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Children Without Homes: Rights to Education and to Family Stability

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Children Without Homes: Rights to Education and to Family Stability

STANLEY S. HERR*

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I. INTRODUCTION

Homeless children have a claim on the legal profession's attention that has gone largely unfulfilled. Of all the segments of the

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homeless population in the United States, they are perhaps the most sympathetic and the least likely to be blamed for their plight.¹ Yet paradoxically, these children too often go uncounted, unheard, and unrepresented. Their legal needs pose pressing questions for both advocates and scholars. Litigators have launched pioneering efforts to define and assert homeless children's rights to education,² to shelter,³ and to preventive services.⁴ Many of these children experience physical, emotional, and developmental harms that demand prompt and comprehensive legal solutions.⁵

Legal and social science commentators have only recently recognized the misery of the homeless child.⁶ The National Academy of Sciences called the phenomenon of homeless children "a national disgrace that must be treated with the urgency that such a situation

1. See J. WRIGHT, ADDRESS UNKNOWN: THE HOMELESS IN AMERICA 56-66 (1989). Referring to sympathetic categories of homeless persons as "the deserving homeless," Professor Wright opines: "Just as women and children are the first to be evacuated from a sinking ship, so too should women and children be the first to be rescued from the degradations of street life or a shelter existence." *Id.* at 61. In contrast, the public has not always acted with sympathy to adults who are homeless, particularly those who identify themselves as homeless in public places. See *Young v. New York City Transit Auth.*, 903 F.2d 146, 149 (2d Cir. 1990) (stating that passengers in subway system "feel harassed and intimidated by panhandlers" who include homeless persons with mental illness or substance abuse problems).

2. *E.g.*, *Fulton v. Krauskopf*, 127 Misc. 2d 20, 484 N.Y.S.2d 982 (Sup. Ct. 1984) (seeking order directing city to either relocate homeless families in children's school area or to provide transportation).

3. *E.g.*, *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (App. Div. 1986) (challenging policies for providing emergency housing for homeless families who have children), *rev'd in part on other grounds*, 70 N.Y.2d 109, 510 N.E.2d 62, 517 N.Y.S.2d 918 (1987).

4. *E.g.*, *Hansen v. Department of Social Servs.*, 193 Cal. App. 3d 283, 238 Cal. Rptr. 232 (1987) (holding that state's emergency shelter care provision applicable to all homeless children); *Grant v. Cuomo*, No. 25168/85 (N.Y. Sup. Ct. filed Oct. 28, 1985) (seeking declaratory order to provide families of children at risk of being placed in foster care with preventative services); PRACTICING LAW INST., THE RIGHTS OF THE HOMELESS 467-93 (1987) (reprinting the *Grant v. Cuomo* complaint).

5. See Bassuk & Rubin, *Homeless Children: A Neglected Population*, 57 AM. J. ORTHOPSYCHIATRY 279 (1987). See *infra* notes 33-45 and accompanying text for a discussion of the physical and psychological harms done to homeless children.

6. Comment, *Homeless Families: Do They Have a Right to Integrity?*, 35 UCLA L. REV. 159, 161 (1987) (stating that the "dearth of material on the homeless family indicates that it is a recent phenomenon"). Most of the legal literature on homelessness focuses on adults in general or on the mentally-ill adult in particular. See, e.g., Birkinshaw, *Homelessness and the Law—The Effects and Response to Legislation*, 5 URB. L. & POL'Y 255 (1982); Rhoden, *The Limits of Liberty: Deinstitutionalization, Homelessness, and Libertarian Theory*, 31 EMORY L.J. 375 (1982). Social science literature has similarly overlooked homeless children. See T. BUSS, THE HOMELESS AND PUBLIC POLICY: A BIBLIOGRAPHY (Public Administration Series: Bibliography P 1950, 1986) (omitting any reference to homeless children in the titles of over 300 included items); AMERICAN PSYCHIATRIC ASS'N, THE HOMELESS MENTALLY ILL (H. Lamb ed. 1984).

demands.”⁷ Shelter providers, noting that young children are the fastest growing segment of the nation’s homeless population, have described them as “America’s forgotten faces.”⁸ Despite such warnings, there is still much more rhetoric than action.

This Article addresses some of the basic issues in mapping legal strategies for children without homes. Section II begins with the realities of their numbers and the impact of homelessness on the physical, mental, and developmental condition of children. It next attempts to capture some of the human dimensions of their plight and that of their parents’. The Section also notes the paucity of lawyers to champion their cause. Section III then turns to the educational rights of homeless children. The discussion underscores the importance of publicly supported education and presents several approaches to obtaining legal remedies. Section IV examines other legal issues that loom larger if homeless children are to gain stable learning and living environments. Section V suggests some ways that lawyers and law students can provide both important preventative and responsive legal assistance to children facing homelessness. The final Section concludes with testimony from homeless children—the voices of the young—caught in this human and national tragedy. The Appendix contains a directory of national, state, and local organizations that provide or coordinate legal assistance to homeless persons.

II. REALITIES OF HOMELESS YOUTH

A. *The Demographics of Children Without Homes*

No one disputes that a large number of children and youth are homeless in the United States. However, just as there is a wide range of estimates for the homeless population in general,⁹ there is no con-

7. INSTITUTE OF MEDICINE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS 156 (1988). The Institute of Medicine operates under a charter by the National Academy of Sciences as an interdisciplinary unit to examine public-health policy matters. See also Newberger & Landy, *Foreword to MASSACHUSETTS COMM. FOR CHILDREN AND YOUTH, NO PLACE LIKE HOME 3* (1986) (“The situation of homeless children and their families in this state truly approaches a moral catastrophe.”).

8. *Homeless Kids: ‘Forgotten Faces,’* NEWSWEEK, Jan. 6, 1986, at 20 (quoting Captain Michael Fletcher, Director of Salvation Army Emergency Lodge, Chicago, Ill.).

9. Critical demographic studies conclude that the number of homeless persons totals as many as 500,000 per night. P. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGIN OF HOMELESSNESS* 70 (1989). Another four to seven million poor people are at “high risk of becoming homeless.” *Id.* at 81. The United States Census is unlikely to produce an accurate count given chronic undercounting of poor and urban populations. See Navarro, *When Census Visits the Poor, Fear Often Answers*, N.Y. Times, Mar. 16, 1990, at A1, col. 2 (stating that fears of the poor prevent them from registering and result in wide range of error for the count); see also Navarro, *Census Takes to the Streets to Seek the Uncounted*, N.Y. Times, July 1, 1990, at 24, col. 1 (discussing follow-up efforts to reach the homeless and other uncounted).

sensus on the number of homeless children. The estimates range from 280,871¹⁰ to 750,000.¹¹ The United States Department of Education, the source of the low-end statistic, bases its estimate on admittedly incomplete and unreliable data from state education agencies.¹² The high-end figures cited by journalists and the Center for Law and Education, appear to be based on advocacy statements or informed guesses without a reliable empirical basis.¹³ Nor is there a consensus on the number of homeless children who fail to attend school. Federal officials acknowledge that at least 67,495 homeless school-age children do not attend.¹⁴ In sharp contrast, the National Coalition for the Homeless maintains that there are 220,000 children who fail to attend public schools on a regular basis.¹⁵

Although the total number of homeless people is a subject of debate, there is widespread agreement that families with children are

New Yorkers). "In 1980, city officials estimate, an undercount of 450,000 New York City dwellers cost the city one seat in Congress and \$675 million in Federal aid based on population." *Id.*; *Counting the Homeless*, Baltimore Sun, Mar. 20, 1990, at 8A, col. 2 (concluding that "[w]hatever the number uncovered, it is certain to be conservative").

10. U.S. DEP'T OF EDUC., REPORT TO CONGRESS: EDUCATION FOR HOMELESS CHILDREN AND YOUTH table 2 (unpaginated) (Mar. 29, 1990) [hereinafter 1990 REPORT TO CONGRESS]. The United States Department of Education estimates the number of school-age children as 272,773. *Id.* at table 1. This represents an increase of over 50,000 children from the prior year's estimate of 220,000 children. U.S. DEP'T OF EDUC., EDUCATION FOR HOMELESS CHILDREN AND YOUTH 3 (Feb. 15, 1989).

11. The estimates are disparate. The National Law Center on Homelessness and Poverty, combining two sources of federal data, reports that at least 450,000 American children are homeless. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, SHUT OUT: DENIAL OF EDUCATION TO HOMELESS CHILDREN 1 (May 1990). The National Academy of Sciences' Institute of Medicine calculates that a minimum of 100,000 children are homeless on any given night. This number includes only children of intact families and excludes runaways and abandoned children in institutions or on the streets. INSTITUTE OF MEDICINE, *supra* note 7, at 13-14. The National Coalition for the Homeless estimates that between 500,000 to 750,000 school-aged children are homeless. K. MCCALL, EDUCATING HOMELESS CHILDREN AND YOUTH: A SAMPLE OF PROGRAMS, POLICIES AND PROCEDURES 1 (1990) (available through the Center for Law and Education) (citing Y. RAFFERTY & N. ROLLINS, LEARNING IN LIMBO: EDUCATIONAL DEPRIVATION OF HOMELESS CHILDREN (Sept. 1989)).

12. For example, only 19 states provided "optional counts" of homeless preschool children. Yet these 56,783 children represented 28% of the total number of homeless children. 1990 REPORT TO CONGRESS, *supra* note 10, at 7.

13. Problems with these estimates stem from the methodological difficulties of precisely defining the homeless and of drawing distinctions between the "literally homeless" and the "marginally housed." J. WRIGHT, *supra* note 1, at 19-22. Another difficulty concerns the unit of time during which the estimates are made. A "snapshot" at one moment in time fails to capture the large number of episodically homeless persons that a year-long count would identify.

14. 1990 REPORT TO CONGRESS, *supra* note 10, at table 3. Due to differing methodologies used by the various states, the Department of Education describes these numbers as "broad estimates only." *Id.*

15. K. MCCALL, *supra* note 11, at 1.

the fastest growing element of the homeless population.¹⁶ Nationally, one-third of the homeless consist of families with children.¹⁷ In a survey of twenty-nine cities, most reported annual increases of fifteen to fifty percent in requests for shelter for the homeless, with an especially rapid escalation in the numbers of homeless families.¹⁸ State officials in Maryland, for example, report that thirty percent of the sheltered homeless were under age eighteen, while the number of homeless family members increased by sixty-seven percent in one year.¹⁹ In one careful study of the Chicago homeless, fifty-four percent had children.²⁰ Many had large families: eleven percent had three children and eleven percent had four or more children.²¹ Homeless families tended to be headed by females who, on average, were younger and homeless for a briefer time than other homeless persons.²² Many were families in transition, forced into homelessness by disastrous marriages or living conditions, and unable to obtain any, or adequate, Aid to Families with Dependent Children benefits or other forms of assistance needed to set up new households.²³

Institutionalization masks the homelessness of many children. Each year, large numbers of children are confined in correctional, mental health, mental retardation, and other juvenile institutions.²⁴ A significant number of those children remain institutionalized because

16. INSTITUTE OF MEDICINE, *supra* note 7, at 11; MARYLAND ALLIANCE FOR THE POOR, INVESTING IN MARYLAND'S FUTURE: A REPORT ON FAMILIES AND CHILDREN IN NEED 7 (1990).

17. L. Mihaly, Beyond the Numbers: Homeless Families with Children 7 (Apr. 1989) (unpublished paper prepared for Johns Hopkins University Conference on "Homeless Children and Youth: Coping with a National Tragedy").

18. INSTITUTE OF MEDICINE, *supra* note 7, at 4 (citing U.S. CONFERENCE OF MAYORS, STATUS REPORT ON HOMELESS FAMILIES IN AMERICA'S CITIES: A 29-CITY SURVEY (May 1987)). In Baltimore, between July 1989 and November 1989, there was a 167% increase in the number of children turned away from shelters, compared to a 50% increase in all homeless persons being turned away. ACTION FOR THE HOMELESS, SHELTER TURNAWAYS: BALTIMORE CITY SURVEY 5 (Dec. 1989).

19. MARYLAND DEP'T OF HUMAN RESOURCES, 1989 DATA COLLECTION ANALYSIS: HOMELESS SERVICES PROGRAM 5-6 (March 1990). Reflecting the soaring numbers of homeless children nationally, the number of Maryland's homeless children increased 103% in the prior year. MARYLAND DEP'T OF HUMAN RESOURCES, 1988 DATA COLLECTION ANALYSIS: HOMELESS SERVICE PROGRAM 2 (Jan. 1989).

20. P. ROSSI, *supra* note 9, at 131.

21. Although all the homeless in the street sample were alone, 14% of those in shelters had some family members with them. The accompanied homeless had their children with them in 80% of these cases. *Id.* at 133.

22. Females headed homeless families in 88% of the cases. Their average age was 28, as compared to an average age of 40 for all homeless persons. *Id.*

23. *Id.* at 134.

24. M. SOLER, A. SHOTTON, J. BELL, E. JAMESON, C. SHAUFFER & L. WARBOYS, REPRESENTING THE CHILD CLIENT § 1.01, at 1-2 (1990).

they have no natural or foster homes to accept them. Each year, over a half-million youngsters are held in juvenile detention facilities or training schools.²⁵ Over 80,000 minors are committed or otherwise hospitalized in mental hospitals or general hospitals; admission rates are described by one commentator as "skyrocketing."²⁶ Nearly 60,000 young persons with mental retardation reside in institutions and other out-of-home facilities.²⁷

B. *Ruth's Children: The Lives of a Homeless Family*

Statistics cannot convey the pain, frustration, and anxiety that a homeless family encounters daily. Imagine, as a pro bono lawyer, that you encounter a family of four persons in an emergency shelter for women and children.

The mother, Ruth, is a twenty-three-year-old single parent of six-year-old twin girls, Diane and Ellen, and three-year-old Donald, whom she suspects is developmentally delayed. Although there are Head Start programs and pre-school special education programs in the three school districts in which the family has lived during their two years of homelessness, none of the children has ever been evaluated or enrolled in any formal educational program. The last year was so chaotic (with moves between two school districts and the refusal of the public school in the district in which the shelter is located to enroll the twins in kindergarten) that Ruth just kept the kids with her. She was told that without immunization records they could not be admitted to school. Now, as she attempts to enroll them in the first grade, the school registrar refuses to accept their enrollment on three grounds: their lack of medical records and birth certificates (they were lost in the apartment fire that left them homeless); their residence in a shelter (the registrar claims that their "real" residence is in the adjacent school

25. As of 1982, 460,000 were held in detention facilities, and 50,000 were committed to state training schools. Another 500,000 were locked up in adult jails and police cells. *Id.*

26. Note, *Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates*, 40 STAN. L. REV. 773, 783 n.67 (1988) (reporting a 450% increase in national juvenile admissions to private mental hospitals from 1980 to 1984).

