of Discrimination**

Public accommodations discrimination against people with mental illnesses has received little publicity in comparison with housing and employment discrimination. Congress heard anecdotal accounts of such discrimination during its 1988 oversight hearings on the Americans with Disabilities Act.<sup>239</sup> The director of a comprehensive mental health rehabilitation program in Lowell, Massachusetts, testified that one restaurant refused to serve any clients of a day treatment center after one client became disruptive.<sup>240</sup> One bank rejected a home loan application from an elderly couple who had mental illnesses,<sup>241</sup> and another bank refused to open a savings account for an individual with mental retardation, since he did not "fit the image the bank want[ed] to project."<sup>242</sup>

A psychologist spoke of a woman with serious mental illness who had a miscarriage after her caseworkers and hospital emergency room staff assumed she was delusional and ignored her claim that she was pregnant.<sup>243</sup> A woman suffering from manic-depressive illness testified that despite her high grades, she had been terminated from her human services major at Fitchburg State College after a psychiatric hospitalization because she was not "psychologically fit."<sup>244</sup>

### **Legal Remedies**

Discrimination by public accommodations on the basis of disability is prohibited by both the Rehabilitation Act and the more recent Americans with Disabilities Act. The potential usefulness of these remedies is discussed below.

**Rehabilitation Act.** Since 1973, the Rehabilitation Act has prohibited discrimination on the basis of disability by any federally funded public accommodation. No one appears to have used this remedy to challenge discrimination by a public accommodation, however, perhaps because few public accommodations receive federal funding or because the remedy is not well known.

An article on the public accommodations provisions of the Americans with Disabilities Act does not even mention public accommodations cases under the Rehabilitation Act.<sup>245</sup>

**Americans with Disabilities Act.** Title II of the Civil Rights Act of 1964 prohibited discrimination by public accommodations on the basis of race, color, religion, and national origin.<sup>246</sup> Congress expanded this protection to people with disabilities by enacting Title III of the Americans with Disabilities Act (ADA) of 1990.<sup>247</sup> The ADA is modeled on the Rehabilitation Act and the FHAA, and incorporates the same definition of disability.

Title III of the ADA begins with a general proscription against disability discrimination: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation..."<sup>248</sup> Title III then enumerates a list of more specific prohibitions. A public accommodation may not deny individuals with disabilities an equal opportunity to participate in the services offered, or segregate them from other people, unless such segregation is necessary and benefits these individuals. Even then, individuals with disabilities cannot be forced to use segregated facilities.

Title III requires that goods and services be afforded in the "most integrated setting appropriate to the needs of the individual." A public accommodation may not utilize standards or criteria that have the effect of discriminating on the basis of disability. Nor may it impose eligibility criteria that tend to screen out individuals with disabilities, unless those criteria are necessary for the services being offered. For example, a restaurant cannot require individuals with mental retardation to sit at the counter rather than at tables or booths<sup>249</sup>. Finally, a public accommodation must make reasonable modifications in its policies and practices when necessary to afford individuals with disabilities an opportunity to participate, unless the modifications would fundamentally alter the nature of the services offered.<sup>250</sup>

The ADA does not require public accommodations to allow individuals with disabilities to participate if they present a direct threat to the health or safety of others, and that threat cannot be removed by a modification in policies and procedures.<sup>251</sup> A "direct threat" defense requires objective medical evidence regarding the "nature, duration, and severity of the risk [and] the probability that the potential injury will actually occur..." These strict requirements insure that individuals with disabilities are not excluded based on "presumptions, patronizing attitudes, fears, and stereotypes..."<sup>252</sup> Title III does not require public accommodations to provide personal attendant services to individuals with disabilities.<sup>253</sup> Nor does Title III (or any other Title of the ADA, for that matter) protect current users of illegal drugs.<sup>254</sup>

A victim of discrimination may file a lawsuit against the public accommodation.<sup>255</sup> If the individual prevails, the court may award injunctive relief, including an order that the public accommodation modify its policies and practices. The Attorney General is required to investigate alleged discrimination by public accommodations, and may initiate a lawsuit if he or she perceives a pattern or practice of discrimination or discrimination against a group of individuals that raises an issue of general public importance.<sup>256</sup> The ADA encourages alternative dispute resolution through mediation, settlement negotiations, arbitration, or other informal procedures.

Title III of the ADA only took effect in July 1992. As of yet there have been no court decisions applying Title III to public accommodations that have discriminated against people with mental illnesses. However, Title III provides a potentially useful remedy for challenging discrimination against people with mental disabilities by shelters for homeless people, health care facilities, parks, public transportation terminals, and social service establishments.

**State or local anti-discrimination laws.** Some state statutes and local ordinances ban discrimination by public accommodations on the basis of disability. These laws usually track the language of federal anti-discrimination laws. The Missouri Human Rights Act, for instance, bans discrimination on the basis of disability by places of public accommodation, including transient hotels.<sup>257</sup> Mental health advocates should familiarize themselves with their state's anti-discrimination laws, since it never hurts to assert multiple legal remedies for discrimination.

### ***Discrimination in Government Programs and Services***

Federal, state, and local government programs, even those designed to serve people with mental illnesses, sometimes engage in discrimination themselves. This section of the paper discusses different forms that governmental discrimination has taken and suggests legal remedies for such discrimination.

#### **Types of Discrimination**

Some government programs have been accused of intentional discrimination against individuals with disabilities. The Massachusetts Department of Mental Health, for example, disproportionately excluded individuals with co-occurring mental health and substance abuse problems from its community residential program.<sup>258</sup> The Pennsylvania Department of Public Welfare refused to provide home attendant care services to people with physical disabilities who were not "mentally alert."<sup>259</sup> Both states claimed that their programs would be more effective if they restricted their clientele.

The Social Security Administration (SSA) was charged with discrimination in the implementation of its benefits reviews in the early 1980s.<sup>260</sup> During those reviews, the benefits of individuals with mental disabilities were terminated at a much higher rate than those of individuals with physical disabilities. Although only 11 percent of Social Security Disability Insurance (SSDI) recipients had mental disabilities, nearly one-third of those who lost their benefits during the first year of the reviews had mental illnesses.

Only after several class action lawsuits were filed did advocates learn why recipients with mental disabilities were more likely to lose their benefits. If SSA learned during its reviews that a recipient no longer met stringent diagnostic criteria, the agency was supposed to conduct an individualized assessment of his or her ability to perform work. Instead of conducting such an assessment for people with mental disabilities, SSA conclusively presumed they were able to perform at least unskilled work. The agency lost several major cases and appeals, but because district courts operate independently of one another, this did not stop SSA from continuing its restrictive policy in other areas for many years.<sup>261</sup>

Sometimes even a well-intentioned, neutral government policy can have the effect of discriminating against people with mental disabilities. A class of individuals with mental disabilities recently challenged SSA's application procedures for the Supplemental Security Income (SSI) program.<sup>262</sup> Although the procedures generally were adequate, the plaintiffs claimed that the voluminous paperwork, intrusive questioning, bewildering bureaucracy, and strict deadlines erected an almost impossible barrier for applicants with mental illnesses, many of whom experience confusion, memory loss, anxiety, and an inability to concentrate.

## **Legal Remedies**

Both the Rehabilitation Act and the Americans with Disabilities Act forbid discrimination on the basis of disability by public entities. The applicability of these statutes for people with mental illnesses is discussed below.

**Rehabilitation Act.** The Rehabilitation Act forbids discrimination on the basis of disability both by federally funded programs and federal agencies. The court in *Martin v. Voinovich*<sup>263</sup> refused to dismiss a Rehabilitation Act claim against the Ohio state government for failure to provide community residential placement for individuals with mental retardation and co-occurring mental illnesses or physical disabilities. The court rejected the state's argument that the Rehabilitation Act covered only discrimination between disabled and nondisabled people, not between people with different disabilities.

More recently, the Ninth Circuit in *J.L. v. Social Sec. Admin*<sup>264</sup> considered a challenge by people with mental disabilities to the Social Security Administration's SSI application procedures. The court suggested that the plaintiffs might have a cause of action under either the Rehabilitation Act or the Administrative Procedure Act (APA) or both.<sup>265</sup>

**Americans with Disabilities Act.** Title II of the Americans with Disabilities Act applies to "public entities," meaning state or local governments and certain railroads.<sup>266</sup> Title II contains one simple proscription: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."<sup>267</sup> Congress intended that Title II also incorporate the more specific provisions of Titles I (employment) and III and the Rehabilitation Act as long as they are consistent with Title II.<sup>268</sup> Therefore, public entities must make reasonable modifications in their policies and practices, and must permit qualified individuals with disabilities to participate in their programs as long as they do not present a direct threat to the health or safety of others. Employees of public entities who feel they have been discriminated against because of a disability may choose to proceed under either Title II or Title I (discussed below).<sup>269</sup>

Title II adopts the same enforcement procedures and remedies as the Rehabilitation Act.<sup>270</sup> An aggrieved party may file a complaint with the appropriate federal agency listed in Department of Justice regulations,<sup>271</sup> or with any federal agency that provides funding to the public entity. If the complaint has merit, the federal agency may terminate the public entity's financial assistance or refer the charge to the Attorney General for a lawsuit. Alternatively, a victim of discrimination

may file a private lawsuit him or herself, without exhausting administrative remedies. A court may award injunctive and monetary relief.

Title II went into effect in January 1992, and several cases interpreting that section have been handed down. The key issue in these cases has been the extent to which a state or local agency can choose to provide special services to some individuals with disabilities and to exclude others. At one end of the spectrum is the Massachusetts Supreme Court's decision in *Williams v. Secretary of Executive Office*,<sup>272</sup> discussed above in conjunction with the FHAA. The court in *Williams* found that the refusal of the Massachusetts Department of Mental Health to provide equal housing services to individuals with both mental illnesses and substance abuse problems did not violate Title II. Congress' purpose, the court found, was to eliminate disparities between disabled and nondisabled people, not to mandate identical services to individuals with different disabilities. The court relied heavily on *Traynor v. Turnage*,<sup>273</sup> in which the Supreme Court rejected a Rehabilitation Act challenge to a Veterans Administrative policy granting educational assistance to disabled veterans, unless their disability resulted from "willful misconduct" such as excessive drinking.

The more persuasive view of Title II is that offered by two federal district courts. The court in *Martin v. Voinovich*<sup>274</sup> refused to dismiss a Title II claim against the state of Ohio for failure to provide community residences to individuals with mental retardation and co-occurring mental illnesses or physical disabilities. Nothing in the language of the Rehabilitation Act or the ADA suggests that they cannot apply to discrimination among individuals with different disabilities, the court held. The *Traynor* decision is distinguishable, the court noted, because it concerned discrimination on the basis of conduct, not disability.

The other decision, *Easley v. Snider*,<sup>275</sup> presents an outstanding analysis that warrants extended discussion. The plaintiffs in *Easley* were individuals with physical disabilities who also suffered from mental health problems: one had chronic, undifferentiated schizophrenia and the other had a head injury that impaired her mental alertness. The plaintiffs challenged Pennsylvania's Attendant Care Program, which sponsored visiting home health aides. The Attendant Care Program was open to "[a]ny physically disabled/mentally alert person 18 through 59 years of age" (emphasis added). The state defined "mental alertness" as the "capacity to hire, fire and supervise care providers and to manage one's own financial and legal affairs." The plaintiffs were not "mentally alert" according to this definition, but they still wanted to participate in the Attendant Care Program.

To determine whether the plaintiffs were "qualified" to participate, Judge Brody first analyzed the program's goals: to enable people with physical disabilities to live independently in the least restrictive environment, to remain in their homes and avoid inappropriate institutionalization, and to seek and/or maintain employment. Judge Brody found no evidence that the plaintiffs' mental disabilities precluded them from realizing these benefits. The clients' mental alertness was not essential to service delivery, the court held, since family members could provide the necessary supervision. Because the plaintiffs were "qualified" to participate in the Attendant Care Program, the court held, their exclusion violated Title II of the ADA.

The state cited the Traynor decision in its defense, as well as the following ADA regulation: "Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part."<sup>276</sup> Judge Brody agreed that the state could choose to aid some individuals with disabilities and not others. However, this case raised a different issue:

The plaintiffs are not arguing that since people with physical disabilities receive attendant care services, individuals with mental disabilities must also receive those services. Instead, the plaintiffs here are physically disabled. They simply happen to fall into a subset of physically disabled people who also have mental disabilities. They are not demanding the service on the basis of their mental disability, but their physical disability. The discrimination at its root is between handicapped and nonhandicapped people -- those with mental disabilities and those without mental disabilities -- which is exactly what the defendant agrees is the gravamen [essence] of the Act.<sup>277</sup>

When read in context, the Traynor decision means only that public entities can discriminate on the basis of misconduct, not on the basis of disability, Judge Brody concluded. He enjoined the state from excluding the plaintiffs from the program and required that they be reevaluated for attendant care services.

