Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions

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HOMELESSNESS: ITS ORIGINS, CIVIL LIBERTIES PROBLEMS AND POSSIBLE SOLUTIONS

NORMAN SIEGEL*

I. ORIGINS

A. Displacement of Poor People by Urban Development

Urban areas in New York and across the country have undergone massive redevelopment over the past fifteen to twenty years. A city or community in which large-scale luxury development occurs may reap some benefits: The quality of the housing stock may improve, additional business may be brought into the area and the city's tax base may increase. However, development also brings serious and substantial problems for poor people. Low income people, and ultimately the society they live in, pay a high price for redevelopment. Large commercial and luxury residential developments in downtown areas frequently result in a decrease in the quantity of low-income housing and a displacement of the poor.

In many instances, development projects directly displace people from the site of the development. Even where there is no direct displacement, reduced services, harassment and dramatic rent increases may threaten tenants in nearby areas, thereby causing secondary displacement. The consequence of either situation is that tenants are forced to leave their homes—often with no place to go. A significant number of these displaced tenants who happen to be poor become part of the ever increasing homeless population.

In the early 1970s, many people in New York City lived in

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* Norman Siegel is the Executive Director of the New York Civil Liberties Union (NYCLU). This paper was delivered at Villanova Law School on November 3, 1990 and was a culmination and synthesis of speeches, testimony, articles and presentations done on behalf of the NYCLU. Normal Siegel wishes to express his appreciation to Arthur Eisenberg and Robert Levy, colleagues at the NYCLU and Steven Glauberman, a volunteer attorney, who all helped develop formulations of the NYCLU positions stated in this paper; Joel Johnson for his assistance regarding some of the footnotes; and Saralee Evans for her support, assistance and love.

1. Substantial portions of this section of this Article previously appeared in a column I wrote for the NYCLU newsletter, See Siegel, The Homeless Crisis in New York, N.Y. CIVIL LIBERTIES 2, Mar. 1986.
Single Room Occupancy Hotels (SROs). The number of available SROs decreased markedly from the early 1970s through the mid-1980s due to gentrification and redevelopment. During this time period, New York City, mostly Manhattan, lost approximately 100,000 SRO units. As the city did not adequately plan for alternative low-income housing, many of the displaced became homeless. In the early 1980s, a significant percentage of all single adult shelter residents in New York City listed an SRO as their last residence.

The shelters maintained by New York City were not adequate housing, and for many, were not even a safe, temporary alternative. Inevitably, many people rejected the city’s shelters and began living in the streets, which they found safer and less confining. Living in the streets was a poor alternative, but, to their way of thinking, it was the best alternative they had.

Many people consider the displacement caused by urban redevelopment to be no more than a harsh economic reality. I, however, am persuaded that, at least in New York, an unfortunate correlation exists between urban redevelopment and the displacement of racial minorities. My experience on the streets of New York City over the last five years has taught me that the homeless in that city are predominantly people of color—Black or Latino—with the overwhelming majority being Black.

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2. SRO dwelling units do not contain bathrooms or kitchens. Residents of SROs share these facilities.


4. A 1984 study conducted by the City of New York Human Resources Administration reveals that 14% of shelter residents questioned reported an SRO as their last place of residence. An additional 17% responded that the street or another shelter was their last home. City of New York Human Resources Administration, The Homeless in New York City Shelters (1984). A 1980 study by the same agency reported that of the male shelter residents surveyed, 45% had lived in an SRO at one time in their life. City of New York Human Resources Administration, Preliminary Report: Service Gap Study Shelter Care Center for Men (1980). It is fair to conclude that many of the 17% listing a shelter as their last address in 1984 previously lived in SROs, but could no longer say it was their last address.

5. A New York State report indicated that in 1983 approximately 90% of the sheltered homeless family population statewide were persons of color (approximately 97% in New York City) and approximately 70% of the sheltered homeless single adults were persons of color (approximately 80% in New York City). New York State Department of Social Services, Homelessness in New York State, a Report to the Governor and the Legislature (1984).
B. Deinstitutionalization of People with Mental Illness

One of the common misconceptions about homelessness is that the problem arose primarily as a result of deinstitutionalization of mentally ill people. Well, a closer look reveals that the problem is not that simple.

Anyone who has read Ken Kesey’s book or saw the film One Flew Over the Cuckoo’s Nest understands why, in the mid 1960s and early 1970s, state after state adopted a policy of deinstitutionalization of the mentally ill. Thousands of people who needed psychiatric help but who were not dangerous to themselves or to society were locked in state facilities, sometimes for many years, often under brutal conditions. While the given reason for such confinement was treatment, in fact, treatment was almost never provided by the institutions. Instead of helping people, the reality for the confined became one of imprisonment.

In 1975, the Supreme Court of the United States in O’Connor v. Donaldson stated: “In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.” Resoundingly rejecting the argument that a state may involuntarily commit the mentally ill for aesthetic reasons, the Supreme Court in O’Connor asked and answered:

May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person’s physical liberty.