27. These estimates are derived from data in F. HAUBER, R. BRUININKS, B. HILL, K. LAKIN & C. WHITE, NATIONAL CENSUS OF RESIDENTIAL FACILITIES: FISCAL YEAR 1982, at 48-51 (U. Minn. Center for Residential and Community Services Project Rep. No. 19, Sept. 1984). Over 27,053 persons from birth to age 21 live in public facilities larger than 16 beds, while the remainder live in special nursing homes (4,959), group residences (8,308), private institutions over 16 beds (12,586), and other types of facilities. *Id.* at 51. As of 1988, some 14,236 children and youth resided in the generally more restrictive, state-operated residential facilities. C. WHITE, K. LAKIN & R. BRUININKS, PERSONS WITH MENTAL RETARDATION AND RELATED CONDITIONS IN STATE-OPERATED RESIDENTIAL FACILITIES 9, 39 (Dec. 1989) (available through the University of Minnesota Center for Residential and Community Services).

district where they lived before becoming homeless); and the twins' lack of kindergarten exposure and "school readiness." In addition, the registrar questions whether they have a suitable class for Diane who is tearful, hyperactive, and vision impaired. Mom becomes so "fed up" with all these bureaucratic hassles that she is tempted to temporarily give up her kids to the social services department. She feels these social workers can, at least, get her children enrolled once they are in foster care. In addition, between trying to find an apartment and getting her life together, Ruth already has plenty on her mind and feels she could use some breathing space.

When you interview Ruth, she mentions the twins' enrollment problems and Donald's "slowness." She mentions these school problems in passing, midway in a laundry list of a half-dozen crises in her life. Ruth has no job, or job training. Even if she had the prospect of a job, she has no child-care arrangements. Her main goal is to find affordable housing, but she is on a long waiting list for public housing and her scant benefits do not meet the rental cost and the "first and last month" security deposit that landlords are demanding. Like many other homeless mothers in her locality, she does not "even bother applying" for Aid to Families with Dependent Children benefits because "everybody knows you can't apply if you don't have a permanent address." The father of her children refuses to make any child support payments.²⁸

As this scenario illustrates,²⁹ children who are homeless face environmental and administrative barriers to obtaining any education,

28. On reports that homeless mothers are routinely denied AFDC benefits due to their lack of a permanent address, and the failure to implement the federal Homeless Eligibility Clarification Act, Pub. L. No. 99-570, 100 Stat. 3207-167 (1986) (codified at 7 U.S.C. § 2011 (1988)). See 1 IN JUST TIMES No. 2 (June 1990) (newsletter of the National Law Center on Homelessness and Poverty) (quoting Brenda McCormick, Director of Mother's Inc., a local advocacy organization in Virginia Beach, Va.). With proper implementation of the federal act, benefits such as AFDC or food stamps cannot be denied on the basis of the lack of a permanent address. *Id.*

29. If this scenario is not desperate enough, imagine the case of a homeless mother dealing with her own depression through heavy drinking and crack cocaine. Similarly, imagine the added complexity for a mother with mental illness, mental retardation, or some other developmental disability, living unsupported in the community. For the 81% of all persons with mental retardation, totaling 1.38 million persons, who are dependent on family members or friends for care, the prospect of homelessness threatens their very survival. G. Fujiura & D. Braddock, *Fiscal and Demographic Trends in Mental Retardation Services: The Emergence of the Family 10-11*, figure 8 (Jan. 1990) (unpublished paper). On the under-publicized existence of homelessness among persons with mental retardation, see Levitas, *Homeless in America*, N.Y. Times, June 10, 1990, § 6 (Magazine), at 45, 91 (describing a former resident of the Willowbrook mental retardation center who was "homeless for six years on the streets of the Bronx, and was raped, robbed and beaten before finding safety at the Traveler's Hotel for women near the Port Authority Bus Terminal"). Research on the lives of such homeless persons is now underway. Letter from Prof. Robert B. Edgerton, Dep'ts of Psychiatry and Anthropology, UCLA, to author (June 19, 1989).

let alone an appropriate education suited to their needs. The environmental barriers include the parents' inability or exhaustion in fighting an unresponsive school system; frequent moves which disrupt educational continuity; other survival priorities demanding the parents' attention; the children's reluctance or even aversion to attending schools where they are taunted as "shelter kids" and "dirty babies" by their peers;³⁰ and the lack of information or assertiveness that results in homeless parents being poor competitors for scarce resources such as Head Start or early special-education placements.³¹ If a parent is also impaired by mental disorder or substance abuse, the odds against the child's finding stable learning and living environments grow considerably. Some parents who are the victims of family violence may even keep their children from school to avoid detection by, and retaliation from, aggressive spouses.³² Going to school is no easy matter for children who have suffered heavy blows to their self-esteem and who live with battered families.

C. *The Harms of Homelessness to Children*

Children without homes are at risk for many reasons. In the United States (which, tragically, lags behind other industrialized nations in preventing infant mortality,³³ child poverty,³⁴ and youth homicide³⁵) homeless children are in great danger of developing health, developmental, and social problems. They are a highly vul-

30. Alperstein & Arnstein, *Homeless Children—A Challenge for Pediatricians*, 35 PEDIATRIC CLINICS N. AM. 1413, 1421 (Dec. 1988) (reporting that children living in shelters and welfare hotels are stigmatized and "sometimes labeled 'hotel kids' and ostracized"). For the children's own reactions to these insults and disruptions to their lives, see *infra* Section VI.

31. Many of these parents have limited educational attainments. In the Chicago Homeless Study, more than two-thirds of the homeless people sampled lacked high school graduation. P. ROSSI, *supra* note 9, at 127-28.

32. One study of homeless mothers found that 41% of the respondents had been battered, and often escaped from the battering relationship by taking themselves and their children to a battered women's shelter. Bassuk & Rosenberg, *Why Does Family Homelessness Occur? A Case-Control Study*, 78 AM. J. PUB. HEALTH 783, 785 (1988).

33. Over the past 30 years, the United States' international ranking on infant mortality has sharply deteriorated from the 6th lowest to 17th among 20 industrialized nations (tied with three other nations for last place). D. HUGHES, K. JOHNSON, S. ROSENBAUM, J. SIMONS & E. BUTLER, *THE HEALTH OF AMERICA'S CHILDREN: MATERNAL AND CHILD HEALTH DATA BOOK 7-8* (1987) (available through the Children's Defense Fund). The United States' infant mortality rate is now relatively constant at 9.7 deaths per 1000 births. Gibbs, *Shameful Requests to the Next Generation*, TIME, Oct. 8, 1990, at 42, 43.

34. In 1988, 20.4% of all children under 16 years old lived in households whose earnings were below the United States government's poverty threshold of \$12,092 for a family of four. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990: THE NATIONAL DATA BOOK 460 (110th ed. 1990).

35. In 1989, 1,899 children under 18 years old were victims of murder. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES 10 (Aug. 5, 1990)

nerable population in terms of death during infancy and early childhood,³⁶ poor physical health,³⁷ developmental disabilities,³⁸ depression,³⁹ and other mental disorders.⁴⁰ They are also a heterogeneous population, ranging from infants in dangerous barrack shelters⁴¹ to eighteen-year-old "street kids" trying to survive by whatever means

36. See COALITION FOR THE HOMELESS, A CRYING SHAME: OFFICIAL ABUSE AND NEGLECT OF HOMELESS INFANTS 1 (Nov. 1985).

In a random survey of 50 homeless families, three deaths of infants were reported. One eight-month old little boy, Shamel Jackson, spent repeated nights without shelter sleeping on the floor in the City's emergency assistance unit (EAU), a welfare office. He was constantly seen, dying, by Human Resources Administration (HRA) workers, but none intervened to protect him. Shamel, suffering from brain damage, eventually died of complications of a stomach virus he apparently contracted from other sick children at the EAU.

Id.

37. Homeless children have chronic physical disorders with rates nearly twice the general population for anemia, asthma, and malnutrition. Homeless adolescents have high rates of substance abuse, sexually transmitted diseases, and pregnancy. INSTITUTE OF MEDICINE, *supra* note 7, at 66-68.

38. See Bassuk & Rubin, *supra* note 5, at 284-85.

Our data indicate that a majority of children living in Massachusetts family shelters are suffering from developmental delays, severe anxiety and depression, and learning difficulties [A]pproximately half of the sheltered homeless children required psychiatric referral and evaluation The high degree of anxiety and depression, whether state or trait, might reflect the current shelter experience. The new and often chaotic environment of the shelter, the lack of privacy, structure and routine; and the acute stress experienced by the mothers contribute to the children's distress.

Id.

39. See *id.* at 282-83. In a study of homeless families in Massachusetts, Professor Ellen L. Bassuk of the Harvard Medical School reported that a majority of the school-age children tested stated that they had suicidal thoughts; one-third of the children scored so high on the Children's Depression Inventory that there was presumptive evidence of clinical depression; over one-half scored at a level to require further clinical evaluation for depression; and a majority of the children who completed the Children's Manifest Anxiety Scale scored above the median on anxiety. *Id.*

40. On the psychological consequences of homelessness for children and their parents, Professor Bassuk concludes that it is apparent that children suffer from the extremely stressful situation of being homeless. These "children manifest symptoms of dire psychological distress. The most common symptoms are associated with severe anxiety and depression. Moreover, a greatly disproportionate number of homeless children are failing to develop normally in several important ways." Hansen v. Department of Social Serv., 193 Cal. App. 3d 283, 295 n.8, 238 Cal. Rptr. 232, 239 n.8 (Ct. App. 1987) (quoting affidavit of Dr. Bassuk given in a trial court proceeding).

Even compared to the children of housed low-income mothers, homeless children had a significantly higher incidence of serious developmental, school, and emotional problems. See Bassuk & Rosenberg, *supra* note 32, at 785-86.

41. See COALITION FOR THE HOMELESS, *supra* note 36, at 20-21 (reporting that infants contract viruses and other diseases through transmission of germs among both children and adults sharing facilities).

possible.⁴²

Not all children experience homelessness in the same way or undergo the same rigors. Some have greater resilience, intact families to insulate them, or shorter periods of homelessness to endure. But many feel anxiety, anger, and distrust as a result of the unsettling encounters and frequent moves in their young lives. If "life on the streets of Miami [or any other large city] is a degrading, frightening experience"⁴³ for adults, it must surely be even more terrifying for the young.

Due to this external and internal turmoil, homeless children are a classic example of a group at educational risk. They are less likely than their non-homeless peers to enter pre-school programs, to be enrolled in school-age programs, to be receptive to classroom learning, to attend school regularly, or to graduate from public schools.⁴⁴ A child who lacks a nutritious diet, a quiet place to do homework, parents who have the energy to be attentive to educational needs, and a stable home environment is at heightened risk of school non-attendance and failure.⁴⁵

D. Scarcity of Legal Advocates

Since homeless children have no political constituency of their own, they face an acute need for legal champions of their cause. To date, the paucity of litigation, legislation, and regulatory reform is attributable, in part, to the scarcity of lawyers and other legally trained advocates acting on behalf of homeless children.⁴⁶ While New

42. See *Leaving Bad Homes to Live on the Streets, Teenagers Discover Fresh Perils*, Baltimore Sun, Mar. 18, 1990, at 1A, col. 2, 10A, col. 4.

"There are not many choices for kids on the street," said Ernie Allen, president of the National Center for Missing and Exploited Children. "Put these kids out there, and they are going to survive. Many of them are going to do that with drugs, theft, prostitution, pornography. There are limited numbers of jobs at McDonald's, and that doesn't pay enough to survive anyhow."

Id.

43. *Pottinger v. City of Miami*, No. 88-2406, slip op. at 3 (S.D. Fla. Dec. 30, 1988) (denying preliminary injunction for relief from alleged police harassment of homeless persons).

44. Compared even to housed welfare families, 41% of homeless children were reported to be failing or doing below average school work in contrast to 23% of their housed counterparts. Bassuk & Rosenberg, *supra* note 32, at 786.

45. See Schmitt, *Ordeal for Homeless Students in Suburbs*, N.Y. Times, Nov. 16, 1987, at B1, col. 2 (reporting that students facing a 35-mile commute on school bus and living in crowded motel rooms are listless and depressed in class). "It's no secret that these children are more prone to academic, physical and psychological problems because of the situations they're in," said Donald S. Rickett, Superintendent of Peekskill city schools." *Id.*

46. See *infra* Section V for further discussion of potential roles of lawyers for homeless children. For an example of exceptional legal work for such children on a Congressional level, see *infra* notes 61-65 & 153-62 and accompanying text.

York, Los Angeles, and Washington are centers for homeless advocacy,⁴⁷ elsewhere legal activism is scant or nonexistent.⁴⁸ In only one locality—Kansas City—is there a report of a significant number of homeless children represented.⁴⁹

To the extent that children are represented at all, they are likely to be aided by attorneys representing their parents. The priorities reflected and the goals of representation advanced are those of adults rather than of children.⁵⁰ Other sub-groups of the homeless, especially single men, are more likely to have the capacity, the time, and the inclination to pursue their legal remedies.⁵¹ Not surprisingly, given the competing priorities for the advocates' attention, the rights of homeless children do not often come to the fore.

In summary, homeless families are a large population that is experiencing rapid growth, with problems often linked to the feminization of poverty.⁵² Their problems are especially intractable since

47. See, e.g., *infra* notes 126-28.

48. See generally AMERICAN BAR ASSOCIATION, REPRESENTATION OF THE HOMELESS PROJECT, STATE AND LOCAL BAR ASSOCIATION HOMELESS PROGRAMS (1989) (resource guide containing information on existing bar and other legal programs).

49. *Permanent Housing for the Homeless: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking, Finance, and Urban Affairs*, 101st Cong., 1st Sess. 2 (1989) (statement of David W. Crosland, Co-chair of the Representation of the Homeless Project on behalf of the American Bar Association) [hereinafter ABA Testimony to Congress]. Over 50% of homeless persons assisted by attorneys of the Kansas City Bar project are children. *Id.*

50. On potential conflicts of interest between children and their parents, see Guggenheim, *The Right to Be Represented but Not Heard: Reflections on Legal Representation for Children*, 59 N.Y.U. L. REV. 76 (1984); and Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE — (1989-1990).

51. In many jurisdictions, the initial right-to-shelter cases were brought by single men. See, e.g., *Callahan v. Carey*, No. 79-42582, N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979) (holding that homeless and indigent men are entitled to lodging). Homeless men continue to pursue remedies in this field. See, e.g., *Jedlicka v. Baltimore County*, No. 90-CSP-1298, (Md. Cir. Ct. Apr. 30, 1990) (granting interlocutory order requiring shelter for homeless men).