## ***Discrimination in Employment***

Private and public employers alike have discriminated against employees and applicants for employment who have mental disabilities. This final segment focuses on various forms of employment discrimination and discusses vehicles for challenging such discrimination.

### **Types of Discrimination**

The most common type of employment discrimination claim is that one was fired due to a disability. In one case, a highly competent therapist was discharged from her job with a mental health center because she was seriously depressed and suicidal.<sup>278</sup> Her supervisors worried that she would communicate an acceptance of suicide to her patients. An office furniture salesman in another case was discharged because he was too depressed to return to work after eight weeks of sick leave.<sup>279</sup>

Sometimes an employer refuses to hire an applicant in the first place after learning that he or she has a history of mental illness. A school in Syracuse, New York, denied a teacher's aide position to a man who previously had had a nervous breakdown while serving in the Air Force.<sup>280</sup> Other employers refuse to modify a standard policy in a way that permits an employee with a mental disability to cope with job pressure. A postal service employee with manic-depressive illness requested a transfer from a nighttime to a daytime job because sleep disruptions influenced the effectiveness of her medication.<sup>281</sup> Her request was denied because other employees with more seniority were entitled to the day job under the collective bargaining agreement.

## Legal Remedies

Again, the Rehabilitation Act and the Americans with Disabilities Act may provide appropriate legal remedies for employment discrimination against people with mental illnesses. Also, most states and some municipalities have laws prohibiting employment discrimination on the basis of disability. A discussion of these options follows.

**Rehabilitation Act.** Under the Rehabilitation Act, federal agencies and federally funded employers may not discriminate on the basis of disability against "otherwise qualified" employees and job applicants. As in all Rehabilitation Act cases, a plaintiff is "disabled" if he or she demonstrates that he or she has a physical or mental impairment that substantially limits a major life activity, or a record of such an impairment, or if he or she is so regarded. These definitions leave much room for interpretation. As a result, employees and applicants with mental disabilities have had trouble making successful claims under the Rehabilitation Act.

Courts have agreed that serious mental illnesses such as schizophrenia, manic-depression, depression, and personality disorders qualify as "mental impairments" under the Rehabilitation Act.<sup>282</sup> Even if a mental impairment precludes an employee from performing his or her particular job, some courts have been reluctant to find that his or her impairment "substantially limits a major life activity," if he or she can still perform other types of jobs.<sup>283</sup>

The major hurdle to most Rehabilitation Act claims is the employer's assertion that the employee is not "otherwise qualified" to perform his or her job. The Supreme Court explained in *Southeastern Community College v. Davis*<sup>284</sup> that an individual is "otherwise qualified" if he or she can perform the essential functions of his or her job "despite his [or her] handicap." Although the Supreme Court later clarified that an employer must consider possible accommodations when determining whether an employee is "otherwise qualified,"<sup>285</sup> many lower courts overlooked this development, at least before the ADA was enacted. As with any type of Rehabilitation Act claim, an aggrieved party may file a complaint with the federal funding agency or immediately file a lawsuit in court.

**Americans with Disabilities Act.** Congress enacted Title VII of the Civil Rights Act of 1964 in order to prohibit discrimination on the basis of race, color, sex, national origin, and religion by public and private employers, regardless of funding.<sup>286</sup> Title I of the Americans with Disabilities Act now forbids private and public employers with more than 15 employees from discriminating against qualified individuals with disabilities in hiring, promotion, compensation, benefits, or termination.<sup>287</sup> The Act expressly prohibits employers from asking job applicants whether they have disabilities, and from requiring applicants to submit to medical exams before a job offer. Congress instructed courts to look to the Rehabilitation Act in interpreting the ADA.<sup>288</sup>

However, the ADA does clarify that a disabled individual is "qualified" for a position if he or she can perform the essential functions of the job "with or without reasonable accommodation."<sup>289</sup> Employers must accommodate a disabled employee at his or her request, unless the accommodation would impose an undue hardship.<sup>290</sup> Reasonable accommodations may include job restructuring, modified work schedules, reassignment to a vacant position, and modifications

of policies.<sup>291</sup> An employer may require that its employees not pose a direct threat to the health and safety of others in the workplace.<sup>292</sup>

The enforcement scheme for Title I of the ADA differs from those of the other titles. A victim of discrimination first must file a charge with the Equal Employment Opportunity Commission (EEOC).<sup>293</sup> After investigating the complaint and attempting conciliation, the EEOC must notify the parties within 90 days whether it has found "reasonable cause" to believe discrimination occurred. If it does find reasonable cause, the EEOC may file a lawsuit on the complainant's behalf. Otherwise the complainant may file suit, whether or not the EEOC found reasonable cause. A court may award injunctive relief, back pay, reinstatement, and, in cases of intentional discrimination, limited compensatory and punitive damages.<sup>294</sup> One court has held that when a state employee sues his or her employer for job discrimination, he or she may proceed to file a lawsuit directly under Title II without submitting charges to the EEOC first.<sup>295</sup>

Title I went into effect for employers with more than 25 employees in July 1992. The ADA applies to employers with between 15 and 25 employees as of July 1994. Because of the requirement that complainants first file EEOC charges, few Title I cases have been decided. The best guidance on Title I still comes from cases under the Rehabilitation Act and extensive commentary.<sup>296</sup>

**State or local anti-discrimination laws.** State and municipal laws prohibiting employment discrimination on the basis of disability generally track the language of the Rehabilitation Act and require exhaustion of administrative remedies. One court found that an employee with clinical depression was not qualified for his job under Massachusetts' anti-discrimination statute, since he was totally incapacitated and unable to go to work.<sup>297</sup> Another employee with depression who was fired for threatening and harassing behavior lost on his discrimination claim under Wisconsin law, since his employer did not know he had a mental illness.<sup>298</sup> Although the plaintiffs in these two cases lost, these statutory remedies are useful in more sympathetic cases.

## *Summary*

The Americans with Disabilities Act and the Fair Housing Amendments Act both provide promising avenues for challenging discrimination on the basis of disability in housing, public accommodations, government services, and employment. The Rehabilitation Act can be used to combat discrimination by federally funded organizations, and the Equal Protection guarantees of the federal and state constitutions remain a viable option for challenging at least the more blatant forms of governmental discrimination.

## Conclusion

Every day people who are homeless and have mental illnesses encounter one or more forms of discrimination discussed in this paper. They may have no place to bathe or store their belongings. Shelter beds may be full, and drop-in centers or day treatment programs may be unavailable. Because of their disabilities, they may be excluded from shelters, public accommodations, or governmental services. Programs for which they are eligible may encounter vigorous opposition from neighbors or community leaders. Trying to meet their own needs, they may be arrested and prosecuted for vagrancy, begging, or sleeping in a public place.

Courts have begun to entertain challenges to laws that discriminate, either intentionally or unintentionally, against people who are homeless and have mental illnesses. Some advocates have successfully defended the rights of people who are disabled and disenfranchised to be free from unwarranted intrusion in their lives, and to have equal access to housing, employment, and public accommodations. This paper has provided a brief overview of legal remedies that are available to challenge various forms of discrimination against people who are homeless and have mental illnesses.

The most promising authorities for challenging laws that serve to restrict the activities of homeless people -- including anti-panhandling laws, laws that regulate public sleeping and camping, and property loss resulting from enforcement of such legislation -- are the First Amendment's free speech guarantee, the Fourteenth Amendment's Equal Protection and Due Process clauses, the Eighth Amendment's prohibition of cruel and unusual punishment, and the Fourth Amendment's right to be free from unreasonable searches and seizures.

Challenging these laws is far from easy, even for the most experienced attorney. Some lawsuits have triumphed and now serve as models for other advocates. Other challenges have met with resounding defeat. Whatever the outcome, each lawsuit adds to the knowledge base, both in terms of legal theory and practical strategy. Unfortunately, at this time, few legal remedies are available for combatting purely private discrimination against people who are homeless. Perhaps this is a gap that Congress or state legislatures will one day fill.

Advocates can invoke several remedies to combat private as well as governmental discrimination against people with mental illnesses. The Americans with Disabilities Act and the Fair Housing Amendments Act both provide promising avenues for challenging discrimination on the basis of disability in housing, public accommodations, government services, and employment. Advocates also can use the Rehabilitation Act to combat discrimination by federally funded organizations. The Equal Protection guarantees of the federal and state constitutions remain a viable option for challenging at least the more blatant forms of governmental discrimination.

Again, these remedies are not guaranteed to succeed in all cases. The ADA and the FHAA are complex statutes that leave much room for judicial discretion. Nonetheless, private litigants and the Attorney General have built a solid foundation for success under the ADA and FHAA,

relying on Rehabilitation Act precedent. Some of these cases hold out much hope for people with mental illnesses.

The legal problems of individuals who are homeless and have mental illnesses will not necessarily fit neatly the remedies described in this paper. It is up to advocates and attorneys to select which remedies would be most useful and likely to succeed in a given case. Litigation is costly and time-consuming. Rarely is it an optimal solution for vulnerable individuals who are struggling to survive. However, if advocates are aware of some of the available remedies, they may be able to strengthen their bargaining position or arouse public sympathy.

This paper does not attempt to answer the many complicated legal issues that may arise in a case. No one should interpret the paper as giving legal advice. The organizations listed in the "Resources" section can provide more specific information tailored to the facts of a particular case. This paper has taken the first step by providing advocates with a roadmap of legal remedies for challenging discrimination against people who are homeless and have mental illnesses.

# Endnotes

1. Tobe v. City of Santa Ana, 27 Cal.Rptr.2d 386 (Cal. Ct. App.), review granted, 872 P.2d 559 (Cal. banc May 12, 1994).
2. Id. at 393, citing Robinson v. California, 370 U.S. 660 (1962).
3. Link et al. "Lifetime and Five-Year Prevalence of Homelessness in the United States." American Journal of Public Health 84(12): 1907-1912, 1994. Culhane et al. Public Shelter Admission Rates in Philadelphia and New York City: The Implications of Turnover for Sheltered Population Counts. Washington, DC: Fannie Mae Office of Housing Research, 1993.
4. Federal Task Force on Homelessness and Severe Mental Illness, Outcasts on Main Street (Washington, D.C. 1992), citing M.R. Burt and B.E. Cohen, America's Homeless: Numbers, Characteristics and the Programs that Serve Them (Washington, DC: Urban Institute Press, 1989).
5. Black's Law Dictionary 420 (5th ed. abridged 1979).
6. Tort remedies might include false imprisonment, trespass, and conversion. False imprisonment or arrest means an unlawful restraint of a person's freedom. Trespass refers to an impermissible interference with someone's person, property or rights. Conversion is defined as the wrongful exercise of ownership of property belonging to another person. Black's Law Dictionary 309, 780, 176 (5th ed. abridged 1983).
7. The federal district courts are the trial courts of the federal system. Parties can appeal district court decisions to appropriate federal circuit courts of appeal.
8. See. e.g. American Psychiatric Association, Task Force Report on Involuntary Outpatient Treatment (Washington, D.C., 1988); Paul S. Appelbaum, "Legal Aspects of Clinical Care for Severely Mentally Ill, Homeless Persons," 20 Bull. Am. Acad. Psychiatry Law 455 (1992); James C. Beck, "Right to Refuse Antipsychotic Medication: Psychiatric Assessment and Legal Decision-Making," 11 Mental & Physical Disability L. Rep. 368 (Sep.-Oct. 1987); H. Richard Lamb, "Involuntary Treatment for the Homeless Mentally Ill," 4 Notre Dame J.L. Ethics & Pub. Pol'y 269 (1989).
9. See. e.g. Curtis Berger, "Beyond Homelessness: An Entitlement to Housing," 45 U. Miami L. Rev. 315 (1990); John H. Whitfield, "A Guide to Finding a Right to Shelter for the Homeless," 9 Miss. C. L. Rev. 295 (1989); Comment, "The Judiciary and the Ad Hoc Development of a Legal Right to Shelter," 12 Harv. J.L. & Pub. Pol'y 193 (1989); Note, "Homelessness in America: Looking for the Right to Shelter," 19 Column. J.L. & Social Probs 305 (1985).