State legislatures have reached the same conclusion. For example, the New York State legislature has attempted to balance the individual’s right to autonomy with society’s interest in pro-

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6. Substantial portions of this section of this Article previously appeared in an article I co-authored with Robert Levy. See Levy & Siegel, The Plight of the Mentally Ill Homeless: Sweeping Them Off the Streets Isn’t the Answer, CIVIL LIBERTIES 12, Fall 1987.

7. 422 U.S. 563, 576 (1975) (action brought by patient against state hospital claiming that hospital was intentionally and maliciously depriving him of his constitutional right to liberty).

8. Id.

9. Id. at 575.
tecting (and safeguarding against) individuals who are deemed a danger to themselves or others, but refuse assistance. In enacting the New York Mental Hygiene Law,\textsuperscript{10} the legislature has expressly drawn a constitutionally appropriate balance between these competing interests. Individuals can be confined involuntarily only upon proof of a mental illness that poses a substantial risk of serious physical harm to themselves or others. This risk of harm must be demonstrated by actual conduct and must make immediate hospitalization appropriate. The threat of danger must be "real and present"\textsuperscript{11} and proof of dangerousness must be "clear and convincing."\textsuperscript{12}

During the 1960s and 70s, people were released from New York State mental hospitals in large numbers.\textsuperscript{13} Concomitant with the release of massive numbers of mentally ill people, the state promised to create community mental health facilities—half-way houses and outpatient clinics—and to provide adequate housing to accommodate the former mental patients.\textsuperscript{14} The state, however, never fulfilled its promises, and few such facilities were established.

In New York City and other metropolitan areas, some former mental patients were placed in SROs with little of the social service assistance that had been promised them. They later became victims of gentrification when their SROs were torn down or converted to luxury high-rise residential housing.

During the winter of 1990-91, the number of homeless street people in New York City appeared to be larger than ever. They could be seen sleeping on heating grates, sidewalks, park benches, in store doorways, on trains, in subway stations and bus depots, or simply walking the streets of New York.

\section*{II. Civil Liberties Problems}

As the 1980s progressed, the homeless population increased substantially. An increasing number of homeless people became

\begin{itemize}
\item \textsuperscript{10} N.Y. MENTAL HYG. LAW §§ 1.01-9.59 (McKinney 1972).
\item \textsuperscript{11} \textit{In re Scopes}, 59 A.D.2d 205, 205, 398 N.Y.S.2d 911, 913 (1977).
\item \textsuperscript{12} Addington v. Texas, 441 U.S. 418, 433 (1979); \textit{In re Scopes}, 59 A.D.2d at 206, 398 N.Y.S.2d at 913-14.
\item \textsuperscript{13} See \textit{New York State Office of Mental Health, Report II of the Study Team Reviewing Changes in New York State Psychiatric Center Inpatient Trends 5} (1979).
\item \textsuperscript{14} See \textit{N.Y. Times}, Sept. 16, 1984, § 4, at 22, col. 1 (pursuant to reform of mental health system, chronically ill patients were discharged from state hospitals in belief that their treatment could continue more humanely in the community; this did not occur).
\end{itemize}
visible on our streets, in our subways and in our parks. Their greater numbers and increased visibility provoked governmental responses that were replete with civil liberties problems. Some of the civil liberties problems arose in the context of "quick fix" solutions offered by municipalities. The following are just a few of those quick fix solutions.

A. The Streets

As many cities began to look like Calcutta, demands were made to "get them off the streets"—especially in the cold weather.

1. The Billie Boggs Cases

I was co-counsel in the Billie Boggs cases. On the eve of Labor Day weekend in 1987, New York City Mayor Edward I. Koch announced that he was going to hospitalize "gravely disabled" homeless people involuntarily, if necessary. The program he established consisted of a psychiatrist, social worker and two police officers who roamed the streets of Manhattan, picked up homeless street people and confined them to a special twenty-eight bed psychiatric ward at Bellevue Hospital. Central to this program was the Mayor's order directing hospital officials to reinterpret the New York Mental Hygiene Law so as to permit people to be picked up who were not presently dangerous to themselves or others but who might be dangerous at some hypothetical date in the "reasonably foreseeable future."

The New York Civil Liberties Union (NYCLU) immediately opposed the Mayor's plan, calling it an unauthorized rewriting of New York State's mental health laws and a violation of basic constitutional liberties. Civil commitment is, in the words of the Supreme Court of the United States, "a massive curtailment of

15. Substantial portions of this section of this Article previously appeared in an article I co-authored with Robert Levy. See Levy & Siegel, supra note 6.


18. Id.

Government's exercise of this power must be limited by statute and constitutional principles. Because it permitted the confinement of nondangerous people based on mere speculation about their future conduct, the Mayor's program conflicted with the United States Constitution and exceeded the authority granted to the Mayor by the New York Mental Hygiene Law.