52. See generally Pearce, *Women, Work, and Welfare: The Feminization of Poverty*, in WORKING WOMEN AND FAMILIES 103 (K. Feinstein ed. 1979) (discussing the interplay of different sources of income on female poverty and the welfare system's role in perpetuating it). Another commentator, noting that over 40% of female-headed families fall below the poverty level, prefers the phrase "the impoverishment of women" to emphasize the social forces that are actively pushing women into poverty. T. ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS* 1-2 (1986); see also L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323 (1985) (stating that in the first year after a divorce, women and their children experience an average 73% drop in standard of living; for society, divorce tends to increase female and child poverty); Burkhauser & Duncan, *Life Events, Public Policy, and the Economic Vulnerability of Children and the Elderly*, in THE VULNERABLE 55, 62-63 (J. Palmer, T. Smeeding & B. Torrey eds. 1988) (reporting that families headed by women in the 25- to 45-year-old age group with incomes falling below the poverty line exceed those

they often face multiple crises: housing, schooling, intra-family violence, substance abuse, family break-up, and stark poverty.⁵³ The legal profession cannot ignore this group on grounds that its problems are not significant or widespread.

III. EDUCATIONAL RIGHTS OF HOMELESS CHILDREN

A. *Barriers to Education*

All too often, homeless children experience rejection at the schoolhouse door. The myriad administrative and legal barriers creates a Catch-22 for the homeless school-age child. These children are being denied schooling due to:

- inability to meet such record requirements as the presentation of birth certificates or utility bills to prove residency;
- lack of proof of medical immunizations;
- delays in the transfer of records from a prior school;
- lack of transportation between the shelter and the school of enrollment;
- residency requirements imposed by law or custom;
- delays in resolving placement disputes on school district or school levels, which arise from differing interpretations of residency or the placement that is in the child's best interest;
- failure to make information available to parents on publicly funded pre-school and other educational opportunities;
- failure to identify children with special educational needs;
- delays in the processing and placement of children with identified special education needs which can lead to withdrawal from school; and
- obstacles encountered by an unaccompanied child registering for school.⁵⁴

headed by men by 20% compared to 13%; five percent of female-headed families in poverty for six years or longer versus two percent for male households).

53. See J. WRIGHT, *supra* note 1, at 32.

[H]omelessness . . . is simultaneously, a housing problem, an employment problem, a demographic problem, a problem of social disaffiliation, a mental health problem, a substance abuse problem, a criminal justice problem, a family violence problem, a problem created by cutbacks in social welfare spending, a problem resulting from the decay of the traditional nuclear family, and a problem intimately connected to the recent increase in the number of persons living below the poverty level. No one of these can be singled out as "the" cause of homelessness

Id.

54. For further discussion on the prevalence of these and other barriers to homeless children's education see generally CENTER FOR LAW AND EDUCATION, MATERIALS ON THE EDUCATION OF HOMELESS CHILDREN (May 1990) (compilation of newspaper articles, reports, relevant statutes and regulations, cases and pleadings); NATIONAL LAW CENTER ON

Although some of these problems are not unique to the homeless, they impact on such families in crisis with a special bite. Diane, the child in the scenario in need of special education, may move to another school district before the ponderous processes of some local educational agencies have run their course. It takes weeks, if not months, to convene an ARD,⁵⁵ draft an IEP,⁵⁶ and actually provide the child with a FAPE.⁵⁷ These acronyms are actually used by educators when talking to the uninitiated in the mysteries of special education. Education officials sometimes make their actual decisions outside the presence of parent and handicapped child,⁵⁸ allowing issues of the moral worthiness of the family and narrow specialist concerns to divert them from identifying and resolving the educational needs of the child.⁵⁹ Even a non-handicapped child may experience difficulties getting into a school that will offer her compensatory education for months of missed schooling, or the tutorial help and encouragement to get her "on track" with her non-homeless peers.

For homeless parents, the advocacy sophistication and persistence needed to work within the educational system are often beyond their ability. Class action plaintiffs may wait years to obtain court orders to enforce placement timelines, only to encounter continued bureaucratic inertia.⁶⁰ Parents are also deterred from coming forward

HOMELESSNESS AND POVERTY, *supra* note 11 (report on the continuing denial of education to homeless children).

55. "ARD" is an acronym for the admission, review, and dismissal committee that must meet prior to recommending a change in a child's special education placement. See 34 C.F.R. §§ 300.343-.344 (1989).

56. "IEP" is an acronym for the individualized education program, consisting of a written statement of goals and specific services, that is required for every handicapped child. Education of the Handicapped Act, 20 U.S.C. § 1401(19) (1988).

57. "FAPE" is an acronym for free, appropriate public education, defined as "special education and related services," that is provided without charge and in conformity with an IEP. *Id.* § 1401(18). Because violations of federal and state timelines for assessment and educational programming are so common, some plaintiffs' attorneys and urban school-district attorneys have devised elaborate remedial plans, including provisions for interim placements, compensatory services, appointments of ombudsmen, and monitors to resolve disputes. See *Vaughn G. v. Hunter*, No. H-84-1911 (D. Md. Jan. 24, 1990) (consent decree).

58. See M. LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 127 (1980) (Conditions under which education bureaucrats make decisions are structured to avoid pressures from affected parties.).

59. Lipsky states: "Where more than one street-level bureaucrat is involved, as in the cases of courtroom processing or the multi-disciplinary assessments of handicapped students with special educational needs, it is often the moral worthiness of subjects that is negotiated in these settings." *Id.* at 109. In the field of special education, "[r]are is the specialist who retains a comprehensive conception of the client and the alternatives available for processing." *Id.* at 147.

60. See, e.g., *Vaughn G. v. Hunter*, No. H-84-1911 (requiring timely assessment of pupils and implementation of special education services); see also *Robinson v. Pinderhughes*, No. 85-1370 (D. Md. Feb. 15, 1985), *aff'd in part, vacated in part & remanded*, 810 F.2d 1270, 1275

with school problems out of fear that overzealous social workers will trigger neglect proceedings, resulting in the taking of their children. It is no wonder that homeless individuals may be intimidated from even invoking these "special" processes.

B. *Legal Rights to Appropriate Education: Overcoming the Barriers*

1. STATUTORY REMEDIES

The Stewart B. McKinney Homeless Assistance Act⁶¹ offers a starting point to identify, if not to resolve, some of the problems of Ruth's children. The Act has four educational premises:

- (1) each State educational agency shall assure homeless children access to a free appropriate public education equivalent to that available to other children.⁶²
- (2) each State shall revise its residency requirement law to assure that homeless children are "afforded a free appropriate public education."⁶³
- (3) each State shall assure that the homeless child's educational records are available and "timely" transferred between schools.⁶⁴
- (4) school placement choices are to be made in the child's "best interest."⁶⁵

Despite its grand aims, the Act has many weaknesses in design as well as in its implementation. With only modest allotments to participating states, the Act lacks real leverage for change.⁶⁶ Despite state agency assurances that homeless children are to receive an appropriate education equivalent to their peers, local educational agencies feel little obligation to alter contrary practices.⁶⁷ Furthermore, the Act emphasizes protecting the homeless child's access to some educa-

(4th Cir. 1987) (stating that a section 1983 remedy may be available for a violation of placement timelines and a school district's failure to comply with a favorable final administrative decision for a handicapped child).

61. 42 U.S.C. § 11301 (1988). In reauthorizing the Act, Congress has recently strengthened some of its education provisions. See Stewart B. McKinney Homeless Assistance Amendments Act of 1990, Pub. L. No. 101-645, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4735 (to be codified at 42 U.S.C. §§ 11431-11434; *infra* text accompanying notes 153-62 & 170).

62. 42 U.S.C. §§ 11431(1), 11432(e)(5).

63. *Id.* § 11431(2).

64. *Id.* § 11432(e)(6).

65. *Id.* § 11432(e)(3). This section's requirements apply only to state educational agencies receiving these federal funds. *Id.* § 11432(a).

66. For a discussion of funding shortages and related problems, see *infra* notes 112 & 116-17 and accompanying text.

67. See NATIONAL COALITION FOR THE HOMELESS, BROKEN LIVES: DENIAL OF ACCESS TO EDUCATION FOR HOMELESS CHILDREN (Dec. 1987). On the myriad problems of implementing the McKinney Act's educational provisions, see *infra* text accompanying notes 112-22.

tion—rather than ensuring educational quality or effectiveness. Unlike the Education of the Handicapped Act, this law fails to specify the supplemental services, for example transportation, counseling, or psychological services, that the child may require, or to provide procedural safeguards that parents may invoke.⁶⁸ In addition, it leaves undefined the parents' roles in the selection of an educational placement that is in the child's best interests, and the criteria to be considered in reaching this "best-interest" determination. As the product of legislative compromise, these provisions lack specificity at points where controversy will most frequently arise.⁶⁹

Thus, in the field of education, the McKinney Act appears to be partly symbolic legislation. However, it arguably creates a new federal right and it is an important opening wedge toward federal responsibility. It identifies a set of significant barriers to education, and offers a generalized standard for placing the homeless child in an educational setting that is in the child's best interests.

2. JUDICIAL REMEDIES

With the exception of a National Coalition for the Homeless suit against the federal government,⁷⁰ to date no case has relied on the McKinney Act for a legal remedy. In *Orozco v. Sobol*,⁷¹ a New York federal district court made a passing reference to the McKinney Act, and to the state's duty to plan for the education of homeless children and to provide procedures for disputed student placements.⁷² Against a long-standing background of cases identifying the lack of such procedures, Judge Goettel stated that judicial safeguards were "sadly" necessary to keep "constitutionally-protected rights from being

68. See Education of the Handicapped Act, 20 U.S.C. § 1401(17) (1988) (related special-education services include "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education"), § 1415 (parents dissatisfied with the child's evaluation or educational placement can obtain an impartial administrative hearing and, if still aggrieved, judicial review in federal or state court). Effective July 1991, this latter act will be renamed the "Individuals with Disabilities Education Act." Pub. L. No. 101-476, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 1142. This amendment is intended to emphasize the person and not her disability.

69. The McKinney Act leaves critical questions unanswered. For example, within how many school days must records be transferred from one school to another for the transfer to be considered timely? How many state legislative sessions can expire before a state must meet its obligation to revise its laws on school enrollment and attendance to ensure the free, appropriate public education of homeless children?

70. *National Coalition for the Homeless v. Department of Educ.*, No. 87-3512 TFH at 1 (D.D.C. Jan. 21, 1988) (requiring the federal government to make reasonable efforts to persuade states to apply for grants for education of homeless children).

71. 674 F. Supp. 125 (S.D.N.Y. 1987).

72. *Id.* at 130 n.5.

sucked up in a vacuum of legal and regulatory dereliction."⁷³ In criticizing this legislative and bureaucratic inertia, the court admonished the defendants that the "plaintiff and the hundreds (or thousands) like her do not have the luxury of waiting for that slumbering giant in Albany to work its will."⁷⁴ After New York State adopted placement regulations and the school district admitted the child, the court was less solicitous of the child plaintiff's position when the remaining issue was damages for ten days of missed schooling.⁷⁵

The handful of cases tried for the benefit of homeless children turn on state education laws on residency, enrollment, transportation, and compulsory school attendance. Perhaps the most striking aspect of this case law is the absence of class actions or other impact litigation for homeless children. As the following discussion reveals, these cases have been litigated on a child-by-child and family-by-family basis. The result is a jurisprudence of limited reach, impact, and consistency.

a. Residency Determinations

The problem of residency is the most frequently litigated issue for homeless children. School districts view these children as "hot potatoes" to be tossed to the district least able to resist the newcomers. For example, in the 1985 case *Richards v. Board of Education*,⁷⁶ the New York Department of Education held that the school district in which children attended classes at the time they became homeless must continue to enroll the children.⁷⁷ The Commissioner of Education stressed the fact-specific nature of residency determinations, and noted that the homeless family's temporary sheltering in a motel in

73. *Id.* at 130.

74. *Id.*

75. *Orozco v. Sobol*, 703 F. Supp. 1113, 1115-17 (S.D.N.Y. 1989) (holding that requests for declaratory and injunctive relief were moot due to the adoption of state regulations and the child's immediate admission by order of court). Casting doubt on the utility of federal judges awarding nominal damages if a constitutional right were violated, the court cited and stated:

See also Stewart B. McKinney Homeless Assistance Act § 722(e), 42 U.S.C. § 11432(e) (directing States, and not the Federal courts, to shape educational policy for the homeless, an instruction New York has been quick to follow through on via adoption of the new regulations). One might have thought that a case touching on such sensitive concerns would have to be made of sterner stuff than the mere possibility of nominal damages, but such is the Alice in Wonderland-like state of the law as we find it.

Id. at 1117.

76. No. 11,490, N.Y. Dep't of Educ. (July 17, 1985), reprinted in CENTER FOR LAW AND EDUCATION, *supra* note 54, at section III.A.

77. *Id.*

another district did not constitute abandonment of residence.⁷⁸

The following year, in *Delgado v. Freeport Public School District*,⁷⁹ a trial court imposed the duty of educating homeless children on the school district in which the shelter was located. In 1987, another court, in an unreported decision, emphasized that the critical factor in determining proper school residency was the bodily presence of the children.⁸⁰ Finally, New York ended some of the confusion by becoming the first state in the nation to adopt regulations that give parents the explicit right to choose the school district in which to enroll their homeless child.⁸¹ Thus, as a result of prodding from the courts and from Congress, the principle of giving homeless children a right of choice as to their school district of enrollment has been recognized. To carry out this principle, legislatures will now have to formulate plans to distribute aid to school districts that enroll a large number of homeless children.

b. Special Education Requirements

For the many homeless children with special-education needs, the Education of the Handicapped Act⁸² and its state law counterparts offer the promise of appropriate education. According to Dr. Ellen Bassuk and other psychiatrists who have studied homeless children, a high proportion of homeless children suffer severe anxiety, depression, emotional trauma, and developmental delays.⁸³ For many of these children, there is an entitlement to a free appropriate public education to meet their specialized instructional needs.⁸⁴ Public Law 94-142 thus presents a well-trod path to services.⁸⁵

78. *Id.* The determination of residency focuses on express intent or implied intention to change residence. Despite the family's moves to six different motels in the county, the commissioner held that she had not abandoned her residence in the district in which she became homeless. *Id.*

79. 131 Misc. 2d 102, 499 N.Y.S.2d 606 (Sup. Ct. 1986).

80. *Mason v. Board. of Educ.*, No. 2865/87 (N.Y. Sup. Ct. Apr. 22, 1987).

81. N.Y. COMP. CODES R. & REGS. tit. 8, §§ 100.2(x)-(y) (1989); see *infra* notes 104-11 and accompanying text.

82. 20 U.S.C. §§ 1400-1485 (1988).

83. See Bassuk & Rosenberg, *Psychosocial Characteristics of Homeless Children and Children with Homes*, 85 PEDIATRICS 257 (1990); see also Bassuk, *Homeless Children: A Neglected Population*, 57 AM. J. ORTHOPSYCHIATRY 279 (1987). See generally Bassuk, *Characteristics of Sheltered Homeless Families*, 76 AM. J. PUB. HEALTH 1097 (1986); Bassuk, *The Homeless Problem*, 251 SCIENTIFIC AMERICAN 40 (1984); Bassuk, Rubia & Lauriat, *Is Homelessness a Mental Health Problem?* 141 AM. J. PSYCHIATRY 1546 (1984). See *supra* notes 38-40 & 44 and accompanying text for a discussion of Dr. Bassuk's conclusions.