10. See, e.g. Paul S. Appelbaum, "Resurrecting the Right to Treatment," 38 Hosp. & Comm. Psychiatry 703 (1987); Spece, "Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories," 20 Ariz. L. Rev. (1978).
11. See, e.g. Federal Task Force, supra, note 4, at 56-72; National Institute of Mental Health, 5-6 (Rockville, Maryland, 1991).
12. Congress defines a homeless individual as: (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and (2) an individual who has a primary nighttime 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. 42 U.S.C. §11302(a).
13. 2 R. Coates, "Legal Rights of Homeless Americans," 24 U.S.F. L. Rev. 297,330-331 (1990). See E. Fuller Torrey, Nowhere to Go: The Tragic Odyssey of the Homeless Mentally 111 8 (1988) (noting that one-third of people living on the streets demonstrate signs of serious mental illness).
14. Smolowe, "Giving the Cold Shoulder," Time, Dec. 6, 1993, at 29 (quoting Robert Hayes, founder of the Coalition for the Homeless) .
15. See C. Knapp, "Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?" 76 Iowa L. Rev. 405 (1991) ("The public response to homelessness in the 1980's was considerable, as cities and states opened emergency shelters and governmental and private entities provided generous economic assistance. ").
16. Smolowe, supra, note 14 at 28.
17. Id. at 30, quoting columnist Pete Hamill. Hamill proposes that the government quarantine male street people on military bases and force them to accept medical treatment. Those who resist "would be charged with crimes of violence and turned over to the criminal justice system."
18. D. Snow and L. Anderson, Down on their Luck: A Study of Homeless Street People 9, 318 nn. 12-13 (1993). See also H. Hershkoff and A. Cohen, "Begging to Differ: The First Amendment and the Right to Beg," 104 Harv. L. Rev. 896, 898 n. 12 (1991) (former President Reagan stated that homeless persons are homeless by choice, while former Attorney General Edwin Meese opined that people go to soup kitchens because the food is free and it's easier than paying for it).
19. Ifill, "Sympathy Wanes for the Homeless; Funding Drop, Arrests Herald New Attitude," Washington Post, May 21, 1990, at A1.

20. D. Snow and L. Anderson, *supra* note 18.
21. New York Times, December 12, 1993 ("The new view [regarding homelessness] holds that most of the homeless are not working people down on their luck and in need of a meal but rather drug abusers or alcoholics or mentally ill.").
22. "Public Intent on Taking Back Streets," St. Louis Post Dispatch, December 28, 1993.
23. "These Guys Do Windows," Newsweek, January 17, 1994, at 48. Giuliani's campaign included proposals to expel homeless persons from shelters after 90 days and to rescind New York City's state-imposed decree to provide emergency shelter to anyone who asks for it. Smolowe, *supra* note 14 at 29. Although protestors at Giuliani's inauguration questioned the Mayor's priorities, his new police commissioner rationalized that "by attacking low-level disorder --begging, urinating, drinking, graffitiing --serious felonies will be deterred. " "These Guys Do Windows, " at 48.
24. Business Week/Harris Poll, Business Week, Nov. 1, 1993, p. 35, cited in National Law Center on Homelessness and Poverty , The Right to Remain Nowhere: A Report on Anti-Homeless Laws and Litigation in 16 United States Cities 2 (Washington, D.C. 1993).
25. The Right to Remain Nowhere, *supra* note 24, at 14; National Law Center on Homelessness and Poverty, Go Directly to Jail: A Report Analyzing Local Anti-Homeless Ordinances 19 (Washington, D.C. 1991).
26. See generally Annotation, "Laws Regulating Begging, Panhandling, or Similar Activity By Poor or Homeless Persons," 7 A.L.R. 5th 455 (1993). See also Knapp, *supra* note 15, at 408 (some states --such as Indiana, Iowa and Maine --have repealed their anti-begging statutes).
27. See Ala. Code 13A-II-9(a)(I)(1975); Ariz. Rev. Stat. Ann. 13-2905(A)(3) (Supp. 1990); Colo. Rev. Stat. 18-9-112(2)(a) (1986); Del. Code Ann. tit. 11-1321(4)(1990); N. Y. Penal Law 240.35(1)(Consol. 1989).
28. See La. Rev. Stat. Ann. 14: 107(3)(West 1986); Miss. Code Ann. 97-35-37 (1972).
29. Kan. Stat. Ann. 21-4108 (1988)(prohibiting vagrancy, which includes" [ d]eriving support in whole or in part from begging"); Mass. Gen. L. 272-63-64 (1988)(prohibiting beggars from soliciting alms in towns in which they have no residence); Mich. Comp. Laws 750.167.1(h)(1990)(begging in a public place constitutes disorderly conduct); Minn. Stat. 609.725(4)(Supp. 1990)("person who derives support in while or in part from begging" is guilty of vagrancy); Vt. Stat. Ann. tit. 13, 3901 (1989)(person who begs "without visible means of" other support is guilty of vagrancy); Wisc. Stat. Ann: 947.02(4)(West 1988)(person who gains partial support from begging is guilty of a misdemeanor).

30. Ark. Stat. Ann. 14-54-1408(1987); III Rev. Stat. ch. 24, para. 11-5-4 (1989); Mont. Code Ann. 7-32-4304 (1989); Neb. Rev. Stat. 15-257 (1987); N.H. Rev. Stat. Ann. 47:17 (XIII)(Supp. 1990); N .J .Stat. Ann. 40:48-1(7)(West Supp. 1989); N .C. Gen. Stat. 160A-179(1982); N.D. Cent. Code 40-05-01(43)(Supp. 1989); Ohio Rev. Code Ann. 715.55B(Anderson Supp. 1989); Utah Code Ann. 10-8-51(Supp. 1990); Wash. Rev. Code 35.22.280(34)(1987); Wyo. Stat. 15-1-103(a)(xvii)(Supp. 1990); W .Va.Code 8-21-10 (1990).
31. See generally The Right to Remain Nowhere, supra note 24, at 27-126. This report looks specifically at anti-homeless legislation in Atlanta, Oakland, San Francisco, Southern California, Chicago, Cincinnati, Dallas, Jacksonville, Key West, Miami, Orlando, Las Vegas, Reno, New York City, Seattle, and Washington, D.C.
32. G. Glenn, "All Things Considered," National Public Radio, Transcript # 1301-7, November 14, 1993. Newly enacted ordinances also make it illegal in Atlanta to enter a parking lot if you do not have a car parked there, to sleep in vacant buildings, and to wash car windows on public streets. Id.
33. Knapp, supra note 15, at 408.
34. Id. (citing ordinances in Minneapolis and Tulsa).
35. J. Hart, " Street Begging Focus of Lawsuit; ACLU Challenges Cambridge Arrests, " The Boston Globe, July 26, 1993.
36. H. Durkee, "Bill Aimed at Agressive (sic) Begging Turns Up Heat on City Panhandlers," Warfield ' s Business Record, October 8, 1993, at p. 3.
37. T. Wills, "Berkeley Set to Debate Curbs on Begging: Has City Found Limit to Tolerance?" The San Francis C.Examiner, February 15, 1994, at A-6. The plan also prohibits activities such as camping in parks and sitting or lying on sidewalks. Apparently, the proposals "set off a raging municipal debate" which prompted local officials to schedule a public debate.
38. Knapp, supra note 15 at 407-408 (noting that the criminalization of begging is rooted in sixteenth century England and was adopted into the codes of most American states).
39. The First Amendment provides in part that " Congress shall make no law. ...abridging the freedom of speech. " U .S. Const. amend. I. Although the First Amendment refers specifically to the federal government, this guarantee was made applicable to state governments when it was incorporated into the Due Process Clause of the Fourteenth Amendment See Gitlow v. New York, 268 U.S. 652,666 (1925).
40. 127 Cal. Rptr. 445 (Cal. Ct. App. 1976).

41. 729 F.Supp. 341 (S.D.N. Y. 1990), rev'd, 903 F.2d 146 (2d Cir.), cert. denied, 498 US 984 (1990).
42. Most federal court of appeals decisions are rendered by three-judge panels. Sometimes controversial or divisive cases are heard "en banc" by all judges on a particular circuit's court of appeals.
43. 903 F.2d at 146.
44. See Village of Schaumbur v. Citizens for a Better Environment, 444 U.S. 620 (1980).
45. 903 F.2d at 156.
46. 458 So.2d 47 (Fla. Dist. Ct. App. 1984).
47. 802 P.2d 1333 (Wash. banc 1990), cert. denied, 500 U.S. 908 (1991). In this case, the Washington Supreme Court considered the constitutionality of an ordinance which made it unlawful to intentionally obstruct pedestrian or vehicular traffic or to intentionally and aggressively beg. The majority did not discuss the anti-begging provision of the ordinance.
48. *Id.* at 1343 (citations omitted).
49. In Blair v. Shanahan, 775 F.Supp. 1315 (N.D.Cal. 1991), app. dismissed and rem. on other grounds, 38 F.3d 1514 (9th Cir., 1994), cert. denied, 63 U.S.L.W. 3660 (1995), the United States District Court for the Northern District of California struck down as unconstitutional a state statute making it illegal to "accost[] other people in any public place... for the purpose of begging or soliciting alms." The court held that the statute violated the First Amendment because begging involves the same speech interests as the charitable solicitation cases. As begging gives the speaker a chance to convey information and ideas about the plight of poor people in this society, it promotes the same speech values that entitle charitable solicitations to protection. Although a professional fundraiser may present a clearer message to his listener than a beggar does, "First Amendment protection should not be limited to the articulate."
50. 999 F.2d 699 (2nd Cir. 1993).
51. Advocates considering this type of challenge should see H. Herschkoff and A. Cohen, *supra* note 18. See also "Aggressive Panhandling Laws: Do These Statutes Violate the Constitution?" ABA Journal (June 1993).
52. In Blair, for example, the court strictly scrutinized the statute at issue because it sought to restrict speech in "any public place." The court required the government to show that the anti-begging law was necessary to serve a compelling governmental interest and that it was narrowly drawn to achieve that end. Like Justice Utter, this court did not find the state's asserted interest in protecting the public from the annoyance of

begging to be compelling . Although the state's interest in protecting the public from threatening conduct could be compelling, the statute was neither necessary nor narrowly drawn to achieve that state interest. Because the statute did more than prohibit threatening or intimidating conduct, it impermissibly restricted a great amount of speech without justification.

53. U.S. Const. amend. XIV. The Equal Protection Clause does not apply to the federal government. The Supreme Court has held, however, that unreasonable discrimination by the federal government violates the Due Process Clause of the Fifth Amendment. See Bolling vs. Sharpe, 347 U.S. 497 (1954).
54. See e.g. Richmond v. Ceonson Co., 488 U .S. 469 (1989).
55. See e.g. Michael M. v. Sonoma County Superior Court, 450 U.S. 464 (1981).
56. See. e.g.. New Orleans v. Dukes, 427 U .S. 297 (1976).
57. Although no court has yet found the homeless to be a suspect class, Justice Utter, in his dissent in Webster, suggests that such an argument may be viable in the future. Webster, 802 P .2d at 1345.
58. See J. Hart, "Street Begging Focus of Lawsuit; ACLU Challenges Cambridge Arrests," The Boston Globe, July 26,1993, p. 13 (allegations that Cambridge police enforce anti-begging ordinance in a discriminatory manner). See also Go Directly to Jail, supra note 25 at 20-21 (facially neutral ordinances, such as those prohibiting littering and drinking in public, are being enforced against homeless persons in a discriminatory manner).
59. Yick Wo v. Hopkins. 118 U.S. 356 (1886).
60. Washington v. Davis, 426 U .S. 229 (1976).
61. 802 P.2d 1333 (Wash.banc 1990), cert. denied 500 U.S. 908 (1991), discussed supra at note 47 and accompanying text.
62. Id. at 1340. The court further questioned whether the respondent himself was, in fact, homeless: "On the limited record before us there is no indication that Mr. Webster is indigent or homeless. His address in the police report merely indicates 'transient.' We cannot conclude from the limited information presented that homelessness is relevant to this case."
63. If a law is written in such a vague way that people cannot tell what conduct the law prohibits, courts might find that the law violates the constitutional guarantee of due process and is, therefore, "void for vagueness."
64. U.S. Const. amend. XIV, §1.

65. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). See also D Baker, “ ‘Anti-Homeless’ Legislation: Unconstitutional Efforts to Punish the Homeless,” 45 Miami L. Rev. 417,427-30 (1990-91).
66. See Papachristou, 405 U.S. at 160-162 (vagrancy ordinance struck down as unconstitutionally vague because failed to give fair notice of conduct prohibited and indefiniteness encouraged arbitrary arrests); Kolender v. Lawson, 461 U.S. 352 (1983)(loitering statute struck down as unconstitutionally vague because statute unclear as to conduct prohibited and did not provide sufficient guidelines to prevent arbitrary enforcement by police). See also H. Simon, “Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities,” 66 Tulane L. Rev., 631: 645 (1992) (under Papachristou and Kolender, “loitering and vagrancy laws ceased to be effective tools to punish and control the displaced poor.”). For a collection of cases addressing the constitutionality of anti-loitering laws, see Annotation, "Validity of Loitering Statutes and Ordinances," 25 A.L.R.3d 836 (1993).
67. See State ex rel. Williams v. City Court of Tuscsm, 520 P.2d 1166 (Ariz. App. 1974); Ulmer v. Muncipal Court-, 127 Cal. Rptr. 445 (Cal. Ct. App. 1976); City of Seattle v. Webster, 802 P.2d 1333 (Wash.banc 1990), cert. denied, 500 U.S. 908 (1991).
68. Interagency Council on the Homeless, Reaching Out: A Guide for Service Providers (Washington, DC: Interagency Council on the Homeless, 1991).
69. R. Gordon, “Homeless Sue to Block Jordan Matrix Plan,” The San Francis C.Examiner, February 24, 1994, at p. A-4.
70. P. Matier and A. Ross, "California Homeless Get a New Jolt, " The Times-Picayune, October 24, 1993, at p. A-15. Although police are instructed to begin by trying to talk the homeless out of their shopping carts in exchange for donated duffel bags or garbage bags, police admit that they will seize the carts if the barter method does not work. Some officers acknowledge that shopping carts are like homes to many homeless people and they have expressed concern about the reaction that the seizures will provoke. Officers are especially concerned about trying to take carts away from homeless people who have mental illnesses. Id.
71. R. Gordon, "Homeless," supra note 69. Approximately 800 of the arrests have been for camping in parks or sleeping in illegal areas. B. Egelko, “Ruling Could Stop Sweep of Homeless,” The San Francis C.Examiner, February 5, 1994, at p. A-1.
72. R. Gordon, “Mayor Defends Matrix, Won't Apologize for It,” The San Francis C.Examiner, November 24, 1993, at p. A-4.
73. R. Gordon, "Mayor," supra note 72.
74. Id.