In addition to the arbitrariness of the Mayor's extra-legal commitment directive, the program offered no guarantee that real help would be provided after pick-up and confinement. The NYCLU feared, with reason, that confinement would not result in real help, but rather in the removal of the victims from public view. The past history of involuntary "hospitalization" confirmed this out of sight, out of mind suspicion. It was no coincidence that the program originally was targeted primarily for white, affluent neighborhoods in Manhattan below 96th Street on the East Side and 110th Street on the West Side.21

Ironically, at the same time that commitment standards were improperly lowered to allow commitment of homeless people who may or may not have been mentally ill and dangerous, scores of severely disturbed people who voluntarily sought psychiatric help were routinely turned away from city hospitals or forced to wait in emergency rooms for days, often strapped to wheelchairs or stretchers, because there were no beds available.22 In fact, for the past five years the NYCLU has been litigating in federal court to require the City of New York to provide basic services for the homeless mentally ill.23

One of the first people to be picked up pursuant to the Mayor's program was a forty year old black woman named Joyce Brown, who also went by the street name "Billie Boggs." Brown called the NYCLU for help.


23. Id. Lizotte is a class action on behalf of individuals who have been involuntarily detained and handcuffed to wheelchairs for prolonged periods of time in the waiting areas of New York City municipal psychiatric emergency rooms because there are no inpatient beds available for them on the wards of city hospitals. Plaintiffs seek declaratory relief and an order requiring defendants to provide duly admitted psychiatric patients with a bed in a physically appropriate environment certified for the delivery of inpatient mental health care and treatment.
For more than one year, Brown had lived on the street at Second Avenue between 65th and 66th Streets in Manhattan. She kept warm by lying next to a steam vent that released hot air twenty-four hours a day. She bought food with money she received from friends in the community and from panhandling. On October 28, 1987, a team of fifteen to twenty employees of the new program picked her up and took her to Bellevue against her will. Seeking to make her an example of the new program, the city diagnosed her as a paranoid schizophrenic in need of hospitalization.

Brown initiated a legal proceeding in which the NYCLU challenged her involuntary commitment. On November 12, 1987, after a three day hearing, New York Acting Supreme Court Judge Robert Lippmann—in an eloquent, sensitive and well reasoned decision—found that Brown did not have a mental illness likely to result in serious harm to herself or others and ordered her released. The Judge stated: "[T]hough homeless, she copes, she is fit, she survives." 24 He further stated that "[f]reedom, constitutionally guaranteed, is the right of all, no less of those who are mentally ill." 25 Judge Lippmann concluded:

Whether Joyce Brown is or is not mentally ill, it is my finding, after careful assessment of all the evidence, that she is not unable to care for her essential needs. I am aware her mode of existence does not conform to conventional standards, that it is an offense to aesthetic senses. It is my hope that the plight she represents will also offend moral conscience and rouse it to action. There must be some civilized alternatives other than involuntary hospitalization or the street. 26

On December 18, 1987, the appellate division, by a three to two majority, reversed Judge Lippmann. 27

25. Id. at 1091, 522 N.Y.S.2d at 412.
26. Id. at 1091, 522 N.Y.S.2d at 412-13.

[We] find the clear and convincing evidence indicates that, while living in the streets for the past year, Ms. Boggs' mental condition has deteriorated to the point where she was in danger of doing serious harm to herself, when, on October 28, 1987, she was involuntarily admitted to
The case was argued before the New York State Court of Appeals on January 8, 1988. Then, on January 12 and 13, a two-day hearing was held before Judge Irving Kirschenbaum on the city's application to medicate Joyce Brown against her will. The hospital wanted to give her Haldol—an anti-psychotic drug—three times a day. She refused. On January 15, Judge Kirschenbaum declined the city's application. He held that Joyce Brown had the mental capacity to make a reasoned decision about her medication under the standards enunciated in *Rivers v. Katz.* Judge Kirschenbaum held: "There is no clear and convincing evidence to support an order permitting the State to exercise its police respondent Bellevue for treatment; and, based upon the entire record and not selective portions thereof, we further find that clear and convincing evidence supports the continued involuntary confinement of Ms. Boggs to the hospital for treatment.

*Id.* at 366, 523 N.Y.S.2d at 87.

Justice Milonas with Justice Rosenberger dissented by stating:

It is a tragedy that in our wealthy society so many people have been driven to homelessness, and those of us who are more fortunate must helplessly witness and feel their misery on a daily basis. Regrettably, our affluent, sophisticated and medically advanced society has not developed a more rational, effective and humane way of dealing with the mentally disturbed homeless than in a manner other than what appears to be revolving door mental health—that is, forcibly institutionalize, forcibly medicate, stabilize, discharge back into the same environment, and then repeat the cycle. These ill and unfortunate citizens especially deserve our sympathy since they are not only homeless, but hopeless. Yet, they have shown extraordinary courage, strength and resourcefulness in their ability to survive in conditions where the "normal" person would be unable to endure.

Fortunately, people of good will have become aroused, and we may be approaching the time when the problem of the homeless will be confronted with sincere and realistic attitudes and resources.

Committing Billie Boggs is not the answer.

*Id.* at 379-80, 523 N.Y.S.2d at 95 (Milonas, J., dissenting).