84. 20 U.S.C. § 1400(C).

85. See L. ROTHSTEIN, *SPECIAL EDUCATION LAW* (1990); H. TURNBULL, *FREE APPROPRIATE PUBLIC EDUCATION: THE LAW AND CHILDREN WITH DISABILITIES* (3d ed. 1990).

Administrative remedies are also available under the Rehabilitation Act⁸⁶ for violation of its non-discrimination provisions. If a handicapped child is excluded or offered inferior services as compared to the non-handicapped child, federal funding can be terminated or other remedial steps can be required. Anyone can file a grievance with the United States Department of Education alleging discrimination by a recipient of federal financial assistance, thus triggering an informal resolution or an administrative hearing.⁸⁷ However, according to the Supreme Court's interpretation, judicial remedies under this Act are limited by the comprehensive remedies and the "careful balance struck" in the Education of the Handicapped Act.⁸⁸

Even before the enactment of these laws, class actions such as *Mills v. Board of Education*⁸⁹ and *Pennsylvania Association for Retarded Children v. Pennsylvania*⁹⁰ had established equal protection and due process safeguards to ensure the identification, evaluation, and appropriate placement of all handicapped children within their jurisdictions.⁹¹ These and other cases offer precedent for statewide class actions to ensure that no children are excluded from, or otherwise denied, a free, appropriate public education on the basis of their handicap and their homeless condition.

c. Constitutional Law Requirements

For other homeless children barred from schooling, a panoply of due process and equal protection claims can be asserted. As the Supreme Court in *Plyer v. Doe*⁹² made clear, equal protection of the laws demands that no child be denied access to a state-created system of free, compulsory education.⁹³ If the children of illegal aliens can not be stripped of that right, then surely the native-born children of homeless persons cannot forfeit their entitlement to education. Although the advocates of homeless children have raised federal and

86. 29 U.S.C. § 794 (1988).

87. 34 C.F.R. §§ 100.6-.10 (1989).

88. *Smith v. Robinson*, 468 U.S. 992, 1021 (1984) (holding that where the remedy under section 504 of the Rehabilitation Act of 1973 is provided with more clarity and precision under the Education of the Handicapped Act ("EHA"), remedies under EHA may not be circumvented or enlarged by section 504).

89. 348 F. Supp. 866 (D.D.C. 1972).

90. 343 F. Supp. 279 (E.D. Pa. 1972).

91. *Mills v. Board of Educ.*, 348 F. Supp. at 874-76 (holding that denial of all publicly supported education to plaintiff class, while providing public education to other children, violates the due process clause); *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pa.*, 343 F. Supp. at 293-97 (enjoining enforcement of state statutes pertaining to exclusion of children with mental retardation from public school programs).

92. 457 U.S. 202 (1982).

93. *See id.* at 221-22.

state equal protection arguments,⁹⁴ the filing of such cases has frequently resulted in school placements that rendered the complaints moot.⁹⁵

Due process claims have also led to offers of school admission. In *Harrison v. Sobol*,⁹⁶ the court held that the plaintiff homeless children had been denied their state law rights to education without due process.⁹⁷ As a result of what the court termed a "useless bureaucratic tangle,"⁹⁸ the school failed to provide written notice on the issue of non-residency and the children missed five days of school. After the plaintiffs' attorney filed for a preliminary injunction, the school voluntarily readmitted them within a few days.⁹⁹ Since the school's action (and the state's adoption of new regulations giving parents of homeless children a right to elect which school district to attend) mooted the plaintiff's claim for injunctive relief,¹⁰⁰ the court awarded only nominal damages and attorneys' fees for the lack of due process.¹⁰¹ *Takeall v. Ambach*¹⁰² clarifies a school district's obligation to provide written notice of a determination of a student's non-eligibility to attend school, along with a statement of reasons and available administrative remedies.¹⁰³ This precedent provides parents of homeless children with valuable information on their transfer or appeal options, and thereby puts school districts on notice of their potential legal liability for failing to respect children's rights.

3. REGULATORY REMEDIES

To avoid educational disruption and inefficient relief, homeless children need clear regulatory remedies. In most states, new regulations are required to achieve these goals and the educational policies

94. See Brief of Plaintiff at 16-17, *Vingara v. Borough of Wrightstown*, No. C-7545-87 (N.J. Super. Ct. Ch. Div. Jan. 5, 1988), reprinted in CENTER FOR LAW AND EDUCATION, *supra* note 54, at section III.D.

95. See, e.g., *Vingara v. Borough of Wrightstown*, No. C-7545-87 (N.J. Super. Ct. Ch. Div. Jan. 5, 1988) (municipality amended zoning ordinance by removing 30-day limit on motel occupancy, thus avoiding threatened transfer of homeless children and their families to other motel shelters and to other school districts), reprinted in CENTER FOR LAW AND EDUCATION, *supra* note 54, at section III.D.

96. 705 F. Supp. 870 (S.D.N.Y. 1988).

97. *Id.* at 874.

98. *Id.*

99. *Id.* The prompt filing of legal action may have reduced the children's time out of school. Excluded from school on November 2nd, their suit was filed on November 4th and the school readmitted them on November 9th. *Id.* at 873-74.

100. *Id.*

101. *Id.* at 877. Since no actual injury had been proved, the damages were \$1. The grant of this relief permitted an award of attorneys' fees.

102. 609 F. Supp. 81 (S.D.N.Y. 1985).

103. *Id.* at 87.

outlined in the McKinney Act. New York has recently promulgated such rules in two areas: the designation of a homeless child's school district,¹⁰⁴ and the determination of a child's residential eligibility to attend district schools.¹⁰⁵ The "designation" rule is commendably straightforward. It permits the parent or guardian, or the homeless child if the parent or guardian is unavailable, to designate either the school district of "last attendance" when the child became homeless or the school district of "current location" as the district in which the child will attend school.¹⁰⁶ This flexibility also enables the parent, guardian, or child to change school districts if she "finds the original designation to be educationally unsound."¹⁰⁷ The "residential eligibility" rule imposes a duty on a school district to afford the child's parent an opportunity to submit information on the child's right to attend school in that district before the determination is made, and to have written notice after the determination.¹⁰⁸ The written notice must include the basis for the district's determination that the child is not entitled to attend its schools, the date on which the exclusion takes effect, and the right to appeal to the state commissioner of education.¹⁰⁹ These rules and their implementation have their flaws, including restrictive definitions of "homeless child,"¹¹⁰ the lack of transportation to permit meaningful choices, and the absence of comprehensive approaches to ensuring universal and effective education for homeless children. However, they are a start toward minimizing the uncertainty, disruption, and fragmentation that officials acknowledge "seriously interferes with the child's ability to receive an adequate education," leading to non-attendance or "interruptions which adversely affect their educational progress."¹¹¹

C. *Empty Promises, Empty Rights: The Problem of Implementation*

Although theoretical remedies abound, the educational promises

104. N.Y. COMP. CODES R. & REGS. tit. 8, § 100.2(x) (1989).

105. *Id.* § 100.2(y).

106. *Id.* § 100.2(x)(2).

107. *Id.* § 100.2(x)(2)(ii). The change of designation must be made within 60 days of starting attendance in a school as a homeless child under the prior designation. *Id.*

108. *Id.* § 100.2(y).

109. *Id.* § 100.2(y)(2)-(4).

110. "Homeless child" is defined as a child temporarily without permanent housing who is "receiving assistance and/or services from a local social services district." *Id.* § 100.2(x)(1). This definition unfortunately excludes the neediest homeless children who are not known to, or assisted by, social services agencies.

111. 10 N.Y. St. Reg. No. 13, at 5 (1988) (codified at N.Y. COMP. CODES R. & REG. tit. 8, § 100.2(x) (1988)), reprinted in CENTER FOR LAW AND EDUCATION, *supra* note 54, at section III.F.

of the McKinney Act go unfulfilled. Part of the problem inheres in the Act's substantive weakness. Serious underfunding exacerbates the problem.¹¹² However, the most damaging factor is the lack of enthusiasm for its implementation that the United States Department of Education¹¹³ and the state education agencies continue to display. The Department of Education failed to implement the McKinney Act properly and with requisite urgency.¹¹⁴ It offered little guidance to states on the plans they must submit,¹¹⁵ and delayed the distribution of funds to support these plans.¹¹⁶ The funds were of limited value to the states, since they were barred from using them directly to educate homeless children and youth.¹¹⁷ Most importantly, the Department ignored its statutory obligation to monitor state compliance with the Act's educational provisions.¹¹⁸

States have also faltered in carrying out their responsibilities under the Act. Left to their own devices, some state coordinators simply reiterated the Department's requirements in their state

112. Inadequate funding was a disincentive to state educational agencies to participate at the outset and continues to restrict severely their ability to develop substantial programs. For fiscal years 1987 through 1990, the McKinney Act authorized Congressional appropriations of five million dollars, annually, for state grants. 42 U.S.C. § 11432(g)(1) (1988). The trickle-down to individual states does not begin to provide the wherewithal to meet state, let alone local, needs. For example, in 1988, Maryland received \$66,546 for its education of homeless children and youth program. CENTER FOR LAW AND EDUCATION, *supra* note 54, at section II.A.4(a). This program paid for a state coordinator, whose duties primarily included collecting data, assessing problems, and preparing a state plan. See 42 U.S.C. §§ 11432(c), 11432(d).

113. It took a lawsuit to goad the Department of Education into fitful action. National Coalition for the Homeless v. Department of Educ., No. 87-3512 TFH (D.D.C. Jan. 21, 1988) (requiring the Department of Education to make reasonable efforts to persuade states to apply for educational grants).

114. The Act's deficiencies are thoroughly catalogued. See, e.g., NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 54, at ii (noting that the Department of Education and state educational agencies have failed to properly implement the McKinney Act).

115. Even the mandated report to Congress, derived from annual state reports required by the state plans, was submitted a full year after the original due date. *Id.* at 17. The report to Congress also was criticized for altering the data submitted by the states to "minimize the number of homeless children." *Id.* at iii.

116. *Id.* at 12-15.

117. As a result, state program coordinators have used the money only for administrative purposes. This caused the Texas coordinator to urge that those in his position should refer to themselves as "Counters of Homeless Children and Youth" since their educational mission was slight. *Id.* at 16. For recent amendments to the Act, enabling future grants for supplemental educational services, see *infra* notes 155-60 and accompanying text.

118. *Id.* at 16-17. In defining national responsibilities under title VII, subtitle B, "Education for Homeless Children and Youth," Congress mandated that: "The Secretary shall monitor and review compliance with the provisions of this subtitle in accordance with the provisions of the General Education Provisions Act . . ." 42 U.S.C. § 11434(b)(1) (1988).

plans.¹¹⁹ Other plans overlooked statutory requirements for the designation of an individual to make determinations about the homeless child's placement, the identification of a dispute resolution process, and the development of a process for the maintenance of school records.¹²⁰ Homeless children who are not living in shelters have even less of a chance of being counted and served by educational agencies than their homeless sheltered peers.¹²¹ A majority of the states surveyed still report significant problems of due process, transportation, transfer of school records, residency requirements, and lack of access to comparable services.¹²² The net result is that homeless children continue to face the barriers to education that Congress intended to dismantle.

IV. THE SEARCH FOR STABLE ENVIRONMENTS

Without stable environments for living and learning, homeless children are unlikely to record real gains from their entry into schools. In contrast, children with permanent housing, by virtue of that step alone, are likely to attend school more regularly and to experience greater educational success.¹²³ Therefore, even if every homeless child could enter the schoolhouse door and receive a first-class education, the victory would be a partial one.

The reality of children without homes mocks every tenet of child welfare law. As the California Court of Appeals observed, "For want of a stable home environment, a homeless child becomes a likely candidate for emotional trauma. Homelessness makes it difficult for a

119. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 54, at 23.

120. *Id.* at 24.

121. *Id.* at 26; see also Interview with Peggy Jackson-Jobe, Coordinator, Education of Homeless Children and Youth, Maryland State Dep't of Educ., in Baltimore (July 11, 1990).

122. In a 20-state survey, 12 states still imposed "outright residency requirements," 15 states reported significant transportation problems, 14 states cited record transfer difficulties, and 11 states reported a lack of access to comparable education services. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 54, at 26-27. In addition, eight of nine states with information available reported significant problems posed by guardianship requirements. *Id.* The Center for Law and Education's review of 35 state plans identified general patterns of "substantial difficulty in devising strategies to meet the school transportation needs of homeless children," vague due process protections, limits on parental decisionmaking in the educational placement of their children, and failure to specify where the homeless child would attend school pending a dispute resolution. Jackson, *The Education Rights of Homeless Children*, in CENTER FOR LAW AND EDUCATION, *supra* note 54, at 5; see also S. JACKSON, STATE PLANS FOR THE EDUCATION OF HOMELESS CHILDREN AND YOUTH: A SELECTED SURVEY OF THIRTY-FIVE STATES (1990) (available through the Center for Law and Education).

123. See Comment, *supra* note 6, at 182 n.23, 203 (suggesting that a long-term solution to the problem of homelessness includes permanent housing).

child to attend school on a regular basis, if at all.”¹²⁴ Rejecting the state’s narrow interpretation of the statutory duty to provide emergency shelter, the court held that children who are homeless or who are “imminently threatened with homelessness” should receive assistance to find housing and to prevent their removal from their own families.¹²⁵ Such children should be able to claim rights to family integrity and family preservation when their needs for nurturing and protection can be met within their own families. To advance those rights, courts in California,¹²⁶ New York,¹²⁷ and Washington, D.C.¹²⁸ have ordered preventive services and housing assistance to avoid or shorten foster-care placement.

A. *The Child’s Right Not to Become Homeless*

As a human right to be memorialized in international declarations¹²⁹ and lauded by commentators, there is no dispute that children are entitled to a decent, stable home environment. However, giving this human right effective legal protection is problematic.¹³⁰ The traditional solution is to intervene coercively, to declare the child neglected and to remove her to a foster setting. Although there are

124. *Hansen v. Department of Social Servs.*, 193 Cal. App. 3d 283, 295, 238 Cal. Rptr. 232, 239 (Ct. App. 1987) (citations omitted).

125. *Id.* at 292, 298, 238 Cal. Rptr. at 234, 242.

126. *See, e.g., id.* at 299, 238 Cal. Rptr. at 242 (enjoining state department of social services from defining emergency shelter care to exclude homeless children).