75. Lynch, "Mayor's Homeless Plan Seems to Need a Hand," San Francis C. Chronicle, October 6, 1993.
76. R. Gordon, "Mayor," supra note 72.
77. Joyce v. San Francisco, 846 F.Supp. 843 (N.D.Cal. 1994).
78. People phoning Jordan's office have expressed approval of Matrix at a ratio of 20-1. P. Matier and A. Ross, "California Homeless Get a New Jolt," The Times Picayune, October 24, 1993, at p. A-15.
79. See generally The Right to Remain Nowhere, supra note 24, discussing anti-homeless legislation in 16 U.S. cities; H. Simon, supra note 66, at 632-35 (citing ordinances in Atlanta, Santa Cruz, Santa Barbara, and Philadelphia); P. Ades, "The Unconstitutionality of Antihomeless' Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel," 77 Cali. L. Rev. 595,596-7 (1989) (citing ordinances in Phoenix, Dallas, and St. Petersburg); D. Baker, supra note 65, at 418-19 (citing ordinances in Miami, San Diego, Phoenix, Santa Barbara and New York); Go Directly to Jail, supra note \_\_\_ at 14-16 (referring to ordinances Miami, San Francisco, Washington, D. C., and Santa Monica). See also J. Big, "Dallas Officers Resume Ticketing Homeless People," The Dallas Morning News, August 30, 1993, at p. 15A (Dallas police ticketing people for sleeping in public); R. Davila, "No-Camping Ordinance Fought by Sacramento Homeless," July 30, 1993, at p. B4 (Sacramento anti-camping ordinance also used to arrest people who are sleeping in public); N. Hill-Holtzman, "Groups File Suit Against Camping Law," Los Angeles Times, November 12, 1992, at p. J-1 (encampment ordinance in Santa Monica prohibits living in city's parks).
80. For example, in People v. Mannon, 265 Cal. Rptr. 616 (Cal. App. Dep't Super. Ct. 1989) , the plaintiffs challenged a section of the Santa Barbara Municipal Code making it unlawful to camp in public areas not designated for camping. The ordinance defined camping to include the "use of camping facilities, such as tents, tarpaulins or temporary shelters..." Although the plaintiffs did not specifically argue that the statute was unconstitutionally vague, they did contend that under the language of the statute they could not be convicted of camping unless they used either a tent, tarpaulin, or temporary shelter. The court rejected this argument, noting that there was nothing ambiguous about the word "camp." Because the court found that "a reasonable person would understand 'camp' to mean to temporarily live or occupy an area in the outdoors," the plaintiffs' convictions for violating the ordinance were upheld.

In Whiting v. Town of Westerly, , 942 F.2d 18 (1st Cir. 1991), the plaintiffs specifically argued that two Westerly , Rhode Island, anti-sleeping ordinances were unconstitutionally vague. One ordinance prohibited sleeping in a motor vehicle on public property or private property of another, and the other prohibited sleeping outdoors in public or sleeping on the private property of another. Because the plaintiffs had been found sleeping in the back of a vehicle in a

parking lot at the beach, the First Circuit determined that they had engaged in conduct clearly prohibited by the statute and therefore could not complain that the statute was vague on its face. The court also found that the ordinance was not overly vague. Because "sleep" was defined to mean "lodge," the ordinance clearly did not seek to penalize "mere nappers" and therefore was not susceptible to arbitrary enforcement.

See, e.g. Seeley v. State, 655 P.2d 803 (Ariz. Ct. App. 1982)(ordinance prohibiting lying or sitting on public land not vague); People v. Davenport., 222 Cal. Rptr. 736 (Cal. App. Dep't Super. Ct. 1985)(ordinances prohibiting sleeping in public and camping on public land not vague), cert. denied, 475 U.S. 1141 (1986). See also Simon, supra note 66 at 648 (most courts have rejected vagueness challenges to anti-sleeping and anti-camping ordinances and have applied "general rule that laws which communicate their reach in words of common understanding ordinarily withstand vagueness challenges").

81. Tobe v. City of Santa-Ana, 27 Cal.Rptr .2d 386 (Cal. Ct. App.), review granted, 872 P .2d 559 (Cal. banc May 12, 1994).
82. Id. at 394. As an additional example of vagueness leading to arbitrary enforcement, the court noted that police had decided that lying on top of a blanket did not constitute camping, but crawling underneath a blanket did. For another example of an unconstitutionally vague anti-sleeping ordinance, y Hershey v. City of Clearwater, 834 F.2d 937 (11th Cir. 1987), cited in The Right to Remain Nowhere, supra note 24 at B-7.
83. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).
84. Baker, supra note 65 at 431, citing Fenster v. Leary, 20 N.Y.2d 309, 299 N.E.2d 426, 282 N.Y.S.2d 739 (1967).
85. City of Houston v .Whiting, 482 U.S. 451, 458 (1987).
86. See e.g. Whiting, 942 F.2d at 18; Seeley, 655 P.2d at 806-07. See also Simon supra note 66 at 649 ("most courts [have] reject[ed] over breadth challenges to laws that prohibit sleeping in public and camping on public land").
87. Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla. 1992). For a more extensive discussion of Pottinger, see infra notes 104 and 105 and accompanying text.
88. See e.g. Hershey v. City of Clearwater, 834 F.2d 937, 940 n. 5 (11th Cir. 1987) (anti-sleeping ordinance would survive over breadth challenge because sleeping "enjoys no peculiar constitutional advantage " ).
89. Pottinger, 810 F.Supp. at 1577.

90. 27 Cal.Rptr .2d 386 (Cal. Ct. App.), review granted, 872 P .2d 559 (Cal. banc May 12, 1994).
91. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.
92. Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla. 1992); Tobe v. City of Santa Ana, 27 Cal.Rptr .2d 386 (Cal. Ct. App.), review granted, 872 P .2d 559 (Cal. banc May 12, 1994). See generally Simon, supra note 66 at 660-664; Baker, supra note 65 at 435-438.
93. Robinson v. California, 370 U.S. 660,666 (1962).
94. In a subsequent case, the Supreme Court reiterated the distinction between status and conduct when it found that while alcoholism may be an involuntary status, punishing a person for the conduct of being drunk in public does not violate the Eighth Amendment. Powell v. Texas, 392 U .S. 514 (1968).
95. 810 F.Supp. at 1559.
96. 27 Cal.Rptr .2d 386 (Cal. Ct. App.), review granted, 872 P .2d 559 (Cal. banc May 12, 1994).
97. Joyce v. San Francisco, 846 F.Supp. 843 (N.D.Cal. 1994).
98. Joyce 846 F.Supp. at 857-58.
99. United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938).
100. Shapiro v. Thompson, 394 U .S. 618, 638 (1969).
101. Dunn v. Blumstein, 405 U .S. 330, 352 (1972).
102. Ades, supra note 79 at 606.
103. Id. at 610-613.
104. Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D.Fla. 1992). See also Simon, supra note 66 and Ades, supra note 79 (arguing that anti-sleeping ordinances burden homeless individuals' fundamental right to travel).
105. After determining that the Miami ordinances burdened the right to travel, the court strictly scrutinized the ordinances and concluded that they were not narrowly tailored to serve a compelling state interest. The city claimed the ordinances were necessary to

maintain aesthetically pleasing parks and public areas so as to promote tourism and business interests. The court found these interests to be legitimate but not compelling. Although the court did agree that the city had a compelling interest in preventing crime, the ordinances at issue did not accomplish that goal in the least intrusive manner. Rather than arresting homeless people, the city could have increased police patrols in the park, allowed homeless people to sleep in only a limited area of the park, and issued warnings to everyone about high crime areas. Pottinger, 810 F.Supp. 1551.

106. Greg Vamos (Note), "Kreimer v. Bureau of Police: Are the Homeless Ready for a Suspect Classification?" 14 Whit tier L. Rev. 731 (1993).
107. See. e.g., Pottinger, 810 F.Supp. at 1578 ("This court is not entirely convinced that homelessness as a class has none of these 'traditional indicia of suspectness' ...[h]owever, resolution of this issue is beyond the scope of evidence presented at trial. ..").
108. See. e.g. Washington v. Davis, 426 U.S. 229 (1976)(data showing racial minorities consistently scored lower on police department admission test insufficient to establish equal protection violation because lack of evidence showing test employed for purpose of discriminating against racial minorities)
109. See e.g., Kreimer v. Bureau of Policy, 958 F.2d 1242,1269 n. 36 (3rd Cir. 1992).
110. Simon, *supra* note 66 at 664-669, citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)(striking down city's denial of permit to group home for mentally retarded persons because decision based solely on negative attitudes and fears about this group); United States Department of Agriculture v. Moreno, 413 U.S. 528 (1973)(striking down federal law excluding unrelated cohabitating individuals from participating in food stamp program because of Congressional intent to deny food stamps to "hippies" and "hippie communes"). See infra notes 174-175 and accompanying text for a detailed discussion of the Cleburne decision.
111. T. Woody, "Homeless Challenging Property Seizures," The Recorder, October 22, 1992, p. 3.
112. L. Carlozo and J. Kass, "On Homeless Move, Daley Plays Both Sides of the Street," The Chicago Tribune, January 6, 1994. One man complained, "They threw away brand new items I hadn't even put on my back. ..\$50 quilts that people bought out of their pockets." *Id.* Chicago city officials justified the police action as an effort to rescue the men from unhealthy living conditions .
113. See generally The Right to Remain Nowhere, *supra* note 24.
114. The Fourth Amendment provides in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. " U .S.Const. amend. IV.

115. E. Schultz, "The Fourth Amendment Rights of the Homeless," 60 Fordham L. Rev. 1003, 1021 (1992)(Fourth Amendment's protection of the home is intended to protect privacy interests rather than property rights).
116. See. e.g. Silverman v. United States, 365 U.S. 505,511 (1961)("At the very core [of the Fourth Amendment] stands that right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").
117. Several commentators have argued that convincing courts to recognize that homeless people have Fourth Amendment rights in makeshift homes is a dubious victory because it suggest that we as a society have come to accept homelessness as a way of life. See. e.g. K. Ouinn, "Connecticut v. Mooney and Expectation of Privacy: The Double-Edged Sword of Advocacy for the Homeless," 13 Boston Coll. Third World L. J. 87,110-111 (1993).
118. See. e.g. Katz v. United States, 389 U.S. 347,361 (1967).
119. See. e.g. Pottinger v. City of Miami, 810 F.Supp. 1551,1572 (S.D. Fla. 1992).
120. Connecticut v. Mooney, 588 A.2d 145 (Conn.), cert. denied, 502 U.S. 919 (1991).
121. Many commentators have criticized Mooney for limiting its holding to privacy rights in closed containers and for failing to find that Mooney had a reasonable and protectible interest of privacy in the entire bridge abutment area that he called home. J. Early, "The Legal Plight of the American Bedouin: A Narrowly Interpreted Fourth Amendment Fails to Protect the Privacy of the Homeless," 39 Wayne L. Rev. 155 (1992)(Fourth Amendment should be interpreted as providing homeless individuals with a basic right to privacy that protects them from unreasonable police searches of their belongings and makeshift homes); T. Eisenberg, "Connecticut v. Mooney: Can a Homeless Person Find Privacy Under a Bridge?" 13 Pace L. Rev. 229 (1993)(Mooney created a protectible zone of privacy in the area under the bridge by treating the area as his home and the court's failure to recognize Fourth Amendment rights in the makeshift home disregarded undue difficulties homeless individuals face in trying to secure privacy).
122. Mooney, 588 A.2d at 161.
123. In Community for Creative Non-Violence v. Unknown Agents, 797 F.Supp. 7 (D.D.C. 1992, 10 federal marshals entered a homeless shelter at 5:30 a.m. after receiving a tip that a fugitive was staying in the shelter. After rousing, detaining, and demanding identification from more than 200 people asleep in the shelter at that time, the marshals were unable to locate the fugitive. They did, however, arrest five other shelter residents who were identified as fugitives. In the subsequent class action lawsuit, the court found that although the marshals had the right to enter the shelter and execute the arrest warrant, their actions in detaining and demanding identification from all of the shelter residents unreasonably infringed on the Fourth Amendment

rights of innocent third parties. The court specifically stated that the homeless residents had an expectation of privacy in the shelter “because the shelter was for them the most private place they could possibly have gone --the place most akin to home’ ” and that the expectation was reasonable because “[t]o reject this notion would be to read millions of homeless citizens out of the text of the Fourth Amendment.’ ”