28. In *Rivers v. Katz,* 67 N.Y.2d 485, 495 N.E.2d 337, 504 N.Y.S.2d 74 (1986), the New York Court of Appeals held that the due process clause of New York's State Constitution affords involuntarily committed mental patients the right to refuse anti-psychotic medication. The court stated:

[N]either the fact that appellants are mentally ill nor that they have been involuntarily committed, without more, constitutes a sufficient basis to conclude that they lack the mental capacity to comprehend the consequences of their decision to refuse medication that poses a significant risk to their physical well-being. Indeed, it is well accepted that mental illness often strikes only limited areas of functioning, leaving other areas unimpaired, and consequently, that many mentally ill persons retain the capacity to function in a competent manner. Nor does the fact of mental illness result in the forfeiture of a person's civil rights, including the fundamental right to make decision concerning one's own body.

*Id.* at 494, 495 N.E.2d at 341-42, 504 N.Y.S.2d at 79 (citations omitted).
power to compel the ingestion of drugs . . . "

On January 19, 1988, at 2:00 p.m., Joyce Brown, after being involuntarily confined for eighty-four days, was released and walked out of Bellevue. Consequently, on February 4, 1988, the New York Court of Appeals issued a decision saying the case was moot.

2. **Round-ups of People Sleeping on the Streets**

In 1989, a proposal was submitted to the New York City Council which was designed to enact legislation that would authorize city officials to pick up persons “found sleeping” in public places and to take such persons to shelters, hospitals or their homes—in the rare instances where such persons had homes.

The NYCLU took the position that this proposal was unworkable and constitutionally suspect. Consider the alternatives offered to the homeless by such a program. Under the proposal, the homeless were to be taken either to a shelter or to a public hospital. Public hospitals, however, were already over-taxed. They could not adequately treat persons who voluntarily came in seeking medical attention. The city shelters were, and are, seriously inadequate in a variety of respects. They are dehumanizing and dangerous places which homeless people avoid.

Furthermore, from a constitutional perspective, we believed the proposal was troublesome. Pursuant to its provisions, city officials would have been permitted to pick up a homeless person who was sleeping, but not one who was awake. Such a distinction points up the absurdity of the program and exposes constitutional problems that arise where, as here, government seeks to seize people against their will.

The proposal implicitly recognized that the attempt to seize people who are awake, based upon their dress and appearance, is fraught with constitutional vagueness problems. But, if the city cannot pick up those who are awake, then by what logic can it

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31. Substantial portions of this section of this Article previously appeared in my statement before the New York City Council Committees on Housing and Building and General Welfare, and the Select Committee on the Homeless on Providing Care, Assistance and Shelter to Homeless Persons on March 9, 1989.

32. Peter Vallone, New York City Council President proposed the legislation in February, 1989.
seize persons who are sleeping? In both instances, such a practice deeply intrudes upon the basic constitutional right of liberty. That constitutional right prevents government from seizing individuals against their will unless such persons are engaged in conduct that is harmful to themselves or others. In most instances, people who are sleeping on the sidewalk are engaged in no such harmful conduct.

The vision of homeless people sleeping on the street or in public facilities is undoubtedly disturbing and discomforting to sensitive and concerned citizens, but society cannot escape the homeless problem by sweeping it out of sight. Nor can it ignore constitutional principles in addressing this tragedy.

B. Trains & Subway Stations

1. Begging/Panhandling

Recently, in New York City, a major controversy arose over the issue of begging in the subways. This came about because homeless people were asking subway riders to help them out with a quarter or a dollar.

The New York City Metropolitan Transit Authority (Transit Authority) promulgated rules that prohibited individuals from requesting contributions in all facilities under its jurisdiction and control. A similar blanket prohibition against begging in the Port Authority bus terminal and on the concourse of the World Trade Center was promulgated by the Port Authority of New York and New Jersey.

By contrast, no such blanket prohibition was imposed upon charitable organizations that solicited contributions within these same facilities. Some of the organizations that were permitted to continue soliciting contributions may very well have been doing so on behalf of poor or homeless people.

34. Substantial portions of this section of this Article previously appeared in an amicus curiae brief filed by the New York Civil Liberties Union Foundation. See Amicus Curiae Brief of New York Civil Liberties Union Foundation, Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.), cert. denied, 111 S. Ct. 516 (1990).
35. See N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.6(b) & (c) (1990); see also Young v. New York City Transit Auth., 729 F. Supp. 341, 345 (S.D.N.Y.), rev'd in part, vacated in part, 903 F.2d 146 (2d Cir.), cert. denied, 111 S. Ct. 516 (1990); Roberts, Subway Begging: Legal for Charity but Not for Poor, N.Y. Times, Dec. 4, 1989, at B1, col. 1.
A federal lawsuit challenging the constitutionality of these regulations, *Young v. New York City Transit Authority*,37 was filed on behalf of homeless individuals. The district court addressed the following set of circumstances. Representatives from organizations devoted to helping the poor were permitted—subject to time, place and manner limitations—to solicit contributions within New York City's transportation facilities. Persons with no organizational affiliation, however, were totally barred from asking for contributions within these same facilities, even though the message conveyed by these poor people may have been virtually identical to the message conveyed by the organizational representatives.