127. *See, e.g., Martin A. v. Gross*, 138 Misc. 2d 212, 524 N.Y.S.2d 121 (Sup. Ct. 1987) (state enjoined from imposing 90-day limit on emergency shelter as preventative service), *aff’d*, 153 A.D. 2d 812, 546 N.Y.S.2d 75 (App. Div. 1989); *see also Palmer v. Cuomo*, N.Y.L.J., July 25, 1985, at 6, col. 3 (N.Y. Sup. Ct. July 18, 1985) (holding that foster children entitled to preparation for independent living, discharge only to adequate living situation, and to some ongoing supervision).

128. Comment, *supra* note 6, at 99 (citing *In re P.L.&E.*, No. N79 (D.C. Super Ct. Apr. 12, 1982)).

129. Convention on the Rights of the Child, *opened for signature*, Jan. 26, 1990, 28 I.L.M. 1448 (1989). Among the Convention’s 54 articles are the rights of the child to: a family environment, *id.* (preamble); “a full and decent life,” *id.* at 1465 (article 23); primary education compulsory and available free to all, *id.* at 1467 (article 28); “a standard of living adequate to the child’s physical, mental, spiritual, moral and social development,” *id.* (article 27); “a periodic review” of any out-of-home placement, *id.* at 1466 (article 25); and in cases of need, the provision of “nutrition, clothing and housing,” *id.* at 1467 (article 27). For commentary on implementation of the Convention’s provisions through a monitoring committee, *see id.* at 1448 (Introductory Note by C. Cohen).

130. Although the Convention on the Rights of the Child entered into force on September 2, 1990, after over 20 nations ratified it, *id.* at 1477 (article 49), the United States may be reluctant to sign it because one of the articles would bar capital punishment of juveniles, *id.* at 1470 (article 37(a)), a position contrary to the decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (Holding that the eighth and fourteenth amendments prohibited the execution of a person who was 16-years-old at the time of the offense, the Court declined to place a “bright line” prohibition for those under the age of 18.).

extreme cases in which this solution is warranted,¹³¹ it is not appropriate for the majority of cases in which homeless families should be strengthened, not sundered. Coercive strategies also produce negative side effects as homeless parents, fearful of losing their children, shun social workers, welfare offices, and even the schools.¹³² Thus, representatives of the American Bar Association have testified before Congress that “[m]any parents are fearful of alerting welfare workers to their homelessness because they may then lose their children to charges of neglect or be pressured into ‘voluntarily’ placing their little ones in foster care.”¹³³ Better solutions than these are wanted.

B. *Housing Solutions: The Search for Affordable Housing Coupled with Support Services*

A pointless debate is raging as to whether low-income housing or support services will stem the tide of homelessness. Some advocates assert that there is a three-word solution to the problem of homelessness: “Housing! Housing! Housing!”¹³⁴ Others maintain that housing alone will not resolve the personal problems that led many adults or teenagers to the streets and shelters.¹³⁵ At this level of generality, a rational solution would be to supply affordable, permanent housing—at points in a continuum from independent to supported living—as a necessary precondition to resolving the multiple needs of homeless individuals.¹³⁶

131. See N.Y. Times, June 19, 1990, at B1, col. 1 (reporting that surviving children were removed after the mother killed one of her children to stop her from crying).

132. See J. KOZOL, *RACHEL AND HER CHILDREN: HOMELESS FAMILIES IN AMERICA* 49 (1988).

133. ABA Testimony to Congress, *supra* note 49, at 9. The ABA noted that “[o]nce separation occurs, it is very difficult to reunite the family and almost impossible to eradicate the effects of the double trauma—loss of home and family.” *Id.*

134. DeParle, *Homeless Advocates Debate How to Advance the Battle*, N.Y. Times, July 8, 1990, at 14, col. 1 (quoting Sister Connie Driscoll, who heads the Mayor’s Task Force on Homelessness in Chicago, complaining that “housing is only part of the problem”).

135. *Id.* “Sister Connie Driscoll . . . criticized Mr. [Mitch] Snyder and [other advocates] for not emphasizing mental illness, drug abuse and a lack of personal responsibility as causes of homelessness.” *Id.*; see also Whitman, *Shattering Myths About the Homeless: New Research Finally Reveals How Many There Are and What They Need*, U.S. NEWS & WORLD REP., Mar. 20, 1989, at 27-28:

While most of the homeless are not mentally ill, and their ranks vary from city to city, about two-thirds of homeless adults have at least one serious personal problem that helps put them on the streets and in shelters. The recent studies show that 33 percent to 38 percent of homeless adults are alcoholics, 13 percent to 25 percent are drug abusers and 21 percent to 24 percent either have had a felony conviction or have served time in state and federal prisons.

Id. at 28.

136. As Robert Hayes, founder of the National Coalition for the Homeless and now in private practice expresses this synthesis: “I’m the first to say that many people need more than

Although Congress is aware of this solution, it is reluctant to fund it on a scale appropriate to the dimensions of America's housing and homelessness crisis. The Cranston-Gonzalez National Affordable Housing Act¹³⁷ seeks to "ensure that every resident of the United States has access to decent shelter or assistance in avoiding homelessness."¹³⁸ As the national housing goal, Congress affirms that "every American family be able to afford a decent home in a suitable environment."¹³⁹ To fulfill these lofty ideals, the public and private sectors are to encourage "tenant empowerment"¹⁴⁰ through a mix of programs that call for homeownership by low-income families, preservation of federally assisted housing units, investment in affordable housing, and supportive housing for persons with special needs.¹⁴¹ Each jurisdiction assisted under this Act is required to submit a "comprehensive housing affordability strategy" for aiding low-income families to avoid becoming homeless, and for helping the homeless "make the transition to permanent housing and independent living."¹⁴²

To assure that housing strategies take into account the frailties of some of the homeless, the Cranston-Gonzalez National Affordable Housing Act details a blueprint for supportive housing. It amends the McKinney Act to provide additional resources for prevention, emergency shelter, transitional housing, specialized permanent housing, and supportive services to help homeless persons and families "lead independent and dignified lives."¹⁴³ Project sponsors can specifically

housing But none of those other things—from substance abuse treatment, to psychiatric care, to remedial education for kids—will work in the absence of housing." DeParle, *supra* note 134, at 14.

137. Pub. L. No. 101-625, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4079.

138. *Id.* § 102(1), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4085.

139. *Id.* § 101, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4085. This goal echoes the national housing policy enacted as long ago as 1949, namely "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family." Housing Act of 1949, ch. 338, 63 Stat. 413 (codified as amended at 42 U.S.C. § 1441 (1988)).

140. Pub. L. No. 101-625, § 102(7), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4085.

141. *Id.* § 103, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4085.

142. *Id.* §§ 105(a)(1), 105(b)(2)(A),(C), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4088.

143. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4331 (amending Title IV of the Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, §§ 401-471). Section 821 will become effective on Oct. 1, 1992 or "on the date specified by a statute adopting a proposed allocation formula." *Id.* § 823(a), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4355. In addition, the Homeless Prevention and Community Revitalization Act, if enacted, would provide residentially-based supportive services, social services such as emergency housing assistance and rent payments to prevent homelessness, and neighborhood support centers for low-income families. It also adds a \$2.5 million

target services to homeless families with children.¹⁴⁴ These broadly defined services range from child care to assistance in obtaining existing governmental benefits.¹⁴⁵ A potpourri of other homeless provisions include eviction prevention for very low-income families;¹⁴⁶ minimum standards of habitability for emergency shelters;¹⁴⁷ and transitional housing projects for homeless families with children.¹⁴⁸ Permanent housing for homeless persons with disabilities and "shelter plus care" for the seriously or chronically ill is also prescribed.¹⁴⁹ In essence, the Act authorizes a broad range of housing and supportive services. Although the Act survived the legislative process intact, will the Emperor choose to afford these new clothes? In an administration that has declared itself better armed with will than wallet to solve social ills, appropriations may bear little resemblance to authorization amounts.¹⁵⁰ Given the austerity that will be demanded in the face of mounting federal budget deficits and defense expenditures, grants for

authorization for homeless youth demonstration projects to coordinate services to them. The Homelessness Prevention and Community Revitalization Act of 1990, S.2600, 101st Cong., 2d Sess., 136 CONG. REC. S12724 (daily ed. Sept. 10, 1990).

144. Pub. L. No. 101-625, § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4333 (amending § 402(16)(A)).

145. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4334 (amending § 402(16)(B)).

[Supportive services] . . . includes (i) food services, child care, substance abuse treatment, assistance in obtaining permanent housing, outpatient health services, employment counseling, nutritional counseling, security arrangements for the protection of residents of facilities to assist the homeless, and such other services essential for maintaining or moving toward independent living as the Secretary determines to be appropriate; and (ii) assistance to homeless persons in obtaining other federal, State, and local assistance for such individuals, including public assistance benefits, mental health benefits, employment counseling, and medical assistance.

Id.

146. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4340 (amending § 411(b)(2)).

147. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4341 (amending § 412(b)).

148. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4341-42 (amending § 413(a)). Grants for child-care service programs for homeless families could be provided in such projects. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4342 (amending § 413(b)(7)). Child-care is often a critically missing component for single parents struggling to find a job or permanent housing.

149. *Id.* § 821, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4343, 4347 (amending §§ 414, 431).

150. The full array of housing programs for the homeless would authorize a \$482 million appropriation in fiscal year 1991, and \$559 million in fiscal year 1992. *Id.* §§ 832-835, 837, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4359, 4362, 4365-66 & 4370-71 (amending §§ 409, 439(a)(c)). To put these costs in federal budget perspective, the Pentagon had ordered a fleet of B-2 Stealth bombers at a cost of \$530 million each. In recent days, those costs per-bomber have soared to \$840 million as production has been cut. Rasky, *Panel's Chairman to Urge Ending B-2*, N.Y. Times, July 23, 1990, at A11, col. 1.

homeless housing assistance may remain tantalizingly unavailable.¹⁵¹

C. *Educational Solutions: From Access to Success*

Compared to housing needs, the solutions and the costs for meeting the educational needs of homeless children appear straightforward and modest. Existing legislation already requires universal access to public schools and equal rights to education for homeless children.¹⁵² Although the McKinney Act sought to bring down access barriers, it did not go far enough to address the problems entailed in changing inconsistent laws, practices, and policies. Nor did it specify or fund the excess costs associated with dismantling barriers that keep homeless children from attending school regularly and achieving educational success. That broader agenda must now be placed before Congress, state legislatures, school bureaucracies, and classroom teachers

Congress has advanced that agenda in the reauthorization of the McKinney Act's educational provisions. The Stewart B. McKinney Homeless Assistance Amendments Act of 1990, and its title VI provisions for the education of homeless children and youth,¹⁵³ fill some glaring gaps. Going beyond mere access to schools, it calls for policies and practices aimed at attendance and success for homeless children.¹⁵⁴ It makes clear that federal funds can be used only to supplement and not to supplant local funds and responsibilities for services to homeless children, including regular academic programs.¹⁵⁵ The Act authorizes state educational agencies to make grants to local educational agencies for direct support services to homeless children and youth. These support services for successful education may include tutoring, remedial-education services, expedited evaluation for special-education programs, counseling, social

151. These grants are also subject to matching requirements that states and other project sponsors may have difficulty meeting in the midst of a recession or a state budget crisis. See Pub. L. No. 101-625, § 406(a), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4337.

152. See *supra* text accompanying notes 61-69 & 112-22.

153. Pub. L. No. 101-645, § 612-613, 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4673, 4735-43 (amending §§ 721-24, redesignating § 725 as § 726, and adding § 725 to the McKinney Act) [hereinafter McKinney Amendments Act]. Many of the ideas embodied in the McKinney Amendments first appeared in the bill known as the Access to Education for Economic Security Act of 1990. H.R. 4574, 101st Cong., 2d Sess., 136 CONG. REC. H1614 (daily ed. Apr. 19, 1990).

154. The McKinney Amendments Act obliges states to revise "laws, regulations, practices, or policies that may act as a barrier to the enrollment, attendance, or success in school of homeless children and homeless youth." Pub. L. No. 101-645 § 612(a)(2), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4735 (amending § 721(2)).

155. *Id.* § 612(c), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4739, 4741 (adding §§ 723(a)(3), (d)(1)(C)).

work, psychological services, early childhood programs, and referrals to medical, dental, mental and other health services.¹⁵⁶ Other grants may be used to train parents, educators, and school personnel to recognize the needs and the rights of homeless children and youth.¹⁵⁷ To remedy a striking omission under the prior law, grants could also defray the excess cost of transporting students to appropriate assigned schools when transportation would not otherwise be provided through governmental funds.¹⁵⁸ In the process of making such an assignment, determined to be in "the best interests of the child or youth," the local educational agency has the duty, vaguely defined, to give "consideration" to a parent's request regarding school selection.¹⁵⁹ Discretion also would exist to fund activities for the specific educational needs of runaway youth and of homeless children affected by domestic violence, and to provide other emergency assistance to permit the homeless children or youth to attend school.¹⁶⁰ State and local programs to enable homeless children to "achieve success in school" and to obtain "comprehensive services" will need generous funding.¹⁶¹ The Act would therefore authorize a tenfold increase over current McKinney Act educational appropriations.¹⁶² In contrast to the \$2.123 billion spent annually under the Education of the Handicapped Act,¹⁶³ current federal expenditures to remedy homeless chil-

156. *Id.* 612(c), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4739, 4740 (adding § 723(b)(1), (2)).

157. *Id.* § 612(c), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4740 (adding § 723(b)(2)(B) & (H)). Other innovative grants could develop coordination between school and agencies serving the homeless; summer programs; activities to provide school supplies at shelters; pre-school programs; and extended school-day programs. *Id.* (adding § 723(b)(2)(E), (F), (I) & (N)).

158. *Id.* (adding § 723(b)(2)(D)).

159. *Id.* § 612(b), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4738 (adding § 722(e)(3)(B)).

160. *Id.* § 612(c), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4740 (adding § 723(b)(2)(K), (L) & (O)). Runaway youth are a singularly neglected group. They are often too young for adult shelters, too old for foster families, and lack sufficient shelter beds and services for persons of their own age. See Leland, *Prologue to J. POWERS & B. JAKLITSCH, UNDERSTANDING SURVIVORS OF ABUSE: STORIES OF HOMELESS AND RUNAWAY ADOLESCENTS xv-xvi* (1989).

161. Pub. L. No. 101-645, § 612(b), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4736 (adding § 722(c)(2) & (d)(5)).

162. *Id.* § 612(b), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4738 (amending § 722(g)(1)). In contrast with the current \$7.5 million authorization and \$5 million appropriation, this bill calls for \$50 million in authorizations. *Id.*

163. U.S. DEP'T OF EDUC., TENTH ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE EDUCATION OF THE HANDICAPPED ACT (1988); Telephone interview with Kathleen McGinley of the Association for Retarded Citizens of the United States, Government Affairs Office (July 20, 1990).

dren's exclusion from free, appropriate education are woefully inadequate.