124. Pottinger v. City of Miami, 810 F.Supp. 1551 (S.D. Fla. 1992).
125. The City of Miami argued that it might find contraband in the belongings of homeless I people, that it was too burdensome to inventory and store the property, and that it had an interest in keeping its public areas clear of unsightly items.
126. Joyce v. City and County of San Francisco, 846 F.Supp. 843 (N .D.Cal. 1994).
127. The Ninth Circuit in Stone v. Agnos, 960 F.2d 893 (9th Cir. 1992), did not even address a homeless man's Fourth Amendment challenge to the destruction of his property following his arrest for public sleeping. Instead, the court ruled that the plaintiff had not proven any Fourth Amendment or due process violation and had not shown that the mayor or police chief ordered the destruction of his property.
128. U .S. Const. amend V.
129. See. e.g. Hawaii Housing Auth. v. Midkiff, 467 U.S. 229,240 (1984). 130. 810 F.Supp. 1551. 1570 n. 30 (S.D.Fla. 1992).
130. See Simon, supra note 66, at 672, discussing the viability of a Fifth Amendment
131. argument.
132. Id., citing First English Evangelical Church v. County of Los Angeles, 482 U .S. 304 (1987).
133. Id., citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172,194 (1985).
134. Simon, supra note 66, at 674-75.
135. See Society for Good Will to Retarded Children v. Cuomo, 572 F.Supp. 1300 (E.D. NY 1983) (describing three community residences destroyed by arson on Long Island), vac. on other grounds, 737 F.2d 1239 (2d Cir. 1984).
136. See U.S. v. Southern Management Corp., 955 F.2d 914 (4th Cir. 1992) (management company refused to rent apartments to recovering alcoholics and drug addicts).
137. See Roe v. Sugar River Mills Associates, 820 F .Supp. 636 (D. N .H. 1993) (landlord threatened to evict tenant with mental illness who verbally harassed another tenant).

138. See Michigan Protection and Advocacy Service, Inc. v. Babin, 799 F.Supp. 695 (E.D. Mich. 1992), y, 18 F.3d 337 (6th Cir. 1994) (discussed infra).
139. See U.S. v. Scott, 788 F.Supp. 1555 (D. Kan. 1992); Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991).
140. Babin, 799 F.Supp. 695; People v. 11 Comwell Co., 695 F.2d 34,37 (2d Cir. 1982), vac. in part on other grounds, 718 F.2d 22 (1983).
141. Patrick T. Bergin, "Exclusionary Zoning Laws: Irrationally-Based Barriers to Normalization of Mentally Retarded Citizens," 3 J. Land Use & Envtl. L. 237, 250 (1987) .
142. Ann Kennedy Grossman, "Community Integration of Persons with Mental Illness: A Legislative Proposal to Combat the Exclusionary Zoning of Community Residential Programs," 8 Law and Inequality 215, 217 (1989); Lester D. Steinman, "The Effect of Land- Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study," 19 The Urban Lawyer 1,2 (1987).
143. Peter Salsich, "Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome," 21 Real Prop. Prob. & Tr. J. 413,417 (1986).
144. See Grossman, supra note 142, at 222-224; Bergin, supra note 141, at 242-44; Robert L. Schonfeld, " 'Five-Hundred- Year Flood Plains' and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded," XVI Fordham Urban L. L 1, 8 (1988).
145. See e.g. Lawrence Teplin, "The Criminality of the Mentally Ill: A Dangerous Misconception," 142 Am. J. Psych. 593 (1985); Sherry Wickware & Tom Goodale, "Promoting and Resisting Group Homes: The Property Value Issue," 4 Leisurability 24 (1980). See also unpublished studies cited in Schonfeld, supra note 144, at 9-10 & nn.34-36; Grossman, supra note 142, at 222-24 & nn.37-50.
146. 146. .See. Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179 (E.D. N.Y. 1993).
147. See Potomac Group Home v. Montgomery County, MD, 823 F.Supp. 1285 (D. Md. 1993) (city licensing law required group home operators to notify neighbors of proposed group home sites and submit to public hearings); Lauren P. Curry, Eliminating Zoning Barriers to Community Residences and Group Homes: A Practice guide (undated, unpublished paper by Cambridge & Somerville Legal Services, Inc. in Massachusetts, describing Cambridge ordinance that required group homes to reapply for a special use permit every two years, after proving that its operation had been "quiet and orderly" and had not "resulted in excessive complaints to the Police Department").

148. Curry, supra note 147, at 4-5 (Cambridge ordinance prohibited the establishment of more than one community residence per every 5,000 persons in the same neighborhood, and permitted zoning board to deny a special use permit to any community residence that was 300 feet or less from an existing residence).
149. See Marbrunak v. City of Stow, 974 F.2d 43 (6th Cir. 1992) (mandating elaborate safety precautions in all group homes persons with developmental disabilities) .See also Beth Pepper, "Highlights in Fair Housing Law: Strengthening the Rights of People with Disabilities to Live in the Community of Their Choice," 26 Clearinghouse Rey 1458, 1464 (March 1993).
150. Bergin, supra note 141, at 247-48. See also Thomas F. Guernsey, "The Mentally Retarded and Private Restrictive Covenants," 25 Wm. & Mary L. Rev 421 (1984); Karen S. DesRoches (Comment), "Group Home for Mentally Retarded Constitutes Family Within the Meaning of a Restrictive Covenant-Gregory v. Department of Mental Health Retardation & Hospitals., 495 A.2d 997 (R.I. 1985)," XX Suffolk U. L. Rey' 273 (1986).
151. Pamac Realty v. Bush, 420 N. Y.S.2d 614,615 (N. Y. Civ. Cit. 1979), citing City Rent Stabilization Code, § 53(b), McK. Unconsol. Laws Appendix.
152. ID. at 616. See also James y: New. York City Housing Authority, 589 N. Y.S.2d 331, 333 (N. Y. App. Div. 1992) (vacating eviction of tenant with schizophrenia and alcoholism who set fire in her apartment several years earlier but had consistently complied with treatment since then).
153. See. e.g. East 90th Street Co. v. Niemela, 453 N.Y.S.2d 567 (N.Y. Civ. Ct. 1982) (refusing to dismiss eviction petition, since tenant with mental illness set two fires in three years, thereby demonstrating a course of threatening conduct).
154. See generally, Bonnie Milstein, Self-help Evictions by Service Providers (August 11, 1993) (unpublished draft memorandum, Judge David L. Bazelon Center for Mental Health Law, Washington, D.C.).
155. See. e.g. Misco Industrys v. Board of County Commissioners, 685 P.2d 866,872 (Kan. 1984) (examining language of lease and circumstances of its execution to determine whether landlord-tenant relationship exists).
156. See cases cited in Milstein, supra note 154, at 5-7.
157. Compare Baldassare v. Erich Lindemann Center, Boston Housing Court No.12466 (Daher, C.J. 1981); Abmad v. Wellmet Project. Inc., Appeals Court No. 87-0090-CV (Kass, J. 1987) (clients of licensed mental health facilities not tenants) .with Serreze v. YWCA of Western Massachusetts, 572 N .E.2d 581 (Mass. App. Ct. 1991); Carr v. Friends of the Homeless. Inc., Hampden Housing Court No. 89-LE-3492-S

- (Abrashkin, J. 1990); Yonaitis v. Donham, Boston Housing No.16411 (Daher, C.J. 1984) (independent residents of assisted housing programs entitled to tenant status).
158. See, e.g. Hessling v. City of Broomfield, 563 P.2d 12 (Colo. 1 ); Berger v. State, 364 A.2d 993 (N.J. 1976); City of White Plains v. Ferraioli, 313 N.E.2d 756 (N.Y. 1974).
159. See, e.g. Costley v. Caromin House. Inc., 313 N.W.2d 221 (Minn. 1981); City of West Monroe v. Ouachita Association for Retarded Children, 402 So.2d 259 (La. Ct. App. 1981).
160. Compare Vienna Bend Subdivision Homeowners Ass'n v. Manning, 459 So.2d 1345 (La. Ct. App. 1984) (group home qualified as "family" under restrictive covenant). With Jayno Heights Landowners Ass'n v. Preston, 271 N.W.2d 268 (Mich. 1978) (group home was commercial facility, not family, for purposes of restrictive covenant).
161. Mass. Gen. L. ch. 40A, § 3, cited in Jonathan M. Bockian, "Shelters for the Homeless and Zoning Use Restrictions," Mass. L. Rev., Summer 1989, at 75, 77. The educational exemption covers residential programs which provide training in daily living skills to people with mental disabilities, and the religious exemption applies to a rehabilitation facility for individuals with mental illnesses. Fitchburg Housing Authority v. Board of Appeals of Fitchburg, 406 N.E.2d 1006 (Mass. 1980); Kendall v. Director of the Division of Employment Security, 473 N.E.2d 196 (Mass. 1985).
162. See statutes cited in Schonfeld, supra note 144, at 10-15 & nn.37-57; Steinman, supra note 142, at 18-20 & nn.87-134.
163. See statutes cited in Steinman, supra note 142, at 19 & nn.89-100.
164. See Steinman, supra note 142, at 20 & nn.115-121, 127-134.
165. See Steinman, supra note 142, at 21 & nn.141-42; Schonfeld, supra note 144, at 12-13 & nn.45-48.
166. This strategy worked for Cambridge & Somerville Legal Services, which persuaded the Massachusetts Attorney General's office to join a challenge to Cambridge's zoning ordinance. To avoid litigating the issue, the Cambridge City Council repealed those sections of the ordinance that discriminated against group homes See Curry, supra note 147.
167. See, e.g. City of Livonia v. Dep't of Social Services, 378 N.W.2d 402 (Mich. 1985); Glenn Heights, Inc. v. Central Bank & Trust, 658 P.2d 872 (Colo. 1983); Nichols v. Tullahoma Open Door, Inc., 640 S.W.2d 13 (Tenn. Ct. App. 1982). The one exception was the state of Ohio, where localities receive zoning authority from the state constitution, which cannot be modified by mere statute. Garcia v. Siffrin Residential Ass'n, 407 N.E.2d 1369 (Ohio 1980), cert. denied, 450 U.S. 911 (1981).

168. See, e.g. Region 10 Client Management. Inc. v. Town of Hampstead, 424 A.2d 207 (N.H. 1981); Fitchburg Housing Authority v. Board of Zoning Appeals, 406 N.E.2d 1006
169. See Region 10 Client Management Inc. v. Town of Hampstead, 424 A.2d 207 (N.H. 1980) (nonprofit Community residences for disabled individuals carrying out deinstitutionalization policy and subject to state regulation immune from zoning ordinance) y Penobscot Area Housing Development Co .v. City of Brewer, 434 A.2d 14 (Me. 1981) (nonprofit organization not immune where degree of state involvement was speculative).
170. See e.g. Berger v. State 364A.2d993(N.J.1976); City of Temple Terrace v. Hillsborough Association for Retarded Citizens, 322 So.2d 571 (Fla. Dist. Ct. App. 1975), y, 332 So.2d 610 (PIa. 1976).
171. Village of Euclid v. Ambler Realty Co., 272 U.S. 365,373 (1926).
172. 416 U.S. 1 (1974).
173. See e.g. J.W. v. City of Tacoma, Washington, 720 P.2d 1126 (9th Cir. 1983); Fialkowski v. Shapp., 405 P.Supp. 946 (E.D. Penn. 1975).
174. 473 U.S. 432 (1985).
175. The plaintiff, Cleburne Living Center (CLC), sought to establish a group home for people with mental retardation in a multi-family district in Cleburne, Texas. The city's zoning ordinance expressly permitted apartments, boarding houses, fraternities, hospitals, and nursing homes, but it required homes for the "insane or feeble-minded" to obtain a conditional use permit. The city zoning commission denied CLC's application for a conditional use permit, based on neighbors' negative attitudes, the home's proximity to a junior high school, the size of the home, concern over its residents, and its location on a 500-year flood plain. Applying rational basis review, the Supreme Court found that, as applied, the ordinance violated CLC ' s right to equal protection. The city simply had no rational basis for requiring CLC to obtain a conditional Use permit while allowing other multi-family and commercial Uses as a matter of Course. The denial of the permit could only have been due to an irrational prejudice toward individuals with mental retardation, the Court concluded. Id.
176. See Pamela K. Agee (Note), "Rationality Scrutiny of Mental Retardation Based Equal Protection Claims: The Door to Discrimination and Confusion," 12- 129, 144 (1988); Scott A. Steinhoff (Note), "Cit of Cleburne v. Cleburne Living Center: Denial of Ouasi-Suspect Status for the Mentally Retarded and its Effect on Exclusionary Zoning of Group Homes," 17 Toledo L. Rex 1041,1074 (1986).
177. Martin v. Voinovich, 840 P.Supp. 1175 (S.D. Ohio 1993). 178. Id. at 1209, citing 42 U.S.C. § 12101(a)(7).