Judge Leonard Sand of the United States District Court for the Southern District of New York ruled that the solicitation of charitable contributions was protected first amendment activity and that, consequently, the blanket restrictions and prohibitions against begging were unconstitutional.38

When the Transit Authority appealed Judge Sand's decision, the NYCLU filed an amicus curiae brief in the circuit court. We argued that the blanket prohibition against begging in transportation facilities was unconstitutional for two reasons. First, the equality principle of the first amendment forbids the Transit Authority from permitting charitable organizations to solicit contributions while excluding individuals without group affiliation from the same expressive activity at the same public facility. Second, the Transit Authority cannot achieve equality by banning solicitation by all groups and all individuals at all times, because an absolute prohibition against begging and solicitation would impinge impermissibly upon first amendment rights of self expression. Additionally, even if, in some circumstances, begging and solicitation involve non-verbal conduct, such conduct amounts to symbolic expression that is itself protected by the first amendment. To us, whether begging was viewed as pure speech or symbolic speech, it was nonetheless entitled to first amendment protection that rendered the blanket prohibition against such expressive activity constitutionally impermissible.


In advancing these arguments, the NYCLU did not insist that the homeless had a constitutional right to solicit contributions in any place and in any manner that they choose. For example, it may be permissible for the Transit Authority officials to restrict or even prohibit solicitation of contributions in the subway cars themselves, so long as such restrictions are imposed on an even-handed and uniform basis. It might also be possible for the Transit Authority to enforce rules to prevent begging and solicitation from being pursued in an overly aggressive or intimidating manner—though the development and enforcement of such rules would require care so as to avoid problems of vagueness and the correlative problem of conferring arbitrary and excessive discretion upon the Transit Authority police officers.

We believe that begging can and must be understood as an essential form of self-expression. Although often personally difficult for the speaker, these communications express his or her need and his or her hope that others will respond with assistance. It is an expressive, non-violent, verbal method of attempting to survive and to deal with the exigencies of life.

The United States Court of Appeals for the Second Circuit did not agree, however.\(^{39}\) The Second Circuit, in a two to one decision, reversed Judge Sand.\(^{40}\)

\(^{39}\) See Young v. New York City Transit Auth., 903 F.2d 146 (2d. Cir.), cert. denied, 111 S. Ct. 516 (1990). The majority (Judges Altimari and Timbers) concluded that the prohibition against begging did not violate the first amendment. \(\text{Id.}\) Judge Altimari stated: “Whether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct.” \(\text{Id.}\) at 154.

Judge Meskill, concurring in part and dissenting in part concluded:

In sum, begging is speech protected by the First Amendment that may be regulated, but not entirely prohibited, to achieve the government interests advanced in this case. I recognize that the presence of large numbers of beggars in the subways presents a serious problem for the TA and contributes to the sense of chaos and frustration experienced by the many hard-working New Yorkers who rely on the subway system. Had the TA’s regulations continued to bar all charitable solicitation in the subways, I would uphold them because no public forum would have been created. I simply fail to see why the TA should be able to permit organized charities, but not beggars, to rattle a cup full of change as one passes by. \(\text{Id.}\) at 168 (Meskill, J., concurring in part and dissenting in part).

\(^{40}\) On November 26, 1990, the Supreme Court of the United States denied certiorari in Young v. New York City Transit Authority, 111 S. Ct. 516 (1990).
2. Blocking the Free Movement of Persons; Lying on the Floor, Platform, Stairs or Landings and Occupying More Than One Seat

In 1989, the Transit Authority enacted regulations which provide that "no person shall block free movement of another person or persons; lie on the floor, platforms, stairs or landings, or occupy more than one seat." The NYCLU took the position that the underlying policy of a rule which prohibits blocking free movement of persons in a transportation facility and occupying more than one seat was reasonable. What concerned the NYCLU was how these standards would be applied and whether they would be applied arbitrarily against poor and homeless people. Would the rules be uniformly applied to the commuter standing at the base of an escalator or stairway looking at the arrival/departure board and the homeless person standing quietly in the same place with a sign requesting assistance and a cup for a contribution?

Transit officials have a legitimate interest in assuring that transportation operations run efficiently and accommodate the many people who utilize the facilities. But, the NYCLU asked, does furtherance of that interest require forcing homeless people out of facilities and onto the streets? Could the rules be enforced in a manner which would permit the Transit Authority to accomplish its legitimate interests without necessarily adversely affecting the homeless? The NYCLU believes that only where government can show that an individual's conduct substantially interferes with the operation or use of the facilities for passengers, or substantially interferes with the rights of passengers, should that conduct be prohibited.

The cases that addressed the issue of sleeping on trains are instructive. In New York, two longstanding cases provided that individuals who were asleep on a train were not guilty of disorderly conduct under a statute directed at conduct with intent to provoke a breach of peace. In People v. Sustek, the court deter-

41. Substantial Portions of this section of this Article previously appeared in my statement on behalf of the NYCLU before the Public Hearing of the Metropolitan Transit Authority on the Proposed Rules and Regulations Governing the Conduct and Safety of the Public in the Use of Terminals, Stations and Trains of the Metro-North Commuter Railroad Company and the Long Island Railroad on November 14, 1989.