State taxpayers will inevitably bear most of the costs, and state legislatures will bear most of the responsibility for implementing the education of homeless children. Implementation of the McKinney Act's school requirements will remain "spotty and slow" if states and local districts continue to ignore the financing of homeless children's schooling.¹⁶⁴ For example, most legislatures have still not addressed these pupils' transportation costs and needs, or specified the means of ensuring that their assignment to a school "shall be made in the best interests of the child[ren]."¹⁶⁵ Although such legislation on transportation and school registration may be essential to comply with the McKinney Act,¹⁶⁶ advocacy coalitions at the state level must mobilize to ensure timely passage of legislation truly protective of children's interests.

In the final analysis, sensitivity and dedication on the part of school officials and teachers will determine whether homeless children succeed and grow. One New York City principal recognized that "the school is the only place that offers warmth, stability and hope."¹⁶⁷ But outreach efforts are needed if hurt or hidden children are to seize that offer.¹⁶⁸ Too often those efforts are dependent upon soft-money grants or heroic individualism. There are isolated programs working on district and school levels, but none have sufficient track records to be labeled "model programs."¹⁶⁹ However, it is not too early to warn of one misguided proposal: separate schools for homeless children. Whether located in a shelter or elsewhere, segregation deprives homeless children of the benefits of "mainstreaming" and imposes undue stigma. It also contravenes clear federal law that requires that "homelessness alone should not be sufficient reason to separate students from the mainstream school environment."¹⁷⁰ To

164. See Hechinger, *Educators Try to Make Homeless Children Comfortable in School*, N.Y. Times, Mar. 14, 1990, at B9, col. 1.

165. See S. JACKSON, *supra* note 122. Less than one-half of the state plans surveyed contained standards for "best interest" determinations. *Id.* at 12. Only five state plans included transportation policies and procedures; 30% of the plans did not even address the need for transportation. *Id.* at 20.

166. Interview with Peggy Jackson-Jobe, *supra* note 121.

167. Hechinger, *supra* note 164, at B9, col. 1 (quoting Terrence Quinn, principal of Public School 225, Rockaway, Queens, New York).

168. According to Quinn, "[homeless children] don't come out on their own as much as we would like There is a shyness. We have to get to them. And there has to be a bus service to bring the children to school." *Id.*

169. See K. MCCALL, *supra* note 11, at 3.

170. Pub. L. No. 101-645, § 612(a), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) 4735 (adding § 721(3)) (to be codified at 42 U.S.C. § 11431(3)). The Act further requires that

accept a contrary solution is to risk relieving the schools and society of their true responsibilities.

D. Family Solutions: Supportive, Preventive, and Reunification Services

The state's interest in protecting the welfare of children is properly described by the Supreme Court as "traditional and transcendent."¹⁷¹ The parents' liberty interests in maintaining the care, custody, and management of their child is also of fundamental importance.¹⁷² These interests of the state and of the parents coincide with the child's own interests in living and bonding with her own parents and strengthening their family life together.¹⁷³ Removal of children from their parents on the basis of homelessness or poverty alone is anathema to these constitutional principles and freedoms.¹⁷⁴

Regrettably, such unlawful and unnecessary separations are a common occurrence. The Delaware Supreme Court in *In re Burns*¹⁷⁵ traced these paths from "voluntary" foster care placement to a judicial order of parental termination.¹⁷⁶ Judy Burns, who spent virtually her entire life in foster care, was seventeen-years-old when she gave birth to a son. While still a minor, she and her son became homeless and destitute. When she turned to public child-protective services for help, Ms. Burns was offered what the court described as "a Hobson's choice": a voluntary placement agreement which, if signed, would shelter mother and child together in a foster home, and if not signed,

children not be "overtly identified" in counts of the homeless, and that state and local policies and practices ensure that such children are not isolated or stigmatized. *Id.* § 612(b), 1990 U.S. CODE CONG. & ADMIN. NEWS (104 Stat.) at 4736 (adding § 722(d)(1)(B) & (e)(1)(I)).

171. *Maryland v. Craig*, 110 S. Ct. 3157, 3168 (1990) (quoting *Ginsberg v. New York*, 390 U.S. 629, 640 (1968)).

172. *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981).

173. *See Quillion v. Walcott*, 434 U.S. 246, 255 (1978) (Recognizing the existing family unit, the Court held that adoption was in the "best interests of the child.").

174. If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interests, I should have little doubt that the State would have intruded impermissibly on "the private realm of family life" which the State may not enter.

Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring), *quoted in Quillion*, 434 U.S. at 255.

These constitutional principles are affirmed in state law. *See, e.g., Martin A. v. Gross*, 153 A.D.2d 812, 814, 546 N.Y.S.2d 75, 77 (1989) (upholding lower court decisions related to the provision of preventative and protective services for families of children at risk of foster care on the basis of state's "expressed legislative declaration of a fundamental state interest in preserving family integrity").

175. 519 A.2d 638 (Del. 1986).

176. *Id.* at 640-43.

would leave them on the streets with the result that "they would have to take [the child] from [her]." ¹⁷⁷ Lacking an attorney or the guidance of any other independent person, Ms. Burns also signed a "consent," temporarily awarding her child's custody to state officials, even though her understanding was that the child would always stay with her. When she later sought to terminate the voluntary placement agreement and leave the foster home with her child, the police were called and her son was forcibly taken from her. Although the sole reason for the placement was that the family had no place to stay, the child care workers did "nothing whatsoever to reunite this mother and child as a family unit." ¹⁷⁸ However, they did succeed in persuading a family court to terminate the mother's parental rights on the basis of her failure to achieve "a stable lifestyle in one location," and her inability to secure suitable living arrangements. ¹⁷⁹

The Supreme Court of Delaware reversed this order and condemned the violations of due process and child welfare statutes. ¹⁸⁰ The court deemed appointment of counsel or a guardian ad litem of critical importance in circumstances in which an unadvised minor relinquished custody of her child as a precondition to receiving "desperately needed housing." ¹⁸¹ The state's failure to plan or carry out reasonable efforts to prevent foster-care placement, or to reunify the family, were equally troubling to the court. The court admonished family court judges to apply federal and state statutes that require findings that the state has met its own obligations through bona fide efforts before parental rights can be terminated. ¹⁸²

The solutions implicit in *In re Burns* must be implemented on a nationwide level. With adequate prevention and pre-placement services, parents like Judy Burns could receive publicly subsidized housing or housing counseling rather than a spiral of increasingly interventionist and punitive child-welfare measures. If armed with affirmative services, state officials could satisfy their federal statutory obligations to make "reasonable efforts" to prevent a child's removal from her parents, and to reunify the child and parents in their own home. ¹⁸³ With genuine reunification services and meaningful case plans and reviews, homeless children would spend less time in foster care, thereby releasing this scarce resource for the flood of truly

177. *Id.* at 641.

178. *Id.* at 642.

179. *Id.* at 645.

180. *Id.* at 646-49.

181. *Id.* at 646.

182. *Id.* at 649.

183. *See* 42 U.S.C. § 671(15) (1983).

abused and neglected children who require those services.¹⁸⁴ This case study also reveals the plight of foster-care adolescents, euphemistically described as "discharged into independent living," who are left unprepared, unhoused, and unemployed. Without transitional services that start earlier and extend through their teenage years, many of these youths will swell the ranks of the homeless.¹⁸⁵ Most significantly, unrepresented homeless children and their parents will continue to lose their rights to dwell together in peace and privacy.

V. ROLES FOR LAWYERS AND LAW STUDENTS IN ASSISTING HOMELESS CHILDREN

A. *Historical Perspectives*

The organized bar has exhorted lawyers to reach out to help the homeless as a means to fulfill professional pro bono obligations.¹⁸⁶ There is important and soul-satisfying work to be done for children without homes. Louis D. Brandeis vividly captured that point eighty-six years ago when he reminded the legal profession of its special opportunities for social usefulness:

The next generation must witness a continuing and ever-increasing contest between those who have and those who have not. . . . [T]he people's thought will take shape in action, and it lies with us, with you to whom in part the future belongs, to say on what lines the action is to be expressed; whether it is to be expressed wisely and temperately, or wildly and intemperately; whether it is to be expressed on lines of evolution or on lines of revolution. Nothing can better fit you for taking part in the solution of these problems, than the study and pre-eminently the practice of law. Those of you who feel drawn to that profession may rest assured that you will find in it an opportunity for usefulness which is probably unequalled. There is a call upon the legal profession to do a great work for this country.¹⁸⁷

184. See generally U.S. ADVISORY BOARD ON CHILD ABUSE AND NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY (prepublication ed. June 1990) (noting that the foster-care system is stretched beyond its capacity).

185. See Note, *Out of the Home onto the Street: Foster Children Discharged into Independent Living*, 14 FORDHAM URB. L.J. 971 (1985-1986) (positing that transitional programs are necessary to teach foster children independent living skills).

186. Raven, *Homelessness: Lawyers Join the Fight*, 75 A.B.A. J., July 1989, at 8. On the importance of the private sector's voluntary advocacy for the homeless, see M. BURT & B. COHEN, AMERICA'S HOMELESS: NUMBERS, CHARACTERISTICS, AND PROGRAMS THAT SERVE THEM 168 (Urban Institute Report 89-3, 1989).

187. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 559, 562-63 (1905). Harvey H. Baker, Judge of the Boston Juvenile Court during the early 1900's, encountered homeless youngsters. But his solution to their problems often focused on reformatory commitment,

With apologies for any legal chauvinism, Justice Brandeis' remarks are apposite to the contemporary work of repatriating the homeless. The United States has so far been spared the cataclysmic revolutions and unrest of Latin America and other developing regions.¹⁸⁸ This relative calm is due, in part, to this nation's ability to shelter, clothe, and feed its citizens and to avoid the endemic homelessness associated with places like Bogotá or Calcutta.¹⁸⁹ Consider, however, the political and social dynamite posed by generations of homeless parents with children who themselves will be homeless. Social scientists in South Florida already report what they term "a wholly new human phenomenon," homeless children who between the ages of seven to ten are "thinking of 'giving up.'"¹⁹⁰ Too many of these children "don't like themselves very much" and do not trust adults.¹⁹¹ If they are so alienated and depressed in their first decade of life, how dysfunctional will they become as teenagers with the added risk of drug addiction, delinquent behavior, and abandonment by their families?¹⁹² In short, there are reasons, both of altruism and narrow self-interest, for providing legal assistance to children to pre-

orphanages, or other forms of institutionalization. Black children, however, were apt to be denied equal access to asylums for "worthy" homeless boys." P. HOLLORAN, *BOSTON'S WAYWARD CHILDREN: SOCIAL SERVICES FOR HOMELESS CHILDREN 1830-1930*, at 141, 205-12 (1989).

188. Gary Blasi, president of the National Coalition for the Homeless and a lawyer for homeless persons in Los Angeles, has eloquently captured the risks of the status quo:

If God stopped the creation of homeless people . . . we might, with enormous expense and effort, get back to normal within two or three years. But we still will need fewer poor people or more cheap housing. Otherwise, the process will go on forever. That's why the energy of advocates goes for housing and raising incomes. We can't solve the problem on the basis of humanitarianism. Thank God for saints and martyrs, but the problem goes well beyond that. The future? The pessimist in me sees homelessness becoming a permanent part of American society, with millions of kids growing up in an essentially third-world country with all those sadly familiar extremes of wealth and poverty. The other possibility is that people will decide it's curable and fix it. It's a question of political priorities and public perception.

Levitas, *supra* note 29, at 84. On the existence of a growing young homeless population in other developed countries, see B. O'MAHONY, *A CAPITAL OFFENSE: THE PLIGHT OF THE YOUNG SINGLE HOMELESS IN LONDON* 13 (1988).

189. See *Suffer the Little Children*, *TIME*, Oct. 8, 1990, at 41 (reporting that the plight of 30 million children living in the streets was discussed at the World Summit for Children).

190. Schilit, *Homeless Families and Children in South Florida*, in *BARRY UNIVERSITY, THE SOUTH FLORIDA HOMELESS STUDIES* 17, 21 (1989).

191. *Id.* at 20-21.

192. "Never before has one generation of American teenagers been less healthy, less cared for, or less prepared for life than their parents were at the same age." Leary, *Gloomy Report on the Health of Teen-Agers*, *N.Y. Times*, June 9, 1990, at A24, col. 1 (quoting the Commission of the National Association of School Boards of Education and the American Medical Association).

vent them from becoming homeless or to help them at the earliest stages of their "homeless careers." The following discussion suggests a few examples of the aid that lawyers and law students could offer.

B. *Prevention Strategies*

The ideal time for lawyer intervention in the lives of homeless children is before they become homeless. However, most low-income tenant families face eviction without the assistance of counsel. These families often find neither an attorney nor a lay advocate to assist them,¹⁹³ even through "attorney representation can mean the difference between access to a home and homelessness."¹⁹⁴ The consequences are often drastic. A 1987 study revealed that almost one-third of New York City's homeless families lost their apartments through eviction proceedings.¹⁹⁵ In response to this housing crisis, legal-aid lawyers have sought a declaration of tenants' rights to an appointed counsel during summary eviction proceedings.¹⁹⁶

Like the rest of society, lawyers must avoid a preoccupation with emergency shelter and focus on some of the underlying causes of homelessness. Two of those causes are the lack of affordable permanent housing and the scarcity of preventive support services for families in crisis and at risk of homelessness.¹⁹⁷ In turn, at the root of many of these family crises are poverty, substandard wages, and the woeful inadequacy of income support available to impoverished families. As New York's highest court recognized in its recent unanimous

193. In urban courts, the proportions of tenants represented varied from a low of 7% to a high of 20%. Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557, 572 n.59 (1988). In some states, there are barriers to tenants being represented by non-attorney agents even though landlords are routinely represented by such agents. For a statute ending that discrimination, see MD. BUSINESS OCCUPATIONS & PROFESSIONS CODE ANN. § 10-206 (Supp. 1990). This Act permits tenants to be represented in summary ejection proceedings by either 1) a law student practicing in a clinical law program who receives in-court supervision by a faculty member, or 2) a trained paralegal employed by a non-profit organization who receives supervision by a licensed attorney. *Id.*

194. Scherer, *supra* note 193, at 591.

195. Shipp, *Lawsuit Seeks to Aid Poor in Evictions*, N.Y. Times, Feb. 25, 1989, at L31, col. 6, L33, col. 3.

196. *See, e.g., Donaldson v. State*, 156 A.D.2d 290, 548 N.Y.S.2d 676 (App. Div. 1989).