178. *Id.* At 1209, citing 42 U.S.C. §12101(a)(7)
179. See e.g. Town of Hempstead v. Commissioner, New York State Office of Mental Health, 468 N .y .S.2d 710 (App. Div. 1983); Village of Westbury v. Prevost, 467 N .y .S.2d 70 (App. Div. 1983), app. denied, 465 N .E.2d 375 (N .y .1984).
180. 29 U.S.C. § 701 et seq.
181. *Id.* § 794(a). The Rehabilitation Act originally forbade discrimination on the basis of "handicap." The Americans with Disabilities Act, discussed below, amended the Rehabilitation Act to use the less stigmatizing term "disability" instead. S. Rep. No.116, 101st Cong., 1st Sess. 21 (1989).
182. See Strathie v. Dept. of Transportation, 716 F.2d 227,230 (3d Cir. 1983); Doe v. New York University , 666 F .2d 761, 774 (2d Cir. 1981).
183. "Major life activities" include "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 24 C.F.R. § 8.3.
184. 29 U.S.C. § 706(8)(A).
185. 24 C.F.R. § 8.3.
186. 29 U .S.C. § 706(8)(C)(i).
187. Southeastern Comm. College v. Davis, 442 U .S. 397, 406 (1979).
188. 24 C.F.R. §§ 8.4, 8.33.
189. The Housing and Community Development Act of 1992 permits public housing authorities (PHAs) to designate some public housing projects or portions of projects for elderly residents only, and to exclude nonelderly persons with disabilities. Pub.L. No.102-550, 106 Stat. 3802,3813 (1992), codified at 42 U.S.C. § 1437e. At first glance, this statute appears to permit discrimination against persons with disabilities in violation of the Rehabilitation Act. The U .S. Department of Housing and Urban Department (HUD) has clarified, however, that PHAs must continue to comply with federal civil rights laws. Final Rule, 59 F .R. 17652, 17653 (April 13, 1994). These laws permit affirmative assistance to historically disadvantaged groups such as elderly persons and persons with disabilities .See. e. 9 ., Age Discrimination Act, 42 U.S.C. § 6103 (b); Rehabilitation Act regulations, 45 C.F.R. § 84.4 (c). HUD explained that, "[A] PHA may not deny an elderly person who is also a person with disabilities admission to a designated project for elderly families. ..on the basis of the elderly person's disability." 59 F.R. at 17653. Nor may a PHA "deny a person with disabilities admission to a designated project for disabled families on the basis of the person's age." *Id.*

190. 29 U.S.C. § 794a(a)(2).
191. See, e.g. Disabled in Action of Pennsylvania v. Sykes, 833 F.2d 1113,1116 n.5 (3d Cir. 1987), cert. denied, 485 U.S. 989 (1988); Smith v. U.S. Postal Service, 766 F.2d 205,206 (6th Cir. 1985).
192. Court decisions on housing discrimination under the Rehabilitation Act may be broken down into two groups. First are those involving evictions. The Fifth Circuit Court of Appeals in Majors v. Housing Auth. Of Cty. of DeKalb. Ga., 652 F.2d 454 (5th Cir. Unit B Aug. 1981), reversed a district court's decision to permit eviction of a tenant with a mental disability from a federally subsidized apartment because she kept a dog in violation of her lease. The Court of Appeals remanded the case for trial, noting that if the woman had a real psychological need for her dog, and if the dog caused no problems at the apartment complex, the tenant could be "otherwise qualified" for residence. Two other courts have prohibited summary evictions of tenants with mental disabilities who demonstrated an emotional dependence on their cats. Crossroads Apartments Assoc. v. LeBoo, 578 N.Y.S. .S.2d 1004 (Rochester City Ct. 1991); Whittier Terrace Assoc. v. Hampshire, 532 N.E.2d 712 (Mass. App. Ct. 1989). Tenants with mental disabilities who damage their apartment or threaten other tenants may not fare so well, even under the Rehabilitation Act.

In Housing Auth. of the City of Lake Charles v. Pappion, 540 So.2d 567 (La. Ct. App. 1989), the court permitted eviction of a tenant with paranoid schizophrenia who repeatedly threatened to harm his elderly neighbors and yelled in his apartment. Despite his caseworker's testimony that he had resumed taking his medication, the court found that the tenant was not "otherwise qualified" for residence, since he might become symptomatic again. The tenant in City Wide Assoc. v. Penfield, 564 N .E.2d 1003 (Mass. 1991), was more fortunate. Although she had defaced her apartment in an attempt to control her auditory hallucinations, the damage was minor and could be covered by her security deposit, and the tenant had sought counseling and medication. Therefore eviction was deemed improper.

The second category of Rehabilitation Act cases are those concerning a landlord's refusal to rent to people with mental disabilities in the first place. The district court in Bolthouse v. Continental Wingate Co.. Inc., 656 F.Supp. 620 (W.D. Mich. 1987), granted a preliminary injunction requiring a federally funded apartment project to rent a unit to a man with schizophrenia. The man was "otherwise qualified" as a tenant, the court determined, as long as he received occasional assistance from his mental health treatment program. Accommodation cost nothing to the landlord.

The court in Martin v. Voinovich, 840 F.Supp. 1175 (S.D. Ohio 1993), refused to dismiss a Section 504 claim by a class of individuals with mental retardation and other disabilities against the Ohio state government. The plaintiffs were residents of state-sponsored institutional facilities who sought placement in community

residences. The state allegedly passed over their applications for community placement in favor of individuals with lesser impairments. The court held that Section 504 reaches housing discrimination among people with different disabilities. Whether the plaintiffs will prevail at trial remains to be seen.

193. 42 U.S.C. §§ 3601-3619 (1968).
194. Pub. L. 100-430, 102 Stat. 1619 (1988) (codified as amended at 42 U.S.C. §§ 3601-3619).
195. The FHAA uses the term "handicap." Unlike the Rehabilitation Act, the FHAA was not amended by the Americans with Disabilities Act to use the term "disability." See supra note 181.
196. H.R. Rep. No.711, 100th Cong., 2ndSess. 18 (1988).
197. 42 U.S.C. § 3602(h); H.R. Rep. No.711, supra note 196, at 22.
198. 42 U.S.C. §§ 3603(b), 3604(0(1)).
199. 24 C.F.R. § 100.60.
200. 42 U.S.C. § 3604(0(2)).
201. 24 C.F.R. § 100.65.
202. 42 U.S.C. § 3604(0(3)(B)).
203. H.R. Rep. No.711, supra note 196, at 24.
204. 24 C.F.R. §§ 100.65, 100.75, 100.80, 100.85; 42 U.S.C. § 3604(e).
205. 42U.S.C. §3617.
206. Id. § 3604(0(9)).
207. H.R. Rep. No.711 , . supra note 196, at 29-30.
208. For detailed discussion, see, Minna J. Kotkin, "The Fair Housing Amendments Act of 1988: New Strategies for New Procedures," XVII Rev. of L. & Soc. Change 755 (1989-90); James A. Kushner, "The Fair Housing Amendments Act of 1988: The Second Geriation of Fair Housing," 42 Vand. L. Rev. 1049 (1989); John M. Payne, "Fair Housing for the 1990s: The Fair Housing Amendments Act and the Ward's Cove Case," 18 Real Est. L.J. 307 (1990).
209. 42 U.S.C. § 3613.

210. *Id.* § 3610.
211. If the discrimination occurred in a jurisdiction with an anti-discrimination law which is substantially equivalent to the FHAA, HUD must refer the complaint to the state or local agency charged with implementing that law. If there is no such state or local agency, HUD must investigate and attempt to conciliate the complaint within 100 days. If HUD finds "no reasonable cause" to believe that discrimination has occurred or is imminent, it will dismiss the complaint. If HUD finds "reasonable cause," it must issue a charge on the complainant's behalf against the respondent (usually the housing provider).
- Either the complainant or the respondent may elect to remove the complaint to federal court within 30 days, in which case the Attorney General prosecutes the action against the respondent. *Id.* § 3612. The disabled complainant may intervene, but either way she may receive monetary damages if the Attorney General wins. The court also may award injunctive relief and/or punitive damages. If neither party removes the complaint to federal court, an Administrative Law Judge (AU) within HUD will conduct a hearing within 120 days. He may award actual damages, injunctive relief, and attorney's fees, and impose a civil penalty ranging from \$10,000 to \$50,000. The AU's decision may be appealed to the HUD Secretary and then to the court of appeals .
212. *Id.* § 3614. If the Attorney General prevails, the court may award monetary damages, injunctive relief, and/or civil penalties. Congress intended zoning cases to be handled by the Attorney General. H.R. Rep. No.711, *supra* note 196, at 24. If HUD determines that a complaint involves a zoning ordinance, the Secretary must refer the case to the Attorney General. 42 U.S.C. § 3610(g)(2)(C). However, it appears that a private individual may also challenge a zoning ordinance by filing his own lawsuit in federal or state court. *Payne*, *supra* note 208, at 331.
213. *See. e.g. U.S. v. Borough of Audubon, N.J.* 797 F.Supp. 353,360 (D. N.J. 1991), *aff'd*, 968 F.2d 14 (3d Cir. 1992).
214. *See. e.g. Oxford House. Inc. v. Town of Babylon*, 819 F.Supp. 1179,1182 (E.D. N.Y. 1993).
215. *Id.* at 1185.
216. 798 F.Supp. 442 (E.D. Mich. 1992), *rev'd*, 13 F.3d 920 (6th Cir. 1993).
217. 13 F.3d 920 (6th Cir. 1993).
218. 872 F.Supp. 1423 (E.D. Mich. 1995).
219. *Id.* at 443-44.

220. 798 F.Supp. 228 (D. N.J. 1992).
221. See, e.g., Oxford House, Inc. v. Town of Babylon, 819 F.Supp. 1179 (E.D. N. Y. 1993) (disparate impact and refusal to accommodate claims against town which attempted to evict group home under ordinance's definition of family); US. v. Audobon. N.J 797 F.Supp. 353 (D. N. J .1991) (disparate treatment claim based on town officials' discriminatory remarks, issuance of daily citations for zoning ordinance violations, and prosecution of landlord for failure to obtain variance), aff'd, 968 F.2d 144 (3d Cir. 1992); Oxford House, Inc. v. Township of Cherry Hill, 799 F.Supp. 450 (D. N.J. 1992) (requiring town to issue certificate of occupancy, since town's restrictive definition of " family " had disparate impact on group homes). See also Oxford House Inc. v. City of Virginia Beach Va. , 825 F.Supp. 1251 (E.D. Va. 1993) (dismissing group home's claim on ripeness grounds but noting that city's restriction on number of unrelated people who could live together violated FHAA, since rule did not apply to related people).
222. At least two ordinances requiring that group home residents with mental disabilities be ambulatory have been struck down under the FHAA, since they irrationally singled out individuals with mental illnesses for special treatment. Potomac Group Home v. Montgomery County. Md., 823 F.Supp. 1285 (D. Md. 1993) (using disparate treatment theory); Cason v. Rochester Housing Auth., 748 F.Supp. 1002 (W .D. N .Y. 1990) (using disparate impact theory). One district court, however, permitted a city to require, before it would issue a conditional use permit, that group homes for mentally retarded individuals provide 24-hour supervision of residents. Bangerter v. Orem City Corp., 797 F.Supp. 918 (D. Utah 1992). The supervision requirement reflected a genuine concern for the residents' safety, the court found. The Tenth Circuit Court of Appeals reversed the district court on the grounds that the lower court did not have sufficient evidence at that stage of the proceeding to support its decision. 46 F.3d 1491 (10th Cir. 1995).
223. 974 F.2d 43,47 (6th Cir. 1992).
224. 955 F.2d 914 (4th Cir. 1992).
225. 820 F.Supp. 636 (D. N.H. 1993).
226. See U.S. v. Scott, 788 F.Supp. 1555 (D. Kan. 1992); Rhodes v. Palmetto Pathway Homes, Inc., 400 S.E.2d 484 (S.C. 1991).
227. 799 F.Supp. 695 (E.D. Mich. 1992), gff.sJ, 18 F.3d 337 (6th Cir. 1994).
228. After issuing this highly restrictive interpretation of the statute, the court on its own motion determined that the FHAA was unconstitutional as applied to the case before it, because Congress lacked the power to reach discrimination by a private homeowner on the basis of disability. Congress has the power under the Thirteenth Amendment to prohibit private discrimination on the basis of race, but not on the basis of sex,

disability, or other categories. The Fourteenth Amendment gives Congress power to regulate housing discrimination by state actors on the basis of sex and disability, but does not empower Congress to regulate private discrimination. The Commerce Clause might support the FHAA's ban on housing discrimination by private commercial entities, but even the most liberal reading of the Commerce Clause would not support regulation of a private homeowner's sale of her own home, the court held. *Id.* at 740-42.