42. Pitt, Rules Passed by Metro North Could Help to Rout Homeless, N.Y. Times, Sept. 14, 1989, at B8, col. 5 (draft rules also banned such acts as washing oneself at a drinking fountain and changing clothes at any Metro-North site).

mined that a disorderly conduct charge against a defendant sleeping in a train or subway was untenable, because the defendant was not found to be acting with intent to provoke a breach of peace, but was engaged in the "involuntary act of sleeping or falling asleep." The observation of the court four decades ago continues to be valid:

[I]t is . . . important that the rights of every individual, no matter how low his station in life, be safeguarded and that he be given the same protection of the law, and be surrounded by the same safeguards, that would of right be given the loftiest citizen.

These defendants . . . are human souls whose rights may not be trampled on and against whom a nonexisting offense may be used merely because they present a practical problem to the authorities in charge of our transit system.

Similarly, in People v. Pickett, the court held that a person who allegedly stretched full length on the seat of a subway car in which there were about fourteen other passengers at 4:30 a.m. and fell asleep, was not guilty of "disorderly conduct." The court observed that "[t]o constitute disorderly conduct there must be actual or threatened breach of peace."

The rules relating to movement of people in railroad facilities are not premised on a disorderly conduct standard. These earlier disorderly conduct cases suggest, however, that the conduct in question must be carefully analyzed to determine whether it is affecting other citizens. Should a person lying across a train seat at 4:00 a.m. in a relatively empty train be treated the same as a person stretched out on a crowded rush hour train? The NYCLU believes that the rules should be enforced carefully so they do not become a mechanism principally used to harass homeless people who are not interfering with passengers or railroad operations and to drive those homeless people from railroad facilities.

The rules that prohibit people from lying on floors do not specify whether lying on a floor in one of the many out-of-the-way

44. Id. at 516-17, 124 N.Y.S.2d at 643.
45. Id. at 515-16, 124 N.Y.S.2d at 642.
47. Id. at 193, 193 N.Y.S.2d at 955.
“nooks and crannies” of Grand Central Terminal or Pennsylvania Station at 2:00 a.m. would be treated in the same manner as the same activity in a heavily travelled area of the facility at 5:00 p.m. Is the government’s interest in enforcement as compelling where no one, including commuters, is interfered with or impeded? The NYCLU believes that these rules should be relaxed, at a minimum, during late night hours. Even if the rules could be viewed as consistent with current due process and equal protection doctrines, it is the position of the NYCLU that these rules are unwise and unnecessary as a matter of public policy and should be modified. These provisions appear to be specifically directed at the homeless people who frequent railroad facilities and will inevitably diminish the right of homeless people to survive. “The right to basic subsistence is arguably the most fundamental of all human rights. For a person who is starving and without shelter, all other rights appear to pale in comparison.”

The result of these rules will be that homeless citizens may be hounded under the threat of arrest leading to a fine or imprisonment at a time when they have few, if any, viable alternatives to provide for their own survival. At present, the federal government, State of New York and the City of New York have each failed to address the growing crisis of homelessness. They have not provided adequate affordable housing, community mental health facilities, drug and alcohol treatment facilities or a basic working plan that contains the necessary commitment of financial, physical and social resources to assist homeless citizens to achieve and secure their basic right to survival.

3. Some General Observations Regarding the Right to Survive

The government should not interfere with any individual’s right to survival. It must be recognized and understood that homeless people who use Grand Central Terminal, Pennsylvania Station and other railroad facilities do so only as a last resort. Many homeless people have told the NYCLU and other organizations with concerns for homeless people that they would rather


49. Substantial Portions of this section of this Article previously appeared in my statement on behalf of the NYCLU before the Public Hearing of the Metropolitan Transit Authority on the Proposed Rules and Regulations Governing the Conduct and Safety of the Public in the Use of Terminals Stations and Trains of the Metro-North Commuter Railroad Company and the Long Island Railroad on November 14, 1989.

50. The Coalition for the Homeless, the Doe Fund, the Partnership for the
remain outside most shelters, even if space is available, because conditions in the city's shelter system are so harsh and dangerous.

Paralleling the significant rise in the number of homeless people in New York has been the increasing harassment of homeless people by government personnel. Government helped create the phenomenon of homelessness and should not and must not threaten the right of homeless citizens to survive. From the perspective of the homeless person who seeks to obtain quarters and dollars from sympathetic fellow citizens in order to eat and to rest for a few hours by sitting or lying in a railroad facility each day to survive, it is unseemly for the officials of the railroad and the police to focus their energies and resources in this insensitive manner. The NYCLU urges the government supported railroad companies to channel their energies and resources into more constructive and humane programs for the homeless. The railroad rules should not be used effectively to close one of the last places of access and acceptable public space available to the homeless. Rather, they should be used to seek a better way of accommodating the needs and interests of the homeless.

Homelessness is a political, social and economic problem and should be so recognized by the governmental entities. They should not attempt to transform the homelessness problem into a law enforcement problem.

The NYCLU believes that the rights and interests of both commuters on railroad facilities and the homeless can be accommodated. They are not mutually exclusive. One group of citizens—passengers—should not be pitted against another group of citizens—the homeless.

C. Parks

1. Begging/Panhandling

In April of 1989, the New York City Parks Department proposed to ban begging/panhandling in the parks. Although the constitutional analysis regarding this proposal is similar to the

Homeless, the United Homeless Organization and the Legal Action Center for the Homeless are some of the organizations working closely with the homeless in New York City.