197. Legal aid can offer both a support service and a means to retain affordable housing. For example, in one recent case that the Homeless Persons Representation Project and the Public Justice Center placed with volunteer attorneys, 185 units of affordable housing were preserved when the aggressively represented low-income tenants forced the building's managers to abandon their plans for mass evictions and conversion of the apartments to renovated condominiums. Samuels, *Centre Towers Tenants Win Battle*, Baltimore Evening Sun, July 24, 1990, at D1, col. 1.

decision, *Jiggets v. Grinker*,¹⁹⁸ the legislative mandate to keep AFDC families together in a "home-type setting" has been flouted by a schedule of shelter allowances "so low that it forces large numbers of families with dependent children into homelessness."¹⁹⁹ Unless the statutory duty to establish adequate shelter allowances is satisfied, homeless families will continue in vain to seek apartments of their own.²⁰⁰ Encouraged by the *Jiggets* precedent, lawyers for the indigent in other states should insist on fairer interpretation and implementation of welfare statutes.²⁰¹

Lawyers can also publicize the contradictions and inconsistencies in public policies that foster homelessness. For example, local departments of social services in Maryland used Emergency Assistance Program funds to help shelter residents to pay security deposits and relocate in permanent housing. When the State Department of Human Resources halted this practice, the legislature approved an act to prevent homelessness by making available Emergency Assistance to Families with Children ("EAFC") funds to prevent eviction or to provide for relocation in cases of eviction.²⁰² Despite the obvious need and cost-effectiveness of this measure, it was vetoed by a governor who expressed "concern for the problems of homelessness" and the public's "declining sympathy for the plight of the homeless," but who objected that more beneficiaries of this aid would come forward than the legislature projected.²⁰³ As a result of this veto, shelter residents will be consigned to shelters that cost the state approximately twenty-five dollars a night when, with modest aid, they could have scraped together a first month's rent and security deposit to avoid

198. 75 N.Y.2d 411, 554 N.Y.S.2d 92 (1990) (holding that the shelter allowance was inadequate to meet statutory standard of adequate housing to AFDC recipients and their children).

199. *Id.* at 417, 554 N.Y.S.2d at 95.

200. J. KOZOL, *supra* note 132, at 42-43.

201. See generally *Vaessen v. Woods*, 35 Cal. 3d 749, 677 P.2d 1183, 200 Cal. Rptr. 893 (1984) (holding that income-tax refunds are not income for the purpose of reducing AFDC benefits because they are irregularly received); *Boehm v. Superior Court*, 178 Cal. App. 3d 494, 223 Cal. Rptr. 716 (Ct. App. 1986) (enjoining county from fixing general assistance benefits without considering recipients' needs for clothing, transportation, and medical care).

202. S. 817, 1990 Md. Gen. Assembly Sess. ("An Act concerning Emergency Assistance—Prevention of Homelessness"), vetoed by Governor William Donald Schaefer (May 25, 1990). Such EAFC grants were to be provided upon evidence of 1) the filing of a summary ejectment action; 2) the condemnation of the applicants' residence; or 3) the exhaustion of the time allowed for a shelter resident to stay in emergency or transitional housing. *Id.* In the latter circumstance, the resident would also have been required to submit a housing plan for state approval. *Id.*

203. Veto message of S. 817 by Governor William Donald Schaefer to Md. Senate President Thomas V. (Mike) Miller, Jr. (May 25, 1990).

shelter housing.²⁰⁴ In criticizing these short-sighted policies, a volunteer attorney for the homeless noted that "the longer we delay in moving homeless persons from the street and shelters back into permanent housing, the more we will have to pay in the long run for increased emergency-room hospital visits, juvenile-services placements, special-education services, mental-hospital commitments, and even jail and lock-up stays."²⁰⁵ Such critiques can lead a state to reassess its inadequate policies and laws for the homeless.

C. *Emergency Responses*

The lawyer's dilemma in representing homeless persons is to balance the need for systemic change with the need to respond to the emergencies and issues of the day. She may wish to expend energies not on homeless persons' right to beg, but on their rights to otherwise survive and achieve a decent living. As one lawyer associated with the New York City subway system solicitation case²⁰⁶ observed, "It is unfair to ban begging without making sure that there are adequate alternatives available."²⁰⁷

To secure those alternatives, lawyers face strategic options. For one partner in a large corporate firm whose pro bono work is primarily impact litigation, the question is whether it is "better to help a hundred homeless people with a lawyer each, or to help ten thousand poor people with a suit that affects their lives?"²⁰⁸ But this rhetorical question misses the mark. Systemic problems can be revealed through individual representation and individuals can be aided through class representation.

The interplay between individual and class representation is evident in emergency services for children. The attorney's role in dependency hearings and related proceedings is to try to prevent family separation and to preserve family integrity wherever possible.²⁰⁹ This role assumes special importance for the homeless family. There is an

204. Sabonis, *Cents and Nonsense*, Baltimore Sun, June 2, 1990, at 11A, col. 1.

205. *Id.*

206. Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir.), *cert. denied*, 111 S. Ct 516 (1990).

207. Freitag, *Subway Security Plan Fails to Purge the Unruly Homeless*, N.Y. Times, Jan. 24, 1990, at A1, col. 1, B2, cols. 4-5 (quoting Douglas H. Lasdon, executive director, Legal Action Center for the Homeless, New York City).

208. Barr, *Doers and Talkers: The AMLAW Pro Bono Rating*, AM. LAW., July-Aug. 1990, at 51, 59 (quoting E.B. Prettyman, Jr. of Hogan & Hartson).

209. "The attorney should . . . attempt to achieve the following results for the child: (1) remaining in the home if consistent with the child's welfare and safety, or (2) if removal of the child from the home is necessary, return home in the shortest time possible . . ." M. SOLER, *supra* note 24, § 4.01[2], at 4-6.

increased risk that a temporary separation may become permanent as the parent is caught in a vicious cycle of homelessness: no child, no AFDC grant; no grant, no prospects for housing. This cycle is catastrophic in both human and economic terms. The costs of foster care for a family with three children can be three or four times greater than the cost of AFDC.²¹⁰ To remedy this problem, advocates have turned to the legislatures. For example, in Illinois, they won legislation to provide special assistance to families "rendered homeless or threatened with homelessness."²¹¹ In Maryland, they obtained passage of a law that prohibits a child's placement in foster care "solely because of homelessness" and instead requires social-services departments to make appropriate referrals to emergency shelters and other services for the homeless.²¹² Since a child who is without shelter may fall within the Child in Need of Assistance ("CINA") definition as lacking "proper care and attention" and be subject to the juvenile court's jurisdiction,²¹³ advocates can frame a legal theory that the appropriate form of care and assistance is to keep the family together in a home-type setting.²¹⁴ In conjunction with other child welfare statutes, they can argue that family shelter, subsidized housing, assistance in finding housing, emergency funds to prevent evictions, or other affirmative services are necessary to enable homeless families to attain "family stability, to preserve family unity, and to help families achieve and maintain self-reliance."²¹⁵ Even if a test case were unsuccessful in the courts, the attendant discovery and publicity could gal-

210. AFDC grants are so meager that the average daily benefit is \$3.87. M. EDELMAN, *FAMILIES IN PERIL: AN AGENDA FOR SOCIAL CHANGE 98-99* (1987). Cuts in this program expose more children to the risks of homelessness. *Id.* The average grant for regular foster care is \$342 per month per child. In contrast, a Maryland family with three children on AFDC receives a total of \$377 per month. REPRESENTING HOMELESS, ELDERLY AND OTHER LOW INCOME PERSONS § 9-4 (C. Rodis ed. 1989) (a joint project of the Pro Bono Coordinating Committee and the University of Maryland School of Law).

211. ILL. REV. STAT. ch. 23, paras. 4-12 (Supp. 1990).

212. MD. FAM. LAW CODE ANN. § 5-525(b)(2) (Supp. 1989) requires that:

(i) A child may not be committed to the custody or guardianship of a local department and placed in foster care solely because the child's parent or guardian lacks shelter.

(ii) the local department shall make appropriate referrals to emergency shelter services and other services for the homeless family with a child who lacks shelter.

Id.

213. MD. CTS. & JUD. PROC. CODE ANN. § 3-801(e) (1989).

214. For a case study of the failure of courts to preserve the integrity of a homeless family and the need for curative legislation, see Young & Morse, *Where Do Homeless Children Sleep?*, 23 MD. B.J., Mar.-Apr. 1990, at 24.

215. MD. FAM. LAW CODE ANN. § 4-401(1) (1989). To implement such state policies, families with children are to be provided "functional services to help a family resolve a situational crisis brought on by catastrophe, deprivation of income, *lack of shelter*, physical illness, mental illness, death, desertion, or abandonment." *Id.* § 4-402(b)(1) (emphasis added).

vanize administrators and legislators into remedial action to fulfill the law's long-neglected pledge—namely that child welfare services shall be provided to any family “to assist in preventing the necessity of placing the child outside of the child's home.”²¹⁶

D. *Transitional Strategies*

Historically, advocates for homeless children have lobbied the public for more resources, not just for their sympathy. Over a century ago, William P. Letchworth reported that “[t]he hands of those engaged in the work [of caring for homeless and suffering children] should be strengthened, not only with our sympathy, but by our pecuniary aid.”²¹⁷ Today, legal advocates acknowledge that expansive right to shelter litigation or referenda, by obligating governments to meet costly short-term needs, may convince officials to search for longer-term and more cost-effective solutions.²¹⁸ If the threat and reality of such litigation were widespread, cities and states might be more vociferous in demanding federal aid for transitional services to replace the revolving door of overnight shelter services.²¹⁹ Pro bono lawyers, particularly those who can testify from first-hand experience of the distress of their homeless clients, can be especially effective in such lobbying.

The persuasive and planning skills of these attorneys will be equally valuable in mounting transitional services programs for older youths leaving foster care, mental disability, or juvenile services.²²⁰

216. MD. FAM. LAW CODE ANN. § 5-524(1) (1984).

217. W. LETCHWORTH, HOMES OF HOMELESS CHILDREN 507 (1903 ed.), reprinted in CHILDREN AND YOUTH: SOCIAL PROBLEMS AND SOCIAL POLICY (R. Bremner ed. 1974). Letchworth, as a Commissioner of the New York State Board of Charities, reminded the state legislators of the governmental extravagances of that era: “The state is now expending millions in the erection of a princely capitol which, when completed, will not equal in value one human life rescued from infamy, and reared to the full stature of virtue and godliness.” *Id.*

218. *E.g.*, Sabonis, *Maryland Needs a Right to Shelter*, 1 MD. J. CONTEMP. LEGAL ISSUES 97, 106-07 (1990). New York “realized that the payment of a maximum \$300 per month rent subsidy was more prudent than the \$795 per month cost of Foster Care.” *Id.* at 107. The prevention of child homelessness through support for stable homes is consistent with the child welfare movement's historic mission to remove dependent children from almshouses to private home placements. *See* W. TRATTNER, FROM POOR LAW TO WELFARE STATE 108 (3d ed. 1984).

219. Funding streams already exist that could be used to open and operate transitional shelters. V. BACH & R. STEINHAGEN, ALTERNATIVES TO THE WELFARE HOTEL: USING EMERGENCY ASSISTANCE TO PROVIDE DECENT TRANSITIONAL SHELTER FOR HOMELESS FAMILIES 6 (1987) (available through the Community Service Society of New York).

220. *See generally* S. HERR, S. ARONS & R. WALLACE, LEGAL RIGHTS AND MENTAL HEALTH CARE 19, 160-61 (1983) (identifying legal services to support deinstitutionalized persons); J. KNITZER, UNCLAIMED CHILDREN: THE FAILURE OF PUBLIC RESPONSIBILITY TO CHILDREN AND ADOLESCENTS IN NEED OF MENTAL HEALTH SERVICES 43-51, 58-59 &

Many of these young men and women require transitional or aftercare services to avoid homelessness. Sadly, as in *In re Burns*,²²¹ they too often find neither legal nor human services help.

Finally, facilities for transitional services are a predictable target for the ire and even the lawsuits of neighbors. If these badly needed programs are to ever open their doors, they will need volunteer lawyers to battle obstructionist suits and to negotiate the maze of building, zoning, environmental, and safety-code hurdles.²²²

E. *Stabilizing Families*

The legal profession can add its voice to pleas by national leaders for permanent homes, not shelters, for children and their families.²²³ It can search for ways to strengthen parents' hands, and to reduce the ever-widening scope of state officials' intervention into the family lives of the underclass. On a direct personal level, the lawyer (and the lawyer's friends or family members) can serve as a mentor to a homeless family leaving a shelter for more permanent housing, or as a tutor for a child struggling to keep up with classmates. On a community development level, lawyers can use their prestige and knowledge of real estate, tax, and housing-finance law to help bring about affordable housing projects for the formerly homeless.²²⁴ They can urge Con-

95-101 (Children's Defense Fund 1982) (documenting need for advocacy and community-based services).

221. 519 A.2d 638 (Del. 1986); see *supra* text accompanying notes 175-82.

222. Winerip, *Our Towns: The Homeless Head for Suburb and Suits Follow*, N.Y. Times, July 24, 1990, at B1, col. 1 (reporting that neighbors of a proposed 108-unit transitional housing complex filed five lawsuits and spent "into the six figures" to block the complex); Sarris, *Homeless Shelter Plans Put on Hold*, Baltimore Evening Sun, July 17, 1990, at A1, col. 1 (county government blocking 300-unit transitional housing and job training complex in Anne Arundel County).

223. See *The Crisis in Homelessness: Effects on Children and Families: Hearings Before the House Select Comm. on Children, Youth and Families*, 100th Cong., 1st Sess. 2 (1987) [hereinafter *House Hearings*] (opening statement of Hon. George Miller, Chairman, House Select Comm. on Children, Youth, and Families). Chairman Miller concluded that:

[H]omelessness is threatening the physical health and safety of thousands of children; it is placing them at risk of serious developmental delays and academic failure; and it is stretching the fabric of family life to its limits. Emergency or temporary shelters are no substitute for a home. Until families are assured of a safe and adequate place to live, there is much work to be done.

Id.; see also Sullivan & Damrosch, *Homeless Women and Children*, in *THE HOMELESS IN CONTEMPORARY SOCIETY* 82, 95 (R. Bingham, R. Green & S. White eds. 1987) (stating that "[t]he shelter system is a Band-Aid and not the permanent solution to homelessness").