229. 18 F.3d 337 (6th Cir. 1994).
230. The court did not reach the question of the Act's constitutionality.
231. 849 F.Supp. 685 (D. Neb. April 12, 1994). In Hughes, the Attorney General sued a bank and its directors for financing the purchase of a house by third parties to prevent a social service organization from buying the property and using it as a group home for people with mental illnesses. The court denied the bank's motion to dismiss, finding that the Attorney General stated a claim for interference with protected rights under the FHAA.
232. 983 F.2d 1277, 1283 (3d Cir. 1993).
233. Williams v. Secretary of Executive Office, 609 N.E.2d 447,454 (Mass. 1993).
234. 840 F.Supp. 1175 (S.D. Ohio 1993).
235. Congress recognized the importance of these remedies when it required HUD to refer FHAA complaints to state or local agencies whose laws are "substantially equivalent" to the FHAA. See *supra* note 211, discussing referrals of HUD complaints to state agencies.
236. Kotkin, supra note 208, at 782 & n.161, citing 24 C.F.R. § 115.6(0(1)).
237. Mo. Rev. Stat. § 213.040.
238. Americans with Disabilities Act, 42 U.S.C. § 12181(7). Although religious organizations and private clubs might serve the public, Congress has exempted them from the definition of public accommodations. *Id.* § 12187.
239. Oversight Hearing on H.R. 4498, Americans with Disabilities Act of 1988, Before the House Committee on Education and Labor, 100th Cong., 2d Sess. ( 1988) .
240. Id. at 200 (Statement of Larry Urban, Director, Renaissance Club, Lowell, Massachusetts).
241. Id. at 229 (Statement of James Brooks, Paralegal, Disability Law Center).

242. Id. at 87 (Statement of Eileen Healy Horndt, Executive Director, Independence Northwest).
243. Id. at 221 (Statement of Patricia Deegan, Northeast Independent Living Center , Laurence, Massachusetts) .
244. Id. at 230 (Statement of Eleanor Blake, Fitchburg, Massachusetts).
245. Robert L. Burgdorf, Jr., "'Equal Members of the Community': The Public Accommodations Provisions of the Americans with Disabilities Act, " 64 Temple L. Rev. 551 (1991).
246. 42 U.S.C. § 2000a.
247. Pub. L. 101-336, 104 Stat. 327,42 U.S.C. § 12101, 12181-12189 (1990).
248. 42 U.S.C. § 12182.
249. Commerce Clearing House, Inc., Americans with Disabilities Act of 1990: Law and Explanation 78 (Chicago, 1990).
250. 42 U.S.C. § 12182(b)(2)(A).
251. 28 C.F.R. § 36.208.
252. H.R. Rep. No.485, 101st Cong., 2d Sess. 102 (1990).
253. 28 C.F.R. § 36.306.
254. Id. §§ 36.104; 35.131.
255. 42 U.S.C. § 12188; 28 C.F.R. §§ 36.501-503,36.506.
256. If the Attorney General prevails, the court may award injunctive relief, monetary damages (but not punitive damages) to the disabled person, and/or a civil penalty ranging from \$50,000 to \$100,000.
257. Mo. Rev. Stat. §§ 213.010(15), 213.065.
258. Williams v. Secretary of Executive Office, 609 N .E.2d 447 (Mass. 1993).
259. Easley v. Snider, 841 F.Supp. 668 (E.D. Pa. 1993), y, 36 F.3d 297 (3d Cir. 1994).
260. See Leonard S. Rubenstein, Antoinette A. Gattozzi, and Howard H. Goldman, "Protecting the Entitlements of the Mentally Disabled: The SSDI/SSI Legal Battles of the 1980s," 11 Int'l J.L. and Psychiatry 269 (1988); Chris Koyanagi, "Social Security

Disability Benefits Reform Act of 1984: Implications for those Disabled by Mental Illness," IX Psychosocial Rehab. J. 23 (1985).

261. Plaintiffs in these cases focused on violations of the Social Security Act itself. If similar cases arose today, the Rehabilitation Act and Title II of the ADA would provide additional useful remedies.
262. J.L. v. Social Sec. Admin., 971 F.2d 260 (9th Cir. 1992). 66
263. 840 F.Supp. 1175 (S.D. Ohio 1993).
264. 971 F.2d 260 (9th Cir. 1992).
265. The APA, 5 U.S.C. § 701 et seq, permits a person who is harmed by a federal agency's actions to seek nonmonetary relief, first through administrative procedures and later through judicial review. The court acknowledged that a plaintiff usually does not need to file an administrative complaint (or "exhaust administrative remedies") before filing a lawsuit under the Rehabilitation Act. However, since the plaintiffs in this particular case were challenging a federal agency's procedures, and were not seeking monetary damages, the court required them to exhaust their administrative remedies first, by filing an APA complaint with the Department of Health and Human Service's Office of Civil Rights. The court deferred to the agency's superior expertise and ability to "formulate and implement systemic change." The plaintiffs could return to federal court later, the Ninth Circuit held, if the agency could not resolve their claims satisfactorily.
266. 42 U.S.C. §§ 12131-12134.
267. Id. § 12132.
268. 28 C.F.R. §§ 35.130,35.103 (App. A).
269. 28 C.F.R. § 35.140.
270. 42 U.S.C. § 12133; 28 C.F.R. §§ 35.170-35.178. See also Anne B. Thomas, "Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act," 22 N.M.L. Rev. 243, 256-57 (1992).
271. 28 C.F.R. § 35.190 .The designated federal agencies correspond to the functions of the state or local government that is charged with discrimination. For example, all complaints related to state and local public housing programs should be directed to the Department of Housing and Urban Development (HUD).
272. 609 N .E.2d 447 (Mass. 1993).
273. 485 U.S. 535 (1988).

274. 840 F.Supp. 1175 (S.D. Ohio 1993).
275. 841 F.Supp. 668 (E.D. Pa. 1993), y, 36 F.3d 297 (3d Cir. 1994).
276. 28 C.F.R. § 35. 130(c).
277. 841 F .Supp. at 678.
278. Doe v. Region 13 Mental Health-Mental Retardation Comm'n, 704 F.2d 1402 (5th Cir. 1983).
279. August v. Offices Unlimited. Inc., 981 F.2d 576 (1st Cir. 1992).
280. Doe v. Syracuse School District, 508 F.Supp. 333 (N.D. N.Y. 1981).
281. Mackie v. Runyon, 804 F.Supp. 1508 (M.D. Fla. 1992).
282. See cases cited in Loretta K. Haggard (Note), "Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act," 43 Wash. U. J. Urb. & Contemp. L. 343,356-58 & nn.73-83.
283. See. Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).
284. 442 U .S. 397, 406 (1979).
285. School Board of Nassau County v. Arline, 480 U.S. 273,287-89 (1987).
286. 42 U .S.C. § 2000e.
287. 42 U.S.C. § 12112.
288. H.R. Rep. No.485, 101st Cong., 2d Sess., at 23 (1990); S. Rep. No.116, 101st Cong., 1st Sess., at 2 (1989).
289. 42 U.S.C. § 12111(8).
290. Id. § 12112(b)(5)(A).
291. Id. § 12111(9)(B).
292. Id. § 12113(b).
293. Id. § 12117(a). See also J.L. Hamilton, "New Protections for Persons with Mental Illness in the Workplace Under the Americans with Disabilities Act of 1990," 40 Cleveland State L. Rev. 63, 89-91 (1992).

294. 42 U.S.C.A. § 2000e-5 (West Supp. 1992).
295. Petersen v. Univ. of Wisconsin Board of Regents, 818 F.Supp. 1276 (W.D. Wis. 1993).
296. See. e.g. Margaret Hart Edwards, Alan C. Freeland, and Beau C. Simon, Americans with Disabilities Act: A Practical Guide for Employers (Berkeley, California, 1992); Haggard, *supra* note 282; Hamilton, *supra* note 293; Deborah Zuckerman, "Reasonable accommodations for People with Mental Illness Under the ADA," 17 Mental & Physical Disability L. Rel2. 3111 (May-June, 1993).
297. August v. Offices Unlimited. Inc., 981 F.2d 576 (1st Cir. 1992).
298. Boldt v. Labor and Industry Review Comm'n, 496 N.W.2d 676 (Wis. Ct. App. 1992), review denied, 497 N.W.2d 131 (Wis. 1993).

# Resources

## **Public Interest Law Firms**

Judge David L. Bazelon Center for Mental Health Law  
(formerly Mental Health Law Project)  
1101 Fifteenth Street, N.W., Suite 1212  
Washington, D.C. 20005-5002  
(202) 467-5730

National Law Center on Homelessness and Poverty  
918 F Street, N.W., Suite 412  
Washington, D.C. 20004  
(202) 638-2535

## **Federal Agency Responsible for Implementing the Fair Housing Amendments Act**

Housing and Civil Enforcement Section  
Civil Rights Division  
United States Department of Justice  
P.O. Box 65998  
Washington, D.C. 20035  
(202) 514-4713

## **Federal Agencies Responsible for Implementing the Americans with Disabilities Act**

### **General**

United States Department of Justice  
Americans with Disabilities Act Information Line  
(202) 514-0301

Equal Employment Opportunity Commission  
Americans with Disabilities Act Information Line  
(202) 663-4679 or (800) 669-EEOC

Title I: Private and Public Employment  
Equal Employment Opportunity Commission  
Public Information Office  
1801 L Street, N.W.  
Washington, D.C. 20507

## **Title II: Government Programs and Services**

### ***All programs, services, and regulatory activities relating to farming and raising of livestock***

Complaints Adjudication Division  
Office of Advocacy and Enterprise  
Room 1353 - South Building  
Department of Agriculture  
14th and Independence Avenue, S.W.  
Washington, D.C. 20250

### ***All programs, services, and regulatory activities relating to the operation of elementary and secondary education systems and institutions, institutions of higher education and vocational education (other than schools of medicine, dentistry, nursing, and other health-related schools), and libraries***

Office of Civil Rights  
Department of Education  
330 C Street, S.W., Suite 5000  
Washington, D.C. 20202

### ***All programs, services, and regulatory activities relating to the provision of health care and social services, including schools of medicine, dentistry, nursing, and other health-related schools; the operation of health care and social service providers and institutions, including "grass roots" and community services organizations and programs; and preschool and day care programs***

Office for Civil Rights  
Department of Health and Human Services  
330 Independence Avenue, S.W.  
Washington, D.C. 20201

### ***All programs, services, and regulatory activities relating to lands and natural resources, including parks and recreation, water and waste management, environmental protection, energy, historic and cultural preservation, and museums***

Office for Equal Opportunity  
Office of the Secretary  
Department of the Interior  
18th and C Streets, N.W.  
Washington, D.C. 20547

*All programs, services, and regulatory activities relating to law enforcement, public safety, and administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies*

Coordination and Review Section  
P.O. Box 66118  
Civil Rights Division  
U.S. Department of Justice  
Washington, D.C. 20035-6118

*All programs, services, and regulatory activities relating to labor and work force*

Directorate of Civil Rights  
Department of Labor  
200 Constitution Avenue, N.W., Room N-4123  
Washington, D.C. 20210

*All programs, services, and regulatory activities relating to transportation, including highways, public transportation, traffic management (non-law enforcement), automobile licensing and inspection, and driver licensing*

Office for Civil Rights  
Office of the Secretary  
Department of Transportation  
400 Seventh Street, S.W., Room 10215  
Washington, D.C. 20590

*Complaints involving more than one area of a public entity should be sent to*

Coordination and Review Section  
Civil Rights Division  
U.S. Department of Justice  
P.O. Box 66118  
Washington, D.C. 20035-6118

### **Title III: Public Accommodations**

Office of Americans with Disabilities Act  
Civil Rights Division  
United States Department of Justice  
P.O. Box 66738  
Washington, D.C. 20035-9998

## **Organizations Providing Information on People Who Are Homeless and Mentally Ill**

The National Resource Center on Homelessness and Mental Illness  
Policy Research Associates, Inc.  
345 Delaware Avenue  
Delmar, New York 12054  
(800) 444-7415

Interagency Council on the Homeless  
451 Seventh Street, S.W., Room 7274  
Washington, D.C. 20410  
(202) 708-1480

American Bar Association Commission on Mental and Physical Disability Law  
1800 M Street, N.W.  
Washington, D.C. 20036  
(202) 331-2240