51. Substantial portions of this section of this Article previously appeared in my statement on behalf of the NYCLU before the Public Hearing of the Department of Parks and Recreation of the City of New York on the Proposed New Rules of the Department of Parks and Recreation on April 24, 1989.

analysis of the prohibition of begging in the train system, it differs in significant ways. It can be argued that the ban on begging in the train facilities was, to some degree, influenced by the fact that the train facilities are underground and that the trains and train stations, unlike parks, are not traditional first amendment public forums. Consequently, if a city parks department attempts to ban begging—the New York City transit case (Young v. New York City Transit Authority)—is not necessarily controlling.

In C.C.B. v. State of Florida, a total prohibition on all begging or soliciting for alms in the streets or public places of the City of Jacksonville was held to be “unconstitutionally overbroad by its abridgement in a more intrusive manner than necessary, of the first amendment rights of individuals to beg or solicit alms for themselves.” The court stated:

Protecting citizens from mere annoyance is not a sufficient [sic] compelling reason to absolutely deprive one of a first amendment right . . . .

. . . . The City . . . is not entitled to absolutely prohibit a beggar’s exercise of his freedom of speech, but the city may regulate that right subject to strict guidelines and definite standards closely related to permissible municipal interests . . . .

2. Loitering

Periodically, politicians and some citizens groups call for a return to the “good old days”—when supposedly things were more orderly. They sometimes advocate for anti-loitering provisions. I fear we will be hearing more of this dynamic in the years to come.

If an anti-loitering proposal is suggested in your jurisdiction, the 1972 decision in Papachristou v. City of Jacksonville will be instructive. The observations of the Supreme Court of the United States in striking down a Jacksonville, Florida vagrancy ordinance in Papachristou remain compelling:

Those generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissent-

54. Id. at 48.
55. Id. at 50.
ers, idlers—may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. It furnishes a convenient tool for “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.” It results in a regime in which the poor and the unpopular are permitted to “stand on a public sidewalk . . . only at the whim of any police officer.”

3. Sleeping and Lying on Park Benches

Some cities prohibit sleeping in parks or lying on park benches.

At least one federal court held that the conduct of a person sleeping in a public park was sufficiently expressive in nature to implicate first amendment scrutiny. In United States v. Abney, the United States Court of Appeals for the District of Columbia Circuit held that a federal regulation giving the superintendent of the park service authority to grant permission to sleep in public parks beyond the time limit specified was violative of the first amendment. The court reasoned that the regulation contained no narrow, objective and definite standards to guide such licensing authority and, thus, failed to guard against the danger of arbitrary or de facto censorship.

In Clark v. Community for Creative Non-violence, however, the Supreme Court of the United States, while recognizing that sleeping may be expressive conduct protected to some extent by the first amendment, held that expression—whether oral or written or symbolized by conduct—is subject to reasonable time, place and manner restrictions. In that case, demonstrators on behalf of the plight of the homeless in parks near the White House were permitted to erect symbolic tent cities, but were refused a permit

57. Id. at 170 (citations omitted).
58. United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976) (defendant appealed conviction under federal regulation that prohibited person from sleeping in park with intent to remain for more than four hours).
59. 468 U.S. 288 (1984) (Community for Creative Non-violence and other individuals claimed that National Park Service’s denial of their request to sleep in symbolic tents in Lafayette Park and on Mall in Washington, D.C., as part of a homeless demonstration, violated first amendment).
to sleep in such tents. The Supreme Court, stating its concern that "camping" in certain parks could cause damage to the parks, upheld a National Park Service regulation prohibiting camping in certain parks. Although the NYCLU disagrees with the decision in *Clark* and believes that the government did not justify adequately the abridgment of protected first amendment expression, the rationale of the Supreme Court with respect to the White House parks does not extend to lying down on a park bench.

Even if the sleeping ban could be viewed as consistent with current first amendment, due process and equal protection doctrines, it is the position of the NYCLU that these rules are unwise and unnecessary as a matter of public policy.

The NYCLU strongly recommends that, notwithstanding the provisions relating to sleeping and lying on park benches, modifications should be made in the enforcement of these provisions to permit homeless people access to the parks during the pendency of the homeless crisis. Alternatively, and less drastically, homeless people should be permitted to use designated and regulated areas of city parks that meet certain minimum size requirements. Such areas would be made available to homeless people only during designated hours (e.g., between 11 p.m. and 6 a.m.) for sleeping and storage of a limited amount of personal belongings. Accordingly, the homeless people would pose no threat or inconvenience to other people using such parks.

The crucial issue presented by homelessness is whether, prior to the creation of sufficient low cost housing and resources for homeless people, we tolerate—in the interest of compassion rather than coercion—people living and sleeping in the parks?

The NYCLU answer to this question is "Yes." The NYCLU sees no reason why certain parks should not be open and available to accommodate all people, including those who are homeless. We believe that, rather than prohibiting people from lying down on a park bench, cities should give serious thought to less drastic alternatives.