224. See American Bar Association, *Lawyering to House the Homeless: Creative Tools* (ABA Satellite Seminar Dec. 7 1989). For a detailed manual on representing tenants or landlords in rental housing that is subsidized or assisted by the United States Department of Housing and Urban Development, see *THE NATIONAL HOUSING LAW PROJECT, HUD HOUSING PROGRAMS: TENANTS' RIGHTS* (1981 & Supp. 1985).

gress and state legislatures to pass and fund laws that will provide new tools, not merely as one White House official put it, "the same toys,"²²⁵ to house the homeless, to educate the excluded, and to relieve the poor. Like one past-president of the ABA, they can warn against the conscience-dulling of a society that has "become unwillingly more familiar with the problem and unwittingly more contemptuous," and seems to be in the throes of "long-term 'compassion burnout.'"²²⁶

In this context, clinical legal programs focusing on the homeless may have a special mission of awakening student-attorneys and the profession itself to the rewards of pro bono representation. They reveal that this work is technically, politically, and ethically challenging as well as emotionally satisfying. At Yale Law School, for example, students and their professors have integrated courses on law and the homeless with right to shelter litigation, and projects to create new non-profit corporations offering housing and support services to New Haven's homeless.²²⁷ At the University of Maryland School of Law, a clinical seminar linked with an interdisciplinary law and social work advocacy project for the homeless offers opportunities for teaching, research, client service, and systemic reform in this field.²²⁸ These programs could be replicated elsewhere, and offer some homeless families intensive advocacy support to escape or avoid homelessness. Even more importantly, as a long-term objective, they would inspire a cadre of lawyers to make the representation of poor persons—whether on a part-time, full-time, or pro bono basis—an ongoing part of their careers.²²⁹

In the 1990's, the children of the very poor will need bold strate-

225. In describing the decision of a federal interagency task force to abandon the development of any new initiatives to combat poverty, a White House official summed up the task force's conclusion with this callous flippancy: "Keep playing with the same toys. But let's paint them a little shinier." Pear, *White House Spurns Expansion of Nation's Anti-Poverty Efforts*, N.Y. Times, July 6, 1990, at A1, col. 3; see also Wicker, *Let 'Em Eat Cake*, N.Y. Times, July 26, 1990, at A19, col. 1 (criticizing President Bush's Domestic Policy Council for deciding not to implement any new anti-poverty programs).

226. MacCrate, *The ABA/IRR Homeless Project: Can We Make a Difference?*, 15 HUM. RTS., Fall 1988, at 55.

227. AMERICAN BAR ASSOCIATION, REPRESENTATION OF THE HOMELESS PROJECT: STATE AND LOCAL BAR ASSOCIATION HOMELESS PROGRAMS 30 (Summer 1989).

228. For a discussion of the initial activities of the University of Maryland project, see Herr, *Helping the Homeless: An Introduction for Lawyers*, 1 MD. J. CONTEMP. LEGAL ISSUES 1, 7-8 (1990).

229. Some students report that one positive effect of clinical work is the recognition that "poor people have rights like everybody else," that those rights are denied due to circumstances over which clients have no control, and that lawyers should reach out to help them. Interview with Lorri D. Wright, third-year law student and former student-attorney, University of Maryland School of Law, in Baltimore (July 24, 1990).

gies to counter inequalities that will deprive them of a fair start in life. For instance, it is in the resource-poor urban school districts that a disproportionate share of homeless children are found. In *Abbott v. Burke*,²³⁰ a courageous New Jersey Supreme Court recently recognized the magnitude of reform needed. As a matter of state constitutional law, the court ordered equalization of educational expenditures to ensure that students from poorer districts have "the ability to function in that society entered by their relatively advantaged peers."²³¹ Like poorer students in general, homeless students may face socioeconomic disadvantages that "no amount of money may be able to erase."²³² Yet, the elusiveness of their quest for educational equality or the complexities of fashioning legal remedies, does not excuse the legal system from the pursuit of the constitutional object. In terms equally apposite to homeless students, the *Abbott* court acknowledged not only the practical difficulties faced by state governments, but also their unavoidable duty:

We realize that perhaps nothing short of substantial social and economic change affecting housing, employment, child care, taxation, and welfare will make the difference for these students; and that this kind of change is far beyond the power or responsibility of a school district. We have concluded, however, that even if not a cure, money will help, and that these students are constitutionally entitled to that help."²³³

VI. CONCLUSION: ON LISTENING TO CHILDREN'S VOICES

Before pro bono lawyers can act, they must question and listen. What do Ruth's children really want us to do for them? Can we honor their wishes and dreams? If not, can we be faithful to our American Dream?

Homeless children seek stable, safe living environments where they can heal and live without fear. As twelve-year-old Yvette Diaz, a resident of Hotel Martinique (an infamous New York City welfare hotel), told Congress:

I don't like the hotel, because there is always a lot of trouble there. Many things happen that make me afraid. . . . My mother is afraid to let me go downstairs. Only this Saturday, my friend, the security guard at the hotel, Mr. Santiago, was killed on my floor. . . . The blood is still on the walls and on the floor. Anyway, people are

230. 119 N.J. 287, 575 A.2d 359 (1990).

231. *Id.* at 374, 575 A.2d at 402.

232. *Id.*, 575 A.2d at 403.

233. *Id.* at 375, 575 A.2d at 403.

afraid to open the door to even look out.²³⁴

In summing up, she shared her dream: "If I could have anything that I want, I wish that we had our own apartment in a nice, clean building and a place that I could go outside to play in that is safe. I want that most of all for me and my family."²³⁵

Homeless children crave learning environments where they can focus on educational and social tasks that other children take for granted. As Kendrick Williams, excluded from Washington, D.C. schools for a month while officials searched for his records, complained:

It's hard being homeless and going to school. People make fun of you and tease you. . . . I love to read and learn, so that month was hard on me. I really missed school. . . . They [school officials] should be on our side and help us get to school. . . . They shouldn't try to ruin the one chance we've got.²³⁶

They want support and understanding to avoid becoming another runaway or homeless statistic. As "V," age fifteen and a runaway youth, advised her peers:

For those who want to run away, you know, TRY to hold on, 'cause the world is cold, and people will knock you down just so they can get up top. They'll knock you down and have you sellin' your own body, putt' money and food in their own pockets.²³⁷

They want a permanent home, not a succession of foster-care settings. In recalling running away at age fourteen, when her uncle sexually abused her and her parents refused to believe her, nineteen-year-old Sasha traced the links between foster placement and school failure:

I was in and out of lots of places—group homes, temporary foster homes, maybe twenty of them within a couple of years. Sometimes I would just go into the foster home, you know, or I would talk to my parents or whatever, go back to court, and then they would send me home and we would try again to make it work. I don't know why they kept switching me so much. I was getting tired of it, getting switched from school to school, you know, I couldn't get used to any of it. I'm the type of person who gets very close to people just like that, you know, and I used to get close to people and didn't want to leave. One time I asked a woman at one of my

234. *House Hearings*, *supra* note 223, at 10.

235. *Id.*

236. 1 IN JUST TIMES, *supra* note 28 (reporting Congressional testimony of a formerly homeless boy, before the Subcomm. on Employment and Productivity of the Senate Comm. on Labor and Human Resources, May 22, 1990).

237. *Children's Rights: The Children Speak*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 173 (P. Vardin & I. Brody eds. 1979).

group homes if she would adopt me. I said, "Please adopt me," and I just held her and wouldn't let her go. It seemed like every time I turned around the courts were putting me someplace else.²³⁸

Many of these children want something as simple as bus tokens to attend school. As Pamela I., a ten-year-old resident of the Pitts Hotel in Washington, declared: "My mother could not always afford to give me bus fare so I stayed at the shelter and watched television all day. I miss learning. Missing school is bad for me. . . . I usually missed two days a week because we had no money for bus tokens."²³⁹

It is no mystery how these children's wishes may be granted. Government has long known that protecting children in homes of their own is both humane and wise policy. As the motif of century-old child welfare laws, this policy has been well-articulated:

The normal development of childhood is one of the main functions of government. The best education requires a proper home training, and it thereby becomes the duty of the State to conserve the home as its most valuable asset whenever factors, other than improper guardianship of the parents, threaten its destruction.²⁴⁰

The voices of homeless children call us to uphold that duty and honor those truths.

238. J. POWERS & B. JAKLITSCH, UNDERSTANDING SURVIVORS OF ABUSE: STORIES OF HOMELESS AND RUNAWAY ADOLESCENTS 149 (1989).

239. Declaration of Pamela I., July 17, 1990 (on file with the National Law Center on Homelessness and Poverty).

240. N.Y. STATE COMM'N ON RELIEF FOR WIDOWED MOTHERS, REPORT OF THE N.Y. STATE COMMISSION ON RELIEF FOR WIDOWED MOTHERS 3 (1914), reprinted in CHILDREN AND YOUTH: SOCIAL PROBLEMS AND SOCIAL POLICY, *supra* note 217.

APPENDIX
PROGRAMS PROVIDING LEGAL ASSISTANCE TO
HOMELESS PERSONS

National Programs:

Center for Law and Education
955 Massachusetts Avenue
Cambridge, Massachusetts 02139
(617) 876-6611
Kathleen Boundy

Children's Defense Fund
122 C Street, N.W., Suite 400
Washington, District of Columbia 20001
(202) 628-8787
Kati Haycock

Mental Health Law Project
1101 15th Street, N.W., Suite 1212
Washington, District of Columbia 20036
(202) 467-5730
Leonard S. Rubenstein

National Coalition for the Homeless
105 East 22nd Street, Room 519
New York, New York 10010
(212) 460-8110
Mary Brosnahan

National Law Center on Homelessness and Poverty
918 F Street, N.W., Suite 412
Washington, District of Columbia 20004
(202) 638-2535
Maria Foscarinis

Local Programs:

Arizona

Arizona State University Homeless Legal Assistance Project
Arizona State University College of Law
Tempe, Arizona 85287-0604
(602) 965-4840
Ron Johnson

California

Homelessness Assistance Project
Public Counsel
Los Angeles County Bar Association
Beverly Hills Bar Association
3535 West Sixth Street, Suite 100
Los Angeles, California 90020
(213) 385-2977
Lisa Mead

San Diego Volunteer Lawyer Program
1305 7th Avenue, Suite 100
San Diego, California 92101
(619) 238-8100
Carl Poirot or Rosalie Crouch

Colorado

Legal and Medical Clinic for the Homeless
Denver Bar Association Young Lawyers Division
1780 South Bellaire Street, Suite 615
Denver, Colorado 80222
Marcy L. Rothenberg-Romer

Connecticut

Homelessness Clinic
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Drawer 9688
New Haven, Connecticut 06536
(203) 432-4800
Robert Solomon

Delaware

Delaware Volunteer Legal Services, Inc.
Widener University School of Law
P.O. Box 7306
Wilmington, Delaware 19803
(302) 478-8680
Christine McDermott

Florida

Dade County Legal Task Force for the Homeless
Dade County Bar Association, Volunteer Lawyers Program
111 N.W. First Avenue
Miami, Florida 33128
(305) 371-2431
Sharon Langer or Nydia Sota

Bay Area Legal Services, Inc.
700 Twiggs Street, Suite 800
Tampa, Florida 33602
(813) 223-2525
Richard Woltmann

Georgia

Atlanta Legal Clinic for the Homeless
233 Mitchell Street, S.W., Suite 430
Atlanta, Georgia 30303
(402) 681-0680
Lorna Spencer or Elizabeth Babcock

Homeless Advocacy Project
Georgia Legal Services, Savannah Regional Office
10 Whitaker Street
Savannah, Georgia 31401
(912) 651-2180
Lynn Van Gould or Susan Watts

Homeless Advocacy Project
Georgia Legal Services, Augusta Regional Office
P.O. Box 2185
Augusta, Georgia 30903
(402) 721-2327
Cheryl Hudson

Illinois

Homeless Advocacy Project
Legal Assistance Foundation of Chicago
343 South Dearborn, Suite 700
Chicago, Illinois 60604
(312) 341-1070
Gloria Pruzan

Young Lawyers Section Committee on Homeless
and Runaway Youth
Chicago Bar Association
500 West Madison, Suite 3700
Chicago, Illinois 60606
(312) 715-5086
Keith Shuttleworth

Maryland

Community Law Center, Inc.
Bar Association of Baltimore City
Real Estate and Business Lawyers Clearinghouse
2645 North Howard Street
Baltimore, Maryland 21218
(301) 366-0922
Anne Blumenberg

Homeless Persons Representation Project
520 West Fayette Street
Baltimore, Maryland 21201
(301) 685-6589
Roberta Maguire

University of Maryland Interdisciplinary Clinic on Advocacy for the Homeless
University of Maryland School of Law and School of Social Work
510 West Baltimore Street
Baltimore, Maryland 21201
(312) 328-3295
Geraldine Hailstolk or Stanley Herr

Massachusetts

Lawyers Clearinghouse on Affordable Housing and Homelessness
Volunteer Lawyers Project of the Boston Bar Association
Homelessness Unit, Greater Boston Legal Services
29 Temple Place
Boston, Massachusetts 02111
(617) 423-0648
Meg Connolly

Missouri

Volunteer Attorney Project
P.O. Box 2695
Kansas City, Missouri 64142
(816) 421-8020
Latricia Reese

Homelessness and Housing Law Clinic
St. Louis University Law School
3700 Lindell Boulevard
St. Louis, Missouri 63108
(314) 658-2778
Amy Ziegler

St. Louis Lawyers Project on Homelessness and Inadequate Housing
c/o Commonwealth Land Title Insurance Company

910 North 11th Street, Suite 250

St. Louis, Missouri 63101

(314) 241-1312

Nathaniel S. Walsh

New York

Housing and Finance Clinic

Syracuse University College of Law

Suite 0044

Syracuse University

Syracuse, New York 13244-1030

(315) 443-4587

Arlene Kanter

Legal Action Center for the Homeless

220 East 4th Street

New York, New York 10009

(212) 529-4240

Douglas H. Lasdon

Legal Aid Society Homeless Family Rights Project

11 Park Place, Room 1807

New York, New York 10007

(212) 267-4663

Steven Banks

Legal Assistance Program: Low-Income Housing Development

State University at Buffalo School of Law

507 John Lord O'Brian Hall, North Campus

Buffalo, New York 14260

(716) 636-2167

George Hezel or Thomas Disare

Westchester Legal Services

150 Grand Street

White Plains, New York 10601

(914) 949-6011

Michael Hampden

Oregon

Homeless Project

Multnomah Bar Association Young Lawyers Section

Portland State University

P.O. Box 751-LS

Portland, Oregon 97207-0751

(503) 725-4556

Kenneth Fox

Volunteer Lawyers Project
P.O. Box 40002
Central Station
Portland, Oregon 97240-0002
(503) 224-1607

Pennsylvania

Homeless Advocacy Project
Philadelphia Bar Association
1324 Locust Street
Philadelphia, Pennsylvania 19107
(215) 893-5387
Sandy Ballard

Legal Aid Society Homeless Project
Allegheny County Bar Association, Young Lawyers Section
c/o Houston, Harbaugh P.C.
Two Chatham Center, Twelfth Floor
Pittsburgh, Pennsylvania 15222
(412) 281-5060
Frankie Jo Pacilla

Texas

Texas Rural Legal Aid
259 South Texas Boulevard
Weslaco, Texas 78596
(512) 968-6574
David G. Hall

Washington, D.C.

The Homeless Children's Tutorial Project, Inc.
Project Northstar
P.O. Box 90197
Washington, D.C. 20090-1097
(202) 416-5235
Louise Stovall

Washington Legal Clinic for the Homeless, Inc.
1800 Massachusetts Avenue, N.W., Sixth Floor
Washington, D.C. 20036
(202) 872-1494
Susanne Sinclair-Smith