American Bar Association Representation of the Homeless Project  
1800 M Street, N.W.  
Washington, D.C. 20036  
(202) 331-2291

Legal Services Homelessness Task Force  
National Housing Law Project  
122 C Street, N.W., Suite 220  
Washington, D.C. 20001-2109  
(202) 783-5140

## Bibliography

- Ades, Paul. "The Unconstitutionality of 'Antihomeless' Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel," 77 Calif. L. Rev. 595 (1989).
- Adler, Steven A. (Note). "Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning," 6 Vt. L. Rev. 509 (1981).
- Agee, Pamela K. (Note). "Rationality Scrutiny of Mental Retardation Based Equal Protection Claims: The Door to Discrimination and Confusion," 12 Law & Psychol. Rev. 129 (1988).
- American Psychiatric Association. Task Force Report on Involuntary Outpatient Treatment (Washington, D.C., 1988).
- Annotation. "Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons," 7 A.L.R.5th 455 (1993).
- Annotation. "Validity of Loitering Statutes and Ordinances," 25 A.L.R.3d 836 (1993).
- Appelbaum, Paul E. "Legal Aspects of Clinical Care for Severely Mentally Ill, Homeless Persons," 20 Bull. Am. Acad. Psychiatry Law 455 (1992).
- Appelbaum, Paul E. "Resurrecting the Right to Treatment," 38 Hosp. & Comm. Psychiatry 703 (1987).
- Baker, Donald E. "Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless," 45 Miami L. Rev. 417 (1990-1991)
- Barak, Gregg. Gimme Shelter: A Social History of Homelessness in Contemporary America (1991).
- Baum, Alice S. and Burnes, Donald W. A National in Denial: The Truth About Homelessness (1993).
- Beck, James C. "Right to Refuse Antipsychotic Medication: Psychiatric Assessment and Legal Decision-Making," 11 Mental & Physical Disability L. Rep. 368 (Sep.-Oct. 1987).
- Berger, Curtis. "Beyond Homelessness: An Entitlement to Housing," 45 U. Miami L. Rev. 315 (1990).
- Bergin, Patrick T. (Note). "Exclusionary Zoning Laws: Irrationally-based Barriers to Normalization of Mentally Retarded Citizens," 3 J. Land Use & Envtl. L. 237 (1987).

Blanck, Peter David. "On Integrating Persons with Mental Retardation: The ADA and ADR," 22 N.M. L. Rev. 259 (1992).

Bockian, Jonathan M. "Shelters for the Homeless and Zoning Use Restrictions," Mass. L. Rev., Summer 1989.

Bonanno, Gale C. "Challenges to the Baltimore Bill Limiting Shelter," 1 Md. J. Contemp. Legal Issues 109 (1990).

Burgdorf, Robert L., Jr. "'Equal Members of the Community': The Public Accommodations Provisions of the Americans with Disabilities Act," 64 Temple L. Rev. 551 (1991).

Coates, Robert. "Legal Rights of Homeless Americans," 24 U.S.F. L. Rev. 297 (1990).

Collins, Ronald K. L. "Reliance on State Law: Protecting the Rights of People With Mental Disabilities," 13 Vt. L. Rev. 305 (1988).

Comment. "The Judiciary and the Ad Hoc Development of a Legal Right to Shelter," 12 Harv. J.L. & Pub. Pol'y 193 (1989).

Commerce Clearing House, Inc. Americans with Disabilities Act of 1990: Law and Explanation (Chicago, 1990).

Curry, Lauren P. Eliminating Zoning Barriers to Community Residences and Group Homes: A Practice Guide 4 (undated, unpublished paper by Cambridge & Somerville Legal Services, Inc. in Cambridge, Massachusetts).

DesRoches, Karen S. (Note). "Property Law-Group Home for Mentally Retarded Constitutes Family Within the Meaning of a Restrictive Covenant-Gregory v. Department of Mental Health, Retardation & Hospitals, 495 A.2d 997 (R.I. 1985)," Suffolk U. L. Rev. 273 (1986).

Devers, Katherine C. and West, J. Gardner (Note). "Exclusionary Zoning and its Effect on Housing Opportunities for the Homeless," 4 Notre Dame J.L. Ethics & Pub. Pol'y 349 (1989).

Early, John (Note). "The Legal Plight of the American Bedouin: A Narrowly Interpreted Fourth Amendment Fails to Protect the Privacy of the Homeless," 39 Wayne L. Rev. 155 (1992).

Edwards, Margaret Hart; Freeland, Alan C.; and Simon, Beau C. Americans with Disabilities Act: A Practical Guide for Employers (Berkeley, California, 1992).

Eisenberg, Teryl S. (Note). "Connecticut v. Mooney: Can a Homeless Person Find Privacy Under a Bridge?" 13 Pace L. Rev. 229 (1993).

Federal Task Force on Homelessness and Severe Mental Illness. Outcasts on Main Street (Washington, D.C., 1992).

- Goldberg, Susan L. "Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws," 30 Wash. U. J. Urb. & Contemp. L. 75 (1986).
- Grossman, Ann Kennedy. "Community Integration of Persons with Mental Illness: A Legislative Proposal to Combat the Exclusionary Zoning of Community Residential Programs," 7 Law & Inequality 215 (1989).
- Grossman, Vigdor. Employing Handicapped Persons: Meeting EEO Obligations (
- Guernsey, Thomas F. "The Mentally Retarded and Private Restrictive Covenants," 25 Wm. & Mary L. Rev. 421 (1984).
- Haggard, Loretta K. (Note). "Reasonable Accommodation of Individuals with Mental Disabilities and Psychoactive Substance Use Disorders Under Title I of the Americans with Disabilities Act," 43 Wash. U. J. Urb. & Contemp. L. 343 (1993).
- Hamilton, Janet Lowder. "New Protections for Persons with Mental Illness in the Workplace Under the Americans with Disabilities Act of 1990," 40 Cleveland State L. Rev. 63 (1992).
- Heifetz, Alan W. and Heinz, Thomas C. "Separating the Objective, the Subjective, and the Speculative: Assessing Compensatory Damages in Fair Housing Adjudications," 26 J. Marshall L. Rev. 3 (1992).
- Hershkoff, Helen and Cohen, Adam. "Begging to Differ: The First Amendment and the Right to Beg," 104 Harv. L. Rev. 896 (1991).
- Hombs, Mary Ellen; Banks, Steven F.; Manning, Dan; Sard, Barbara and Sciarra, David. "Advocacy to End Homelessness: New Initiatives for Social Equity," 27 Clearinghouse Review 1143 (Jan. 1994).
- Interagency Council on the Homeless. Priority: Home! The Federal Plan to Break the Cycle of Cycle of Homelessness (Washington, D.C.: U.S. Department of Housing and Urban Development, 1994).
- Kanter, Arlene S. "Recent Zoning Cases Uphold Establishment of Group Homes for the Mentally Disabled," 18 Clearinghouse Rev. 515 (1984).
- Knapp, Charles Feeney. "Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?" 76 Iowa L. Rev. 405 (1991).
- Kotkin, Minna J. "The Fair Housing Amendments Act of 1988: New Strategies for New Procedures," XVII Rev. of L. & Soc. Change 755 (1989-90).
- Kushner, James A. "The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing," 42 Vand. L. Rev. 1049 (1989).

Lamb, H. Richard. "Involuntary Treatment for the Homeless Mentally Ill," 4 Notre Dame J.L. Ethics & Pub. Pol'y 269 (1989).

Maffeo, Patricia A. "Making Non-Discriminatory Fitness-for-Duty Decisions About Persons with Disabilities Under the Rehabilitation Act and the Americans with Disabilities Act," 16 Am. J.L. & Med. 279 (1990).

McElyea, William D. "The Fair Housing Act Amendments of 1988: Potential Impact on Zoning Practices Regarding Group Homes for the Handicapped," 12 Zoning & Planning L. Rep. 145 (1989).

Mental Health Law Project. "Mental Health Developments," Clearinghouse Rev. 1079 (1993).

Milstein, Bonnie. Self-Help Evictions by Service Providers (August 11, 1993) (unpublished draft memorandum, Judge David L. Bazelon Center for Mental Health Law, Washington, D.C.).

Moomaw, Dawn L. (Note). "The Mentally Disabled in the Institution and the Community: An Overview of the Difficulties of Psychiatric Care," 92 Dick. L. Rev. 947 (1988).

National Institute of Mental Health. Two Generations of NIMH-Funded Research on Homelessness and Mental Illness: 1982-1990 (Rockville, Maryland, 1991).

Note, "Homelessness in America: Looking for the Right to Shelter," 19 Colum. J.L. & Social Probs 305 (1985).

Parry, John W. "Mental Disabilities Under the ADA: A Difficult Path to Follow," 17 Mental & Physical Disability L. Rep. 100 (Jan.-Feb. 1993).

Payne, John M. "Fair Housing for the 1990s: The Fair Housing Amendments Act and the Ward's Cove Case," 18 Real Est. L.J. 307 (1990).

Pepper, Beth. "Highlights in Fair Housing Law: Strengthening the Rights of People with Disabilities to Live in the Community of Their Choice," 26 Clearinghouse Rev. 1458 (1993).

Quinn, Kathleen M. (Note). "Connecticut v. Mooney and Expectation of Privacy: The Double-Edged Sword of Advocacy for the Homeless," 13 B.C. Third World L.J. 87 (1993).

Rubenstein, Leonard S.; Gattozzi, Antoinette A.; and Goldman, Howard H. "Protecting the Entitlements of the Mentally Disabled: The SSDI/SSI Legal Battles of the 1980s," 11 Int'l J.L. & Psychiatry 269 (1988)

Schonfeld, Robert L. "'Five-Hundred-Year Flood Plains' and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded," XVI Fordham Urb. L.J. 1 (1988).

Schutz, Elizabeth. "The Fourth Amendment Rights of the Homeless," 60 Fordham L. Rev. 1003 (1992).

Seltser, Barry J. and Miller, Donald E. Homeless Families: The Struggle for Dignity (1993).

Simon, Harry. "Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities," 66 Tulane L. Rev. 631 (1992).

Simring, Richard B. (Note). "The Impact of Federal Antidiscrimination Laws on Housing for People with Mental Disabilities," 59 Geo. Wash. L. Rev. 413 (1991).

Sloan, Craig. (Note). "Constitutional Challenges to Section 812 of the Fair Housing Act," 79 Ky. L.J. 585 (1990-91).

Snow, Donald and Anderson, Leon. Down on Their Luck: A Study of Homeless Street People (1993).

Spece. "Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories," 20 Ariz. L. Rev. 1 (1978).

Steinhoff, Scott A. (Note). "City of Cleburne v. Cleburne Living Center: Denial of Quasi-Suspect Status for the Mentally Retarded and its Effect on Exclusionary Zoning of Group Homes," 17 Toledo L. Rev. 1041 (1986).

Steinman, Lester D. "The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study," 19 Urb. Law. 1 (1987).

Tessler, Richard C. and Dennis, Deborah L. A Synthesis of NIMH-Funded Research Concerning Persons Who Are Homeless and Mentally Ill (Rockville, Maryland: National Institute of Mental Health, 1989).

Thomas, Anne B. "Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act," 22 N.M. L. Rev. 243 (1992).

Torrey, E. Fuller. Nowhere to Go: The Tragic Odyssey of the Homeless Mentally Ill (1988).

Toth, Jennifer. The Mole People: Life in the Tunnels Beneath New York City (1993)

U.S. Department of Health and Human Services. Deinstitutionalization Policy and Homelessness (Washington, D.C., 1990).

U.S. General Accounting Office. Homeless Mentally Ill: Problems and Options in Estimating Numbers and Trends (Washington, D.C., 1988).

Vamos, Greg. (Note). "Kreimer v. Bureau of Police: Are the Homeless Ready for a Suspect Classification?" 14 Whittier L. Rev. 731 (1993).

Whitfield, John H. "A Guide to Finding a Right to Shelter for the Homeless," 9 Miss. C. L. Rev. 295 (1989).

Wirth, Richard J. "Clearing the Way for Handicapped Individuals in Common Interest Communities," 21 Real Est. L.J. 152 (1992).

Zuckerman, Deborah. "Reasonable Accommodations for People with Mental Illness Under the ADA," 17 Mental & Physical Disability L. Rep. 311 (May-June 1993).

## **ADDENDUM**

The following information on the Protection & Advocacy system should be added to the Resource list that begins on page 65. The P&A system is a federally funded program that addresses the rights to quality care and treatment for individuals with serious mental illnesses.

Karen S. Armstrong, LISW, Esq.  
Director  
Protection and Advocacy Program  
Center for Mental Health Services  
5600 Fishers Lane, Room 15C-21  
Rockville, MD 20857  
(301) 443-3667

National Association of Protection & Advocacy Systems, Inc.  
900 Second Street, NE, Suite 211  
Washington, D.C. 2002-3557  
(202) 408-9514