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60. Defined as "(including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or ... other structure ... for sleeping or doing any digging or earth breaking or carrying on cooking activities." *Id.* at 290 (citation omitted).

61. *Id.* at 299.
III. Possible Solutions

The challenge for all people, including federal, state and city government officials, is to create viable options for the homeless. The choices cannot be limited to living in the streets, arrest or imprisonment against one's will in a psychiatric hospital. If viable options are created,—e.g., low income housing, halfway houses, drug and alcohol treatment facilities, drug education programs, vocational education and employment training programs—then many homeless people will jump at the opportunity to be homeless no longer. It must be emphasized that shelters are not the solution, because shelters are not homes.

To the politicians and the public I say: Let's stop, once and for all, the demagoguery on these serious issues. Let's stop the diversions that prevent us from focusing on government's failure to create available affordable low income housing, viable community mental health programs and drug treatment facilities. Let's begin to address—constitutionally, legally and realistically—the unacceptable homeless crisis which grows steadily worse.

Twenty-five to thirty years ago, people of good will expressed their commitment to racial equality by sending activists and lawyers to Southern communities to help protect the constitutional rights of Blacks there. Today, the commitment to racial and economic equality means that we must send activists and lawyers into our urban streets, train and bus stations, and parks to learn about the problems of the homeless and to seek solutions to this horrible situation.

Economic justice requires focused attention and intense consideration. It is long overdue. The spirit and advancement of political and social rights during the civil rights movement and over the following decades now must be expanded into the economic rights area.

The measures noted below should be taken if we are to resolve the homeless crisis:

1) Create more affordable low income housing—and the sooner the better.

2) Rehabilitate abandoned, boarded up and in rem buildings and begin to use these buildings as viable housing.

3) Develop and implement remedial measures which would ameliorate the harsh impact of urban redevelopment on housing

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62. Substantial portions of this section of this Article previously appeared in a column I wrote for the NYCLU newsletter. See Siegel, supra note 1.
available to the poor. I believe government—the city, the state, and the federal government—has failed to provide meaningful housing programs for people displaced by redevelopment. In fact, during the 1980s, the federal government substantially reduced housing funding to the states. One measure worth exploring is a housing development trust fund. Developer contributions to such a fund could be tied to the number of residential units being constructed, or to the amount of commercial space that would be leased at market rates. Such a program would likely reduce a developer's profit or alternatively he or she might increase the cost of the market (often luxury) space being constructed. In either case, parties who reasonably can afford the contributions would be, in effect, subsidizing low income housing that is so desperately needed. Economic channeling of this nature seems only fair, however, when one understands that the development is a direct and demonstrable cause of the displacement and dislocation.

4) Create an experimental voluntary jobs training program for the homeless. My experience with the homeless has led me to conclude that most of them are unemployed and many could be trained and made employable.

5) Establish a constitutional right to counsel in landlord-tenant cases where the tenant faces eviction. The sixth and fourteenth amendments mandate the right to an attorney in criminal cases. We should expand the right to counsel principle to such civil matters as landlord-tenant proceedings. Today, too many tenants are without counsel when they confront a landlord (who usually has counsel) in housing court. The consequence of not having a lawyer is often homelessness. In New York City, there are approximately 28,000 evictions each year. Due process of law—fairness—requires that tenants facing eviction be provided an attorney.63

6) Convey a positive message to and about the homeless.

63. In February, 1989, the NYCLU, American Civil Liberties Union, Legal Aid Society of New York, New York Legal Services and the law firm of White & Case filed Donaldson v. State, 156 A.D.2d 290, 548 N.Y.S.2d 676 (1989), appeal denied, 75 N.Y.2d 1003, 556 N.E.2d 1115, 557 N.Y.S.2d 308 (1990). Donaldson is a class action on behalf of indigent tenants who are, or will, be faced with eviction as a result of summary proceedings in the Housing Part of the New York City Civil Court, who cannot afford counsel, and who are therefore unrepresented by counsel. Id. at 290-91, 548 N.Y.S.2d at 677. Plaintiffs claim that the failure to provide counsel to indigent tenants in eviction proceedings violates: state and federal constitutional due process and equal protection principles; common law privileges incorporated into article I, § 17 of the New York Constitution which requires the State to provide for the aid, care and support of needy
The key to any effective policy regarding homelessness is a demonstration by the federal, state and city governments that they care about each homeless person's situation. Government officials should meet and talk with homeless people. They should find out who these people are, why they are there, and what, if anything, government can do for them in the short and long terms.

I have learned a great deal about homelessness and its causes by going out and talking with homeless people. City, state and federal administrations would also learn a great deal if their key personnel were to spend time at places where homeless people congregate. Perhaps most importantly, they would convey to the homeless that the city, state and federal governments care and want to help. Compassion must be shown by government and citizenry alike.

All of us should become more involved in the issues of the homeless and in the subject of economic rights, primarily focusing on poor people. Our involvement in these issues is essential to the resolution of the desperate situation of the homeless people among us. Hopefully, we can make a difference. It is imperative that we make a difference.

persons; and New York Civil Practice Laws and Rules permitting the assignment of counsel to poor persons (N.Y. Civ. Prac. L. & R. 1102(a) (McKinney 1976)).